



**State v Otieno (Criminal Case E025 of 2023)
[2024] KEHC 16438 (KLR) (18 December 2024) (Sentence)**

Neutral citation: [2024] KEHC 16438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E025 OF 2023
RE ABURILI, J
DECEMBER 18, 2024**

BETWEEN

STATE PROSECUTION

AND

BENJAMIN OMONDI OTIENO ACCUSED

SENTENCE

1. On the 3rd day of July 2023, Marion Atieno Ochieng, a 15-year-old girl of a widowed mother left her uncle’s home where she lived in Mbalawandu village, West Karateng sub-location in Kisumu West sub-county within Kisumu County for school. She was a Form Two student at Kuoyo Secondary School. She attended to her school activities and in the evening, she left school in the company of the accused herein, Benjamin Omondi Otieno, who was her school mate at the same school and in Form three. Marion was never to be seen alive again.
2. She was found to have been stabbed nine times in the neck with jugular veins dichotomized and with several lacerations and left lifeless on the road, not far from where she lived with her relatives. The convict herein Benjamin Omondi Otieno was arrested in connection with her demise, investigations were carried out and he was arraigned before this Court for the murder of Marion.
3. The accused denied committing the offence. After a full trial, he was found guilty of the offence of murder contrary to section 203 of the *Penal Code* and convicted accordingly.
4. The prosecution had no previous criminal records on the convict hence he could be treated as a first offender. The convict mitigated through his advocate and in his own words urging the court to let him go and complete his studies. Mr. Awuonda advocate for the convict mitigated seeking for leniency on behalf of the accused who was young and remorseful.
5. The Court called for a presentence report from the probation officer who filed the report on 16th December, 2024.



6. The probation report as filed regrettably appeared to have been compromised in many respects. The report brought out evidence which was inconsistent with the evidence on record concerning the age of the convict, but with no proof that the convict was a minor. This Court summoned the probation officer who stated on oath that at the time of preparing the report, he did not see the birth certificate which had been filed into Court before plea was taken and that neither did he see the age assessment report which had been filed by the prosecution. Further, that when he met the convict's mother, she availed to him a birth certificate which showed that the convict was born on 29/8/2006. He did not, however, keep a copy of that birth certificate for reference and verification by this Court.
7. However, when the court summoned the convict's mother to avail the birth certificate which she had supplied to the probation officer, she attended court and took oath and produced the original birth certificate which was the same as that certified copy of birth certificate which was supplied to this court by the investigating officer and which birth certificate this Court relied on at the time of taking plea. The investigating officer PC Nicholas Maweu had a copy of the birth certificate certified by Maseno Senior Resident Magistrate and which this Court had seen throughout the proceedings. It showed that the convict herein was born on 29/8/2004 meaning, he was 19 years old, just slightly one month after his 19th birthday at the time that he committed the offence.
8. This court also noted that the age assessment report as requested by the court on the first appearance in this Court by Hon. G.C. Serem, Resident Magistrate and which this court had seen prior to taking of the plea was missing from the Court file and neither was the copy of the birth certificate which was initially filed by the prosecution available. I however subsequently traced the copy of the birth certificate from the exhibits which were sealed in an envelope.
9. When the convict's mother appeared in court and took oath, she denied supplying a different birth certificate to the probation officer. She confirmed to court that the birth certificate which she had produced, being an original one, whose copy as certified and relied on by this court, showing the date of birth of the convict as 29/8/2004 was the correct one and only birth certificate she knew and she also denied ever supplying the probation officer Mr. Nyaicho with any birth certificate. She stated that the probation officer never asked her about any birth certificate.
10. This court then concluded that the convict's mother and the probation officer may have attempted to obstruct justice by trying to introduce evidence of a fake birth certificate because she confirmed to court by producing the original birth certificate with the same entry number as noted by the court during defence hearing, showing that the convict was born on 29/8/2004 hence he was 19 years old when he committed the offence. The convict's mother also urged this court to expunge from the court record and reject the probation officer's report which was in favour of the convict.
11. I have nonetheless considered the probation officer's report which paints the convict as a respectful and polite harmless person and that he regrets committing the offence and is remorseful, seeking for leniency in sentencing. The report recommends probation for three years.
12. Having resolved the attempt to defeat justice, I proceeded to ask the victim's mother to give her victim impact statement on oath. She prayed for justice for her daughter and urged this court to impose deterrent sentence.
13. I now proceed to determine what appropriate sentence to mete out to the young convict who stabbed his young victim more than nine times using a knife while on their way from school. Before I do that, it is important to consider the principles of sentencing as espoused in the *Francis Karioko Muruatetu & another v Republic* [2017] eKLR case and in the judiciary policy sentencing guidelines.



14. In determining what sentence to impose in murder cases, this court is guided by the above *Muruatetu case* and the sentencing policy guidelines, 2016 as revised in 2023.
15. Under paragraph 5.2.2. of the Guidelines, the National Council on Administration of Justice recognizes that:

“The harm caused by such an offence is immeasurable. The sentence is not a measure of the value placed on the life of the victim. Therefore, the assessment of aggravating and mitigating features relating to the offence focusses on culpability. However, the victims’ family may wish to make a statement to the court about the impact of the offence.

5. In addition to the generic features contained in the GATS, features particularly relevant to murder may include but are not limited to:

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.[emphasis added]
16. Under paragraph 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 categorised 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.
 - v. That the offender acted to any extent in self-defence or in fear of violence.
 - vi. The age of the offender.
16. In the instant case, and as guided by the Francis Muruatetu case as well as the sentencing guidelines reproduced above, the convicted offender is now aged 20 years and he was 19 years old when he committed the offence.
17. The offence was premeditated as evidenced by the threatening ‘poisoned’ letters written by the convict threatening to kill the victim who also wrote back to the convict, fearing for her life for refusing to have sex with the convict and insisting that she wanted to pursue her education.
18. The offence is a gender-based violence case, it was committed against a minor aged 15 years old and a form two student who had a future ahead of her, very much interested in pursuing her dream through education.
19. There was no provocation of the convicted offender herein by the victim and there was no evidence of self-defence by the convict in fear of any violence. The victim was subjected to serious mental and physical suffering before her death as evidenced by the injuries that she sustained as per the post-mortem report. The convict used a sharp knife to scoop life out of the young victim and stabbed her more than 9 times in the neck severing her jugular veins and tearing or lacerating them as described in the post-mortem report
20. The offender never made any self-reporting. The offender felt nothing about the brutal murder of the victim after executing her as he went about his business of going to school the following day and asking for permission to go to hospital just to fool the teachers in school.
21. The mother of the victim attended court and she gave a victim impact statement on oath. She was very emotional. She loved her daughter who was her second born child. She had 4 other children yes but she



- was pained at the brutal murder of her daughter. She prayed that the court gives justice to her daughter and imposes sentence that would teach other would-be murderers a lesson.
22. The convict herein had no license to kill the deceased. The motive was that the deceased victim had refused to have sex with him. She was fifteen years old while he was 19 years old. He hatched a plan to eliminate her. He accomplished it. The deceased too deserved to live. No person has any right to take away the life of another person. Article 26 of the Constitution guarantees every person the right to life and only in those circumstances allowable by the Constitution or by statute would the exception apply.
 23. Punishment for murder, upon conviction, is death as provided for under section 204 of the penal Code. Death sentence is lawful. It still exists in our statutes and neither has the Supreme Court outlawed it as is misconceived by most people convicted of murder. The convict has been given the opportunity to mitigate and the court has considered a presentence report as well as the victim's mother's statement.
 24. The court also allowed the convict to speak to the victim's mother in court during the sentencing proceedings and he told her that he was sorry for killing her daughter. She however repulsed the apology tendered in open court. She stated that she was not forgiving the convict.
 25. The presentence report recommends probation. However, considering the circumstances under which the murder most foul was committed, I am not persuaded that non-custodial sentence is appropriate. It is not proportional to the offence committed. Despite his young age of 20 years now, the convict deserves custodial sentence. This was a gender-based violence murder against a minor who was vulnerable. It is a femicide case. Cases of femicide are on the rise in Kenya.
 26. Deterrent sentence is necessary to forewarn those who have no respect for lives of vulnerable persons like the victim girl in this case. She did no wrong, her only offence being that of refusal to quench the convict's sharp appetite for sex with a minor. The convict wanted to ruin the victim's life and future the victim was conscious of that ploy so she resisted and so she paid the ultimate price, death by a sharp knife, covering over nine stabs and lacerated wounds into her body.
 27. The convict wants to continue with his education. He can do so behind bars as the Kenyan prison system encourages those interested to continue learning as they are rehabilitated in prison.
 28. In my view, the convict herein does not deserve to live in the society. He is a danger to the girl-child and to any other human being. The society must be protected by keeping him away for a longer period of time for the victim's family to heal although their daughter will never be brought back to life by whatever sentence this court may impose on the convict.
 29. However, the victim's family must also feel that justice has been done to their daughter. The convict is 20 years old and an adult. He voluntarily stabbed the deceased minor for refusing to be defiled by him. I shall exercise discretion in view of the mitigations and order that the convict Benjamin Omondi Otieno is hereby sentenced to serve fifty (50) years imprisonment. The sentence to take into account the period that the convict has been in custody upon arrest to the time he was released on bond and from the date the bond was cancelled when he was placed on his defence until today, the date for mitigation and sentencing.
 30. Right of appeal to the Court of Appeal is 14 days of today, explained.
 31. Further, Mr. Awuonda advocate on pauper brief basis is hereby appreciated for the services rendered and discharged from these proceedings and his fees to be settled upon filing of the fee note and necessary documentation. The surety is hereby discharged and his security deposited in court is hereby ordered to be released to him.
 32. This file is closed.



DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

