



REPUBLIC OF KENYA



**Kimani v Republic (Criminal Appeal 21 of 2022)
[2023] KECA 953 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KECA 953 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 21 OF 2022
MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA
JULY 28, 2023**

BETWEEN

MARGARET WANGUI KIMANI APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at
Nairobi (Lesiit, J.) dated 4th October 2016 in HC.CR. No. 55 of 2011)*

JUDGMENT

1. Margaret Wangui Kimani the appellant herein, comes before this Court by way of an appeal, having been convicted and sentenced to death by Lesiit J, (as she then was) on October 4, 2016.
2. The appellant was charged with the offence of murder, contrary to section 203 as read with section 204 of the *Penal Code* (cap 63) Laws of Kenya. The particulars of the offence were that; Together with Henry Muturi Mwangi, on June 19, 2011 at Muthandi village, Ndakaini location within Murang'a County jointly murdered Kimani Ikua.
3. This appeal relates to the appellant only as her co-accused was acquitted after the trial.
4. At the hearing of the appeal the appellant abandoned the appeal against the conviction and therefore this appeal is against the sentence only. However, in order to contextualize the appeal, we shall give the facts in a summary form. PW1, JWK, a daughter to the appellant and deceased was taken through voire dire by the court and gave sworn evidence. The facts as accepted by the trial court were that PW1 went to sleep on June 19, 2011 at about 9.00 pm together with her two sisters. By the time they were going to sleep, their deceased father had not yet returned home.
5. According to PW1, the deceased went home at about 10.00 pm, knocked on the door and the appellant opened the door, lit the tin lamp, left the deceased in the sitting room, and went to the bedroom.



Shortly thereafter, she saw fire in the sitting room and their father was burning. She woke up her 2 sisters, who were 12 years and 6 years old respectively. The appellant was screaming and was at the gate with a neighbour by the name, Muigai. Muigai called out the deceased by name twice, but he did not respond. Neighbours began streaming in. A lady neighbour then took them to her house, to sleep. She added that her father used to drink alcohol and that he had good relations with the appellant.

6. PW2, Isaac Muigai Marienya, the appellant's neighbour, testified that on June 19, 2011 at about 9.30 pm he heard a knock on his door, and opened since it was the appellant, who was a neighbour. The appellant informed him that the deceased had burnt himself in the house. The appellant also told him that the deceased had earlier on, entered the house, she gave him food and went to her bedroom. When she came back to the sitting room, the deceased was burning, while lying on his stomach. PW2 asked for water which he poured on the back of the deceased. He found a tin lamp that had fallen down and was next to the body. There was blood on the back of the head of the deceased and it was oozing. At this point, the appellant was standing outside the house. He called a neighbour, by the name Maurice and together with other neighbours, went to Ndakaini police station and made a report at around midnight. They left the appellant outside the house, together with other neighbours.
7. PW3, Maurice Gakiya Mangi, the appellant's other neighbour stated that on June 19, 2011 at about 1.00 pm he received a call from PW2, who told him to go to the deceased's house as he had been burnt. On the way, he met PW2 who told him to go and see what had happened to the deceased. He went to the deceased's house, pushed the door open, and saw the deceased's leg near the door and later saw his body facing down lying on his belly. He stated that the fire was not raging. He noticed that the deceased had burns on the back and blood on his head. He went to Ndakaini police station together with other neighbours.
8. PW4 Seargent Moses Masibu was the arresting officer. He stated that on June 20, 2011, after a report was made by Stanley Mwangi Kuria and 4 others, the Chief Inspector Raymond Mukaju, together with Stanley Mwangi Kuria and 4 others, proceeded to the scene of crime. They found the corpse lying on the ground in the sitting room, facing downwards. He observed an injury to the head which was a deep cut at the back of the head. The body was burnt. They preserved the body at the scene until the scene of crime personnel came from Thika. After taking photographs of the scene, he arrested the appellant.
9. PW5, Karaya Njoroge a brother to the appellant, was the one who helped identify the body of the deceased at Thika District Hospital Mortuary together with a relative by the name Wairegi, and in the company of a police officer.
10. PW6, Chief Inspector Raymond Mkanju stated that on June 20, 2011 he visited the scene of crime together with PW4 after which they arrested the appellant to assist with investigations. He stated that the appellant told him that she had entered into an agreement with the co – accused before the trial court, that in consideration for Kshs 100,000/- he would kill the deceased. Payment was to be made after the death of the deceased. He stated that on June 19, 2011 the deceased had gone to Ndakaini Trading centre at about 9.00 am and did not come back until
10. 00 pm. When he eventually did, the appellant heard him crying. She came out of the bedroom and met the deceased lying in the sitting room and Muturi, the co–accused was holding a metal bar. The appellant then asked Muturi, why he had killed the deceased in the house instead of outside the house. Muturi replied that he opted to do it in the house. On the basis of that admission, they arrested the appellant and the co–accused Muturi.
11. PW7, Anthony Kamau Murage, a medical officer at Thika level 5 hospital, testified that he filled the post – mortem form dated April 13, 2012 after carrying out the post-mortem on the body of



- the deceased. He opined the cause of death to be multiple traumatic injuries on the head, neck and abdomen which caused the cardiorespiratory arrest.
12. PW8, P C Fycosani Muthiu Mbelenge was the investigating officer. He witnessed the postmortem of the deceased at Thika level 5 hospital, took the appellant and the co–accused for mental assessment at the same hospital. Both were found to be mentally fit to stand for trial.
 13. The appellant’s defence was that on June 19, 2011 she woke up in the morning, her husband was well and at about 8.00 am went to the farm. At noon, he came back and they had lunch and he left, after giving her Kshs 2,000/= . In the evening she had dinner with her children and slept. She later heard a knock on the door, the deceased identified himself and she opened for him. He was drunk. She gave him food and began dozing off. The deceased told her that she could go sleep. She went to sleep and in her own words during her testimony, slept soundly. She woke up later and found the deceased had not joined her in the bed. She went to check on him and found that he had fallen by the fireplace. His clothes had caught fire. The fire lamp had also fallen next to the deceased. She began putting out the fire. She called the neighbour, Mungai and the children. Mungai inquired on what had transpired. Another neighbour by the name, Gakuya came and the appellant sent him to call the village elder. Essentially the appellant denied committing the offence.
 14. The appellant through her Advocate Mr Mwangale filed written submissions dated May 11, 2023. At the hearing, the appeal on conviction was abandoned and the appellant indicated that he was appealing against the sentence only. The appellant submits that: the Court should interfere with the sentence imposed on her in light of the case of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR; which held that section 204 of the Penal Code deprived the Court of the use of judicial discretion and was thus harsh, unjust and unfair and that the mandatory nature deprived the Court the jurisdiction to exercise discretion not to impose the death sentence in appropriate cases; that the sentence meted out on her was harsh and manifestly excessive in the circumstances considering that the appellant was a first time offender with no previous records; and that she had already served 10 years in prison.
 15. Mr Omondi, senior deputy director of public prosecutions for the State opposed the appeal and highlighted the written submissions which we take the liberty to summarize as follows: that the learned Judge, indeed considered all the mitigating factors including the brutal nature of the execution of the murder; that the act was committed in the house of the deceased and that the children were present and have to live with the trauma that they were subjected to; that although the learned Judge did not have the advantage of going through the Muruatetu case judgment on sentencing, it was clear that all mitigating circumstances were considered.
 16. We note that the only ground of appeal revolves around the legality of the death sentence. Long before the oft cited Muruatetu case, this Court pronounced itself on sentencing in *Francis Nkunja Tharamba vs Republic* [2012] eKLR as follows:

“...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court’s exercise of discretionary power such as that of sentencing. The next principle that



the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere.”

17. The Supreme Court gave guidance on the issue of legality of the death sentence in *Francis Karioko Muruatetu* (*supra*) when it held as follows:

(66) “It is not in dispute that Article 26 (3) of the *Constitution* permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that Article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in Article 50 (1) of the *Constitution* must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.

.....

(69) Consequently, we find that Section 204 of the Penal Code is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.”

18. In view of the Muruatetu case, the death penalty is therefore legal and what was declared unconstitutional is the mandatory nature of the sentence that had taken away the discretionary power of the courts in sentencing. It is trite that the courts can now impose an appropriate sentence after considering the nature of the offence, how it was executed and the mitigating factors among other reasons.

19. A cursory reading of the sentencing notes reveals that the trial Judge was very clear that in imposing the death sentence, she had considered the appellant’s mitigation statements. The trial Judge held:

- “ 1. I have considered submissions by Mr. Mwaura, defence counsel in mitigation on behalf of the accused person. I have considered that the accused is the surviving parent of the children of the deceased.
2. I have considered that the accused has been in custody for the last five years during pendency of her trial.
3. I have also considered the circumstances of this case. The deceased was brutally murdered in his home. The murder was in cold blood. The motive of the assault was not apparent from the evidence adduced before court. It was done at home where the children of the couple were also living. That was very traumatic to the children.
4. The sentence for murder is provided under section 204 of the Penal Code.
5. Accordingly, I sentence the accused to death as by law prescribed.”

20. It is instructive to note that despite considering the mitigation factors, the hands of the trial Judge were still tied by the mandatory nature of the sentence and she could only impose the death penalty as it



was the only sentence available. To that extent, the appeal has merit on the ground that this Court can interfere with the death sentence that was imposed by the trial court.

21. In considering the appropriate sentence, we note that each case has to be considered in light of its' own circumstances. Before us, is an appellant who in conjunction with others, arranged the attack of an innocent person, to wit her husband. The murder scene was in their house and the children were sleeping in the same house. It was a cold premediated murder that is only good in movies and not in real life.
22. In our view, the sentence that was meted was lawful in the circumstances and we will only interfere with it to the extent that we set aside the death sentence and substitute it with a sentence of 35 years. The appeal on conviction fails.
23. Consequently, this appeal succeeds only to the extent that the death sentence that was imposed is hereby quashed and substituted with a sentence of 35 years which shall run from July 12, 2011 when the appellant was charged in court and stayed in custody throughout the trial.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

ASIKE - MAKHANDIA

.....

JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

