



**Republic v Osiako alias Aswani (Criminal Case E010 of 2021)
[2024] KEHC 13544 (KLR) (30 October 2024) (Sentence)**

Neutral citation: [2024] KEHC 13544 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL CASE E010 OF 2021
JN KAMAU, J
OCTOBER 30, 2024**

BETWEEN

REPUBLIC PROSECUTION

AND

GEOFFREY EDWARD OSIAKO ALIAS ASWANI ACCUSED

SENTENCE

1. The Judgment herein was delivered on 25th July 2024. The Accused person herein was found guilty of the offence of the murder of Fanuel Tony Nambute contrary to Section 203 of the Penal Code as read with Section 204 thereof, and was convicted accordingly under Section 215 of the Criminal Procedure Code Cap 75 (Laws of Kenya).
2. In his mitigation, the Accused person said that he was remorseful. He stated that he was a family man with three (3) children. The first born was eleven (11) years old, the second born, eight (8) years old and the third born, three (3) years old. He averred that he was the sole breadwinner of his family which had relied on his pay as a watchman at Ebusakami Secondary School.
3. He asked the court to consider the Sentencing Guidelines which he said fitted his mitigation. He added that the court should take into account that the incident occurred at night and the evidence of many witnesses indicated that the deceased had visited many homes. He urged the court to take into consideration his mitigation and the Pre-Sentence Report that was positive in respect to his sentencing. In this regard, he prayed for a non-custodial sentence.
4. On its part, the Prosecution pointed out that the victim’s family was still bitter with the occurrence of the offence. It stated that the Accused person was not remorseful as the Pre-Sentence Report indicated that he still denied having committed the offence. It invited the court to look at the injuries that were sustained by the deceased which were indicative of malice aforethought. It pointed out that it was apparent from the said Pre-Sentence Report that the victim’s family had received threats from the



Accused Person's family and were apprehensive that if he was released, their lives would be in danger. It urged the court to look at the sentencing objective and impose a custodial sentence.

5. According to the Pre-Sentence Report by Benard Mwembe, Probation Officer, Vihiga County Office that was dated 20th September 2024 and filed on 23rd September 2024, the Accused person was said to have been thirty-five (35) years of age. He attended Ebusakami Primary School until Standard seven (7) when he dropped out of school due to the death of his parents. He was married and blessed with three (3) children. He used to suffer from cerebral malaria but got treated and healed. He was in good health save for complaints about stomachache. He did not drink alcohol or smoke cigarettes.
6. He denied having committed the offence. However, having been convicted, he expressed remorse of the whole unfortunate incident. He pleaded for leniency and attributed the same to ill-advised adventure and bad luck. He promised to be a law-abiding citizen and prayed for an opportunity to serve a non-custodial sentence whose terms and conditions he was ready and willing to abide by.
7. His family described him as a good brother, polite, humble, well intentioned, a spirited person who was non-confrontational and a level headed person with no history of violent behavior prior to the incident herein. They believed that he was innocent and had been framed. They pleaded with the court to show him mercy and give him a chance to undergo transformation while serving a non-custodial sentence to enable him take care of his children. They added that the community had no issues with him and the home environment was conducive.
8. The victim's family was bitter for having lost their first-born child whom they had depended on. They opined that the Accused person's possible release to the community would be unpalatable.
9. According to the Local Administration and the community members, the Accused person was humble, focused, reserved and hardworking and had no history of violence. They welcomed the consideration for him to be placed on a non-custodial sentence that would afford him a second chance which could assist in his rehabilitation, resettlement and re-integration.
10. The Probation Officer found the Accused person to be suitable to be considered for Probation for a maximum sentence of three (3) years subject to the discretion of this court.
11. Notably, sentencing is one of the most intricate aspects of trial. Indeed, a trial does not end unless a sentence has been meted out. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.
 1. It was important that the sentence communicate to the community, condemnation of their criminal act. The sentence would indirectly send a strong signal to deter would be offenders from committing such an offence. The sentence also had to be one that was hinged on retributive justice for the secondary victims.
 2. If the court did not take into account the three (3) objectives of deterrence, retribution and denunciation of the offence at the time of sentencing him, chances of the Accused person being reintegrated in the society would be next to impossible as there were possibilities of being harmed.
 3. After serving a sentence, the offender could rejoin society as a reformed person capable of re-integration into the society. He would have learnt his lesson and others would have learnt through him.



4. This court looked at the Post-mortem Report dated 15th October 2021 and noted that the cause of the deceased's death was severe head injury due to blunt force trauma following assault. The Prosecution's evidence was that the Accused person herein attacked the deceased having mistaken him for a thief.
5. Although the Probation Officer, the Accused person's family, local administration and the Community urged this court to mete out a non-custodial sentence on the Accused person, this court did not find it prudent to grant the same due to the nature of the offence.
6. The nature of the injuries the deceased sustained showed the malice that the Accused person had and showed his intention of killing him. Although he appeared to have been remorseful, despite having been found guilty after a full trial, he still denied having committed the offence. In the same vein, however, he also prayed for leniency.
7. Killing someone was an abomination in the society. That could explain why the victim's family did not want them released on a non-custodial sentence. Justice not only needed to be done but it had to be seen to be done.
8. Having considered the facts of this case and the Accused person's mitigation and weighed against the death sentence that is prescribed for the offence of murder prescribed under Section 204 of the Penal Code, this court came to the firm conclusion that a non-custodial sentence would be unjust as a life was lost.
9. It was the considered view that as a life was lost and the Accused persons proceeded with the full trial, a sentence of fifteen (15) years imprisonment would be suitable and adequate herein. It was irrespective that the deceased was drunk and was loitering in people's homes hence mistaken as a thief. The Accused person ought not to have taken the law into his hands. He was the accuser, investigator and the juror which was against the rules of natural justice. This court could have meted out a lower sentence had he entered into a Plea Bargain Agreement.
10. Going further, this court was mandated to consider the period that he spent in remand while his trial was on going in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
11. The said Section 333(2) of the Criminal Procedure Code provides that: -

“Subject to the provisions of section 38 of the Penal Code (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody” (emphasis court).

23. Further, the Judiciary Sentencing Policy Guidelines provide that: -

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court



must take into account the period in which the offender was held in custody during the trial.”

24. The requirement under Section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.
25. The Accused person was arrested on 16th October 2021. He was released on bond on 10th November 2021. He was convicted on 25th July 2024. The period that he spent in custody while his trial was going on and the period that he was awaiting his sentence therefore ought to be taken into consideration while computing his sentence.

Disposition

26. Accordingly, for the reasons set out above, the Court having in its judgment convicted the offender for the offence of murder contrary to Section 203 as read with 204 of the Penal Code, it is hereby directed that the Accused person be and is hereby sentenced to fifteen (15) years imprisonment to run from today.
27. For the avoidance of doubt, the period the Accused person spent in custody from when he was arrested on 16th October 2021 until 10th October 2021 and the period between 25th July 2024 and 29th October 2024 be and is hereby taken into account while computing his sentence in line with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).
28. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF OCTOBER 2024

J. KAMAU

JUDGE

