



REPUBLIC OF KENYA



**KENYA LAW**  
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**Opiyo v Republic (Criminal Appeal 294 of 2019)  
[2024] KECA 730 (KLR) (21 June 2024) (Judgment)**

Neutral citation: [2024] KECA 730 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 294 OF 2019  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
JUNE 21, 2024**

**BETWEEN**

**DENNIS OKUMU OPIYO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from the Judgment of the High Court of Kenya at Kisii  
(Musinga, J.) dated 10th November, 2009 in HCCRC No. 22 of 2007)*

**JUDGMENT**

1. The appellant, Dennis Okumu Opiyo Alias Kilolo Nyatiwa, was charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. It was alleged that he killed, without lawful excuse and with premeditation, Isaiah Omondi James, on 18<sup>th</sup> April, 2007 at Ongoro Beach, Winam sub-location in Migori District within the then Nyanza Province.
2. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the case, the learned Judge, Musinga, J. (as he then was), convicted the appellant of the offence and sentenced him to death.
3. The appellant has preferred an appeal against the judgment of the High Court. His appeal, as crafted and argued by his erstwhile advocate, Ms. Ida Anyango, is restricted to the sentence imposed. It raises two issues thus:
  1. That the trial Judge erred in law and in fact by failing to provide an opportunity for the appellant to mitigate.
  2. That the Judge erred in law by sentencing the appellant to death since its mandatory nature was declared unconstitutional as per the law.



4. During the plenary hearing of the appeal in which Ms. Anyango appeared for the appellant and Mr. Kimanathi, learned prosecution counsel, appeared for the State, Ms. Anyango expounded on the two grounds of appeal. Mr. Kimanathi conceded the appeal on those grounds.
5. We think the State Counsel was right in conceding the appeal. The sentence was imposed by the learned Judge well before the decision by the Supreme Court in [Francis Karioko Muruatetu & Another v R](#) [2017] eKLR. That decision declared the mandatory death sentence in section 204 of the Penal Code unconstitutional. In addition, it affirmed the legal position that courts are obligated to take the mitigation of a convicted person before pronouncing sentence. These are the two issues taken up by the appellant in this case. The appellant is correct on both scores. The record is clear that after the conviction, the learned Judge did not take any mitigation from the appellant. Neither did he record any mitigating or aggravating circumstances from the prosecution. He proceeded to sentence the appellant to death, indicating that that was the only sentence provided by the law.
6. As aforesaid, following the Muruatetu Case, our jurisprudence on the question has shifted. It is, therefore, only proper for this Court to, without much ado, set aside the death sentence imposed on the appellant for the reason that the learned Judge did not take mitigation; and considered himself hamstrung by the straitjacket of the mandatory sentence in section 204 of the [Penal Code](#).
7. Having set aside the death sentence as imposed, the Court grappled with the question whether to remand the case for sentence hearing or to conduct the sentence hearing itself. We opted for the latter on the considerations of preserving judicial economy and expedition of justice for the appellant. We are also informed by section 3(2) of the [Appellate Jurisdiction Act](#), which provides that:

“(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.”
8. Consequently, we invited the appellant and his advocate to address us on sentence. Ms. Anyango mitigated on behalf of her client. She said that the appellant was remorseful and is a first offender. He has accepted responsibility for his conduct. In addition, Ms. Anyango told the Court that the appellant was very young when he committed the offence – he was only 20 years old – and that he had been in custody for 17 years. During that time, Ms. Anyango submitted, the appellant has been a model prisoner – taking advantage of his time to learn new skills; undertake new courses; and get fully reformed and rehabilitated.
9. We have taken into consideration these extenuating circumstances. We have started with the position that murder is an objectively serious offence. We have also considered the circumstances in which the offence was committed. While the homicide was a result of a vicious and brutal attack involving a panga, we have considered that it was a single act of wanton violence fuelled by uncontrolled rage. It is no doubt true that the extreme youthfulness of the appellant at the time was a factor as well. While grizzly, the offence was not committed after any level of planning: it was a spontaneous if spectacular explosion of violence. Additionally, as Ms. Anyango submitted, the appellant is a first offender, and is remorseful for his actions. We formed the view that the remorse was sincerely felt.
10. Consequently, taking each of the matters referred to above into account, we formed the view that a sentence of twenty (20) years’ imprisonment is an appropriate one for this offence and we hereby impose it on the appellant for the offence. By dint of Section 333(2) of the Criminal Procedure Code,



the sentence period shall run from 21<sup>st</sup> June, 2007 when the appellant was first arraigned before the court since he has been in custody since then.

11. Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF JUNE, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H. A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**

