



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL CASE NO. 30 OF 2010

REPUBLICPROSECUTOR

VERSUS

DANIEL KIMANTHI KIIO ACCUSED

RULING

1. In a Judgment delivered on 9th November, 2016 this court found the accused, Daniel Kimanthi Kiio , guilty of the murder of Abdulrahman Rabi on the 19th day of October, 2010, and convicted him of the offence of murder contrary to section 203 as read with Section 204 of the Penal Code, [Caps 63, Laws of Kenya].
2. Upon conviction, I called for a Probation Report on the antecedents and family background of the accused. The Probation Report is dated 22nd November, 2016 and was filed in court on the same day. The Report is comprehensive. The accused is a first offender, and that prior to the incident he was known to be a quiet person who helped his neighbours and donated benches from his carpentry shop to the local community church whenever there was a meeting.
3. The murder of the deceased was the only known incident against the accused. He has been in custody since his arrest on 19th October, 2010. Murder is an offence which carries the death penalty under Section 204 of the Penal Code. The accused should therefore suffer the death penalty. Several factors, **firstly**, of circumstance and **secondly** of the Constitution militate against the imposition of the death penalty.
4. On the question of circumstances, H.E. President Uhuru Kenyatta the President and Commander in Chief of the Armed Forces of Kenya on the occasion of **Mashujaa Day**, 20th October, 2016 commuted the death penalty imposed on all death row convicts.
5. **Secondly** on the legal and Constitutional front, I acknowledge that Section 204 of the Penal Code (which provides for the death penalty) is still part of our law; and Article 26(3) of the Constitution suggests that a person's life may be taken away **intentionally** if authorized by the Constitution, or other written law.
6. Abortion which is taking away of life is prohibited under Article 26(4), except where in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the

mother is in danger, or if permitted by any other written law.

7. I hold the view that what Article 26(1) guarantees is the right to life – “**Every persons has the right to life**”. Article 20, on the application of the Bill of Rights states that the Bill of Rights applies to all and binds all state organs and all persons (Article 20 (1)). And Article 20 (3) requires the court in applying the Bill of Rights to -

(a) Develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) Adopt the interpretation that most favours the enforcement of a right or fundamental freedom;

8. And Article 20(4) also enjoins a court, tribunal or other authority in interpreting the Bill of Rights to promote –

(a) the values that underlie an open and democratic society based on human dignity, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

9. In my humble opinion, death is the ultimate destiny of life, and the spirit, purport and object of the Bill of Rights is to protect life and not to take it away “**intentionally**”. The courts are enjoined to give effect to the rights and not take them away.

10. In the circumstances, I would not sentence the accused to death, I would and hereby do sentence him to twenty five (25) years in prison taking into account the years he spent in prison remand.

11. There shall be an order accordingly.

Dated, Signed and Delivered at Mombasa this 30th day of November, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Ayodo for State

Mr. Igunza for Accused

Mr. Kaunda Court Assistant