



REPUBLIC OF KENYA



**KENYA LAW**  
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**State v Ochieng & 11 others (Criminal Case E004 of 2020)  
[2023] KEHC 883 (KLR) (7 February 2023) (Sentence)**

Neutral citation: [2023] KEHC 883 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT SIAYA  
CRIMINAL CASE E004 OF 2020  
RE ABURILI, J  
FEBRUARY 7, 2023**

**BETWEEN**

**STATE ..... PROSECUTION**

**AND**

**ERICK OCHIENG ALIAS OWILA OMUNGI ..... 1<sup>ST</sup> ACCUSED  
PETER ONYANGO ALIAS ONYANGO NYAWANDA ..... 2<sup>ND</sup> ACCUSED  
VINCENT NYAWANDA ALIAS NELLY YONA ..... 3<sup>RD</sup> ACCUSED  
ERICK ODUOR ALIAS OMULO OTUNGE ..... 4<sup>TH</sup> ACCUSED  
DAVID ODHIAMBO ALIAS JALAGO LAZARO ..... 5<sup>TH</sup> ACCUSED  
ELVIS OTIENO OBONYO ..... 6<sup>TH</sup> ACCUSED  
ODHIAMBO LAZARO ..... 7<sup>TH</sup> ACCUSED  
DAN AJIMBA ..... 8<sup>TH</sup> ACCUSED  
FANUEL NYAWANDA OGONY ..... 9<sup>TH</sup> ACCUSED  
KEVIN ODONGO AJIMBA ..... 10<sup>TH</sup> ACCUSED  
JOHN FELIX OTIENO ..... 11<sup>TH</sup> ACCUSED  
CHARLES NGONDE NYAWANDA ..... 12<sup>TH</sup> ACCUSED**

**SENTENCE**

1. The 12 accused persons herein are jointly charged with the offence of murder contrary to section 203 as read with section 204 of the *Penal Code*. This court after hearing the prosecution's 9 witnesses and each of the accused persons in their sworn statements of defence and DW13 a defence witnesses for



the 7<sup>th</sup> accused person, and upon considering written submissions by counsel for all the 12 accused persons, I returned a verdict of guilty in respect of all the 12 accused persons and convicted each one of them for the offence of murder contrary to section 203 of the Penal Code.

2. After hearing mitigation by each of the accused persons although Mr Ayayo Advocate for 1<sup>st</sup> to 10<sup>th</sup> accused persons had attempted to forestall their mitigation by his clients by claiming that he had instructions to appeal even before the court could hear and consider their mitigations as stipulated in the Supreme Court's decision in Francis Karioko Muruatau & another v R [2017], which attempt this court did not buy in as it is the right of each of the accused persons to mitigate, after being convicted, unless they elect, voluntarily, not to mitigate, before the court can mete out appropriate lawful sentence upon which the convicted and sentenced persons can exercise their constitutional and legal right to appeal to the Court of Appeal.
3. The court, after satisfying itself that the convicted persons had not renounced their rights to mitigate, allowed each one of them to mitigate before calling for presentence reports on each of the 12 accused persons (convicts). The reports were all compiled, signed and filed by Mr James O Odongo, the Probation Officer Siaya County Office.
4. From the presentence reports availed to this court, each convict is a first offender and said to be well behaved in the community. It is stated that the convicts are remorseful and that they have heavy responsibilities to their respective families who will suffer immensely if they are incarcerated. The Probation Officer recommends in each case, non-custodial sentences.
5. I observe that each of the convicts herein were released on bail pending trial and they all adhered to the bail/bond terms.
6. This court had the opportunity to hear their mitigations individually.
7. Punishment for murder, as stipulated in section 204 of the Penal Code, is death sentence. However, this is no longer mandatory following the decision in the case of Francis Karioko Muruatau & another v Republic [2017] eKLR as pronounced by the Supreme Court of Kenya.
8. The Supreme Court held that albeit death sentence is not unconstitutional per se, its mandatory nature is what was rendered unconstitutional as the trial court's judicial pronouncements were such that courts' hands were tied to imposing death sentence irrespective of whether the convict mitigated or not. The courts were not obliged to take into account the mitigating circumstances or circumstances under which the offence of murder was committed in view of the mandatory nature of death sentence.
9. With the Muruatau decision, the court's discretion in sentencing was fully restored and whereas the court may, having regard to the circumstances of each case, impose death sentence in appropriate cases. However, the court too must consider the mitigations of each convict, circumstances under which the offence was committed and the objects and purposes of sentencing or punishment as contained in the Judiciary Sentencing Policy Guidelines.
10. From the evidence adduced on record, it was alleged that the deceased Clinton Awino Omoke was hacked to death by villagers among them, the 12 accused persons herein on allegations that he was a thief. The Assistant Chief of the area did testify to that fact. The convicts' testimonies which they were not obliged to give, was that they knew nothing of the death of the deceased.
11. The presentence reports have all brought out some facts concerning the deceased to the effect that he was, according to the community members, involved in stealing people's properties in the village and could run away after committing such offences. That his reputation was bad in his home surrounding and that the incident left his parents in shock. He was about 30 years old and unmarried.



12. The law is clear on what should happen to an offender or suspected offender in the community. The person should be apprehended and handed over to the law enforcement agencies who will process him or her to face the law.
13. There is no law that allows citizens to take the law into their own hands and execute a suspected offender. That can only be the law of the jungle and therefore all persons including those who have come to this court today to listen to this ruling on sentence and those reading this ruling after it is delivered ought to know that self-help mechanisms to prevent crime is not permitted. In addition, two wrongs cannot make one right. It is for that reason that the convicts herein upon being arrested on suspicion of murder, they were arraigned before this court and I am pretty sure that each one of them expected justice to be served. Their expectation of justice may have been to be acquitted but justice of the case is two pronged, such that both the victims of offence and the accused persons deserve justice.
14. The accused persons have gone through a long trial before this court which endeavoured to fast track their case which was initiated on October 26, 2020, although the offence took place in 2019. They were all released on bond terms which they met and have faithfully attended court until the last day of judgment on January 20, 2023 when they were all convicted of the offence of Murder.
15. The Probation Officer recommends probation in respect of each of the 12 accused persons as they have heavy parental responsibilities. The victim's father who testified as PW1 was also taken through Victim Impact Statement and he prayed for stiffer sentences as the convicts keep threatening him. In his testimony, he stated that the accused are his village mates and even some are his clan mates.
16. From the names of the convicts, some of them are close family members and in their respective mitigation, they stated that if they are jailed, their whole families will be affected adversely.
17. Indeed, more often than not, relatives of convicts suffer the consequences of the unlawful actions of their irresponsible relatives who must face the law & justice.
18. Most of the convicts did on their own accord disclose to court that they were on anti-retrovirals and that jail terms would affect their health adversely and their families too would suffer.
19. Most of them are young people under the ages of 35 years. They have young families comprising children who are toddlers and in school, from the Presentence report.
20. Among the facts to be considered in passing sentence in murder cases, as enunciated in the *Muruatetu* decision and directions given on July 6, 2021 by the Supreme Court, although those factors relate to resentencing of the convicts but which I find relevant in sentencing are:
  - (a) Aggravating circumstances;
  - (b) Being a first offender;
  - (c) Whether the offender pleaded guilty;
  - (d) Character and record of the offender;
  - (e) Commission of the offence in respect to gender based violence;
  - (f) The manner in which the offence was committed to the victim;
  - (g) The physical and psychological effect of the offence on the victim's family;
  - (h) Remorsefulness of the offender;
  - (i) The possibility of reform and social readaptation of the offender;



(j) Any other fact that the court considers relevant.

These guidelines are only but a few and are not conjunctive.

21. As stated, earlier, the offence herein was aggravated in that the convicts after cutting the victim with crude weapons on allegations of being a thief, they also set his body ablaze. All the convicts are below 50 years of age. They are remorseful, from their own mitigations and most of them are said to be on antiretrovirals.
22. They maintained their innocence which they are entitled to; they are first offenders with no past criminal records and are said to be well behaved in the community where they live, save, off course for this incident. The family of the deceased was affected by his death and the manner in which he was killed in their presence.
23. However, from the presentence reports, although the victim's family did not disclose to court the character of the deceased, it appears that he was not wanted by the villages who had sworn to eliminate him because they were tired of his character of stealing and escaping from facing justice.
24. Whether the convicts are sentenced to death or long term sentences, that will only appease his family members and not the community because blood, they say, is always thicker than water.
25. The community is of the view that the convicts who are not past criminals deserve a chance to be reintegrated to reform. The convicts too pledged not to engage in any criminal behavior should they be given the opportunity to serve non-custodial sentences.
26. Albeit the deceased's father claimed that the convicts are a gang who threaten to kill him, there is no credible evidence to that effect. In any event, the law will still catch up with them should they attempt at harming him or his family members.
27. On the other hand, the State is overburdened with holding many convicts in prison at the tax payer's cost. The convicts have heavy responsibilities to third parties who are their young families comprising children who are in school and deserve to be provided for by the convicts herein.
28. The family of the deceased can still sue the convicts for damages under the *Law Reform Act* and the *Fatal Accidents' Act* and get compensation for the loss of life of the deceased. That is only possible if the convicts who are still in their productive ages are given an opportunity to serve their sentences out of prison and continue to work and eke a living not only for themselves but also for their innocent families who are most likely to suffer immensely because of the grievous mistakes of their sole breadwinners.
29. With most of the convicts disclosing their health status to court, the burden on the State and on their family will be lesser if they fended for themselves from outside prisons.
30. For the above reasons, as I emphasize with the family of the deceased for the loss of their son, I exercise discretion and sentence each of the 12 convicts to serve on probation for a period of three (3) years from date of release from prison. The convicts shall abide by probationary terms and shall not reoffend. Should they reoffend or breach the probation terms and conditions, which shall include threats to the family of the deceased Clinton Awino Omoke, they shall be brought before this court and sentenced to appropriate custodial terms as the court shall deem fit to impose in accordance with the law.
31. Right of appeal 14 days to the Court of Appeal from today explained.
32. I so order.
33. File closed.



**DATED, SIGNED AND DELIVERED AT SLAYA THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2023**

**R.E. ABURILI**

**JUDGE**

