



**Republic v Irungu alias Jowie & another (Criminal Case 51 of 2018)  
[2024] KEHC 2533 (KLR) (Crim) (13 March 2024) (Sentence)**

Neutral citation: [2024] KEHC 2533 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CRIMINAL  
CRIMINAL CASE 51 OF 2018  
GL NZIOKA, J  
MARCH 13, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**JOSEPH KURIA IRUNGU ALIAS JOWIE ..... 1<sup>ST</sup> ACCUSED**

**JACQUELINE WANJIRU MARIBE ..... 2<sup>ND</sup> ACCUSED**

**SENTENCE**

1. The sentence herein is delivered pursuant to the judgment rendered in this matter on February 9, 2024, wherein the 1<sup>st</sup> accused was found guilty and convicted of the offence of murder contrary to contrary to section 203 as read with section 204 of the [Penal Code](#) (Cap 63) Laws of Kenya.
2. Sentencing has been defined as "the judicial determination of a legal sanction to be imposed on a person found guilty of an offence" (Canadian Sentencing Commission 1987: 115 quoted in MJNZ, 1997.) Further in the [Principles of Sentencing in Criminal Justice System](#), Rabindra Bhattarai, 195, sentencing is defined as an action of passing judgement by a court of law under legitimate jurisdiction where formal declaration of legal consequence of the acts or omissions of a convict is pronounced.
3. Therefore, sentencing is a judgement where the accused is compelled to bear the legal consequence of his acts or omissions. It is the imposition of penalty on a convicted person and a legal consequence of anti-social acts of the offender.
4. Similarly, the [Sentencing Guideline \(2023\)](#) defines sentencing in clause 1.1.1 as the process by which a court imposes a penal sanction once an accused person has pleaded guilty or has been convicted of an offence following a trial.



5. Further sentencing is central task of administration of justice by a court of law. In that regard clause 4.6.1 of the afore *guidelines* provide *inter alia* that; the sentencing process forms part of the trial and is therefore subject to the fair hearing constitutional guarantees.
6. Similarly, in the case of; *Attorney General v Susan Kigula & 417 Ors* (Constitutional Appeal No. 03 of 2006) [2009] UGSC 6 (21 January 2009) the Supreme Court of Uganda stated that:
 

“A trial does not stop at convicting a person. The process of sentencing a person is part of the trial. This is because the court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. This is clearly evident where the law provides for a maximum sentence. The court will truly have exercised its function as an impartial tribunal in trying and sentencing a person.”
7. Furthermore the Supreme Court of India in the case of, *Antony Pereira v State of Maharashtra* (2 AIR 2012 SC 3802) held that:
 

“70. Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done.
8. In addition, the Supreme Court of Kenya in the case of, *Francis Karioko Muruatetu & another v Republic* [2017] eKLR stated that:-
 

“(41) It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too.”
9. Therefore, when the court concludes a conviction on a charge then the door for sentencing opens for the court and the question that arise and which the court should address is; what would be the reasonable corresponding punishment for the offence and after the sentence is passed another question arise, whether that sentence was fair and appropriate enough to serve the interest of justice or not.
10. To address these questions, it is important to consider the several recognized principles of sentencing that serve to make punishment reasonable and rational. Many of these principles are consistent with human rights law standards and elementary goals or rationales of sentences.
11. Thus the recognized principles of sentencing are principles of; justice, peace and humanity. Similarly, other major principles are: minimum intervention, equality, proportionality, sufficiency, imprisonment as last resort and cost effectiveness of sentence.
12. The principle of minimum intervention wishes for the use of the least disturbing and least severe sanction possible, given the circumstances of the offence and the offender, and the intended aims of the sentencing system.
13. The afore principle is supported by the provisions of; Article 50 (2) (p) of the *Constitution* of Kenya, 2010 that provides that a person convicted of a criminal offence has a right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing.



14. The principle of equality before law argues that certain personal characteristics not pertaining to the offender's crime should be excluded and considered irrelevant in sentencing decisions. It prohibits discrimination on the grounds of sex, marital status, religious or ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, and sexual orientation.
15. In that regard the provisions of Article 27 (1) and (4) of the *Constitution* of Kenya states that, every person is equal before the law and has the right to equal protection and equal benefit of the law. That the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
16. The principle of equality of impact and proportionality seems to be in conflict with the principle of equality before the law, arguably raising the issue that all people are not equal in terms of social, economic, and personal circumstances, treating all people equally will result in injustices. It advocates human treatment.
17. The afore principle has two wings that is; aggravating factors and mitigating factors. Aggravating factors are those, which may increase the sentence, while mitigating factors may have the opposite effect. Sentencing includes the weighing up of aggravating and mitigating factors in order to individualize the sentence with respect to the offender and the circumstances of the offence.
18. The principle of imprisonment sentence of last resort could be understood as an extended idea of minimal intervention. This principle emerged when the popularity of imprisonment declined as crime did not decrease even when there was a very high rate of incarceration. The principle clearly suggests that there are alternatives to imprisonment available in the form of non-custodial measure to deal with criminality.
19. Cost effectiveness of sentence is an extended form of the principle of minimum intervention. It campaigns for the need to take into account the cost of administering sentences. The principle, suggests imposing alternative sentences or deferring imposing sentences of imprisonment until some inmates are released from prison as the limited resource is already in use.
20. In addition to the above, clause 1.2 of the *Sentencing Guidelines (2023)* lay out the principles underpinning the sentencing process as follows: -
  - i. Proportionality: The sentence meted out must be proportionate to the offending behaviour meaning it must not be more or less than is merited in view of the gravity of the offence. Proportionality of the sentence to the offending behaviour is weighted in view of the actual, foreseeable and intended impact of the offence as well as the responsibility of the offender.
  - ii. Equality/Uniformity/Parity/Consistency/Impartiality: The same sentences should be imposed for same offences committed by offenders in similar circumstances.
  - iii. Accountability/Transparency: The reasons behind the determination of sentence should be clearly set out and in accordance to the law and the sentencing principles laid out in these guidelines.
  - iv. Inclusiveness: Both the offender and the victim should participate in and inform the sentencing process.
  - v. Totality of the Sentence: The sentence passed for offenders convicted for multiple counts must be just and proportionate, taking into account the offending behaviour as a whole.



- vi. Respect for Human Rights and Fundamental Freedoms: The sentences imposed must promote and not undermine human rights and fundamental freedoms. Whilst upholding the dignity of both the offender (and where relevant, the victim), the sentencing regime should contribute to the broader enjoyment of human rights and fundamental freedoms in Kenya. Sentencing impacts on crime control and has a direct correlation to fostering an environment in which human rights and fundamental freedoms are enjoyed.
  - vii. Enhancing Compliance with Domestic Laws and Recognised International and Regional Standards on Sentencing: Domestic law sets out the sentences that can be imposed for each offence. In addition, those international legal instruments, which have the force of law under Article 2 (6) of the Constitution of Kenya, should be applied. There are also international and regional standards and principles on sentencing that, even though not binding, provide important guidance on sentencing.
21. Be that as it may, justification, function and objective of punishment in criminal law, has five major goals: retribution, deterrence, restoration, rehabilitation, and incapacitation.
22. In that recognition of these goals, clause 1.3 of the Sentencing Guidelines (2023), stipulates the objectives of sentencing as follows:-
- i. Retribution: To punish the offender for his/her criminal conduct in a just manner. It serves to deter future crime. Victims and society might feel satisfied that the criminal justice system is functioning well when they learn that the offender has received an appropriate sentence for their crimes, which raises trust in the criminal justice system
  - ii. Deterrence: To deter the offender from committing a similar offence or any other offence in future as well as to discourage the public from committing similar offences. Thus it is divided into two components; individual and general deterrence. Individual deterrence is to dissuade the perpetrator with the objective to inflict a punishment severe enough to deter the offender from engaging in criminal activity. The convict is expected to be discouraged from committing crimes in the future as a result of the sentence. The society is the target of general deterrence. Other people are deterred from committing those offences by the punishment meted out to those who commit them.
  - iii. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person. It aims at changing the offenders and make it easier for them to reintegrate into society, through a variety of programs and treatments. It focusses on treating the root reasons of criminal behaviour, such as dependency, mental health conditions, or a lack of education. The objective is to give the offender the resources and assistance they need to upon release, become law-abiding citizens.
  - iv. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages sustained by the victim or the community and to promote a sense of responsibility through the offender's contribution towards meeting those needs. Any harm done to the victim may be compelled to be repaired or restored by the court. The goal is to put the victim back in his pre-crime status or position. The goal of restoration is to make up for any harm the perpetrator has caused the victim.
  - v. Restitution deters crime by financially penalizing the offender. It is somewhat like a civil lawsuit damages judgement and occurs when the court directs the offender to compensate the victim for any injury. Restitution may be required in cases of financial loss, property damage,



and, in rare cases, mental suffering. It may also take the form of a fine to help defray part of the expense of the criminal investigation and punishment.

- vi. Community protection: To protect the community by removing the offender from the community thus avoiding the further perpetuation of the offender's criminal acts.
  - vii. Denunciation: To clearly communicate the community's condemnation of the criminal conduct.
  - viii. Reconciliation: To mend the relationship between the offender, the victim and the community.
  - ix. Reintegration: To facilitate the re-entry of the offender into the society.
  - x. Incapacitation's main purpose is to simply keep offenders outside of society so that everyone is safe from their potentially harmful actions. A person convicted of a crime should not be permitted to mingle with the general public if there is no assurance that they will not commit the same crime again. In certain civilizations, punishment takes the form of death sentence or it may entail a sentence of life in jail without the chance of release.
23. To determine the appropriate objective of the sentence and mete out the appropriate sentence, the Supreme Court of Kenya further stated in the case of, *Francis Karioko Muruatetu & another v Republic (supra)* as follows: -

“(42) Pursuant to Sections 216 and 329 of the *Criminal Procedure Code*, Chapter 75, Laws of Kenya, mitigation is a part of the trial process. Section 216 provides:  
The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.

Section 329 of the *Criminal Procedure Code* provides:

The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(43) Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency.”

24. In addition, the *Supreme Court gave guidelines* for the Courts to consider in re-sentencing offenders convicted of the offence of murder as follows:

“(71) As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

- (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.

(72) We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.

25. The Supreme Court subsequently in the case of *Muruatetu & another v Republic; Katiba Institute & 4 others* (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Direction) clarified that

“ix. These guidelines (above) will be followed by the High Court and the Court of Appeal in ongoing murder trials and appeals. They will also apply to sentences imposed under section 204 of the *Penal Code* before the decision in *Muruatetu*.”

26. In addition, the Court of Appeal in the case of; *Agunga & 2 others v Republic* (Criminal Appeal 119 of 2016) [2022] KECA 14 (KLR) stated that:

“28. In determining the appropriate sentence, it is incumbent upon us to consider not only the mitigating factors addressed by learned counsel for the appellants in his oral submissions, but also the gravity of the offence, the brutality displayed by the appellants in full view of their neighbours, the traumatic effect of the heartless and fatal assault on the deceased’s widow and children, their diminished source of livelihood, and the deceased’s children’s emotional distress inflicted on them. When all is said and done, the appellants’ conduct among men and women of good sense must be deterred. To our mind, a crime of this nature calls for retribution to such reasonable degree as would allow time for healing of those adversely affected by the crime in issue, and for the appellants’ reform in due time. And that is the least we can do in determining the appropriate sentence to be meted on the appellants.”

27. Having considered the sentencing principles, the purpose and/or objective of sentencing, I shall now revert to the matter herein. The court called for the accused previous records of conviction, if any, and the prosecution filed record dated, March 6, 2024 to the effect that he has no previous record of conviction and is a first offender. That fact has been considered herein.

28. The court also accorded the parties an opportunity to address it on sentencing. The prosecution filed submissions dated March 7, 2024 and argued that, it is its duty is to bring to the attention of the court any aggravating or mitigating circumstances, submit relevant law and judicial precedents that would impact sentencing.



29. Further through the evidence of its witnesses, it has demonstrated beyond reasonable doubt that there exist aggravating circumstances being:
- a. On the September 20, 2018 Monica Nyawira Kimani's lifeless body was found inside a bathtub with her throat brutally slit and hands tied.
  - b. Post mortem report produced by Dr. Peter Ndegwa confirmed that Monica Nyawira Kimani died due to exsanguination due to severe neck injuries due to a sharp force.
  - c. That there was serious and/or grievous harm occasioned on the Monica Kimani.
  - d. That the weapon used as seen on the injuries occasioned on Monica Kimani was definitely a dangerous weapon.
  - e. That indeed there was an intricate planning of an offence.
  - f. That there was No degree of provocation from Monica Kimani.
  - g. That there was an attempt to conceal the offence committed.
  - h. The impact of this crime has serious physiological and physical harm to the victim and the victims family who still suffer today
30. That the aggravated circumstances warrant the court to impose the death sentence in accordance with the law in respect to capital offences.
31. The prosecution further relied on the case of *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others* (Amicus Curiae) [2021] eKLR to argue that death sentence for the offence of murder is constitutional.
32. Further reliance was placed on the case of; *Bachan Singh vs State of Punjab* (1980) 2 SCC 684 the court stated that before exercising discretion to impose the death sentence it should consider aggravating and mitigating circumstances. Further the court upheld the validity of the death sentence and stated that life imprisonment was the rule while death sentence was an exception to be imposed in the rarest of rare recording special reasons.
33. The prosecution invited the court to consider sections 216 and 329 of the *Criminal Procedure Code* where the court is required to receive evidence before it metes out an appropriate sentence. The case of *Republic -vs- Thomas Gilbert Cholmondeley* (2009) eKLR was cited where the court stated that sentencing is central in the administration of justice as it is the stage that a court of competent jurisdiction after conviction makes an order of specifying the penalty to be meted out and that, the severity of the sentence depends on the circumstances of each case.
34. That in the case of; *Dahir Hussein v. Republic* [2015] eKLR, referred to in; *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR held that objectives of sentencing is
- " deterrence, rehabilitation, accountability for one's actions, society protection, retribution, and denouncing the conduct of the offender on the harm done to the victim".
- The prosecution further relied on the case of *Ruth Kamande Wanjiku vs Republic* (2017) eKLR where the court imposed a death sentence after the decision in Muruatetu case.
35. Finally, the prosecution cited the case of, *Bacchan v. State of Punjab* (1980) 2 SCC 684 where the Supreme Court of India held that death penalty should be reserved for the rarest of rare cases involving intentional and aggravated acts of killing and argued that the matter herein meet all the requirements



- to warrant a death sentence. The court was urged to mete out the death sentence even as it considers the time the accused spent in pre-charge and custody during trial.
36. The victim's family filed submissions dated March 7, 2024 and argued that the punishment for the offence of murder is death as per section 204 of the [Penal Code](#), although it is not mandatory following the decision in [Muruatetu case](#), but it is constitutional and valid.
  37. That one of the underpinning principles of sentencing under the [Sentencing Policy Guidelines](#) is proportionality that requires the punishment not to be more or less than is merited in view of the gravity of the offence. Further proportionality of sentence is weighed in view of the actual, foreseeable and intended impact of the offence and the responsibility of the offender.
  38. The victim's family referred the court to the objectives of sentencing under the [Sentencing Policy Guidelines](#) discussed herein being; retribution, deterrence, community protection, and denunciation.
  39. The victim's family implored the court to consider; the impact of the offence on the family and the contribution of the 1<sup>st</sup> accused to the commission of the offence.
  40. That, the deceased was the only daughter in the family, a close confidant of the mother and source of her emotional support. That, the family is still struggling to understand the motive of the perpetrators and why she was treated in such a violent manner.
  41. Further, the deceased managed the family business based in South Sudan single-handedly, which was the back bone of the family's main source of income. Furthermore, the pain the deceased underwent in the hands of the perpetrators is not perceivable. That no amount of money can erase the pain of losing a loved one.
  42. Furthermore, the court should also consider the contribution of the 1<sup>st</sup> accused to the commission of the offence. That in the case of, [Francis Karioko Muruatetu & another v Republic](#) [2017] eKLR (Muruatetu case) the Supreme Court stated that there is a distinct possibility of differing culpability of different murders which can be addressed by allowing judicial officer discretion to consider whether to impose the death sentence or not. That a formal equal penalty for unequal wicked crimes and criminals is not in keeping with the tenets of fair trial.
  43. That, the accused did not play a peripheral role but was the main perpetrator of the offence. That he armed himself with a gun, wore a *kanzu* over his clothes, accessed the deceased house using stolen identity and was the last person seen with the accused. That, he murdered the deceased in cold blood in a ghastly, barbaric and most grotesque manner as shown by the post mortem report of Dr. Peter Muroki (PW1).
  44. The court was urged to hand down the death penalty to achieve the objectives of sentencing.
  45. The accused in his mitigation submissions dated, March 10, 2024, stated he was aware that nothing he says will relieve the pain of the deceased's family and less said, the better, to avoid opening up the deceased's family wounds.
  46. He expresses his sadness, that such a tragic and callous loss of life on extreme circumstances bordering on act of "absolute madness that is beyond understanding" even to him who stands convicted.
  47. He prayed that the deceased's family find peace and her soul rests in eternal peace. That in view of the aforesaid and understanding the terrible fear and pain that the deceased must have endured, he can only humbly plead for leniency during sentencing.



48. He urged the court to take into account the fact that he was convicted purely on circumstantial evidence and prayed that the court prefer a “custodial sentence”.
49. That although the prosecution is seeking for the death penalty the Supreme Court in *Muruatetu’s case* declared the mandatory nature of the death sentence unconstitutional and therefore the court can mete out a custodial sentence.
50. Further, although the advocate for victim’s family sought for the death sentence, it is contrary to the wishes of the deceased’s father, Bishop Paul Ngarama, who on behalf of the family publicly stated that he had managed to find forgiveness and did not wish to seek retribution nor the death of the accused.
51. Finally, the accused urged the court to consider the fact that he is a first offender, and never been previously accused of any crime in the past and is well known for protecting the lives of others. Further the period he spent in custody too be considered.
52. In addition to the submissions by the parties, the Probation Department prepared a pre-sentence report dated; March 5, 2024 in which it is indicated that the 1<sup>st</sup> accused is thirty-three (33) years’ old having being born on November 20, 1990.
53. That his parents are alive and has three siblings. The family has a permanent dwelling at Nguta Estate adjacent to Lanet Military Barracks in Nakuru County.
54. Further, the accused completed his secondary education in 2010 and proceeded to the Kenya Polytechnic and completed in the year 2011 College where he was awarded with a Diploma in Food Production.
55. That he moved to Dubai where he received training in tactical military at Dubai Police Academy and Ogara Group, a security firm with presence in Dubai, the United Kingdom and several European Countries, and was licensed to offer private security.
56. Further he was providing private security in Kenya mostly to persons in the political sector and was in an advanced level of registering his own security firm when he was arrested. Furthermore, he performed music in church to earn a living and produced several music videos on social media.
57. The report further states that, at the time of his arrest, the accused was in a relationship with Jacqueline Maribe, the co-accused herein and was planning to formalize the relationship. That, they had lived together at Royal Park Estate in Langata for over one (1) year.
58. That he suffers from mild asthma since childhood that is triggered by colds and dust but is on medication. Further, he developed a nerve problem and stiffness in his hand from the gunshot he suffered and occasionally uses pain killers and nerve medication.
59. On the offence, the report indicates that, the accused maintained his innocence and stated that he is shocked and depressed for being linked with the murder. He denied knowing the deceased despite knowing her brother. He stated that he grieves for the family of the deceased for losing her in a gruesome manner.
60. The report further indicates that, his family has a good relationship with him, as demonstrated by his sister who stood with him through the entire trial. They describe him as a social, overly generous, respectful to authority and committed Christian and they believe he is innocent though they have painfully accepted his conviction.



61. That the family has faced stigmatization and financial drain in footing the legal costs. Further they expressed empathy for the family of the deceased praying that the real perpetrator of the offence will be found and that the court will give the accused a lenient sentence.
62. In addition, the Senior Chief of Free Area Location, Nakuru County, Dr. Samuel Macharia, observed that the accused was well mannered and respectful and was not a security threat to the community as he lived peacefully while out on bond although the offence was committed in Nairobi County.
63. Furthermore, other community members interviewed expressed shock of his conviction and vouched for his good character and social standing as they know him as a responsible youth committed to church activities.
64. The report indicated that Bishop Shadrack Oloo of Agape Sanctuary Church, where the accused is a member stated that the accused is steadfast in his faith, relates well with fellow Christian faithful and was at one time a choirmaster in the church. That he strongly pleaded for leniency.
65. However, the Investigating Officer Mr. Maxwell Otieno is indicated in the report to have stated that the accused is a dangerous person whose violent nature was demonstrated by the assault of one Rodgers, at Club 1824 when out on bond though the complaint was withdrawn. That he called for the maximum sentence provided for under the law.
66. On the other part, the community from Thika, where the deceased hailed from described her as having had a promising future and called for a stringent sentence.
67. The family of the deceased is reported to have stated that the offence has occasioned them monumental psychological impact and that, family members are at different levels of coping with the death of the deceased. That only the deceased's father has received formal psychological counselling.
68. The report indicated that the deceased's mother emotionally broke down wailing during the interview and stated that, she has suffered prolonged depression and stroke after the demise of the deceased. She maintained that the only appropriate sentence is death.
69. The deceased's father is reported to have stated that the extensive media coverage impeded their emotional healing. That the younger brother ceased watching the news, stopped trusting people, limits his movements, avoids going to public places and does online jobs.
70. Further the deceased's brothers stated that the deceased was their role model who offered leadership in the family business. That since the death of the deceased the family business in South Sudan, which she was managing as the Managing Director, was ruined due to the negative reports which tended to re-victimise them. That the offence drained them financial and they were forced to recalibrate new source of income.
71. The deceased's father asked that the family be given security as the motive of the offence was unknown and asked for the necessary sentence as provided in law while acknowledging that no sentence can console the family.
72. Furthermore, the elder brother of the deceased described the accused as violent, deceptive and provocative and stated that the accused obstructed his car during trial.
73. The Probation Officer, Mr. Andrew Kanyutu M, identified the accused criminogenic risk factors as; the lack of a stable partner relationship, antisocial personality pattern manifested by living on the edge, impulsive and a thrill seeker, use of anger or aggression to control others and states that he had a double personality trait.



74. He recommends that the court exercises its discretion and metes out a sentence that takes into consideration the sentiments of the victim's family as well as those of the offender.
75. Pursuant to above matters, I revert back to the question I posed earlier herein as to what then is the appropriate sentence. Section 24 of the [Penal Code](#), recognizes the following types of punishments:
- (a) death;
  - (b) imprisonment or, where the court so determines under the [Community Service Orders Act, 1998](#), community service under a community service order;
  - (c) detention under the [Detention Camps Act](#);
  - (d) deleted by [Act No. 5 of 2003](#), s. 3;
  - (e) fine;
  - (f) forfeiture;
  - (g) payment of compensation;
  - (h) finding security to keep the peace and be of good behaviour;
  - (i) any other punishment provided by this [Code](#) or by any other Act.
76. Therefore, the court can pass a custodial or non-custodial sentence. However, from the mitigation submissions of the accused he prays for a "custodial sentence" thus ruling out a non-custodial sentence.
77. Further in considering the appropriate sentence the objectives of the sentence discussed herein are crucial. The question is; should the accused be given a rehabilitative sentence and/or be considered for re-integration? I find the answer in the negative because the accused does not acknowledge commission of the offence. As such he will not appreciate the rehabilitation process and therefore re-integration will be difficult.
78. What about the restoration and/or restitution? Again that will not be appropriate in that, as rightfully submitted by the prosecution and the victim's family no amount of money can restore lost life. In that regard, the Court of Appeal in the case of; [Coastal Kenya Enterprises Limited v Muchiri](#) (Civil Appeal 84 of 2017) [2023] KECA 897 (KLR) (24 July 2023) (Judgment) stated that:
- "In making these awards we identify ourselves with the words of Potter, JA in [Rabima Tayab & Others vs Anna Mary Kinanu](#) [1983] KLR 114; where it was held while relying on the oft-cited case of [H West and Son Ltd vs Shephard](#) [1964] AC 326 at 345 that:
- "Money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavor to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional."
79. Is reconciliation sentence appropriate here? Certainly not. The pre-sentence report clearly indicates that the victim's family wants the killer of the deceased wheeled away forever and therefore cannot even nurse the idea of reconciliation.



80. What about retribution, I find that it is appropriate in that, an offender needs to be punished fairly and justly for the offence committed.
81. However, in my considered opinion, the most appropriate objective to achieve in this case is deterrence. Deterrence of the accused and the general public or any other member of the public who is intent on committing a similar offence.
82. The afore is informed by the fact that the aim of the law is to maintain law and order and protect the citizen of a particular state. That is why one of the objectives of sentencing is community protection. Therefore the sentence meted out must clearly communicate the community's condemnation of the criminal conduct of the offender and any other person intent to commit a similar offence. Indeed, it suffices to note and it is a fact that in recent past there have been numerous reports of senseless murders targeting the persons of female gender.
83. By an article dated January 26, 2024, Amnesty International Kenya noted a woman is killed every two days. The Article in question states that:
- “Amnesty International Kenya strongly condemns the profiling, torture and killing of women and any other individual based on their identity. Over 10 cases of femicide have been reported across the country since 1 January 2024. That is, every second day, a woman has been brutalised and killed because of her identity. According to statistics from Africa Data Hub, between 2016 and 2023, over 500 women have been killed. The majority of those murdered were below the age of 35 years and were killed by intimate partners or people known to them.
84. According to the Africa Data Hub, a regional network of data organizations that traces such killings based on newspaper reports, states that about 500 women have been killed in Kenya from January 2016 to December 2023.
85. In an article in the Nation on Saturday, January 27, 2024, it is indicated that sixteen (16) women had been killed in January 2024. The most disturbing of these was that of Rita Mueni, a 20-year-old student of Jomo Kenyatta University of Agriculture and Technology (JKUAT) who was lured to short accommodation apartment at Roysambu, commonly known as Airbnb, where she was murdered and thereafter dismembered and her head dumped. in a different location. the Government Pathologist, Dr. Johansen Oduor stating public that
- “This is the first time I have come across such an incident. In my forensics life, I have never come across such an incident.”
86. These cases are a clear indication that the social fabric of the society has been torn into the middle. It is therefore, the role of the judiciary to need to inter alia, protect the rights and the liberties of all, including the vulnerable groups and individuals that cannot protect themselves. The sentences meted should instil discipline and restore respect for the rule of law order and humanity.
87. What sentence should the court mete out to achieve the afore said objectives. The options are limited to an imprisonment for a term of years, life imprisonment or death.



88. Be that as it were, it is noteworthy that sentencing is the discretion of the court. However, the discretion must however, be exercised judicially. In the case of, *Benard Kimani Gacheru vs Republic* [2002] eKLR the Court of Appeal stated that:

“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.”

89. Pursuant to the aforesaid, in determining the sentence herein, I have considered the fact that the offence herein was committed in the most heinous or horrific and monstrous manner. This is demonstrated by the following facts:

- a. The post mortem report revealed that the throat of the deceased was cut “through and through”. In the judgment delivered by the court, it was observed that whoever committed the offence was skilled in military training. This fact has been corroborated by the pre-sentence report where the accused herein has expressly stated that he was trained in Dubai by the Dubai Police Academy and Ogara-Group in tactical military training.
- b. The photos of the scene and in particular the body of the deceased were a clear indication of a slaughter house and again as observed in the judgment, no other than the accused own counsel kept on referring to the horrific murder as “slaughter”.
- c. What about the accused. In the mitigation submissions he states the act of murder herein is “a tragic and callous loss of life on extreme circumstances bordering on act of “absolute madness that is beyond understanding”.

90. It is clear from the aforesaid that the murder herein was, grisly, horrific and frightening.

91. In addition, the consequences of the murder cannot be overlooked. It is reported in the pre-sentence report that as a result of the murder:

- a. The deceased’s family business in South Sudan collapsed and rendered the family devoid of income therefrom.
- b. The mother of the deceased suffered depression and stroke following the loss of her only daughter.
- c. The younger brother has withdrawn from the public and keeps house.

92. What about the accused’s character? Whereas the family members describe him as a staunch and devoted Christian, the pre-sentence report speaks to the contrary. The accused is described as a “bully”. The guards at Royal Park testified that he used to brandish a gun and refused to be searched.

93. The deceased brother stated in the pre-sentence report that he even blocked his car after one of the sessions of the court hearing. The investigating officer stated that he was reported to have assaulted someone in the club when this case was on going.

94. The Probation Officer crowns it all by saying: criminogenic risk factors as; the lack of a stable partner relationship, antisocial personality pattern manifested by living on the edge, impulsive and a thrill seeker, use of anger or aggression to control others and states that he had a double personality trait.

95. Based on the afore factors, the question that arises is whether the accused person should be released back to the society when he has no remorse for the offence committed. The answer is in the negative.



96. The further question is; is it a term of years, life imprisonment or death sentence that is appropriate. The Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR in considering whether it should fix a definite number of years of imprisonment, subject to remission rules, which will constitute life imprisonment, considered various jurisprudence across the globe.

97. After taking into consideration the afore comparative jurisprudence, the Supreme Court noted that the life sentence did not necessarily mean the whole natural life of the prisoner and stated that: -

“(95) We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.”

98. In more recent jurisprudence the Court of Appeal in the case of, *Manyeso v Republic* (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) held that the sentence of life imprisonment is unconstitutional and stated thus: -

“21. We note that the decisions of this court relied on by the appellant, namely *Evans Wanjala Wanyonyi v Rep* [2019] eKLR and *Jared Koita Injiri v Republic Kisumu* Crim App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the *Penal Code*. This fact notwithstanding, we are of the view that the reasoning in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the *Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.”



99. Further, in the case of; *Mweke v Republic* (Criminal Appeal 100 of 2022) [2023] KECA 1527 (KLR) (8 December 2023) (Judgment) the Court of Appeal stated that:

“23. As regards sentence, the appellant was sentenced to a life sentence. A life sentence, in our view, is only meaningful where there is a prescription as to what life entails. Otherwise, such a sentence becomes indeterminate and fails to take into account the peculiarities of individual circumstances such as the age of the offender. In that case, the indeterminate nature of the sentence lends itself to indiscriminate application of the law. If such a sentence is meant to punish the offender, it means that the longer one stays alive the more punishment is inflicted on him or her since we cannot tell when the sentence will be said to have been served or executed.

24. Such sentences, whose service and execution cannot be determined may only meet the objective of sending a message to the society, an objective that may well be achieved by a little longer, but definite sentence. In our view a sentence ought to be capable of being executed by those whom the law can compel to execute them. It was in realization of this fact that, we believe the Supreme Court in *Francis Karaoke Muruatetu & another vs. Republic* [2017] eKLR recommended:

“that Attorney General and Parliament commence an enquiry and develop legislation on the definition of ‘what constitutes a life sentence’; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing. We are of the view that such proposed legislation will enable us to comply with Articles 2(6) of the *Constitution* which states that any treaty or convention ratified by Kenya shall form part of the Law of Kenya.”

100. In addition, in the case of; *Ayako v Republic* (Criminal Appeal 22 of 2018) [2023] KECA 1563 (KLR) (8 December 2023) (Judgment) the Court of Appeal analysed emerging trends from various jurisdictions and equated life imprisonment to thirty years. In doing so, the Court held that: -

“25. This qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objective indicia of the emerging consensus that life imprisonment is seen as being antithetical to the constitutional value of human dignity and as being inhuman and degrading because of its indefiniteness and the definitional impossibility that the inmate would ever be released. This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness.

26. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years’ imprisonment.”



101. The jurisprudence from the afore Court of Appeal decisions simply means that life imprisonment can be equated to imprisonment for a term of years.
102. Be that as it were, death sentence is still available, valid and constitutional.
103. The Supreme Court in the *Muruatetu case*, cited with approval *The Human Rights Resolution 2005/59: The Question of the Death Penalty* and observed that the *Resolution* indicates that States that have not abolished the death penalty should:
- (d) Not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgement rendered by an independent and impartial competent court, and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence;
  - (f) To ensure also that the notion of “most serious crimes” does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults nor as a mandatory sentence;
104. Similarly, this Court is live to the international instruments and in particular those that enhance human rights and more specifically on the sentence of death. Article 6 of the *International Covenant on Civil and Political Rights (ICCPR)* ratified on May 1, 1972, states: -
- 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
  - 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final Judgement rendered by a competent court.
105. Article 4 of the *African (Banjul) Charter on Human and Peoples' Rights* ratified on the January 23, 1992 provides that: -
- Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.
106. Based on the Supreme Court decision and the International Instrument afore, the death sentence is available for the most serious crimes. The question is, is the matter herein of that kind? I find the answer in the positive.
107. The murder was intentional, it was not as a result of provocation, it is not that the perpetrator did not have an opportunity to reflect on his actions before committing the offence. It was premeditated, planned and executed with subsequent destruction of evidence. Therefore the offender deserves no mercy for he had none on the victim. Justice is weighed on a scale that must balance.
108. It is also noteworthy that life is inviolable, sacrosanct and sacred. In the book of Job chapter 1 vs 12 and 13, the Lord said to Satan “Behold all that he has is in your power, only do not lay a hand on his person” Therefore the provision of life is the preserve of God and there is no provision given to any person to take another person’s life unlawfully.
109. In conclusion I refer to the following wise sayings on murder: -



- a. “In the act of murder, one person’s life ends but a countless number of lives are forever impacted”
  - b. Murder leaves behind a trail of shattered dreams and broken hearts that can never be healed”
  - c. The act of murder is a heinous crime that challenges the moral fabric of society and demands justice”
110. I therefore sentence the 1<sup>st</sup> accused Joseph Kuria Irungu alias Jowie, to suffer death as provided under section 204 of the [Penal Code](#), unless the sentence is set aside by a court of complete jurisdiction.
111. It is so ordered.

**DATED, DELIVERED AND SIGNED ON THIS 13<sup>TH</sup> DAY OF MARCH 2024.**

**GRACE L. NZIOKA**

**JUDGE**

In the presence of:

Ms. Gichuhi for the State

Mr. Omiti for the Victim’s family

Mr. Muge for the 1<sup>st</sup> accused

The 1<sup>st</sup> accused present, physically in court

Mr. Kinyua, Court Assistant

