



**Republic v Kunia (Criminal Case E001 of 2022)  
[2024] KEHC 11154 (KLR) (24 September 2024) (Sentence)**

Neutral citation: [2024] KEHC 11154 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CRIMINAL CASE E001 OF 2022  
RB NGETICH, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**CHEPARSIP KUNIA ..... ACCUSED**

**SENTENCE**

1. By the judgement delivered on the 8<sup>th</sup> day of July, 2024, this Honourable court found the accused person guilty of the offence of murder contrary to Section 203 as read with section 204 of the [Penal Code](#) and convicted her under section 215 of the [Criminal Procedure Code](#) accordingly. The particulars of the charge were that the accused person on the 1<sup>st</sup> day of January,2022 at around 0600 hours at Baringo County Referral Hospital Kabarnet within Baringo Central Sub- County in Baringo County murdered Chepkopis Ling’ari.
2. Upon delivery of Judgment, the prosecution informed the court that they had no previous convictions against the accused. The court directed that pre-sentence report to be filed before mitigation.

**Pre-sentencing Report**

3. From the report filed, the offender’s mother indicated that the offender had been of good character and might have committed the offence due to anger; she prayed for a non-custodial sentence so that she can continue taking care of her children. She added that reconciliation and cleansing has not taken place due to low economic power within the family. The offender’s nephew undertook to facilitate her reintegration by ensuring that she gets her basic needs for some time. The probation officer gathered that the offender’s family are ready to accepts the offender back to the family but they did not show any interest in facilitating his supervision within the community. Efforts to reach out to the offender’s children and the husband who is now separated from her were futile. The offender has been in remand custody for the last three years. she does not use any alcohol or any other drugs.



4. From evidence adduced in court, the offender was taking care of her sister-in-law in hospital who was the mother of the victim a 10 days old child. From the report, the mother of the deceased child is still in pain for losing her child but she does not oppose the offender being given community-based rehabilitation sentence. The victim's father who is the offender's elder brother said he has already forgiven the offender and does not oppose non-custodial sentence. He said the family have not done cleansing ceremony and if the offender will be released, she will go back to stay with the mother.
5. From the report, the offender still denies the offence indicating that she woke up to give the patient a bucket to vomit on and the baby wrapped in a lesa fell down. She prayed for a non-custodial sentence so that she can continue taking care of her children since she is separated from her husband. She also added that she has already been forgiven by his brother and the sister in law.
6. The local administration indicated that the offender has been of good character and no cleansing has taken place but were not opposed to community-based rehabilitation sentence.
7. From the social inquiry, the family want the offender released on non-custodial sentence but plans for cleansing to take place because they do not believe the offender committed any crime.
8. The probation officer recommends that the offender be dealt with otherwise than community-based rehabilitation due to gravity of the offence and lack of remorse from the offender.

### **Mitigation**

9. On 25<sup>th</sup> July, 2024 defence counsel Mr. Chebii mitigated on behalf of the offender. He submitted that the offender is a first offender, a sole bread winner of her family. That she has 7 children, the eldest being 22 years while the youngest being 5 years old and is separated from her husband. He prayed for a lenient sentence so that the offender can take care of her children. He further submitted that the family of the deceased are not opposed to probation and that there is report that the family have settled the matter but the state opted to proceed. That the offender is aged 60 years old and is remorseful. Counsel prayed that the court exercises leniency and also urged that the court considers the period the accused has served in prison stating that this is her fourth year in prison and that life span is 65 years and the fact that the accused is now 60 years old.

### **Response From State**

10. The prosecution counsel Ms. Ratemo submitted on behalf of the state that from presentence report, the accused has not shown remorse for having caused the loss of life of a young child. She submitted that the child was 10 days old as captured by the postmortem report and not 3 weeks.
11. Counsel submitted that the circumstances under which the child died was gruesome. That the accused fell the child down more than once leading to the loss of the child. She stated that the child lost her right to life and as much as the family have forgiven the accused, they urge the court to consider that the offence was against the child. She prayed for a deterrent sentence and urged this court to pass sentence that is in line with the offence committed. She stated that they do not object to court considering time spent in custody.
12. Counsel further urged this court be the defender of the child lost and prayed for imprisonment for a term not less than 40 years imprisonment. She submitted that the state rejected agreement by the family as it appeared demeaning for the life lost. She submitted that they could not accept the discussion under a tree where they sat and said that the mother could give birth to another child. She submitted that the accused had no right to take away the life of the child. That she was caregiver because the child's mother was incapacitated. She urged this court not to show leniency to the accused. Further that incident also



happened in a public place in a hospital. She prayed that deterrent sentence be imposed against the accused.

### Determination

13. Section 204 of the [Penal Code](#) provides mandatory death sentence for offence of murder. However, the Supreme Court decision in [Francis Muruatetu & another v Republic](#) [2017] eKLR declared mandatory nature of death sentence unconstitutional. The supreme court stated as follows:-

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“45. To our minds what Section 204 of the [Penal Code](#) is essentially saying to a convict is that he or she cannot be heard on why in all the circumstances of his/her case. The death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decision. Try as we might we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.

46. We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the [Constitution](#) does not deprive it of the necessity and essence in the fair trial process. In any case, the right pertaining to fair trial of an accused pursuant to Article 50 (2) of the [Constitution](#) are not exhaustive.”

The court therefore proceeded to pronounce itself thus:

58. We now lay to rest the quagmire that has plagued the court with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the [Penal Code](#) unfair thereby conflicting with article 25(c), 28, 48 and 50(1) and (2) (g) of the [Constitution](#).”

14. However, the court did not outlaw the death sentence. This has been re-affirmed by the Court of Appeal in the case of [Joseph Njuguna Mwaura & 2 others v Republic](#) (2013) eKLR where the court stated that “the death penalty shall continue to be imposed in a case of a conviction where the law provides.
15. The sentencing objectives in Kenya have been captured in the [Judiciary Sentencing Policy Guidelines](#) at page 15 to be the following: -
- a. Retribution: to punish the offender for his/her criminal conduct in a just manner.
  - b. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
  - c. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law-abiding person.



- d. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.
  - e. Community protection: to protect the community by incapacitating the offender.
  - f. Denunciation: to communicate the community's condemnation of the criminal conduct.
16. In deciding whether to impose a custodial or non-custodial sentence, the court is required to take into account the following factors: -
- i. Gravity of the offence: - sentence of imprisonment should be avoided for misdemeanor.
  - ii. Criminal history of the offender. Taking into account the seriousness of the offences, first offenders should be considered for non-custodial sentence.
  - iii. Character of the offender:- non-custodial sentence are best suited for offenders who are already remorseful and receptive to rehabilitative measures.
  - iv. Protection of the community:- where the offender is likely to pose a threat to the community.
  - v. Offender's responsibility to third parties:- where there are people depending on the offender.
  - vi. Children in conflict with the law:- non- custodial orders should be imposed as a matter of course in cases of children in conflict with law, except in circumstances where, in light of the seriousness of the offence coupled with other factors, the court is satisfied that a custodial order is the most appropriate.
17. The Supreme court in the *Francis Muruatetu Case* at paragraph 71 amended the guidelines in respect of re-hearing sentence for the conviction of murder charge to include:-
- 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.
18. Having taken into account the circumstances leading to the commission of the offence herein, the mitigation by the accused, the recommendation by the Probation Officer, I am of the considered opinion that while the accused persons should be given the opportunity for reconciliation, she also merits a deterrent sentence to deter would be offenders against innocent children. The accused committed heinous act towards an innocent defenseless child aged 10 years. In my view, she deserves custodial sentence and I hereby impose 10 years imprisonment.
19. Final Orders: -
- 1. Accused to serve 10 years imprisonment.
  - 2. The period served in remand to be computed in the sentence above.



3. Right of appeal 14 days.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 24<sup>TH</sup>  
DAY OF SEPTEMBER 2024.**

.....

**RACHEL NGETICH**

**JUDGE**

In the presence of:

Elvis - Court Assistant.

Accused present.

Ms. Ratemo for state.

Mr. Kipkulei holding brief for Mr. Chebii for Accused.

