



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL CASE NO. 27 OF 2018 [MURDER]

CORAM: HON. R.E. ABURILL J

STATE.....PROSECUTION

VERSUS

BENJAMIN ELI ODHIAMBO ALIAS BEN.....1ST ACCUSED

VINCENT OWUOR OPONDO Alias RASTA DADDY.....2ND ACCUSED

RULING ON SENTENCE

1. The two accused persons herein, Benjamin Eli Odhiambo alias Ben and Vincent Owuor Opondo alias Rasta Daddy were jointly charged with the offence of Murder contrary to *Section 203 as read with Section 204 of the Penal Code*. They denied the charge. After a full trial, this court found the two accused persons guilty of the offence of Murder as charged and convicted them accordingly, vide judgment of this court rendered on 15/12/2021. The Prosecution then stated that they had no previous records on the two accused persons hence they could be treated as first offenders.

2. In mitigation, the 1st and 2nd accused persons and their counsel stated that they were first offenders, were you men with young families who highly depended on the accused persons, that the 1st accused has 4 children with the youngest being 7 years old while the 2nd accused has a young family of 3 children the youngest being 11 months.

3. The 2 accused persons therefore pleaded with this court to consider the above factors and avoid meting out custodial sentences on them as that would make their young families struggle to survive as the accused are their sole breadwinners.

4. The accused were also said to be remorseful for the acts that led to the death of the deceased Ronald Odhiambo Otieno and are sorry to the families of the deceased. They pleaded for leniency stating that they had cooperated with the court leading to speedy disposal of the case.

5. The court also gave each of the 2 accused persons a chance to mitigate personally. The 1st accused Benjamin Eli Odhiambo stated that he was seeking for forgiveness from the court and the family of the deceased saying that it was bad luck as he had never committed any other offence.

6. The 2nd accused Vincent Owuor Opondo stated that he had close to three years suffered and wished to reunite with his family again. That he was a passenger and did not know that such an incident would occur.

7. The court, upon hearing the above mitigation, ordered for presentence reports to be filed by the Probation Officer on both the 2 accused persons and to obtain Victim Impact Statements from the family of the deceased, before pronouncing appropriate sentence. I have now received the 2 presentence reports on each of the accused persons as presented by Milton Kasera Probation Officer, Siaya County Office. Concerning the 1st accused Benjamin Eli Odhiambo, he is said to be 37 years old and was born in a stable family. He is a first born. His parents separated but the family is stable with responsible parents who are now retired teachers. His siblings are working. The accused is a trained driver and married with 3 children. His wife works for a German Security firm in Eldoret. The three children are in Form three, Form one and Class Four respectively. He is said to be negatively influenced after taking alcohol.

8. The deceased's family comprises of a widowed mother and eight siblings. He was first born. He was aged 26 years old and a boda boda operator. I observe that nothing much was said concerning the impact of the death on his family.

9. Concerning the 2nd accused Vincent Owuor Opondo, he is 32 years old, a child of a retired primary school teacher. His mother died in

2014 and he is the last born of the 4 siblings. His other siblings are gainfully engaged in both formal and informal (business ventures). He is trained in ICT and computer maintenance. He is married with 2 children but separated with the 1st wife. He has one child with the second wife who is a teacher. That he was a responsible husband but partakes alcohol which distorts his logical thinking.

10. I have considered the circumstances under which the offence herein was committed, the age of each of the 2 accused persons, their touchy mitigations and their family social backgrounds as presented in the presentence reports. I have also considered the Judiciary Sentencing Policy Guidelines and the fact that sentencing is in the discretion of the trial court, which had the opportunity to hear and see the witnesses and the accused persons as they testified. That discretion must however be exercised judiciously and not capriciously. It must be well guided by the law and sound and sensible judgment with a view to doing justice to all the parties involved.

11. In sentencing a convict in a murder case, the case of *Francis Karioko Muruatetu & Another V R[2017]eKLR* provides guidance. This is notwithstanding the letter of *Section 204 of the Penal Code* which provides that a person convicted for Murder shall be sentenced to death. It is the mandatoriness of death sentence in murder cases that gave rise to the Francis Muruatetu decision by the Supreme Court.

12. In the *Francis Muruatetu* case, the Supreme Court gave the following guidelines with regard to mitigating factors applicable in rehearing sentence for the conviction of a Murder charge, after making a finding that the mandatory nature of the death penalty as stipulated in *Section 204 of the Penal Code* is unconstitutional for reasons that it deprives of the trial court the discretion in sentencing and denies an accused person as convicted, the opportunity to mitigate before being sentenced. The guidelines are:

- (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) **possibility of reform and re-adaptation of the offender;**
- (h) **any other factor that the court considers relevant.**

13. In this case, the deceased was a young man aged 26 years and lost his life at the cruel hands of the 2 accused persons who are in both their 30s. The accused persons are first offenders and have stated that they are remorseful. They are both married with children. They were also working and met the needs of their families. Their spouses are also gainfully employed. They pleaded not guilty to the charge.

14. The trial record of proceedings show how the 2 accused persons jointly executed the deceased Ronald Odhiambo Otieno and ensured that he was not just left for dead but dead like a dog in that after knocking him on a motorcycle that he rode while carrying PW3 his brother, and instead of leaving it at that, after he had fallen off the motorcycle, the 1st accused herein stopped the vehicle, got out, went and checked on the two, found PW3 was thrown into a ditch, concluded that he was dead then he checked on the deceased who had fallen near the road, kicked him, saw him still alive, got back into the motor vehicle wherein he had left his passengers, then the 2nd accused opened the door of the vehicle in question, got out, went and pulled the deceased into the road, near the vehicle's tyres and directed the 1st accused driver to reverse and crush the deceased then driving over the deceased again before driving away and telling the other passengers not to say that they had killed a person but a dog! This cruel and ghastly act is demonstrated in the horrifying photographs of the deceased and as analyzed by the homicide team, shows how the death of the deceased was stage-managed by the 2 accused persons. The accused persons wanted to cover up the death of the deceased to appear as if it was an ordinary accident. Whereas they could have succeeded in doing so, had there been no credible passengers in that motor vehicle, which passengers had a conscience to tell this court the truth, the accused persons miserably failed to persuade this court that this was an ordinary accident, and it was never an accident by all means. This is one of those cases that the police took their time and spend it well. They mobilized all resources at their disposal to forensically examine the scene and conclude that this was no ordinary accident but a calculated murder of the deceased camouflaged as an accident.

15. The 2 accused persons were indeed callous and cruel. After crushing the deceased, they killed him twice by crushing his body further so that what was left of him was mutilated pulp matter. The accused persons do not deserve the mercy of this court at all for such gruesome murder of the deceased, in the face of other passengers watching in horror. One of the witnesses PW9 Mercy Anyango was so traumatized that as she gave evidence of what she saw, she appeared traumatized and so scared and fearing that she would face dire consequences from the accused persons for telling the court what transpired as she recalled what the 2 accused persons did to the deceased's body after knocking him on a motor cycle.

16. Life is sacrosanct and it is for that reason that the Constitution at *Article 26(3)* provides that a person shall not be deprived of life intentionally except to the extent authorized by this Constitution or other written law. It follows that no person shall intentionally deprive of another life.

17. The objectives of sentencing as set out in the Judiciary of Kenya Sentencing Policy Guidelines are:

- 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 victim's, 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 victim's needs;

5. Community protection: to protect the community by incapacitating the offender;

6. Denunciation: to communicate the community's condemnation of the criminal conduct.

18. The 1st accused is a seasoned driver and knew or ought to have known that after an accident whether self-involved or involving a third party, assuming it was an accident or that he wanted this court to believe that he had simply caused an accident, he should have reported the occurrence to the nearest police station. Instead, the two accused persons escaped and were arrested at Hideout Hotel in Kiambu County. As the name of the venue where they were found suggests, they were in a hideout escaping from justice. They even cleaned the blood and brain matter that stuck in the vehicle registration No. KCG 209M Toyota double Cabin that the 1st accused was driving to erase traces of the deceased's DNA matter. The postmortem report is clear that the deceased's head was crushed an indication that the 2nd accused placed the deceased's head near the vehicle's tyre and signaled the 1st accused to crush it.

19. Taking into account the objectives and policy guidelines on sentencing and circumstances of the offence and the mitigations, and conduct of the 2 accused persons in the manner that they unlawfully, with malice aforethought killed the deceased, and the guidance provided by the Supreme Court in the *Francis Muruatetu case* (supra), I find that the two accused persons deserve a severe long term sentence away from the society as their conduct clearly shows that they do not value human life. I hereby sentence the 2 accused persons Benjamin Eli Odhiambo alias Ben and Vincent Owuor Opondo alias Rasta Daddy to each serve **life imprisonment** for the gruesome cold blooded murder of the deceased **Ronald Odhiambo Otieno**.

20. Right of Appeal is 14 days of today. File closed. I so order.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 15TH DAY OF DECEMBER, 2021

R.E. ABURILI

JUDGE