



REPUBLIC OF KENYA



**Otiato v Republic (Criminal Appeal 152 of 2016)
[2022] KECA 438 (KLR) (11 March 2022) (Judgment)**

Neutral citation: [2022] KECA 438 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 152 OF 2016
PO KIAGE, M NGUGI & F TUIYOTT, JJA
MARCH 11, 2022**

BETWEEN

DAVID OTIATO APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the Judgment of the High Court of Kenya at Kakamega
(Mwita, J.) dated 18th August, 2016 in HCCRA No. 32 of 2013)*

JUDGMENT

1. The appellant was charged with robbery with violence contrary to section 295 as read with section 296 (2) of the *Penal Code*. The particulars were that on the 4th of October 2012 at Magui sub-location in Vihiga county within western province jointly with another not before court while armed with dangerous weapons, namely, knives, robbed Grace Sayo Ksh. 50,000 and immediately after such robbery threatened to use actual violence on her.
2. The appellant was arrested and arraigned before the Senior Principal Magistrate’s Court at Vihiga and charged. The trial magistrate (G. A. Mmasi, PM) evaluated the evidence tendered before the court and convicted the appellant under Section 296(2) of the Penal Code and sentenced him to death.
3. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. The appeal was heard by E. C. Mwita who by a judgment delivered on 18th August, 2016 upheld the conviction of the appellant by the trial court and dismissed the appeal.
4. Further aggrieved, the appellant filed the instant 2nd appeal, against the sentence, urging;

“The Appellant urges this court to review the death sentence and consider mitigating factors in accordance with the decision of the Supreme Court of Kenya Petition No. 15 of 2012,



Francis Karioko Muruatetu & Others vs Republic which set aside the sentence of death since its mandatory nature was declared unconstitutional per the law”.

5. During the hearing of the appeal, learned counsel Ms. Namusubo appeared for the appellant while the respondent was represented by Mr. Konga, holding brief for Ms. Lubanga the learned Prosecution Counsel. Both parties had filed written submissions which they sought to rely on.
6. For the appellant it was submitted that; based on the Supreme Court decision in *Francis Karioko Muruatetu -vs- Republic & 4 others [2017] eKLR* and the mitigation of the appellant, the sentence of death should be reduced to a term sentence to take effect from the date of arrest in 2012. Further that, the appellant is remorseful for the offence committed, has since rehabilitated and in any case no injuries were suffered by the complainant, thus the Court should exercise leniency.
7. In opposition to the appeal, and while acknowledging the decision in *Francis Karioko Muruatetu (supra)*, counsel asserted that the decision does not outlaw the death penalty which is still applicable as a discretionary maximum penalty. Counsel urged this Court to maintain the death sentence.
8. This being a second appeal, our jurisdiction is confined to consideration of questions of law only by dint of section 361(a) of the [Criminal Procedure Code](#).
9. The only issue of law in this appeal to be determined is the issue of the mandatory sentence. From the record, it is clear that the appellant was found guilty of robbery with violence by the trial court and sentenced to death as provided for in Section 296(2) of the Penal Code. The same was upheld by the High Court. Notably, the ground breaking decision in Francis Karioko Muruatetu (*supra*) was delivered in 2017, subsequent to the delivery of judgment by the trial court and the High Court in 2012 and 2016 respectively. We cannot therefore fault them for imposing the mandatory death sentence.
10. As duly pointed out by the appellant, the Supreme Court decision held that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence on a case by case basis. It was found that this took away judicial discretion to determine the appropriate sentence based on the facts of each case.
11. This Court has adopted the reasoning of the Supreme Court and reduced various mandatory sentences on merit, for instance in *Caleb Otieno Nyongesa alias Atiti -vs- Republic [2020] eKLR*, *SS -vs- Republic [2021] eKLR*, *William Mica Amasa -vs- Republic [2020] eKLR*, *Jared Koita Injiri -vs- Republic [2019] eKLR*, *Evans Wanjala Wanyonyi -vs- Republic [2019] eKLR*, and *Paul Ngei -vs- Republic [2019] eKLR*.
12. However, the Supreme Court subsequently revisited its decision in Muruatetu and issued directions to the effect that it was to apply to the offence of murder under section 203 and 204 of the Penal Code and not to mandatory sentences generally. Thus, while we see the obvious injustice that such a position may cause, we are nonetheless bound to abide by those directions and cannot therefore interfere with the sentence imposed herein.
13. Accordingly, this appeal stands dismissed in its entirety.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF MARCH, 2022

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI



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JUDGE OF APPEAL
F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

SIGNED

DEPUTY REGISTRAR

