



**State v FOM & another (Criminal Case E021'A' of 2022)
[2025] KEHC 13955 (KLR) (7 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13955 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CRIMINAL CASE E021'A' OF 2022
DK KEMEL, J
OCTOBER 7, 2025**

BETWEEN

STATE PROSECUTION

AND

FOM 1ST ACCUSED

VOM 2ND ACCUSED

RULING

1. The two accused herein FOM and VOM have been charged with an offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. The particulars are that on the 25th day of April, 2021 at Barkowino Sub-Location, in Bondo township location, Bondo Sub County within Siaya County, jointly murdered one Stephen Oyugi Rajula.
2. Vide the judgment of this court dated 16/9/2025, the two accused were found guilty for the offence of murder under Section 203 as read with Section 204 of the Penal Code and were convicted therefor accordingly.
3. The sentencing hearing proceeded on 30/9/2025. Mr. Mshindi for the defence submitted regarding the 1st accused inter alia; that he is remorseful; that he was a minor at the time of the offence and that he was a student at a technical college; that he has no past criminal records and attended court throughout his trial; that a non-custodial sentence be imposed; that minors should not be awarded custodial sentence and therefore the 1st accused should be sentenced in accordance with the Children’s Act and in adherence to the Judiciary Sentencing Policy Guidelines as amended in 2023.

As regards the 2nd accused, learned counsel submitted inter alia; that he is a son to the 1st accused’s brother; that he is remorseful; that he is still young and energetic and that a custodial sentence will take away his productive life; that there was lack of premeditation in the incident; that the court exercises its discretion in coming up with reasonable sentences. Learned counsel in response to the sentiments of



counsel for the prosecution, submitted inter alia; that the claims mentioned in the presentence report have not been substantiated; that both accused attended court without fail and that no such issues cropped up at all; that the court should take judicial notice of the fact that Siaya County is currently faced with several cases of murder and that the Sentencing Guidelines should be used for purposes of reforming offenders.

4. M/s. Mumu for the prosecution submitted inter alia; that the 1st accused is twenty one(21) years old while the 2nd is twenty three (23) years old; that the presentence report reveals that the accused persons are persons of bad character in the society and that they are members of a very bad group; that a custodial sentence should be imposed to deter them from committing further crimes; that the family of the victim is still grieving over the loss of their loved one; that the ground is still hostile.
5. This court called for a pre-sentence reports by the Probation department. The same are dated 29/9/2025. The same indicate inter alia; that the community is hostile to both accused persons as they are known to be of very bad characters as they associate themselves with bad groups in the community; that their father is not able to control them; that the ground is still hostile and the community members are reported to be waiting for the conclusion of the case before they decide their next course of action against them; that the 2nd accused after being released on bond is reported to have teamed up with other criminals from Bondo and has remained a threat to the society; that the Local Administration is of the view that the accused persons require custodial rehabilitation before being released back into the society; that the probation officer is of the view that due to the hostility on the ground, a non-custodial sentence is not suitable for each of the accused.
6. I have given due consideration to the mitigation submissions of learned counsels and the pre-sentence report. Under Section 204 of the Penal Code, the maximum sentence for murder is death but owing to the Supreme Court’s decision in Francis Karioko Muruatetu & Ano. Vs, Republic [2017] eKLR, held that the mandatory sentence of death was unconstitutional as it denied the courts the opportunity to receive mitigation from offenders before imposing the appropriate sentences. It was therefore held that the courts were now free to receive mitigation from offenders before imposing the appropriate sentence but the courts could as well impose such sentence if the circumstances warrant it.
7. As regards the sentence to be imposed, the court of Appeal in the case of Charo Ngumbao Gugudu Vs. R [2011] eKLR held as follows:

“ Further, the law is that sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and that it is not proper exercise for the court to fail to look at the facts and circumstances of the case in their entirety before settling for any given sentence. See Ambani Vs. R [1990] KLR”
8. It is noted that the offence herein was committed when the deceased met both accused at their gate and greeted them only for the accused persons to violently attack him. It is clear that the accused persons as noted from the presentence reports that the accused persons were part of a gang in the village who had terrorized members of the community. The deceased was attacked outside his house and his wife was no match and could not assist her husband. The deceased was assisted to hospital but died soon afterwards. According to the wife, the assailants had hit her husband with clubs on the head. The autopsy report dated 5/5/2024 produced by Dr. Thaddeus Owiti (PW3) indicated that the deceased sustained a fracture of the skull and formed the opinion that the cause of death was severe head injury secondary to assault with a blunt object. The deceased could not survive from the said injuries. It is instructive that after the incident, the accused persons went underground while their father attempted to deflect incriminating evidence pointing towards the accused persons who are his sons as he informed members of the public that his sons were not at home. It is instructive that one of the accused persons



tried to hide for some days within his homestead before being smoked out while the other accused took refuge in some gold mines within Bondo but was eventually brought to book after almost a year. It is also noted that after the accused persons assaulted the deceased, they left him for dead and did not bother to even assist him to hospital for medication. This was a clear indication that the accused persons wanted the deceased to die.

From the presentence reports, the accused are known to be members of terror gangs in the village and that they have terrorized the villagers who have no kind words for them. In fact, the reports further add that the ground is still hostile and that the villagers are waiting for them to come out so that they can lynch them. Learned counsel for defence has beseeched this court to consider the fact that the 1st accused was a minor aged 17 years at the time of the offence. It is noted that the 1st accused is currently aged 21 years and therefore an adult. This court is under obligation to treat him as an adult while imposing sentence even though he was a minor at the time of the incident. Learned counsel's suggestion that the 1st accused be dealt with like a minor under the Children's Act is not persuasive in view of the fact that the said 1st accused is no longer a minor. It is impracticable to sentence the said 1st accused as a minor in view of the fact that any of the Borstal Institutions would not admit him as he is currently an adult. This court take note of the fact that the two accused persons are young persons who still have a long productive life ahead of them. The court also must weigh the circumstances of the accused persons as against the fact that they killed the deceased who was an innocent man and who was at the time innocently heading to the toilet to answer a call of nature. The accused persons though young men in their prime, did not have the licence to just go about marauding the village causing havoc and terror upon innocent villagers. The actions of the accused persons were not warranted since they killed an innocent villager. Their wanton killing and creating problems for the villagers within Bar Kowino Location must be discouraged. The injuries inflicted on the deceased were quite severe and did not give him a chance to survive. The deceased therefore died a very painful death. I find that the circumstances herein warrant a custodial sentence for both accused so as to enable them undergo comprehensive rehabilitation before being released back to the society. It is noted that the accused persons managed to post bail and therefore they were not in custody during the trial. Hence, the application of Section 333 (2) of the Criminal Procedure Code does not apply in the circumstances.

9. In the result, I order each of the accused persons herein FOM and VOM to serve a custodial sentence of twenty (20) years' imprisonment.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 7TH DAY OF OCTOBER 2025.

D. KEMEI

JUDGE

In the presence of:

FOM.....1st Accused

VOM.....2nd Accused

Mshindi.....for both Accused

Soita.....for Prosecution

Kimaiyo/Moureen.....Court Assistant

