



**State v Ochung (Criminal Case E006 of 2022)
[2024] KEHC 15758 (KLR) (10 December 2024) (Sentence)**

Neutral citation: [2024] KEHC 15758 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL CASE E006 OF 2022
RE ABURILI, J
DECEMBER 10, 2024**

BETWEEN

STATE PROSECUTION

AND

SYLVESTER AKELLO OCHUNG ACCUSED

SENTENCE

1. The accused herein Sylvester Akello Ochung has been found guilty of the murder of the baby Palmer Kimathi Omondi and has been convicted accordingly.
2. The prosecution submitted that they had no previous criminal records on the accused person hence he could be treated a first offender. The accused person and his advocate mitigated asking for leniency, that he had learnt lessons in prison, was remorseful, learnt his mistake and sought the court’s leniency. The court asked him questions on his age and marital status and whether he and children which admitted that he was married with three children aged between 16 years and 4 years old. He was 31 years old. He stated that he killed the deceased because the child’s father was sleeping with the accused person’s wife. He was a farmer. He then added that he decided to go smoke bhang then he went to kill the baby.
3. I have considered all the above, the circumstances of the offence, the barbaric manner in which the accused slaughtered a 2-week-old baby in the face of his mother. I find the accused to be a dangerous human being. The child did not have to pay the price even assuming that the child’s father was sleeping with the accused person’s wife as alleged, which allegation is unsubstantiated since the accused did not find the wife and the deceased’s father together and therefore the defence of crime of passion cannot hold. The accused went into the victim’s house and snatched him from the protective arms of its mother. The child did not deserve to die such a painful death. He did no wrong and he did not have to be sacrificed like chicken.



4. The victim child had the right to live. Article 26 of *the Constitution* guarantees every person the right to life. Those of us who are alive today is because nobody sacrificed us. Nobody tampered with our lives. Mother nature plucks and takes us to where we belong at the ripe time. This was not the ripe time for the baby. Children have the right to be protected from harm.
5. The law at section 204 of the Penal Code provides for death penalty upon conviction for murder. However, sentencing is in the discretion of the trial court. I shall apply the Sentencing Guidelines set out in the Francis Muruatetu v Republic [2017] e KLR case and the Judiciary Sentencing Guidelines, 2023 which provide as follows at pages 66 and 67:

“Murder 5.2.2 The harm caused by such an offence is immeasurable. The sentence is not a measure of the value placed on the life of the victim. Therefore, the assessment of aggravating and mitigating features relating to the offence focusses on culpability. However, the victims’ family may wish to make a statement to the court about the impact of the offence.

5.2.3 In addition to the generic features contained in the GATS, features particularly relevant to murder may include but are not limited to:

5.2.4 Aggravating Factors in Murder Cases:

- i. A significant degree of planning or premeditation.
- ii. The mental or physical suffering inflicted upon the victim before death. Factors such as the type of weapon used, torture or inhuman or degrading treatment prior to death will be relevant.
- iii. The use of duress or threats to enable the offence to take place. iv. The vulnerability of the victim e.g., due to age or disability.
- v. The fact that the victim was providing a public service or performing a public duty.
- vi. Multiple victims or multiple perpetrators.
- vii. Where the offence involved an abuse of trust. The relationship between the victim and the accused should be carefully considered.
- viii. Offence was motivated by, or there was demonstrated hostility to the victim based on his or her race, gender, sex, sexual orientation (or presumed sexual orientation), pregnancy, marital status (so called ‘honour killings’ for example), health status (e.g., murder occurred because of the HIV status of the victim, or albinism), ethnicity, culture, dress, language, birth, or religious orientation (or presumed religious orientation).
- ix. A history of assaults, threats, or coercion upon the same victim.
- x. Absence of self-defence or provocation.
- xi. The offence involved deliberate drugging or stupefying of the victim.
- xii. Proven abduction or kidnapping of the victim before the murder was committed.



- xiii. Where a demand for ransom was made, signifying a financial motive.
- xiv. Concealing, destroying, or dismembering the body.
- xv. Where the murder was conducted in furtherance of a ritualistic practice such as witchcraft.

5.2.5 Mitigating features relating to murder might include:

- i. Lack of premeditation.
- ii. The offender suffered from a mental disorder or mental disability which lowered his degree of blame.
- iii. In a case of joint enterprise, the role the offender played may be lower than his co-accused. For example, in the resentencing of the Applicants in Francis Karioko Muruatetu & 6 others v Director of Public Prosecution [2019] eKLR the Judge categorised the offenders into four categories based on their culpability. The first category involved the architects of an offence e.g., those who financed the killing, the second category involves offenders who ensnared the deceased into his death, the third category is the henchmen, those who carried out the brutal killing and the fourth category involves offenders involved in the cover up of the offence by attempting to silence witnesses. The Judge sentenced the third category with the highest term of imprisonment and graduated the term down for the other categories.
- iv. That the offender was provoked.
- v. That the offender acted to any extent in self-defence or in fear of violence.
- vi. The age of the offender.

5.2.6 Where an unlawful killing is done without an intention to kill (or cause grievous bodily harm?), the offence of manslaughter may be made out. In sentencing such cases, as with murder, the focus must lie primarily upon culpability. With manslaughter cases, the degree of culpability may vary widely, from the 'one punch' manslaughter to the case involving a prolonged campaign of domestic violence which ultimately results in the victim's death. The focus must be on the offender's actions and intentions at the time of the crime in assessing the degree of culpability. Sometimes a nuanced approach is called for.

5.2.7 In addition to the generic features contained in the GATS, some features that are relevant to assessing culpability in manslaughter cases include, but are not limited to the following:

- i. Where death was caused in the course of an unlawful act which involved an intention by the offender to cause harm falling short of grievous bodily harm e.g., one punch that caused the victim to fall and suffer a catastrophic and fatal brain injury.



- ii. Where death was caused in the course of an unlawful act that carried a high risk of death or grievous bodily harm which was or ought to have been obvious to the offender e.g., driving a motor vehicle dangerously through a crowded street.
 - iii. Where death was caused in the course of committing or escaping from a serious offence.
 - iv. Where the offender tried to conceal the offence by concealing, dismembering, or destroying the body.
 - v. Where death was caused in the course of self-defence or defence of another (though not amounting to a defence).
 - vi. Where there was no intention by the offender to cause ANY harm AND no obvious risk of anything more than minor harm e.g., the offender pushed the victim out of the way and the victim fell and suffered a fatal injury.
 - vii. Where the offender's responsibility was substantially reduced by mental disorder, learning disability or lack of maturity. Examples might include the woman who suffers severe post-natal depression, or the war veteran who suffers posttraumatic stress disorder to the extent that he behaves in a way that is erratic and violent in the face of ordinary day-to-day stressors.
 - viii. Where there has been a history of violence towards the victim by the offender, this might be relevant to sentencing.
 - ix. Significant mental or physical suffering caused to the deceased.
 - x. Where the offence involved use of a weapon.
 - xi. Offence committed in the presence of children (particularly relevant to domestic violence deaths)
6. There was no provocation by the baby Palmer Kimathi Omondi to warrant the dismemberment of his body by the convict herein. The convict kidnapped the baby victim of his brutal murder. There was premeditation. There are no mitigating factors. The victim suffered significant mental and physical suffering prior to his death a day after the attack on him. The convict used violence and a panga in slicing and or slaughtering the innocent baby.
 7. The convict does not deserve to get back into the society. The community must be protected from further harm. He is a danger to other people.
 8. I hereby sentence the accused person to serve life in prison for the brutal murder of the baby.
 9. Right of Appeal to the Court of Appeal explained is 14 days of today.
 10. The defence counsel Mr. Hemstone Owino is appreciated for the pauper brief service offered and he is now discharged, his legal fees to be paid upon filing of his fee note with relevant documentation.
 11. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 10TH DAY OF DECEMBER, 2024.



R.E. ABURILI
JUDGE

