



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ogot v Republic (Criminal Appeal 215 of 2015)  
[2022] KECA 936 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 936 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 215 OF 2015  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
JUNE 24, 2022**

**BETWEEN**

**JAMES ODONGO OGOT ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(An appeal from the conviction and sentence of the High Court of Kenya at Kisumu (Warsame, J) dated 27th July, 2006 in Kisumu H.c. Criminal Case No. 102 of 2003)*

**JUDGMENT**

1. James Odongo Ogot was convicted for the murder of Michael Otieno Wao which happened on October 29, 2003 at Bondo Township. On the same date of conviction, being July 25, 2006, Hon. Warsame, J (as he then was) sentenced the appellant to suffer death.
2. At plenary hearing, counsel for the appellant informed us that although the appeal was against both conviction and sentence, the appellant sought to press on with the challenge on sentence only. In this regard it was submitted that the death sentence is not the only sentence that can be imposed for a conviction under section 204 of the [Penal Code](#).
3. We think that since the Supreme Court decision in [Francis Karioko Muruatetu & another v Republic \[2017\] eKLR](#) the question whether the mandatory nature of the death sentence provided for in section 204 of the [Penal Code](#) is unconstitutional is moot and counsel for the State readily conceded to this single point of appeal.
4. From the record of Appeal, the trial court neither invited the appellant to make his mitigation nor the Republic to state whether any aggravating circumstances existed, and for that reason we do not have any material on which we can consider and determine a review of the sentence. In the circumstances, the only option open to us is to remit the matter to the High Court for re-sentencing. We trust that



the High Court will use the guidelines set out in *Francis Karioko Muruatetu and another v Republic* [2021] eKLR (*Muruatetu (2)*) to arrive at an appropriate sentence.

5. The order we make is to remit the matter to the High Court for re-sentencing on a priority date to be given by that court. To that end the matter shall be mentioned before a Judge of that court within fourteen (14) days of the date hereof for appropriate directions as to resentencing.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 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.*

**DEPUTY REGISTRAR**

