



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NYERI**  
**CRIMINAL CASE NO. E012 OF 2025**

**REPUBLIC .....**

**ODPP**

**VERSUS**

**NICHOLAS JULIUS MACHARIA**

**.....ACCUSED**

**SENTENCING RULING**

1. The convict, Nicholas Julius Macharia, was charged with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. Particulars of the offence were that on 24.05.2025 at Witemere area within Nyeri Township in Nyeri County within the Republic of Kenya, he murdered T.B.K (a minor). The information dated 12.06.2025 was signed by the learned Senior Assistant Director of Public Prosecution, Solomon Naulekha. The minor's name has been anonymized to protect the minor's identity and dignity, now deceased.

2. TBK, a minor 7 years in the world woke up on Saturday of 24.5.2025 as usual. Little did she know that this was her last day. Ahead of this day, about 6 p.m., she came across the convict, a man well known to her through her mother and her grandmother - a man she looked to, and unsuspecting and unbegrudging, endured like a parent. She must have known this man, the convict, but did she, rating her innocence and age, foresee that the convict would one day lure, defile, strangle her to death, and bury her under his bed for his life secret? This is the fate that unfortunately befell TBK at the hands of the convict on the evening of 24.5.2025.
3. On 22.07.2025, the convict pleaded guilty. Ex *abundanti cautela*, the court gave the convict time to reflect and return on 6.10.2025 for plea and pretrial directions. On the said 6.10.2025, the convict pleaded not guilty. The court then fixed the matter for hearing on 22.1.2026 after the parties confirmed they were ready.
4. On the hearing date of 22.1.2026, the matter was allocated a time for hearing, where three witnesses were present. However, before we could proceed, the advocate for the convict informed the court that the client wished to plead afresh.
5. The court, in keeping with the practice in capital offences, cautioned the convict that the charge of murder is a capital offence and carries the most serious consequences under

the law. Notwithstanding the warning, the convict confirmed that he understood the implications and was ready to proceed. This warning was interpreted for him from English to Kiswahili and Kikuyu. The accused indicated in the proceedings that he understood Kiswahili and Kikuyu

6. The convict thereupon pleaded guilty to the charge. Ordinarily, upon a plea of guilty, the prosecution is expected to have the facts ready for immediate presentation to the court to enable it to satisfy itself that the plea is unequivocal. In this case, however, the facts were not ready, as the matter had been scheduled for a hearing rather than a plea. The court accordingly granted the prosecution time and directed that the facts be presented on 9.2.2026.
7. On 9.2.2026, the convict recalled he had pleaded guilty and was ready for facts. The prosecution outlined facts, which the court has as much as possible summarized, and not set out some of the most graphic details, which may be harrowing to the secondary victims. The facts narrated were:
  - a. On 24.5.2025, the minor's mother reported to her usual place of work within Nyeri County. Since it was Saturday, she took the firstborn, TBK, to work, leaving the young one at daycare. TBK played with her friends in the market and got to her mother at lunchtime. She continued playing as usual.

- b. However, at around 7 pm, the mother noted that TBK had not come home. The mother went to look for TBK at her grandmother's place, who was a vendor in the town. She confirmed that TBK was not at her grandmother's place. They mounted a search until the wee hours of the night. The following day, 25.5.2025, a missing person report was filed at Nyeri Police Station through OB/16/25/05/2025 at 0826 hours.
- c. While at the police station, one of the officers confirmed that she had seen the child playing with other children within the police lines. She informed them that the police would follow up and revert to the family. In the meantime, the family posted pictures of the child and placed them in Nyeri Town.
- d. On Monday, 25.5.2025, one of the vendors, Susan Wacuka, saw the poster for a discussion where she reported seeing the convict with the minor. She said she did not give it much thought, as it was usual for the convict to do errands for the minor's mother and grandmother. The search party went to the market and shops to check CCTV footage to see whether the child was spotted anywhere.
- e. They stumbled on one CCTV at an auto spare shop, where the convict was spotted with TBK. They alerted the Nyeri Police Station. The convict was later traced and arrested. The convict then led the police to his

house, where they observed fresh, damp soil, a spade, and a jembe.

- f. Upon unearthing the topsoil, they came across a human skull. They controlled the area while seeking an exhumation order. While at the scene, members of the public came baying for the blood of the convict and demolished the convict's house. The convict was taken to the police cells for his safety. The police later returned to the scene and exhumed the body, which they took to Nyeri Provincial Hospital. The police recorded statements and reviewed CCTV from the Auto Spare Shop, which was taken to the DCI for analysis.
- g. On 29.5.2025, the convict voluntarily made a confession before Chief Inspector Jefferson Kipyegon in the presence of the convict's sister, Wairimu Phyllis. A postmortem was conducted by Dr. Mutheu, a Pathologist. DNA samples were taken from the parents of the minor, the body of the minor, clothes, body organs, vagina, and swabs for analysis.
- h. The investigating officer took buccal swabs from the convict for analysis.
- i. The postmortem report revealed that the minor had been defiled with tears, lacerations, and hemorrhage and was suffocated before dying. The government chemist confirmed that spermatozoa from high vaginal swabs merged with the sample taken from the convict.

- j. The following exhibits were produced:
- a. Clothes - Pink trousers, white shirt, jacket, and green underwear. They were produced as exhibits 1(a) to 1(d).
  - b. Spade - exhibit 2
  - c. Folk jembe - exhibit 3
  - d. CCTV Footage - exhibit 4
  - e. CD with exhibit memo dated 2.6.2025 - exhibit 5
  - f. Accused's shoes white with black stripes top size 8 - exhibit 6.
  - g. Cybercrime report - exhibit 7(a)
  - h. Electronic certificate - exhibit 7(b)
  - i. Government Chemist Analyst Report dated 3.6.2025 - exhibit 8.
  - j. Government analyst report dated 10.8.2025 - exhibit 9.
  - k. Postmortem report dated 30.5.2025 - exhibit 10.
  - l. Confession statement recorded on 28.5.2025 - exhibit 11.
  - m. Photographs of the scene of crime - exhibit 12.
  - n. Medical assessment report for the convict - exhibit 13(a).
  - o. Certificate in relation to the photographs dated 14.11.2025 - exhibit 13b.

8. The court accorded the convict an opportunity to mitigate, both personally and through his advocate. The advocate then proceeded to mitigate on behalf of the convict. On his part, the convict relied on the mitigation by his advocate. It was submitted that the convict was remorseful and that, on the plea date of 09.02.2026, he had sent his advocate to convey his apology to the family in the presence of the investigating officer. Counsel further submitted that by ultimately entering a plea of guilty, the convict had saved the court valuable judicial time. It was contended that he had initially pleaded not guilty on 06.10.2025 after being misled by third parties.
9. The convict prayed that he be afforded counselling to address what was described as his tendency, and urged the court to exercise leniency in the circumstances.
10. The deceased's mother gave evidence related to the impact. She stated that she had undergone 7 sessions of counselling. She was unable to explain to the younger sibling when the sister, TBK will be coming back from school. She stated that they had trusted the convict, as Mama Bale had entrusted them with a lot of money. She could not forgive the convict's betrayal.

### Submissions

11. The court directed the parties to file submissions within 48 hours. Immediately, the parties left the court, and the victims appointed another advocate to act for them. There

were, therefore, three advocates watching for the victims, that is, for the National Gender and Equality Commission, the Law Society, and the family of the deceased minor.

12. The Prosecution, through submissions dated 12.2.2026, contended that the penalty for the offence of murder is death, as provided for under section 204 of the Penal Code. It was their submissions that the Supreme Court, in a binding decision of *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment)*, upheld the constitutionality of the death penalty. Further reliance was placed on Article 26(3) of the constitution.
13. The Director of Public Prosecutions submitted that there were aggravating circumstances as the victim was a minor of tender years who underwent trauma and was buried, which meant the convict intended to get away with the murder. The prosecution cited the Judiciary Sentencing Guidelines 2023, paragraphs 5.22 and 5.2.3, to support the aggravating factors. Reliance was also placed on Article 53 (1)(d) of the Constitution, based on which it was submitted that the convict subjected the minor to prohibited violence and inhumane treatment. Reliance was also placed on **Nyaga v Republic** [2025] KECA 2131 (KLR).

14. The Prosecution accordingly urged the court to impose the death penalty as the appropriate sentence in the circumstances of this case. In the alternative, and in the event that the court was not inclined to impose the death sentence, the Prosecution submitted that a custodial term of seventy (70) years would meet the ends of justice.
15. The Victims' advocate filed submissions dated 17.2.2026 and submitted that the Accused person should be sentenced to death. Reliance was placed on Section 203, read with Section 204, of the Penal Code.
16. It was submitted that the Accused was intentional in his actions, and his apology was not genuine and was declined as it would never bring back the deceased. Reliance was also placed on Murutetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] (supra).
17. They submitted that the Court has gone ahead to issue the death penalty in certain cases post the Muruatetu decision. In the case of **Republic Vs Ruth Wanjiku Kamande HCCR 93 of 2015**, the offender appealed, arguing that the court failed to consider the mitigating factors.
18. A subsequent appeal in **Ruth Wanjiku Kamande v Republic [2020] KECA 14 (KLR)**, the Court of Appeal [Kwengu, Warsame & J. Mohammed, JJ.A)] made a finding that the death sentence meted out to the appellant was

proper, regular, and legal as the trial court addressed itself to the mitigating factors. The court stated as doth:

49. Having carefully examined the evidence on record, we find the conclusion that the appellant violently, intentionally and unlawfully killed the deceased inescapable. On our own analysis, we find no fault and agree entirely with the learned Judge's finding that:

"...the evidence of the eye witness account discredits accused defence that the attack was confined to the bedroom. The evidence is clear that the deceased was on his feet in the kitchen and corridor when the accused attacked him. In addition the evidence of PW2 that the accused climbed the sink to reach for the key to the house after the deceased had already succumbed to the injuries; taken together with the evidence of PW7 and 8 that the accused blocked the deceased from reaching the kitchen to get the keys where he normally kept them in order to escape from her and the fact the accused not only stabbed the deceased 25 times all over the body, but did it intermittedly, all taken together establishes beyond any doubt that the accused had formed the intention to cause grievous harm or death to the deceased. The accused inflicted each stab, not in a frenzy as she alleged in her defence, but deliberately and intermittently. Her action was calculated to inflict pain and cause death slowly but assuredly. That is clear proof of malice, of spite, callousness and hatred. There is no doubt in my mind that the accused action was caused by malice."

51. The trial court properly considered the law and evidence and rightly rejected the appellant's plea of self-defence. Accordingly, we find that the appellant's conviction for the offence of murder was within the confines of the law.

52. In regard to the sentence meted out on the appellant, the trial court addressed its mind to the mitigating factors in line with the Supreme Court's decision in Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR. We see no reason to interfere with the same.

19. It was also submitted that severe aggravating factors existed. The attempt to conceal evidence following the commission of the crime by burying the deceased can be considered as an aggravating factor. This, with the trust the deceased and her mother and grandmother had in the accused, presented a gruesome murder that is reeling, which classifies the Accused as the worst of the offenders to whom the maximum punishment must be reserved. Reliance was placed on the Malawian case of **Rep. v. Jamuson White, Criminal Case No. 74 of 2008** (unreported), where the Court restated the position that the death penalty be reserved for the 'rarest of rare' cases -

"The offence must have been occasioned in very decrepit and gruesome circumstances, meticulously intentioned and planned and that the convict is highly likely to offend again to justify his total removal from associating with other persons even in prison. He must be a threat to society so much so that society would without thinking twice approve of his

elimination from planet earth. The motive for the killing must be extremely heinous so as to cause a deep sense of society abhorrence and condemnation that such human being does not qualify to live. I may put deliberate mass murders and serial killers in this category.

20. Part of the submissions by the National Gender and Equality Commission included the duty of the court and the aspects of sentencing. Given the centrality of sentencing as a court function, it will be subsumed in the analysis to avoid repetition.

### Analysis

21. The court is now engaged in the solemn and noble task of sentencing. It must remind itself that sentencing is an integral part of the judicial function and, while discretionary, that discretion must be exercised judiciously. The sentence imposed cannot, in any circumstances, be capricious or arbitrary. It must be guided by established legal principles, relevant statutory provisions, and applicable sentencing guidelines.

22. The guidelines in no way replace judicial discretion. They were advisory and not mandatory. They were designed to promote consistency and transparency in sentencing hearings. They were also aimed at promoting public understanding of the sentencing process. However, where there were guideline judgments, that is, decisions from the

superior courts on a sentencing principle, the subordinate courts were bound by them. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it was the duty of the prosecutor and defense counsel to inform the court of existing guideline judgments on an issue before it.

23. The court is enjoined to consider the nature and gravity of the offence, the circumstances under which it was committed, the mitigation offered, and the objectives of sentencing, including retribution, deterrence, rehabilitation, restorative justice, community protection, and denunciation. Above all, the sentence must be proportionate to the offence and the offender, so as to uphold the integrity of the justice system and maintain public confidence in the administration of justice. In the case of **Mkirani Vs Republic (Criminal Appeal E010 of 2021) [2021] KEHC 377 (KLR) (17 December 2021)** (Judgment), Mativo J. (as he then was) stated:

**Regarding the sentence, sentencing is the discretion of the trial court, but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors.**

24. This had also been discussed in the case of **Republic V Thomas Patrick Gilbert Cholmondeley [2009] KEHC 3853 (KLR)**, which was also referred to by

the victims, through the National Gender and Equality Commission, as follows:

**Sentencing is central in the administration of criminal justice. It is the process stage in the criminal procedure at which a court of law of competent jurisdiction makes an order, after convicting an offender as to the specific penalty to be meted out. The severity of a sentence depends on the circumstances of each case. Regard is usually had to the nature of the crime, the offender and the purpose of the sentence. Those are among the issues that both counsels have eloquently submitted to this court.**

25. Before proceeding, the court needs to address the victims' place in the matter. This is because they had the secondary complainant testify and also filed submissions.

26. The duty to receive submissions on the concerns of the victims is set out in section 20(1)(b) of the Victim Protection Act, which provides as follows:

*A victim has a right to submit any information for consideration to the-*

*a. —*

*b. court during plea bargaining, bail hearing and sentencing;*

*c. -*

27. The court is also aware of the remit of the victims in the trial as set out superbly by the Supreme Court [DK Maraga, CJ & P, Mk Ibrahim, SC Wanjala, N Ndungu & I Lenaola,

SCJJ] in the case of **Waswa v Republic (Petition 23 of 2019) [2020] KESC 23 (KLR) (4 September 2020)** **(Judgment)** as follows:

78. Conscious that this is a novel area of law for our criminal justice system and recognizing our mandate, under Section 3 of the Supreme Court Act as the court of final Judicial Authority, we are of the view that the following guiding principles will assist the trial Court when it is considering an application by a victim or his legal representative to participate in a trial and the manner and extent of the participation:

- a. The applicant must be a direct victim or such victim's legal representative in the case being tried by the court;
- b. the court should examine each case according to its special nature to determine if participation is appropriate, at the stage participation is applied for;
- c. The trial Judge must be satisfied that granting the victim participatory rights shall not occasion an undue delay in the proceedings;
- d. The victim's presentation should be strictly limited to "the views and concerns" of the victim in the matter granted participation;
- e. Victim participation must not be prejudicial to or inconsistent with the rights of the accused;
- f. The trial Judge may allow the victim or his legal representative to pose questions to a witness or expert who is giving evidence before the court that have not been posed by the prosecutor;
- g. The Judge has control over the right to ask questions and should ensure that neither the

victim nor the accused are not subjected to unsuitable treatment or questions that are irrelevant to the trial;

- h. The trial court should ensure that the victim or the victim's legal representative understands that prosecutorial duties remain solely with the DPP;
- i. While the victim's views and concerns may be persuasive, and no doubt in the public interest that they are acknowledged, these views and concerns are not to be equated with the public interest;
- j. The court may hold proceedings in camera where necessary to protect the privacy of the victim;
- k. While the court has a duty to consider the victim's views and concerns, the court has no obligation to follow the victim's preference of punishment.

28. The court is enjoined to consider both mitigating and aggravating factors in determining an appropriate sentence. It must carefully weigh all the circumstances that may either lessen or enhance the severity of the punishment. The circumstances under which the offence was committed are particularly decisive, for they provide the context within which the court assesses the gravity of the conduct and the degree of culpability. It is those circumstances that ultimately guide the court in arriving at a sentence that is just, proportionate, and consistent with the objectives of sentencing. The Revised Sentencing Policy Guidelines, 2023, provide as follows regarding both harm and culpability:

5.1.7 The circumstances of the offence may justify either reducing or increasing the sentence. Here are some factors to consider:

- Was the offence motivated by or did it demonstrate hostility based on race, gender, sex, pregnancy, marital status, health status, ethnicity, age, disability, religion, conscience, belief, culture, dress, language, or birth.
- Was the offence planned or premeditated?
- The length of time over which the offending behaviour took place.
- Did the offence require a high level of planning, organisation, sophistication, or professionalism?
- Did the crime involve sustained or prolonged offending behaviour such as repeated attacks upon the same victim or a spate of robberies?
- Did the convict intend to cause a more severe consequence than what actually occurred?
- Was the offence committed whilst under the influence of alcohol or drugs which were consumed voluntarily and deliberately so as to effect the commission

of the offence (i.e., to give the convict 'Dutch courage')?

- Was the offence intended to interfere with or obstruct the course of justice?
- Was the offence committed by a group rather than an individual?
- Did the convict use or threaten to use a weapon? The more dangerous the weapon, the higher the culpability.
  - Did the offence involve a flagrant and excessive use of violence or damage to a person or property in the execution of the offence?
  - Was the offence committed for financial gain? Examples might include a person killed in order to make an insurance claim.
  - Was there a high level of profit - realised or anticipated - from the commission of the offence?
  - Did the offence involve an abuse of trust or position of authority?
  - Did the offence involve restraint, detention, inhuman treatment, or other degradation of the victim?
  - Was the victim vulnerable, e.g., very young, elderly, or disabled?

- Was the victim providing a public service or performing a public duty at the time of the offence?
- Did the offence cross international borders?
- Was a witness placed in the witness protection programme because of dangers posed to them by the convict or their agents?
- Was there an attempt to dispose of or conceal evidence following the commission of the crime or did the convict attempt to blame others?
- Was the offence committed whilst the convict was on bail?
- Was the offence committed in the presence of others (especially children)?
- Was the offence committed while the convict was subject to court orders or whilst the convict was in custody?
- Does the convict have relevant previous convictions e.g., of a similar nature to the offence committed?
- Did the convict intend to harm more than one victim?

29. The other main issue to consider is the victim impact statement. The revised Judiciary Sentencing Guidelines,

2023 further provide as follows regarding a victim impact statement:

A victim impact statement is an obvious source of information for determining the level of harm, but it may not always be available to the court - not all victims may wish to make such a statement and they should not be forced to do so. The following factors may be considered in determining the harm caused by the offence:

- Were multiple victims involved?
- Were other people placed at risk by the convict's conduct?
- Where injury was inflicted, how serious were the injuries - both physical and psychological - to the victim?
- How did the offence affect the victim? Consider the impact upon the victim's employment prospects, mobility, or ability to continue their lifestyle as a result of the offence, and any medical or psychological prognoses.
- Where damage occurred, how serious was the damage?
- Did the victim suffer losses as a direct result of the offence? Consider both financial and less tangible losses, such as the loss of items of sentimental value.

- Is the kind of offence prevalent in the victim's community?
- Did the offence have a harmful impact on the broader community, or is the type of offence prevalent in the community?

5.1.10 The absence or presence of these factors will either increase or reduce the level of harm as assessed by the court. The above list is not exhaustive, and different offences will have different types of harm that must be considered. The court must judge each case separately on its own facts.

30. The victim gave a victim impact statement. This is provided under section 12 of the Victim Protection Act as follows:

(1) A victim of a criminal offence may make a victim impact statement to the court sentencing the person convicted of the offence, in accordance with section 329C of the Criminal Procedure Code (Cap. 75) and that statement may be considered by the court in determining the sentence of the offender.

(2) If a victim expresses a wish to make a victim impact statement, a prosecuting agency shall refer the victim to an appropriate victims' services agency for assistance in preparing the victim impact statement.

(3)A victim has a right to present a victim impact statement in all cases where the court is to consider victim protection and welfare.

(4)The statement referred to under subsection (1) shall include information on the impact of the offence on the victim's life and any concerns the victim may have about their safety.

31. Section 329C of the Criminal Procedure Code (Cap. 75), which is referred to above, provides that:

*(1) The giving of a victim impact statement is not mandatory.*

*(2) A victim impact statement shall not be received or considered by a court if the victim or any of the victims to whom the statement relates objects to the statement being given to the court.*

*(3) The absence of a victim impact statement shall not give rise to any inference that an offence had little or no impact on a victim.*

32. Pursuant to section 12(3) of the Victim Protection Act, the victim is entitled to be heard. The mother chose to speak directly in court. She could not be denied her right to be heard. Her evidence was therefore solely on the impact on life. It is one thing the court cannot take away from her. To tell the court the impact the defilement and killing of her 7-

year-old firstborn has had on her, her family, and the community.

33. The minor's mother is still having nightmares, even after 7 counselling sessions. The impact on the community, as shown from the PACS report, is clear that the effect on both the life and the mental status of the secondary victim is shattered for good. The close-knit market community was affected and shuttered in a way that will prevent it from recovering.
34. In determining the sentence for this particular case, the court found itself more in finding the factors in the sentence that were not applicable than those that were applicable. The court notes that, in reaching an appropriate sentence, it is guided by a range of factors relating to both the offender's culpability and the harm caused by the offence. One of the factors was that this was sexual and violence based on the age of the minor, gender, and sex of the victim.
35. The offence was planned or premeditated, carried out meticulously, and the minor was lured by a trusted person to her death. She was violently defiled and was buried. Were it not for the intervention of a hawk-eyed police officer, the offence would not have been discovered. The evidence shows that the offence required a high degree of planning, though it was not particularly sophisticated.

36. The offence was committed by the convict by first devouring the minor, rapturing her, and leading to severe hemorrhage, and then pouring copious amounts of spermatozoa in the raptured vagina of the minor. He then proceeded to strangle the minor by smothering her. The minor died of asphyxiation due to suffocation under the excruciating pain, as described by the convict himself. The pain the minor suffered cannot be fathomable; it is beyond human understanding and capacity. Describing the convict as a beast will be an understatement.

37. The offence was aggravated by the unnecessary use of sexual violence. The convict abused the position of trust. He did not exercise any restraint. The treatment the minor received is inhuman and unusual treatment. The 7-year-old victim was degraded by not only being violently defiled but also by being buried in a shallow grave without a coffin and a decent burial inside a house to remain as an unmarked grave.

38. The court considers the vulnerability of the victim, who was only 7 years old, and who was defiled and strangled, to be a key determinant of the appropriate sentence. The court is enjoined by Article 53(2) to have regard to the best interests of a child. As a fact, children are protected from all forms of inhuman and degrading punishments under Article 53(1)(d) of the Constitution. The said article provides as follows:

- (1) Every child has the right—
- (a) ..
  - (b) ...
  - (c) ...
  - (d) to be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment, and hazardous or exploitative labour;

39. By meting out cruel and inhuman treatment of the minor, the convict voluntarily stepped outside the constitutional protection of his own life. It is noted that femicide is on the rise in the country because the offenders think it is safer to hide their sexual crime in murder of victims. A sentence that is commensurate with the harm and culpability of the convict must be meted out.

40. It must not be forgotten that the convict attempted to conceal or dispose of evidence by burying the minor in the most unlikely place, his own house. He was the only one who had access to the house. This concealment could have been complete had fate not conspired against him, that is, CCTV and PC(w) Atieno.

41. Lastly, the victim's impact in this matter was of great significance. The primary victim was the deceased. The secondary victims were the grandparents, parents, and the surviving minor sibling, the market community, all of whom have been left in a state of permanent fear and emotional trauma. The court heard directly from one of the secondary

victims, the mother, whose testimony was heartfelt and deeply distressing.

42. The probation report is dated and filed in court on 18.2.2026. All the interviewees recommended a severe sentence or justice for the family of the deceased. This included members of the Accused's family and the community. The probation officer did not find the convict fit for a noncustodial sentence.

43. Although the convict indicated that he had previously apologized, he did not take the opportunity to offer any apology in court while the victim was present. The court carefully observed the convict's demeanor throughout the proceedings. While the victim was pouring her heart out and visibly breaking down, the convict appeared either blank or was smiling. He exhibited no remorse whatsoever. He was relishing the moment with some sense of Déjà vu.

44. Instead, the convict conducted himself as though he were entitled to a lenient sentence, showing no regard for the pain and suffering of the victims. His demeanor suggested contentment and a disturbing lack of empathy, giving the clear impression that he was unrepentant and indifferent to the gravity of his actions.

45. From the foregoing, it is clear that the commission of the offence was in furtherance of gender-based and sexual violence. The 7-year-old was defiled, hemorrhaged, and torn apart, with the consequence that she must have undergone

excruciating pain, which is indescribable. Apart from being torn and shattering her vagina into smithereens, the convict proceeded then to suffocate her to death. A reading of the post-mortem report reads like a horror story. The 35-year-old man, a friend of the family and entrusted with the child, to gain her trust, went ahead to hide evidence by digging a shallow grave in the house. It was only PC Atieno, who definitely deserves a promotion, who recalled that the convict had been with the minor the previous day.

46. By pure coincidence, Jader Autospaes had installed CCTV, which led to the convict being placed in the *locus in quo*. The convict agreed to help the police only after it became clear that the noose was tightening around him.

47. The convict committed the heinous act after defiling a minor aged 7 years. He did not respect the sanctity of human life, especially of the vulnerable children. The court notes the intersectionality of gender, poverty, and the aspect of being a child as the driving force behind the offence.

48. The underlying offence of defilement attracts a mandatory life sentence. See **Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR)**. Therefore, if the court sentences the convict to any sentence below a life sentence or equal to a life sentence, the death of TBK will be in vain. This does not mean that the court is

sentencing for defilement. This is a separate offence that the state may decide to charge, as there is evidence of it in the record. If the court gives a life sentence, it means that it will have no practical difference between defiling the minor, then killing her or and defiling and leaving her alive. A life sentence will not be a deterrent enough.

49. The convict combined 4 aggravating factors, leaving the court with the clearest choice. The first aggravating factor is that the killing involved a child and a child of tender years at that. Secondly, the same involved breach of trust. The convict came into contact with the child because the parents trusted him. Thirdly, it involved gender-based violence, and finally, it involved a sexual offence. To crown it all, the manner of killing was macabre and leaves a bad taste in the mouth.

50. The manner of killing was, in the most macabre sense, the sexual violence was disproportionate to the age of the victim. The vagina ligaments were violently torn by penile entry with discharge of copious amounts of spermatozoa, showing a long and endurant exercise where mercy and compassion were not felt. As was stated by the Court of Appeal in case of **Nyaga v Republic [supra]**, where the Court of Appeal [W Karanja, S ole Kantai & A Ali-Aroni, JJA] held as follows:

**We agree with Mabeya, J. that the death sentence was well deserved. A father who misleads his wife to surrender their 2½ year son so that he can butcher him and proceeds to do so by strangling and**

**inflicting fractures of the skull and other fractures on the helpless child is a beast undeserving of living with ordinary members of the society. He does not deserve any mercy.**

51. The manner of killing conveys a deeply disturbing account, revealing a profound disregard for human life and dignity.

52. The recorded confession and conduct displayed reflect a disturbing disposition and suggest a troubling readiness to repeat similar actions if afforded the opportunity. That is a matter the court cannot ignore when assessing both culpability and the need to deter and protect the public. In his confession, the convict sought to attribute his actions to the devil. The court, however, is unable to discern any role played by the devil in the commission of the offence. Criminal responsibility rests with the offender. The law does not recognize the shifting of blame to supernatural forces as a mitigating factor. In the circumstances of this case, the responsibility lies squarely and entirely with the convict. The devil is innocent in that respect, as he was not involved.

53. The convict demonstrated conduct that reveals a deeply depraved disposition. There is no evidence that he was suffering from any mental incapacity; on the contrary, he was found to be mentally fit and fully aware of his actions. Despite this, he returned to and continued residing in the same house, fully cognizant that he had transformed it into

a place of death and a cemetery. Such conduct underscores a disturbing level of moral depravity and aggravates the gravity of the offence.

54. The tone and content of the confession project an unsettling detachment, evincing traits consistent with cruelty and self-absorption. Overall, it presents a portrait of an individual whose actions and expressed sentiments demonstrate a marked absence of empathy with narcissistic tendencies.

55. The medical evidence did not create any better situation. The post-mortem report revealed multiple injuries indicative of significant trauma. There was a lesion on the left maxillary region of the face, as well as abrasions within both the left and right orbital areas. The deceased also sustained multiple abrasions to the oral mucosa, affecting the lower lip, the gum, and the left lateral aspect of the mouth. In addition, the examination disclosed genital injuries, including a broken hymen with a vaginal opening measuring approximately 2.3 by 2 centimetres, together with a vaginal tear and laceration accompanied by hemorrhage.

56. In mitigation, the convict submitted that by pleading guilty as he did, he had saved the court's time and resources. He also expressed remorse and tendered an apology through counsel. The court afforded him an opportunity to address the minor's mother directly and to convey his remorse personally. However, the apology,

delivered through the advocate, appeared perfunctory and devoid of genuine contrition.

57. While the saving of judicial time is a relevant consideration and is to be encouraged, the court exists to hear and determine matters properly placed before it. The prayer by the convict that the court should take into account the time saved is therefore a legitimate submission. However, the saving of judicial time is not, in itself, a decisive factor in sentencing. The mere fact that proceedings were shortened, though welcome and beneficial to the administration of justice, cannot override the gravity of the offence, the circumstances under which it was committed, and the broader objectives of sentencing. It remains but one factor among many to be weighed in the exercise of the court's discretion. In the case of **Bernard Kimani Gacheru V Republic [2002] KECA 94 (KLR)**, the Court of Appeal [Chunga, C.J, Shah & Bosire, JJ.A] dealt with sentencing as follows:

Ogola s/o Owoura's case has been accepted and followed by this Court and the High Court on matters of sentence for many years. What was stated there still remains good law to date.

For example, in the High Court case of **WANJEMA VS R. 1971 E.A 493**, more particularly, on page 494 letters (D) to (E) this is what that court said:

"A sentence must in the end, however, depend upon the facts of its own particular case. In the circumstances with which we are concerned, a

custodial order was appropriately made. But that which was made cannot possibly be allowed to stand.

An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case. The instant sentence merits this court's interference with it on each of these grounds. No account was taken as it should have been, of the fact that the appellant pleaded guilty: Skone (1967), 51 Cr. App. R. 165 and Godfrey (1967), 51 Cr. App. R. 449 (This admits of no doubt because the magistrate awarded the maximum sentence to this first offender; which of itself is unusual.) Matter extraneous to the trial was acted upon for the magistrate bore in mind that he had "issued a warning only last week that dangerous drivers will be dealt with severely by the court."

In the appeal before us, the learned trial Judge made comprehensive notes on sentence. He took into account everything that was urged before him by the appellant's advocate. He did not disregard any material factor, nor did he take into account any matter immaterial. Similarly, he did not act on any wrong principle. The very same matters that the appellant urged before us were urged before the learned trial Judge and he took all of them into account.

58. It is upon consideration of the applicable principles, and not solely on the saving of judicial time, that an appropriate sentence must be determined in a judicious manner. Some of the factors can be summarized as follows:

- a. The gravity of the offence;
- b. The manner in which the offence was committed;
- c. The degree of participation of the offender;
- d. The offender's conduct before, during and after the offence;
- e. The impact of the offence on the victim and the community;
- f. The offender's personal circumstances, including age and antecedents;
- g. The possibility of reform and social re-adaptation of the offender;
- h. The need for deterrence, rehabilitation, retribution and community protection;
- i. Culpability and harm, and
- j. Relevant factor in the interests of justice.

59. These factors are set out in clause 4.5 of the Judiciary Sentencing Guidelines 2023, as follows:

4.5.1 In determining the appropriate sentence, courts must assess a number of issues, starting with the degree of both culpability and harm.

4.5.2 The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or, where a plea is entered, through the prosecution's

summary of facts. Aggravating and mitigating features surrounding the offence may be advanced by the prosecution and the accused (or his/her representative).

4.5.3 Where an offence is committed by more than one offender, a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence.

4.5.4 The assessment of harm may be based on testimony, or the summary of facts presented and also by a victim impact statement, where that has been obtained.

4.5.5 Mitigating factors refer to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender.

4.5.6 Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.

4.5.7 A list of aggravating and mitigating circumstances – which is not exhaustive – is contained within the GATS along with those specific to murder, manslaughter, and wildlife cases, in Part V.

4.5.8 Having heard all relevant submissions and considered any reports advanced by either prosecution or defence, or the probation or children's officer (where applicable), and any victim impact statement, the court should:

- i. Decide as to whether a custodial or a non-custodial sentence should be imposed in line with these guidelines.

- ii. In the case of sexual offences, before the terms of a custodial sentence are determined, the court must have recourse to relevant probation reports as required in sections 39 (2) and (4) of the Sexual Offences Act No.3 of 2006 that contain provisions about post-penal supervision of dangerous sexual offenders.

60. In the circumstances of this case, the mitigation advanced was insufficient to outweigh the gravity of the offence, the high degree of culpability, and the profound harm occasioned. It did not displace the court's assessment of maximum culpability and maximum harm, and therefore could not justify a lesser sentence.

61. There is a question whether the court should give a life sentence or a death sentence. Life sentence, on the one hand, was discussed in the case of Republic v Manyeso [2025] KESC 16 (KLR), the supreme court [PM Mwilu, DCJ & VP, MK Ibrahim, SC Wanjala, N Ndungu & I Lenaola, SCJJ] addressed life sentence as follows:

Paragraphs 11 to 14 of the Muruatetu directions are very clear that the decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the Penal Code, Sexual Offences Act, or any other statute. Further, that the Muruatetu case cannot be said to be the authority for stating that all provisions of the law prescribing minimum sentences are inconsistent with the Constitution. Paragraphs 93 to 97 of the Muruatetu decision are also explicit that it is not for the court to define what constitutes a life sentence. While we appreciated

that a life sentence could mean a certain minimum or maximum time to be set by a judicial officer, this court made the following recommendations to the Attorney General to develop legislation on what constitutes a life sentence:

“94. We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in Jackson Wangui, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.

95. We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.

96. We therefore recommend that the Attorney General and Parliament commence an enquiry and develop legislation on the definition of ‘what constitutes a life sentence’; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or

provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing.

62. The Supreme Court found that the death sentence is lawful. However, it outlawed the mandatory nature of the sentence. In *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2017] KESC 2 (KLR), the Supreme Court [DK Maraga, CJ & P, PM Mwilu, DCJ & VP, JB Ojwang, SC Wanjala, N Ndungu & I Lenaola, SCJJ] held as follows:

48. Section 204 of the Penal Code deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under articles 25 of the Constitution; an absolute right.

49. With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to

the blind infliction of the penalty of death thereby dehumanizing them.

50. We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence, thereby treating them as an undifferentiated mass, violates their right to dignity.

63. In concluding the debate, the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [supra], stated as follows:

It is to be noted that the mandatory nature of the death sentence provided for under section 204 of the Penal Code long predates any international agreements for the protection of Human Rights. Notably too, as contended by counsel for the petitioners, the respondents and the five amici curiae, it is indeed a colonial relic that has no place in Kenya today. Whereas it is the duty of Parliament to make laws, it is the duty of this court to evaluate, without fear or favour, whether the laws passed by Parliament contravene the Constitution.

68. Once again we agree and affirm the statement by the Court of Appeal in *Mutiso* at paragraph 14

that: As will be seen shortly, and indeed it is axiomatic, human society is constantly evolving and therefore the law, which all civilized societies must live under, must evolve in tandem. A law that is caught up in a time warp would soon find itself irrelevant and would be swept into the dustbins of history. (Emphasis is ours).

69. Consequently, we find that section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.

64. What then is the most appropriate sentence to mete out? Each mitigating factor has been considered as above. The mitigating circumstances have not lessened the need for the death penalty. The fact that the convict pleaded guilty did not diminish the utter heinousness of the offence. Punishment in criminal law depicts how society expresses its denunciation of wrongdoing. Punishment goes as deep into society as to maintain respect for the rule of law. It is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for such grave offences.

65. The convict chose a path that has now led to destruction. He had an utter disregard for human life. The convict decided to steal the innocence of TBK, destroy both her body and the lives of the secondary victims, and kill her.

The convict must surely reap what he sowed to please his flesh and cause the death of a child. In that regard, choices have consequences. The ramification of the actions of the convict were to bring him within the exception in article 26(3) of the Constitution, which provides as follows:

*(3) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.*

66. In that regard, section 204 of the penal code and section 69 of the Prisons Act have provided for the lawful taking of human life. This is true for the convict who forfeited his life engaging in reckless and wanton destruction of life and cheapening life to sexual and momentary gratification with glee and no remorse.

67. Section 203 of the penal code provides for the offence of murder as follows:

*Any person who of malice aforethought, causes death of another person by an unlawful act or omission is guilty of murder.*

68. The convict Section 204 of the penal code provides as follows:

*Any person convicted of murder shall be sentenced to death.*

69. The law provides the manner in which the sentence, if imposed, is to be carried out. Section 69 of the Prisons

Act sets out the procedure and legal framework governing the execution of such a sentence, ensuring that it is carried out strictly in accordance with the prescribed statutory provisions. It states as follows:

**When any person is sentenced to death, he shall be hanged by the neck until he is dead, and the sentence shall be carried out in such manner as the Commissioner shall direct.**

70. There has been no mitigating factor demonstrated that would remove the death penalty from consideration. The court has carefully weighed the mitigation tendered against the disclosed aggravating circumstances. The offence was committed against a seven-year-old child, in circumstances involving a grave breach of trust reposed in the convict as a friend of the family. The conduct was abhorrent, despicable, and marked by extreme violence.

71. In view of the totality of the circumstances, and having considered the applicable law and the objectives of sentencing, the court finds that the ultimate penalty remains available and appropriate. The sentence must reflect the gravity of the offence, denounce the conduct in the strongest terms, protect society, and serve as a deterrent to like-minded offenders.

72. Accordingly, the convict is hereby sentenced to suffer death in accordance with the law.

## ORDERS

73. The court makes the following orders:

- a) The convict was convicted on his own plea of guilty for the offence of murder contrary to section 203 as read with section 204 of the Penal Code.
- b) The convict is hereby sentenced to DEATH.
- c) The death warrant be transmitted to the competent authority for signing and carrying out the sentence, after a 30-day stay of execution.
- d) Right of appeal 14 days, explained.
- e) The file is closed.

**DELIVERED, DATED** and **SIGNED** at **NYERI** on this **19<sup>th</sup>** day of **February, 2026**. Ruling delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

**In the presence of: -**

Ms. Kaniu for the State

Mr. Mahugu Mbarire for Accused

Ms. Rasowo for National Gender & Equality Commission

Mr. Mwaniki Watching brief for LSK

Court Assistant – Michael