



**Director of Public Prosecution v Amwai (Criminal Case E104 of 2021)
[2024] KEHC 15794 (KLR) (17 December 2024) (Sentence)**

Neutral citation: [2024] KEHC 15794 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CRIMINAL CASE E104 OF 2021
S MBUNGI, J
DECEMBER 17, 2024**

BETWEEN

DIRECTOR OF PUBLIC PROSECUTION REPUBLIC

AND

ERICK MWALE AMWAI ACCUSED

SENTENCE

1. The accused person was charged with the offence of murder contrary to section 203 as read with section 204 of the *penal code*. The particulars of the offence were that on the 5th day of February, 2021 at Buchesani village, Shibuye location, Shinyalu division in Kakamega East sub county within Kakamega County the accused murdered Phanice Mwanjirwa Musoga.
2. The matter proceeded to full trial and the prosecution called and relied on the evidence of eleven witnesses to prove their case.
3. The court ruled that a prima facie case had been established against the accused person and was put on his defence.
4. The accused was the only defence witness and judgment was entered thereafter where this court presided by Hon. Justice P.J.O Otieno found the accused person guilty of the offence of murder as charged and convicted him accordingly.
5. I heard the mitigation where the counsel for the accused person, Mr. Kombwayo, pleaded with the court to exercise leniency while sentencing the accused, stating that the accused is a young man, and 1st time offender who has undergone rehabilitation and changed his behavior while in custody. He submitted that his family is ready to welcome him back, albeit the pre-sentencing report being 50/50 on favorability.



6. The prosecution counsel submitted that a life was lost and could not be restored. He stated that the deceased was the glue of her household and her husband went into distress owing to her death. Her children had to be taken by relatives. He further submitted that despite the submission by the counsel of the accused that he is remorseful, the probation report indicated that the accused still did not own up to committing the offence, thus cannot be said to be remorseful.
7. The pre-sentence report filed by the Probation Department indicates that the accused person is the youngest in a household of four siblings. He is 26 years of age and was a casual laborer. The community leaders from both where the accused comes from and where the crime took place are in support of a custodial sentence since the accused was a habitual troublemaker. The victim's family is still bitter about the incident. The death had an emotional toll on the deceased's husband who has resorted to drinking so as to cope with the loss. The children of the deceased were traumatized after witnessing the crime. They had to endure nightmares and often scream during the day in fear. They had to move in with their mother's nephew as they continue to cope with the crime. The victim's family pray for a custodial sentence so as to get some closure and healing from the loss.
8. I note that the report also shows that the offender is still inconsistent in his recall of events that led up to the moment of crime. He insists that the victim was his girlfriend, yet the victim was a married woman. Furthermore, the accused also presents himself as a visitor who happened to be in the area to see the victim yet records show that he spent considerable time in the locality, living at his maternal grandparents' home.
9. If given a non-custodial sentence, the family members are ready to be supportive of his rehabilitation. However, I note that they are unaware of the gravity of the offence, as they have been detached from the court proceedings and trial process. They claim to have only heard rumors about the accused being arrested for murder and never sought to know the truth.
10. The Supreme Court in *Francis Karioko Muruatetu & Another v Republic*, Petition No. 15 of 2015, as a guide in sentencing held that:

“...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.”



11. In *Dabir Hussein v. Republic* Criminal Appeal No. 1 of 2015; [2015] eKLR, the High Court held that the objectives of sentencing 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.”
12. 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.”
13. The discretion in sentencing rests with the trial judge because he or she has the knowledge of the relevant facts before him or her and in many instances, has observed the accused and witnesses’ demeanor. The discretion must however be exercised judiciously. In the Nigerian case of *African Continents Bank v Nuamani* [1991] NWLI (part 86)486, it was observed 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.”
14. I was not the trial judge, but I have perused the proceedings. I am properly sized of the facts in the matter.
15. I have considered the submissions by the prosecution Counsel, the mitigation by the defence counsel on behalf of the accused person and the pre-sentence report filed in this court. I have also considered the circumstances under which the murder was committed and how it was committed. The accused and the deceased were drinking chang’aa together early on in the morning. PW2 told the court that the



two left the drinking den and headed towards the direction of the deceased's house. The deceased was later found dead in her house by her children, PW6 and PW7.

16. The post mortem report showed that the deceased had bruises on her neck and had died of strangulation. The accused was well aware that strangling the deceased would cause her death or at the very least, grievous harm. For this reason, I decline to met a non-custodial sentence.
17. Life is precious. The accused is not remorseful and there is need for him to realize the consequences of his actions since a life was lost. Taking all these facts into consideration the sentence of forty (40) years is appropriate which I hereby sentence him to serve. The sentence shall run from the date of arrest being 06.02.2021.
18. Right of appeal 14 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 17TH DAY OF DECEMBER, 2024.

S.N MBUNGI

JUDGE

In the presence of :-

Accused person – present

Mr. Kombwayo Advocate for the accused – present

Court Prosecutor – Mbonzo

Court Assistant – Elizabeth Angong'a

