



REPUBLIC OF KENYA



**Masika v Republic (Criminal Appeal 51 of 2020)
[2025] KECA 1290 (KLR) (11 July 2025) (Judgment)**

Neutral citation: [2025] KECA 1290 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 51 OF 2020
HA OMONDI, LK KIMARU & WK KORIR, JJA
JULY 11, 2025**

BETWEEN

WILLIAM MUGENGELE MASIKA APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal against the judgment of the High Court at Siaya
(Chemitei, J.) dated 29th June 2016 in HCCRA No. 59 of 2012)*

JUDGMENT

1. William Mugengele Masika, the appellant herein, was found guilty of the murder of Rispa Adongo Ondigo contrary to section 203 as read with section 204 of the Penal Code. Upon conviction, he was sentenced to death on 9th August 2016. He is now before us appealing against the sentence, terming it harsh and excessive because it was issued in its mandatory nature without considering his mitigation.
2. Before addressing the appeal, we find it prudent to summarize the facts of the case. The appellant and Rispa Adongo Ondigo (the deceased) were both employees of Joseph Odero Agok. The deceased worked in Odero's Mpesa shop. On 3rd July 2012, as was the norm, the deceased passed by her employer's house in the morning where she was issued with an Mpesa phone, float, airtime scratch cards, and transaction ledger books. However, she never made it to her place of work. Her employer was informed of the deceased's failure to report to work later that day, and a search ensued. Her decomposing body was discovered two months later, buried in a banana farm near her employer's farm. This was after the appellant led the police to the place where the body of the deceased was buried after being arrested in Webuye in possession of the deceased's mobile phone handset and 16 pieces of iron sheets, suspected to have been bought with the money taken from her. A postmortem conducted on the body of the deceased disclosed that she died of a deep cut to her neck.



3. When the appeal came up for hearing on 5th February 2025, learned counsel, Ms. Omollo, appeared for the appellant while Senior Principal Prosecution Counsel (SPPC), Mr. Okango, appeared for the respondent. Counsel for the parties opted to rely on their respective written submissions.
4. Counsel for the appellant relied on the submissions dated 3rd December 2024 where she set off by referring to the case of *Okeno v Republic* [1972] E.A. 32 to highlight this Court's role on a first appeal. Turning to the appeal proper, Ms. Omollo urged that the appellant was pleading for a non-custodial sentence because he had reformed, and that he was incarcerated when he was a young man. Counsel referred to the Supreme Court's holding in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR that the mandatory death sentence for murder was unconstitutional, and urged that our intervention was called for because the death penalty was imposed in its mandatory nature. Additionally, counsel submitted that in passing the term sentence, the Court should, as per the proviso to section 333(2) of the *Criminal Procedure Code*, take into account the pre-conviction incarceration period. In the end, counsel urged us to set aside the death sentence and, in its place, impose a sentence of 15 years' imprisonment. This sentence, according to her, should take into account the period spent in custody during the trial.
5. In response to the appeal, Mr. Okango, through the submissions dated 4th February 2025, referred to *Francis Karioko Muruatetu & Another v Republic* (*supra*) and conceded that the death sentence should be set aside since it was passed in its mandatory nature. He consequently proposed that we consider the mitigating and aggravating factors and substitute the death penalty with a custodial sentence of 25 years.
6. We have reviewed the record, specifically on the sentencing proceedings. We have also considered the submissions by counsel and the authorities cited. One issue arises for determination, to wit, whether the death penalty is appropriate in the circumstances of the case.
7. In several decisions of this Court, including *Abamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, it has been held that sentencing is essentially the exercise of discretion, and 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 the sentence is manifestly excessive.
8. Therefore, in principle, sentencing remains a matter within the discretion of the trial court and as an appellate Court, we are required to approach the issue with deference to the discretion of the trial court and we should not interfere with the sentence imposed by the trial court unless there are concrete grounds for doing so. In the appeal before us, the parties agree that the death sentence was imposed in its mandatory nature. They are indeed correct because when passing sentence on 9th August 2016, Majanja J. stated that:

“The accused has been convicted of the murder of Rispa Adongo Ondigo. The law provides for only one penalty and it is death. I hereby sentence William Mugengele Masika to death. He has a Right of Appeal to the Court of Appeal within 14 days.”
9. We must appreciate that the sentence was passed prior to the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic* (*supra*), and the learned Judge is therefore blameless. However, the appellant is entitled to benefit from this new jurisprudence as per the guidance of the



Supreme Court in *Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae)* [2021] KESC 31 (KLR) that:

“18. Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the courts below us as follows:

...

viii. Where the appellant has lodged an appeal against sentence alone, the appellate court will proceed to receive submissions on re-sentencing.

ix. These guidelines will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the *Penal Code* before the decision in *Muruatetu*.”

10. In *Muruatetu & Another v Republic; Katiba Institute & 4 Others (Amicus Curiae)* (*supra*), the Supreme Court went ahead and held that:

“In re-hearing sentence for the charge of murder, both aggravating and mitigating factors such as the following, will guide the court;

- a. Age of the offender;
- b. Being a first offender;
- c. Whether the offender pleaded guilty;
- d. Character and record of the offender;
- e. Commission of the offence in response to gender-based violence;
- f. The manner in which the offence was committed on the victim;
- g. The physical and psychological effect of the offence on the victim’s family;
- h. Remorsefulness of the offender;
- i. The possibility of reform and social re-adaptation of the offender;
- j. Any other factor that the court considers relevant.”

11. In the appeal at hand, the appellant was 24 years old and a first offender. He regretted his involvement in the death of the deceased. He also stated that he had a young family to provide for. On the other hand, the attack was vicious. It had all the hallmarks of a gender-based violence. In one blow, Rispa’s life was lost. The appellant went beyond ending her life and buried her in a pit to conceal his heinous deed. He also took away the money she had with her and went to enjoy the proceeds of crime in Webuye. The deceased’s family lived in anxiety for two months only for their hopes to be dashed when the body was recovered decomposing in a banana plantation.

12. In our view, the injuries suffered by the deceased speak to the heinous nature of the act. The appellant’s action after the act portrays a barbaric act not just towards the deceased, but one which left her family traumatized and grieving. Weighing the mitigating factors against the aggravating factors, we are of the



view that the appellant, though not deserving of the death sentence, ought to be incarcerated for a long period of time to allow him to reflect on his crime and hopefully reform.

13. Consequently, the appellant's appeal against sentence succeeds to the extent that the death penalty is set aside and substituted with a sentence of thirty (30) years' imprisonment. The appellant urged us to take into account the period he was detained during the trial. However, a perusal of the record shows that his surety was approved on 1st October 2012 shortly after he was presented before the trial court on 4th September 2012. He cannot, therefore, benefit from the proviso to section 333(2) of the Criminal Procedure Code because he was not in detention during his trial. His prison sentence will therefore run from 9th August 2016, when he was sentenced by the High Court.

14. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF JULY 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

