



**Rotich v Republic (Criminal Appeal 5 of 2017)
[2023] KECA 1234 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1234 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 5 OF 2017
F SICHALE, FA OCHIENG & WK KORIR, JJA
OCTOBER 6, 2023**

BETWEEN

AMOS KIMUTAI ROTICH APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (M. Odero, J.) delivered and dated 6th February 2017 in HCCRC No. 28 of 2012)

JUDGMENT

1. Amos Kimutai Rotich, the appellant herein, was charged and convicted for the offence of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. As a result, he was sentenced to death by the trial court. Initially, he lodged an appeal challenging both conviction and sentence. However, on June 7, 2023 when this matter came up for virtual hearing, the appellant through his counsel Mr. Orege informed the Court that he was abandoning the appeal on conviction and would only pursue the appeal against sentence. This position is indeed captured in the appellant's supplementary Memorandum of Appeal dated May 30, 2023 in which the only ground of appeal is against the imposition of the death sentence in its mandatory nature. According to the appellant, the sentence is harsh and excessive.
2. In brief, the appellant was convicted of having murdered one Lilian Cheprotich on the April 16, 2012 at Keringet Shopping Centre in Kuresoi District within Nakuru County. PW1 Dr Julius Ngulungu conducted an autopsy on the body of the deceased and found that it had five stab wounds on both the anterior and posterior of the chest leading to severe injury of the chest organs with massive hemorrhage. PW2 Cynthia Chelanga, PW3 Wesley Kibet Kemboi and PW6 Hillary Kiprono Siele all placed the appellant at the scene of crime and narrated having heard the deceased scream as the appellant fled from the scene. PW4 Abigael Cherono on her part gave evidence as to how the appellant entered her house and locked himself inside the house in a bid to escape from the crowd that was baying for his blood.



3. When this appeal came up for hearing, Mr. Orege for the appellant and Ms Kisoo for the respondent indicated that they had filed their respective submissions and they were relying on them. Mr. Orege also made a brief oral highlight of the written submissions and argued that the mandatory death sentence handed down by the trial court was harsh and excessive in the circumstances of this case. Counsel relied on the Supreme Court decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR to submit that the mandatory nature of death sentence was unconstitutional. Counsel also relied on the Judiciary *Sentencing Policy Guidelines* in urging us to consider the appellant's mitigation which was to the effect that the appellant was an orphan and a 1st year university student at the time, and also a first offender. Counsel also relied on the case of *Agunga & 2 others vs. Republic* [2022] KECA 14 (KLR) to persuade us to exercise our discretion as a first appellate court and set aside the sentence imposed by the trial court. In the end, it was counsel's plea that we set aside the death sentence and replace it with a more lenient and determinate term running from the date when the appellant was first incarcerated.
4. On her part, Ms Kisoo submitted that it was only the mandatory nature of death sentence that was declared unconstitutional in *Francis Karioko Muruatetu & another vs. Republic* (*supra*). Counsel further argued that murder remains a capital offence with the death penalty still prescribed by the law which is yet to be repealed. Counsel also pointed out that under Article 26 of the *Constitution*, the right to life can be deprived to the extent authorized by any written law and that the right is not one of the non-derogable rights listed in Article 25 of the *Constitution*. In conclusion, counsel urged that the aggravating circumstances of this case warranted a death sentence and the appellant was not deserving of any leniency. She therefore pleaded with us not to interfere with the sentence handed down by the trial court.
5. This is a first appeal albeit concerning only the issue of sentence.

By dint of Section 379(1) of the *Criminal Procedure Code* and Rule 31(1)(a) of the *Court of Appeal Rules, 2022*, we are clothed with the jurisdiction to consider both issues of facts and law. In the instant appeal, the only issue being that of sentence, we are aware that ordinarily sentencing is a matter falling within the trial court's discretion. As an appellate court, our interference with the trial court's discretion on sentencing is only warranted if in our view, the trial court overlooked a material factor or took into consideration irrelevant factors, or adopted wrong legal principles in arriving at the sentence. This Court in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR reaffirmed the principles we have stated above as follows:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

6. With the above guidelines in mind, this appeal turns upon consideration of the legality and proportionality of the death sentence meted on the appellant.
7. In addressing the issue of the legality of the sentence, it is important to note that the appellant was sentenced on October 26, 2016. This was before the Supreme Court made its decision in *Francis Karioko Muruatetu & another vs. Republic* (*supra*) on December 14, 2017. This appeal having been



heard after the Supreme Court pronounced itself on the place of the death sentence provided for the offence of murder under Section 204 of the Penal Code, the appellant is entitled to the benefit of law as it currently stands.

8. In sentencing the appellant, the trial court stated that:

“Mitigation noted. There is only one mandatory sentence for this offence. As such I do sentence the accused to death in line with section 204 of the Penal Code. Right of Appeal explained.”

9. A reading of the pronouncement of the trial court leaves no doubt that the Judge handed down the sentence in its mandatory nature. She cannot be faulted for that was the way the law was understood at that time. Therefore, it is only on the basis of the imposition of the sentence in its mandatory nature that we find ourselves obliged to enter the arena of sentencing. We say so based on the holding in Francis Karioko Muruatetu & another vs. Republic (*supra*) that:

“The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution.”

10. The next issue for our determination relates to the appropriate sentence in the circumstances of the appellant’s case. The record shows that in mitigation counsel indicated that the appellant was remorseful, an orphan, a college student at the time of the commission of the offence and a first offender. Counsel also pointed out that the appellant had spent a long period in remand. And this was indeed true for the appellant had been presented to court on April 17, 2012 and his trial concluded on November 26, 2016. On the other hand, we note that a life was lost. The appellant, using a knife, stabbed the deceased on the chest five times from both the front and back. Going by the number of stab wounds, the appellant was hell-bent on terminating the life of the deceased; this is despite the deceased pleading with the appellant for mercy. Even if it was about unrequited love, as appears to have been the case, reason could still have prevailed upon the appellant to turn around and spare the deceased’s life. There is no indication from the record of the appellant’s age. In our view, in the circumstances of this case, there are more aggravating circumstances calling for a more stringent and deterrent sentence. Our view is that a prison sentence of 30 years would be commensurate to the nature of the appellant’s offence. However, as per the proviso to Section 333(2) of the Criminal Procedure Code we are required to take account of the period spent in custody prior to sentencing. From the record, the appellant was in pre-sentence custody for about four (4) years. The appropriate sentence would therefore be 26 years from the date of sentencing being 26th October 2016.

11. The upshot of the foregoing is that the death sentence meted upon the appellant by the trial court is hereby set aside. The appellant is sentenced to 26 years imprisonment from the date of sentencing by the trial court, that is October 26, 2016.

12. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023.

F. SICHALE

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JUDGE OF APPEAL



F. OCHIENG

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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.

Signed

DEPUTY REGISTRAR

