



**Republic v Nyaoke alias Siaya & 2 others (Criminal Case  
7 of 2019) [2024] KEHC 11552 (KLR) (1 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 11552 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CRIMINAL CASE 7 OF 2019  
RE ABURILI, J  
OCTOBER 1, 2024**

**BETWEEN**

**REPUBLIC ..... PROSECUTOR**

**AND**

**ABISAYE ODONGO NYAOKE ALIAS SIAYA ..... 1<sup>ST</sup> ACCUSED**

**SYLVESTER OYOO OGADA ..... 2<sup>ND</sup> ACCUSED**

**MICHAEL ONYANGO ODONGO ALIAS BOB ..... 3<sup>RD</sup> ACCUSED**

**RULING**

1. On 21/8/2024, this court delivered judgment finding the two accused herein Abisaye Odongo Nyaoke alias “Siaya” and Sylvester Oyoo Ogada, jointly guilty of the murder of Kevin Onyango Abuto alias Dadi and convicted the two accused persons for the said murder as charged under section 203 of the Penal Code.
2. The principal Prosecution Counsel, Mr. Marete submitted that the prosecution had no previous criminal records on the convicts and therefore they should be treated as first offenders.
3. The Court then allowed both convicts to mitigate through their counsel Ms Awuor holding brief for Mr. Sala and in their own words. Ms Awuor intimated to court that the convicts would each mitigate in their own words which they did.
4. In his own words, the 1<sup>st</sup> convict Abisaye Odongo Nyaoke alias Siaya stated as follows in Kiswahili:

“I ask the court to help me. I have been attending court sessions since the commencement of the case. I am 31 years old. I am married with 2 children. I am a bodaboda rider.”



5. The 2<sup>nd</sup> Accused Sylvester Oyoo Ogada mitigated in Dholuo language interpreted by Court Assistant Mr. Osir as follows:

“I pray for leniency of the court. I have been attending court since I was released on bond. I am aged 25 years old, unmarried. I am a mason. My father died, my mother is alive”.

6. After the mitigations, Ms. Awuor, their counsel stated as follows: “That is all we wish to state in mitigation.”

7. Upon hearing the mitigation by the two convicts, I observed that the deceased’s family was not present to give Victim Impact Statement. I noted that the convicts were youths and young persons at the time of committing the offence in this 2019 case.

8. I directed that for this court to mete out sentence or punishment that is fair and just, a pre-sentence report to be filed by the Probation Officer within 14 days, which report was to include the Victim Impact Statement. Pending the presentencing report, the bonds for the two convicts were suspended until 12<sup>th</sup> September 2024.

9. As this court was to be engaged in an official function on 12<sup>th</sup> September, I issued Notice to parties to appear earlier on 11<sup>th</sup> September for presentencing report and a production order was issued for the two convicts.

10. On 11<sup>th</sup> September, 2024, Helida Atieno Abuto, the mother to the deceased was in court. She was sworn and she gave her victim impact statement stating that she had testified in this case as PW1 and that the deceased Kevin Onyango Abuto is my first-born son. She stated that she had been interviewed by the Probation Officer for Presentence Report. She then stated as follows:

“I wish to state that the 2 accused are people from my village. I wish if it is possible, and my heart desires that I forgive them. I have forgiven them and that is what I have to say.”

11. Mr. Marete, Principal Prosecution Counsel on behalf of the State submitted that he had perused the two presentence reports filed by Mr. Otieno the Probation officer. That he was not convinced that the accused are remorseful. He was concerned that the conclusion of the report was that the offence was not premeditated which is not a factor in sentencing as a life was lost by Kevin Onyango Abuto.

12. Counsel invited this court to look at what the accused said in the report on circumstances of the offence where they still claimed that they did not cause grievous harm to the deceased and alleged that he was assaulted by other people. He pointed out that the accused did not acknowledge committing the offence hence they will not acknowledge or appreciate the rehabilitation process.

13. Mr. Marete submitted that the Probation report failed to capture a proper Victim Impact Assessment of the deceased, his age and the psycho—social impact his death and whether he had any prospects. He stated that the report sounded like the death of the deceased had no impact at all.

14. On the people allegedly interviewed by the Probation Officer, it was submitted that we are not told who is this administrator the Probation Officer spoke to and his rank and which community members he spoke to.

15. Counsel submitted that nobody has to die so that there are cordial relations in the society. He wondered aloud why, after conviction, parties are said to have healed yet someone had died. he urged the court to be guided by Article 27 (1) and (4) of *the Constitution* on the principle of equality before the law,



- not to discriminate during sentencing, based on the Probation report which according to him, gives extraneous factors which are diversionary of the real issue of the offence of murder.
16. The prosecution prayed for a formal declaration that the consequences of the acts of the two convicts is death which is still available in law as was observed by the Supreme Court in the Francis Muruatetu & another v Republic [2017]e KLR case.
  17. The Prosecution further prayed that in the event of an imprisonment term, the Court should impose a term where the objectives of criminal law will be attained through the imposition of appropriate, adequate, just and proportionate sentence commensurate to the nature and gravity of the offence and how it was committed. Counsel referred to the evidence of PW6 on the nature of injuries which were sustained by the deceased all over his body, including fractures. He maintained that the murder of the deceased Kevin was intentional and that the 2 convicts reflected on their intentions before committing the offence and achieved their desired consequences.
  18. Finally, Counsel for the prosecution submitted that appropriate sentence will impact directly on crime control which will have a direct correlation to fostering an environment where human rights and fundamental freedoms of victims are respected, referring to Clause 1.2 of the Judiciary Policy Sentencing Guidelines.
  19. On behalf of the two convicts, Mr. Sala counsel for the convicts submitted that the evidence and presentencing report show that the murder was not premeditated. That the 2 convicts acknowledge the offence and are remorseful. That the very unique circumstances of this case call for non-custodial supervised reintegration into the society as appropriate punishment.
  20. Counsel for the convicts submitted that the Probation Officer interviewed all the relevant parties and the local administration and the community and that not even one person has cast aspersions or raised a finger against a lighter sentence against the 2 convicts.
  21. Counsel submitted that the two convicts were good friends with the deceased and enjoy a cordial relationship with the family of the deceased, not just after conviction. That they acknowledge the gravity of the offence which they are remorseful about and prayed for inherent discretion to give lenient sentence.
  22. He submitted that the deceased's mother on her own volition had attended all court sessions and had sworn to have forgiven the accused persons; and that being the closest family member to the deceased, she would have had misgivings.
  23. Following the lengthy submissions on sentencing, I reserved the matter for sentencing today.
  24. I have considered the circumstances under which the offence was committed, the mitigations, victim impact statement by the deceased's mother and the pre-sentence reports on each of the two convicts coupled with the serious submissions by the prosecution and the defence counsel.
  25. From the onset, the two convicts herein denied committing the offence and even in their mitigations, they never acknowledged that they committed the offence. They simply stated of how they had attended court sessions faithfully until the end and prayed for leniency of the court in sentencing. The 1<sup>st</sup> convict was prodded by the court as to his age and whether he was married with children is when he admitted saying he was aged 31 years, married with two children and a bodaboda rider. The 2<sup>nd</sup> convict reiterated what his co-convict stated save that he was unmarried and was aged 25 years, his father died, his mother was alive and that he was a mason.



26. The presentence reports reveal that the convicts had never been in conflict with the law before and that they are cousins, with their families having reconciled with the deceased's family as their cousin had bought land from the deceased's family. That the deceased's family was forgiving and had forgiven them, reiterating what the deceased's mother had given on oath and that lenient sentence was desirable due to the reconciliatory mood of forgiving the offenders/ convicts herein.
27. Under section 204 of the Penal code, punishment for murder, upon conviction is death. However, the discretion in sentencing vests in the trial judge because the trial court had the opportunity to see and hear evidence from both the prosecution witnesses and the defence and therefore observe their conduct and behaviour. That discretion must however be exercised judiciously and not capriciously. In *African Continents Bank V Nuamani* [1991] NWLI 486, the Court stated that:
- “The exercise of court's discretion is said to be judicial if the judge invokes the power in his capacity as a judge qua law. An exercise of discretionary power will be said to be judicial, if the power is exercised in accordance with the enabling statutes, discretionary power is said to be judicious if it arises or conveys the intellectual wisdom or prudent intellectual capacity of the judge. The exercise must be based on a sound and sensible judgment with a view to doing justice to the parties.”
28. The question is what would constitute an adequate, appropriate and just sentence in the circumstances of this case? The Supreme Court in *Francis Karioko Muruatetu & Another vs Republic*, Petition No. 15 of 2015, guided on sentencing and stated as follows:
- “...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.”
29. The apex Court in the above Muruatetu Case appreciated that:
- “In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in *Dahir Hussein v. Republic* Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: “deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim.”
30. On the other hand, the 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:
- “Sentences are imposed to meet the following objectives:1.Retribution: To punish the offender for his/her criminal conduct in a just manner.2.Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.3.Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.4.Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.5.Community protection: To protect



the community by incapacitating the offender.6.Denunciation: To communicate the community's condemnation of the criminal conduct.”

31. I have considered the circumstances of this case, where the deceased was hacked to death for reasons known to the accused persons herein as the theory advanced that he was mobbed for being a thief could not sell. Even if it were the case that he was a thief, there are legal means of dealing with thieves. Killing them mercilessly is not one of those methods of punishing thieves. I have also considered the mitigations, submissions by both counsel and the victim impact statement; and given equal consideration to the objects of sentencing as stated in the Kenya Judiciary Sentencing Policy Guideline and as summarised in the Francis Muruatetu & Anther vs Republic [2017] eKLR decision, which guidelines and principles are relevant in so far as sentencing and re-sentencing in murder cases is concerned. I have further considered the fact that the convicts are first time offenders and they committed the offence when they were young; they are both under 35 years old; Further noting that in their own words in mitigation, they did not show any remorse, until their counsel Mr Sala mitigated only after the pre-sentence report was filed and from which report, the convicts were very evasive, blaming other people for the death of the deceased.
32. I further observe that the mother to the deceased testified stating that she had forgiven the convicts, which may be so, although the convicts did not plead guilty to the charge and neither did they plea bargain for a lesser charge and or sentence. There is also no evidence that the convicts herein expressed remorse to the family of the Deceased or in any way sought reconciliation. If it were so, nothing prevented them from expressly saying so in court and to the deceased's mother who was present in court. The deceased's mother did not say that the convicts had expressed remorse to her. She only said that she forgives them.
33. As correctly stated by Mr. Marete for the Prosecution, the presentence report gives abstract statements of people allegedly interviewed without specifying which specific community leaders were interviewed. It also talks of a murder not premeditated when there is no legal requirement for motive to be proved in criminal cases.
34. It is now well settled law that sentence must reflect the accused's blameworthiness for the offence. See *Omuse vs R* (2009) KLR 214, where it was held that the sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that the proper exercise of discretion in sentencing requires the Court to consider that fact and circumstances of the case in their entirety before settling for any given sentence.
35. No person has any right to take away the life of another except in situations of absolute self-defence or defence of property or as provided for under the law and *the Constitution*.
36. The prosecution asked for a declaration of death sentence, which is lawful punishment under section 204 of the Penal Code and as reiterated by the Supreme Court in the Muruatetu(supra) case. The defence on the other hand sought for lenient non-custodial sentence.
37. In the circumstances of this case, I find a non-custodial sentence as sought by the convicts to be inappropriate. The accused persons need to feel the consequences of the crime they committed. A custodial sentence will rehabilitate them and send a warning to others that it does not pay to take law into one's hands and that violence do not pay at all. Further, that all lives matter; live and let live.
38. Thus, this Court has to balance between the need to have the accused atone for their actions and the need to exercise leniency, given the circumstances of the case as described above. In this regard, I think that a shorter custodial sentence is appropriate. and within the range of sentences meted out in similar cases.



39. Therefore, in the circumstances of this case, and taking into account the Muruatetu sentencing guidelines in murder cases, the fact of the accused convicts being young people, first offenders and the objects and purposes of sentencing, I hereby exercise discretion and sentence each of the convicts herein Abisaye Odongo Nyaoke alias Siaya and Sylvester Oyoo Ogada to each serve fifteen (15) years imprisonment for the murder of Kevin Onyango Abuto alia Dadi. The imprisonment term for each of the convicts herein shall take into account the provisions of section 333(2) of the Criminal Procedure Code in that the period that the two convicts have spent in custody following their conviction on 21/8/2024 to 1/10/2024 date of sentencing when their bonds were suspended and and from the date of their arrest on 15/1/2019 until their release on bond pending trial shall be considered as part of the prison term. For avoidance of doubt, the convicts were arrested on 15/1/2019 and were released on bond on 5<sup>th</sup> April 2019 in the case of the 2<sup>nd</sup> convict Sylvester Oyoo Ogada and on 9<sup>th</sup> April, 2019 in the case of the 1<sup>st</sup> convict Abisaye Odongo Nyaoke alias Siaya.
40. Right of Appeal explained, 14 days of today to the Court of Appeal is guaranteed.
41. This file is closed.
42. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 1<sup>ST</sup> DAY OF OCTOBER, 2024**

**R.E. ABURILI**

**JUDGE**

