



**Republic v SOO (Criminal Case E012 of 2023)
[2025] KEHC 1910 (KLR) (6 February 2025) (Sentence)**

Neutral citation: [2025] KEHC 1910 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E012 OF 2023
RE ABURILI, J
FEBRUARY 6, 2025**

BETWEEN

REPUBLIC PROSECUTOR

AND

SOO ACCUSED

SENTENCE

1. The accused person SOO was in a judgment rendered on 31st January 2025 found guilty of the charge of murder and convicted under section 203 of the *Penal Code*. The victim of the murder was Florence Adhiambo Opondo aged 65 years as per the post mortem report produced as exhibit 7 dated 13th March, 2023.
2. In mitigation through his counsel Mr. Orego, he pleaded for leniency of the court. He is young and though an adult now, he regrets the offence committed when he was 17 years old; that he has been in custody since arrest and has learnt lessons. The Children’s Officer from Kisumu Remand Home stated that he was obedient, polite and well behaved.
3. That the court should not mete out maximum sentence as mandated by law and that section 333(2) of the *Criminal Procedure Code* should be taken into account.
4. According to the prosecution, the accused is a first offender.
5. I have considered the mitigations by the defence counsel and the fact that the accused is a first offender and a young person. I have also taken into account the Revised *Sentencing Guidelines*, 2023 by the National Council on Administration of Justice at pages 66 and 67 wherein it is stated as follows:

“Murder



5. The harm caused by such an offence is immeasurable. The sentence is not a
2.2 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
2.3 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.

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.”
6. The victim was aged 65 years old while the convict was aged 17 years old but has since become an adult. He is now 19 years old as per the age assessment report dated 15/6/2023. He has no history of mental illness. According to the pre bail assessment report, he dropped out of school in class three due to socio economic hardship. His father is a wanderer preacher living away from home which his mother is a peasant struggling to eke a living for her seven children including the convict who was born in 2006.
 7. The deceased is also said to be the step mother a wife to the paternal uncle of the convict and that following the incident, the home of the convict was razed by villagers out of vengeance.
 8. Punishment for murder upon conviction is death. This is provided for under section 204 of the *Penal Code*. However, applying the *Francis Muruatetu & another v Republic* [2017] eKLR case where the supreme Court in finding that the death penalty was lawful save for its mandatory nature and its deprivation of the trial court discretion in sentencing having regard to the mitigation and circumstances under which the offence was committed, and the fact of the age of the convict herein, I shall exercise discretion and rely on decided cases in determining what sentence to impose.
 9. In *R v Dennis Kirui Cheruiyot* [2014] eKLR, the Appellant was aged 20 years at the time of sentencing, but was 15 years when the offence was committed. He was convicted of murder. The court sentenced him to life imprisonment. On appeal, the Court of Appeal reduced the sentence to 10 years imprisonment after noting the dilemma a court faces in sentencing an offender who was a minor turned into an adult at the time of sentencing or at the time of an appeal.
 10. The Court of Appeal in *R v Dennis Kirui (supra)* relied on *JKK v Republic* [2013] eKLR, a decision of the Court of Appeal sitting in Nyeri. In that case, a minor charged with murder was convicted and sentenced to death. The Court of Appeal found that the Appellant was under 18 years of age at the time of committing the offence although at the time of the sentence, four years had elapsed making



him about 21 years of age. The Court reduced the sentenced from the death penalty to a custodial sentence of 12 years. The Court reasoned as follows:

“The purposes of the sentences provided for under the *Children Act* are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence”

11. In *S C N v Republic* [2018] eKLR, the High Court found that the appellant was a child at the time of committing the offence. On appeal, the Court observed that the trial Magistrate ought to have prescribed any other lawful sentence pursuant to section 191(1)(g) and (l) of the *Children’s Act*, and the authorities cited. The High Court reduced the appellant’s sentence to a custodial sentence of ten (10) years.

12. In *J. M. K. v Republic* [2015] eKLR, the Court of Appeal avoided the issuance of an order under Section 25(2) of the *Penal Code* and opted to instead impose a prison sentence of ten years. In doing so, the Court stated:

“A critical issue in this appeal relates to the appropriate sentence for a minor who has been convicted of murder. At the time of the offence, the appellant was a minor 16 years of age. The offence of murder attracts a mandatory death sentence. In Nyeri Criminal Appeal No 118 of 2011 (*JKK v R* (2013) eKLR), this Court had an opportunity to consider the appropriate punishment for a minor offender. The Court stated that the offence of murder committed by the minor appellant was serious and an innocent life was lost. The appellant though a minor at the time of the offence was to serve a custodial sentence so that he could be brought to bear the weight and responsibility of his omission or lack of judgment. The Court expressed that the appellant who now of age of majority could not be released to society before being helped to understand the consequences of his mistakes. (See also *Republic v S.A.O., (a minor)* [2004] eKLR and Nyeri Criminal Appeal No 184 of 2009, *Dennis Kirui Cheruiyot v R*).

13. The above decision was prior to the Muruatetu decision of the Supreme Court.

14. On the other hand, under section 25(2) of the *Penal Code*, a sentence of death cannot be imposed on a person who was under the age of 18 years at the time when the offence was committed and in lieu thereof, such person should be detained at the President’s pleasure.

15. However, even before the 2017 Muruatetu decision was rendered, the High Court held that detention of children at the presidential pleasure was unconstitutional. This was in *AOO & 6 others v Attorney General & another* (Petition 570 of 2015) [2017] KEHC 6022 (KLR) (Constitutional and Human Rights) (12 May 2017) (Judgment).



16. The petitioner's assertion in the above case was that detention at the President's pleasure under section 25(2) and 25(3) of the Penal Code was unconstitutional. Particularly, they said that it went contrary to articles 53(f)(2) of the Constitution; Article 37(c) of Convention of the Rights of the Child; Article 2(b) of the African Charter on the Rights and Welfare of the Child and paragraph 1 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty. The petitioners also contended that given that the duration of the punishment was indeterminate such punishment amounted to cruel, inhuman and degrading treatment. They asserted that the Penal Code provision on the detention was unconstitutional as it donated judicial power to the President contrary to the principle of separation of powers. The Court therefore issued a declaration that section 25(2) and (3) of the Penal Code was unconstitutional in that it violated the provisions of articles 53 (1) (f) (i) and (ii), (2), and 160(1) of the Constitution and international conventions governing the rights of children.
17. It further issued a Declaration that to the extent that the second to the seventh petitioners were imprisoned for an indefinite and or an undetermined period of time at the pleasure of the President, thereby vesting into the executive judicial powers to determine the duration of their sentences contrary to the constitutional provision of separation of powers, their imprisonment at the Presidents pleasure was unlawful to the extent that it violated the concept of separation of powers and the principles of constitutionalism under the repealed constitution and the Constitution of Kenya.
18. The Hon. Attorney General and Parliament were directed to move with speed to enact the necessary amendments to ensure that the provisions of sections 25 (2), and (3) of the Penal Code conformed with the provisions of Article 53(1)(f)(i) and (ii), (2) and 160(1) of Constitution.
19. Based on all the above considerations, I hereby exercise discretion and sentence the convict herein SOO to serve ten (10) years imprisonment for the murder of Florence Adhiambo Opondo. The sentence shall be calculated from the date of his arrest on 6th June, 2023, taking into account section 333(2) of the Criminal Procedure Code, as the convict has been in custody in the Children's Remand Home at Kisumu since his arrest.
20. Right of Appeal to the Court of Appeal is guaranteed and explained, 14 days of today.
21. The ruling on sentence to be uploaded on the Case tracking System and to be published. The convict to be supplied with a copy of judgment and sentence herein free of charge, considering his socio-economic status as per the pre bail assessment report filed in court on 4th July, 2023.
22. This file is now closed.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY VIA MICROSOFT TEAMS
THIS 6TH DAY OF FEBRUARY, 2025**

R.E. ABURILI

JUDGE

