



**Ochieng v Republic (Criminal Appeal 115 of 2018)
[2025] KECA 2290 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2290 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 115 OF 2018
DK MUSINGA, PO KIAGE & GV ODUNGA, JJA
DECEMBER 19, 2025**

BETWEEN

BERNARD OTIENO OCHIENG APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Siaya
(Makau, J.) dated 9th February 2017 in HCCRA No. 48 of 2015)*

JUDGMENT

1. The appellant is in custody under a death sentence imposed on him by the High Court at Siaya (J. A. Makau, J.) on 9th February, 2017 consequent upon his conviction for murder. He was found to have killed Joseph Onyango Mboya, who was his grandfather, on 15th September, 2025 at Tingare sub-location in Siaya County. The evidence led through the witnesses called by the prosecution established that on the fateful day, the appellant quarrelled with the 80-year-old who he then assaulted with a rungu and a stick. Two of those witnesses, Stephen Ochieng Oguna (PW4) and David Opiyo Obonyo (PW5), disarmed and arrested the appellant. They were taking him to the police but, out of the urging of Edward Ooko Ligale (PW3), whom they met along the way, they returned and forced the appellant to carry the deceased on a wheelbarrow to the hospital. At Eywaya Health Centre they were referred to Gonja Hospital, but, as it was late, he was taken home in the hope of being taken to hospital the next morning. It was a vain hope, as the deceased expired that night.
2. Even though the appellant purported to deny the offence and even mounted what amounted to a weak alibi defence, the learned judge found the offence against him proved and sentenced him to death. He did so, indicating that even though the appellant had offered mitigation that he was remorseful, the breadwinner for his family, and was a first offender, the charge of murder provided only one sentence death.



3. In this appeal, the appellant does not challenge the conviction. In submissions filed on his behalf by the firm of C. O. Obiero & Associates, which his learned counsel Ms. Abuya relied on solely at the hearing of the appeal, the appellant anchors his appeal on the Supreme Court decision of Francis Karioko Muruatetu & Anor Vs. Republic [2017] eKLR which declared the mandatory death sentence for the offence of murder unconstitutional. He also relies on the Sentencing Policy Guidelines, 2023, to plead for a setting aside of the death sentence and substituting it with a

“proportional sentence of 15 years or less.” He bases that contention on the fact that he was a first offender who should not, therefore, be visited with the maximum sentence, and finds support in the case of Patrick Kagundu Mungira Vs. Republic [2020]eKLR. It is also urged that the appellant was remorseful and deeply regrets his action.
4. The respondent’s written submissions were filed Ms. Bernice Daisy Kagali, Principal Prosecution Counsel, and were relied upon by Ms. Busieni of that office. They acknowledged the evolving jurisprudence on mandatory sentencing and concurred with the appellant that the mandatory death penalty was unconstitutional for being harsh, excessive and arbitrary as stated in Muruatetu (supra), and conceded the appeal on the death sentence, which should be set aside. The prosecution, however, indicated that the substituted sentence should be 30 years’ imprisonment owing to the age and vulnerability of the deceased, who could not defend himself, and the absence of provocation, which are aggravating factors.
5. We have given the appeal and the submissions made before us due consideration. It is now trite that a death sentence imposed on account of it having been the mandatory sentence prescribed cannot be allowed to stand, and we must set aside the one imposed on the appellant, a course concurred in by both parties before us. The issue we must decide is the term sentence to be imposed.
6. Whereas the appellant pleads for 15 years in prison, citing the fact that he was a first offender and remorseful, it is rather chilling and wholly perplexing that he should have violently set upon and beat his octogenarian grandfather to death, when it is more natural to expect a filial solicitousness for and protection of such a grey- haired ancient. Such sentence as we impose must, therefore, reflect an appropriate degree of opprobrium. Having said so, however, there is no denying that the appellant was a first offender. The record shows in the testimony of PW3 that immediately after the tragic death, when he was asked why he assaulted his grandfather, he said “forgive me, forgive me,” which reflects instant remorse and regret. We note, also, that even though the appellant’s name is Benard Otieno Ochieng, all the witnesses from the village who testified referred to him as ‘Ngonyi,’ which appears to be a vulgar term of abuse in the local language. Indeed, PW2 Jennifer Owino in cross- examination indicated that the deceased used to abuse the accused referring to him as “vagina of your mother.” This, added to the fact, as testified by Mary Akinyi Samo (PW1), that whenever drunk the deceased used to abuse family members and had made a habit of insulting the appellant and telling him to leave his (deceased’s) homestead, provides a context that we cannot wholly ignore. We are thus unable to agree with the respondent that he should be sentenced to 30 years’ imprisonment, a term altogether too harsh in the circumstances.
7. Weighing all the relevant factors, we think that justice would be served with a proportionate sentence of incarceration. We, therefore, order that the appeal on sentence is allowed to the extent that the death sentence is hereby set aside and substituted with a term sentence of twenty (20) years’ imprisonment to run from 15th September, 2015 when the appellant was first taken into custody.

Order accordingly.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER, 2025.



D. K. MUSINGA, (PRESIDENT)

.....

JUDGE OF APPEAL

P. O. KIAGE

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

