



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ongere v Republic (Criminal Appeal 155 of 2016)  
[2022] KECA 620 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 620 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CRIMINAL APPEAL 155 OF 2016  
K M'INOTI, M NGUGI & F TUIYOTI, JJA  
JUNE 24, 2022**

**BETWEEN**

**KENNEDY OGIRO ONGERE ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the judgment and sentence of the High Court of Kenya at Homa Bay (D.S Majanja J) dated 11th April 2016 in HCCR No. 21 of 2013)*

**JUDGMENT**

1. The appellant was charged and convicted of the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. The particulars of the offence were that on the 21<sup>st</sup> day of May 2010, at around 10:30 a.m. at Kanyimach Village, South Sakwa Location, Uriri District in Migori County, he murdered Sospeter Anyango Othim. The trial court sentenced him to death, noting that the only penalty provided in law for the offence of murder was the death sentence.
2. The appellant was aggrieved by his conviction and sentence and filed the present appeal. In his Memorandum of Appeal dated 18<sup>th</sup> October, 2019, he urges this Court to review the sentence and consider the mitigating factors in accordance with the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR (Muruatetu) in which the court declared the mandatory nature of the death sentence in murder cases unconstitutional.
3. At the plenary hearing of the appeal, Learned Counsel for the appellant, Ms. Namusubo, indicated that the appellant was raising only the issue of sentence. He relied on the written submissions dated 30<sup>th</sup> November 2019 in which he argues that in accordance with the decision of the Supreme Court in Muruatetu, the mandatory nature of the death penalty had been outlawed. Courts therefore have discretion in sentencing in murder cases, and could consider the mitigation offered by a convicted person. At the time of sentencing, the appellant before us was not given an opportunity to mitigate.



- 4. Counsel for the State, Mr. Onanda, submitted that the State was not opposed to the appeal on sentence. He however, urged the court to consider the Muruatetu decision and the directions of the Supreme Court issued on 6<sup>th</sup> July, 2021, as well as the guidelines to be followed when applying the Muruatetu decision. He further urged us to consider the circumstances of the case and the nature of the offence, as well as the suffering that the family of the deceased was undergoing.
- 5. We have considered the record of the trial court. The appellant was convicted on 6<sup>th</sup> April 2016 and sentenced on 11<sup>th</sup> April 2016, prior to the decision of the Supreme Court in Muruatetu, and was not given an opportunity to mitigate. The Supreme Court directed that a person convicted of the offence of murder should be given such opportunity before the court considers the guidelines on sentencing set in Muruatetu.
- 6. In the circumstances, the order that commends itself to us is to remit this matter to the High Court in Homa Bay for a re-sentencing hearing in accordance with the guidelines set in Muruatetu.
- 7. We accordingly direct that the matter be placed before the High Court in Homa Bay for mention within Fourteen (14) days of today with a view to taking appropriate directions on re-sentencing.
- 8. Orders accordingly.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE, 2022**

**K. M'INOTI**

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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**

