



**Director of Public Prosecution v Ouma (Criminal Case E140 of 2021)
[2024] KEHC 16406 (KLR) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E140 OF 2021
S MBUNGI, J
DECEMBER 20, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

DAVID JUMA OUMA ACCUSED

RULING

1. The accused person 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 the 26th day of October, 2021 at Khalaba sub-location in Matungu sub-county within Kakamega County the accused murdered Catherine Nyangweso.
2. The matter proceeded to full trial and the prosecution called and relied on the evidence of eight witnesses to prove their case.
3. The court ruled that a prima facie case had been established against the accused person and was put on his defence.
4. The accused was the only defence witness and judgment was entered thereafter where this court presided by Hon. Justice P.J.O Otieno found the accused person guilty of the offence of murder as charged and convicted him accordingly.
5. I heard the mitigation where the counsel for the accused person, Mr. Otsyeno, pleaded with the court to exercise leniency while sentencing the accused, stating that the accused is a first-time offender and has reformed in the period he has served in custody. He submitted that the accused is the sole breadwinner to his wife, one child and 7 siblings who rely on him for their livelihood. Additionally, he stated that the accused's father is willing to relocate him to Busia County to start a new life; and the court ought to exercise its discretion to grant a lenient sentence to the accused.



6. The prosecution counsel submitted that a life was lost and children lost a mother and grandmother. He submitted that at the time of commission of the offence, the deceased was with her four-year old grandson who ran to hide in a nearby maize plantation but could hear the cries of mercy from her grandmother and will leave with that memory. He stated that the accused could not beg the court for mercy when he did not show any mercy to the deceased.
7. The pre-sentence report filed by the probation department indicates that the accused is 27 years of age, and may have been manipulated to harm the victim due to tensions within the extended family as a result of unresolved family conflicts since the victim was his aunt. The community is also conflicted on whether there was an informal agreement with the victim's family and there is concern that the ground might still be hostile and unsuitable if the accused is given a non-custodial sentence.
8. The Supreme Court in Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 of 2015, as a guide in sentencing held that:
 - a. age of the offender
 - b. being a first offender;
 - c. whether the offender pleaded guilty;
 - d. character and record of the offender;
 - e. commission of the offence in response to gender-based violence;
 - f. remorsefulness of the offender;
 - g. the possibility of reform and social re-adaptation of the offender;
 - h. any other factor that the Court considers relevant.”
9. In Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR, the High Court held that the objectives of sentencing include: “deterrence, rehabilitation, accountability for one’s actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.”
10. The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:
 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.
 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.



4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
 5. Community protection: To protect the community by incapacitating the offender.
 6. Denunciation: To communicate the community's condemnation of the criminal conduct."
11. The discretion in sentencing rests with the trial judge because he or she has the knowledge of the relevant facts before him or her and in many instances, has observed the accused and witnesses' demeanor. The discretion must however be exercised judiciously. In the Nigerian case of *African Continental Bank vs Nuamani* [1991] NWLI (part 86) 486, it was observed that,
- “The exercise of court’s discretion is said to be judicial if the judge invokes the power in his capacity as a judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”
12. I was not the trial judge, but I have perused the proceedings. I am properly sized of the facts in the matter.
 13. I have considered the submissions by the prosecution Counsel and defence counsel in mitigation and the pre-sentence report filed in this court. I have also considered the circumstances under which the murder was committed and how it was committed. The accused dug a hole on the wall at the back of the house so as to gain access to the victim’s house. He attacked the deceased who was in her safe aboard severally and indiscriminately using a wooden plunk, including on her head causing her to die on the spot. The nature of assault shows that the accused was out to cause the death of the victim, or grievous harm in the very least.
 14. The post mortem report showed that the deceased had severe head injury from traumatic brain injury. This shows the extent of force that was used in the incessant assault that resulted to the loss of her life.
 15. Despite the defence counsel submitting that the accused is remorseful, the pre-sentence report indicates that the accused continues to deny the offence.
 16. The Court agrees that the maximum sentence (death penalty) is not suitable in the circumstances of the case since the accused is a first-time offender. I am however of the view that the circumstance of the offence; the fact that the deceased and the accused are relatives, and that the deceased was an old woman aged 89 years in the safe confines of her home warrants that the accused should serve a deterrent sentence as a lesson to other would-be offenders in the society from taking advantage of the vulnerable.
 17. From the foregoing, I am inclined to impose a custodial sentence. The accused will serve forty (40) years imprisonment. Taking into account the provisions of section 333(2) of the Criminal Procedure Code, the sentence shall run from the date of arrest being 26.10.2021.
 18. Right of appeal 14 days explained.



DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :

Accused person – present

Mr. Otsyeno Advocate for the accused – present

Court Prosecutor – Mbonzo

Court Assistant – Elizabeth Angong'a

