Atela v Republic (Criminal Appeal 2 of 2022) [2025] KECA 993 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 993 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 2 OF 2022

HA OMONDI, LK KIMARU & WK KORIR, JJA

MAY 30, 2025

BETWEEN

THOMAS OTIENO ATELA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court at Kisumu (D.S. Majanja, J.) dated 21st September 2017 in HCCRC No. 56 of 2013)

JUDGMENT

1. Thomas Otieno Atela, the appellant herein, was charged with 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 11th November 2013 at Kabienge village, in Nyakach District within Kisumu County, the appellant murdered Philister Monyi Ngere. He pleaded not guilty, but after a trial spanning about 4 years, he was convicted of the offence of murder and sentenced to suffer death. He is dissatisfied with the sentence which is the basis of his first appeal.

2. In a nutshell, on the morning of 11th November 2013, Nicole Adhiambo (PW1) witnessed a fight between the appellant and her deceased grandmother over trees that had been cut by the appellant without permission from the deceased. After the fight, the deceased returned to the shamba, and PW1 saw the appellant follow her with a panga and attack her. The appellant then threatened PW1, saying he would harm her too if needed.

3. Another grandchild of the deceased, Jackline Achieng' (PW8), heard PW1 crying and saw the appellant approach, carrying a bloodied panga. He threatened to kill them if they screamed. PW8 later found the deceased lying under a tree with head wounds and rushed to get help.

4. On the same day, Joseph Odhiambo (PW2) was coming from school prayers when he heard someone shout, "whatever happens should happen," and, "that woman has insulted me enough." He recognized the voice as that of the appellant, who he had known for a long time. Shortly thereafter, he saw the

appellant carrying a blood-stained panga and wiping it on the grass while repeating the words that "whatever should happen, should happen." On his way to Bodo market, PW2 encountered a child who told him, "mama has died." Suspecting the child was referring to actions of the appellant and feeling afraid, he reported his suspicions to David Asanyo Juma (PW3). After PW2 informed him about his suspicions, PW3, who was an immediate neighbour, went to the deceased's homestead where he saw the deceased's body with the head decapitated and immediately reported the incident to the authorities.

5. George Ochieng Demba (PW4), another grandchild of the deceased testified that upon receiving the news of her demise, he proceeded to the locus in quo where he found neighbours gathered. He observed the deceased's body under a mango tree with her head cut "badly like meat in a butchery." He recalled that the previous day, the appellant had come to see the deceased and told her he would cut a tree to make charcoal, and if she refused, he would kill her.

6. Meshack Were Washore (PW 7), a neighbour of the appellant and the deceased, received the news while at Bodi and immediately left for Kabienge Village, where he found the deceased's decapitated body. He alerted Senior Sergeant Joseph Ojune Ekasiba (PW9) who upon receiving the report proceeded to Kabienge village, where he found the deceased lying in a pool of blood with her head disfigured as a result of panga cuts. At the scene, PW9 interviewed various witnesses and started looking for the appellant at his home, but he was not there. The next day, he returned to the appellant's homestead and found a sharp panga in the house of the appellant's mother. The appellant was later arrested after he surrendered himself at Pap Onditi Police Station.

7. When this matter came up for hearing on 4th February 2025, the appellant, virtually appearing from Kibos Prison, was represented by learned counsel Mr. Ariho Ndung'u, while the respondent was represented by Senior Principal Prosecution Counsel (SPPC) Mr Okang'o.

8. Learned counsel Mr. Ariho sought to rely on his written submissions dated 25th November 2024. Therein, counsel urged the Court to apply the ratio decidendi in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR and vacate the death penalty for being entered in its mandatory nature. Counsel proposed a sentence of ten years from 12th November 2013, when the appellant was first arraigned in court. To justify the submission, counsel implored the Court to consider that the appellant had reformed as evidenced by a letter dated 5th May 2020 attesting to the appellant's good character while in prison, and a certificate of completion of a bible study program by Bible League dated 22nd August 2019, a diploma certificate in Bible correspondence course from Emmaus Bible College, and another from Gospel Messenger Ministry acquired during his time in prison.

9. On his part, Mr. Okang'o conceded to the appeal only to the extent that the death penalty was handed in its mandatory nature. However, Mr. Okang'o urged the Court to consider the evidence on record regarding how the offence was committed, which in his view warranted the death penalty. According to Mr. Okang'o, this was a case of gross femicide which warranted a death penalty. Counsel therefore urged the Court to maintain the death sentence.

10. We have reviewed the record and the submissions by counsel. This being an appeal against sentence, the only issue for determination is whether the death penalty was appropriate in the circumstances of the case.

11. As an appellate Court, we are aware that sentence is a matter that rests with the discretion of the trial court and we should not readily interfere with the sentence unless, it is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or considered

wrong material, or acted on a wrong principle. In that regard, the Court in Bernard Kimani Gacheru vs. Republic [2002] KECA 94 (KLR) held 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."

12. In this case, the basis upon which our interference with the sentence is invited is that it was passed in its mandatory nature contrary to the subsequent holding by Supreme Court in Francis Karioko Muruatetu & Another vs. Republic (supra) that the mandatory nature of the death sentence as provided for murder under section 204 of the *Penal Code* was unconstitutional.

13. In sentencing the appellant to suffer death, the learned Judge held as follows:

> "The accused has now been convicted of murder of Philister Monyi Ngere. I have considered his mitigation, but the law leaves me no option but to enforce the only sentence: death. I accordingly sentence Thomas Otieno Atela to death. He is informed of his right of appeal."

14. It is important to appreciate that whereas the mandatory nature of the death penalty was declared unconstitutional on 14th December 2017, the appellant was sentenced on 27th September 2017. Since his sentencing predates the Supreme Court decision, we cannot fault the learned Judge on how he approached the sentence, as that was the prevailing jurisprudence at the time. Considering the change in jurisprudence, the appellant deserves to benefit from the current jurisprudence. On this basis, we accept the invitation to interfere with the sentence.

15. In sentencing the appellant, we are bound to consider the mitigating factors as outlined by the Supreme Court in Francis Karioko Muruatetu & Another vs. Republic (supra) as follows:

> " To avoid a lacuna, the following guidelines with regard to mitigating factors were applicable in a re-hearing sentence for the conviction of a murder charge:
>
> 1. Age of the offender;
> 2. Being a first offender;
> 3. Whether the offender pleaded guilty;
> 4. Character and record of the offender;
> 5. Commission of the offence in response to gender- based violence;
> 6. Remorsefulness of the offender;
> 7. The possibility of reform and social re-adaptation of the offender;
> 8. Any other factor that the court considered relevant."

16. The Sentencing Policy Guidelines, 2023 published by the National Council on the Administration of Justice at page 67 also provides some of the mitigating factors for the offence of murder as follows:

> " 5. 2.5 Mitigating features relating to murder might include:
>
> i. Lack of premeditation.
>
> ii. The offender suffered from a mental disorder or mental disability which lowered his degree of blame.
>
> iii. In a case of joint enterprise, the role the offender played may be lower than his co-accused. For example, in the resentencing of the Applicants in Francis Karioko Muruatetu & 6 others v Director of Public Prosecution [2019] eKLR the Judge categorized the offenders into four categories based on their culpability. The first category involved the architects of an offence e.g., those who financed the killing, the second category involves offenders who ensnared the deceased into his death, the third category is the henchmen, those who carried out the brutal killing and the fourth category involves offenders involved in the cover up of the offence by attempting to silence witnesses. The Judge sentenced the third category with the highest term of imprisonment and graduated the term down for the other categories.
>
> iv. That the offender was provoked.
>
> iv. That the offender acted to any extent in self- defence or in fear of violence.
>
> vi. The age of the offender."

17. However, the mitigating factors cannot be considered in isolation of the aggravating factors. The Sentencing Policy Guidelines, 2023 at pages 66 to 67 lists some of the aggravating factors as follows:

> "5.2.4 Aggravating Factors in Murder Cases:
>
> i. A significant degree of planning or premeditation.
>
> ii. The mental or physical suffering inflicted upon the victim before death. Factors such as the type of weapon used, torture or inhuman or degrading treatment prior to death will be relevant.
>
> iii. The use of duress or threats to enable the offence to take place.
>
> iv. The vulnerability of the victim e.g., due to age or disability.
>
> v. The fact that the victim was providing a public service or performing a public duty.
>
> vi. Multiple victims or multiple perpetrators.
>
> vii. Where the offence involved an abuse of trust. The relationship between the victim and the accused should be carefully considered.

viii. Offence was motivated by, or there was demonstrated hostility to the victim based on his or her race, gender, sex, sexual orientation (or presumed sexual orientation), pregnancy, marital status (so called 'honour killings' for example), health status (e.g., murder occurred because of the HIV status of the victim, or albinism), ethnicity, culture, dress, language, birth, or religious orientation (or presumed religious orientation).

ix. A history of assaults, threats, or coercion upon the same victim.

x. Absence of self-defence or provocation.

xi. The offence involved deliberate drugging or stupefying of the victim.

xii. Proven abduction or kidnapping of the victim before the murder was committed.

xiii. Where a demand for ransom was made, signifying a financial motive.

xiv. Concealing, destroying, or dismembering the body.

xv. Where the murder was conducted in furtherance of a ritualistic practice such as witchcraft."

18. It is the act of balancing the mitigating and aggravating factors that will guide us in determining what in our view is the appropriate sentence in the circumstances of the case. Learned counsel for the appellant, Mr. Ariho Ndung'u, urged for a sentence of ten years imprisonment, while learned counsel for the respondent, Mr. Okang'o, urged us to maintain the death penalty. Undoubtedly, the death sentence is still legal and can be handed down in deserving cases. The question that we must answer therefore is whether this is a case deserving of the death penalty as submitted by Mr. Okang'o or whether we should impose a term sentence as proposed by Mr. Ariho Ndung'u.

19. Perhaps, the decision of the Indian Supreme Court in Bachan Singh vs. State of Punjab (Bachan Singh) Criminal Appeal No 273 of 1979 AIR (1980) SC 898 captured the dilemma we are currently faced with when it held that:

> "But what are the special reasons for which the court may award death penalty is a matter on which Section 354 Sub-section (3) is silent nor is any guidance in that behalf provided by any other provision of law. It is left to the Judge to grope in the dark for himself and in the exercise of his unguided and unfettered discretion decide what reasons may be considered as 'special reasons' justifying award of death penalty and whether in a given case any such special reasons exist which should persuade the court to depart from the normal rule and inflict death penalty on the accused. There being no legislative policy or principle to guide. the court in exercising its discretion in this delicate and sensitive area of life and death, the exercise of discretion of the Court is bound to vary from judge to judge. What may appear as special reasons to one judge may not so appear to another and the decision in a given case whether to impose the death sentence or to let off the offender only with life imprisonment would, to a large extent, depend upon who is the judge called upon to make the decision. The reason for this uncertainty in the sentencing process is two-fold. Firstly, the nature of the sentencing process is such that it involves a highly delicate task calling for skills and talents very much different from those ordinarily expected of lawyers...
>
> Even if considerations relevant to capital sentencing were provided by the legislature, it would be a difficult exercise for the judges to decide whether to impose the death penalty

or to award the life sentence. But without any such guidelines given by the legislature, the task of the judges becomes much more arbitrary and the sentencing decision is bound to vary with each judge. Secondly, when unguided discretion is conferred upon the Court to choose between life and death, by providing a totally vague and indefinite criterion of 'special reasons' without laying down any principles or guidelines for determining what should be considered to be 'special reasons', the choice is bound to be influenced by the subjective philosophy of the judge called upon to pass the sentence and on his value system and social philosophy will depend whether the accused shall live or die."

20. The above excerpt resonates with our dilemma and there may be need for further legislative guidance as to the circumstances under which the ultimate death penalty may be imposed. In India the Supreme Court in Bachan Singh vs. State of Punjab (supra) while discussing the circumstances under which the ultimate death penalty may be imposed opined that:

> " A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

21. In our view, the death sentence should not be meted simply based on the side of the bed the judge has woken up from. We would agree with the Supreme Court of India that such a life-ending sentence should be reserved for the rarest of rare cases. The question still remains whether the death penalty is befitting in the circumstances of this case.

22. What came out from the appellant's mitigation on record is that he was a first offender and a breadwinner of his young family. He also supported his mother. Additionally, the appellant registered a plea for leniency. On the other hand, this offence was committed against an elderly woman as her grandchild watched. The appellant, despite having quarrelled with the deceased, not only picked his machete but also sharpened it before proceeding to the farm where he dismembered her head. Evidence on record shows that he had harboured the thought of ending the deceased's life a day before he committed the act. In what is in our view a lack of remorse, the appellant, after slaughtering the deceased, asked her two grandchildren to keep watch over her head lest the dogs ate it. The manner in which the deceased met her death was captured in the postmortem report as follows:

> " Head completely disfigured by multiple deep cut wounds, with a partial decapitation, open skull, and exposed brain matter.
>
> Deep cut wound on the right shoulder (5*4) centimeter.
>
> Multiple deep cut wounds on right forearm, approximately 4 in number, the longest measuring 6cm and shortest 3 cm.
>
> Deep cut wound on the left shoulder (3cm)."

23. In the circumstances of this case, we find that the appellant harboured the thought of ending the deceased's life and his acts were not out of impulse. The injuries suffered by the deceased speak to the heinous nature of the act. The appellant's action after the act which we have already pointed out portrays a barbaric attitude not just towards the deceased but also the young grandchildren who have been left with lifetime trauma. The aggravating factors we pick from this case are that there was premeditation, the victim suffered physical injury and was a vulnerable grandmother. It is not lost upon us that the deceased was killed for protecting her property rights by denying the appellant an opportunity to cut her trees. This is clearly one of the worst cases of gender motivated violence. Weighed against the mitigating factors, the aggravating factors lead us to the conclusion that the

appellant deserves a long incarceration period. Flowing from our discussion, we find that the death sentence was not appropriate in the circumstances of this case. As such, we allow the appeal against sentence, set aside the death penalty, and in its place sentence the appellant to thirty-five (35) years imprisonment. Considering that the appellant was in custody throughout the trial, the sentence shall, in accordance with the proviso to section 333 (2) of the *Criminal Procedure Code*, run from 20th May 2010 when the appellant was presented in court for plea.

24. Consequently, this appeal, which is against sentence only, succeeds to the extent that the death penalty is set aside and substituted with a prison sentence of thirty-five (35) years.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY 2025

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR