



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

CRIMINAL CASE NO. 2 OF 2013

REPUBLIC.....PROSECUTOR

VERSUS

ZACHARIA OMARA HIRIBAE.....ACCUSED

SENTENCE

1. The accused herein is convicted of the offence of murder. After his conviction both counsel for the accused person Mr. Nyaga and Mr. Okemwa for the Prosecution made submissions on sentence.
2. Mr. Nyaga for the accused person was the first to make his submissions and stated that the accused is a first offender and is remorseful. He also stated that this is the first time that the accused was charged in court with a criminal offence, and that at the time of his arrest, the accused was a responsible person in the society as he was a School Headmaster.
3. Mr. Nyaga went further to state that from the jurisprudence expounded by the decision of the Supreme Court in the recent case of **Francis Karioko Muruatetu & Another vs Republic – Petition No. 16 of 2015 (Muruatetu case)** was that it was now the law that the death sentence, though constitutional was not mandatory. Counsel thus urged this court to consider a sentence other than death as during proceedings at the trial, it had come out clearly that the accused suffered some form of mental illness. He stated that the accused raised the issue of his mental status during the prosecution case, and in addition a doctor was called during defence to testify on the mental state of the accused.
4. Counsel thus urged this court to consider imposing a non-custodial sentence or a custodial sentence which took into account his long period of stay in custody. Counsel suggested that the court could order for a Victim Impact Assessment Report for consideration in sentencing the accused person.
5. In response, Mr. Okemwa for the State stated that they did not have any previous criminal record of the accused as the police from Hola Police Station had informed him on the phone that they had no record of any previous criminal activity of the accused.
6. With regard to the constitutionality of section 204 of the Penal Code, which imposed a mandatory death sentence for the offence of murder, counsel submitted that the Supreme Court had confirmed that the death sentence though constitutional, its mandatory nature was unconstitutional and gave trial courts a discretion to consider handing down appropriate sentences based on circumstances of each case.
7. He further stated that he had discussions with the defence counsel the previous day, and both felt that this was a unique case in which the death penalty was not appropriate since the accused had been in and out of hospital a number of times and the court also in the judgment had made a finding that the accused might have been operating under stress.
8. Mr. Okemwa also underscored the fact that in the **Muruatetu case**, the Supreme Court stated that sentencing being an integral part of the proceedings, the prosecution was required to assist the court in sentencing. He stated that in his view, the court should consider the presence or absence of premeditation, delay in disposal of the case, and the mental status of the convict and his age. With regard to victim impact report, he stated that the victim was a member of the family of the accused as she was his wife. He stated also that he had met the brothers of the deceased with Mr. Nyaga and they did not have strong views about the sentence and said that the children of the accused were currently taken care of by brothers. Counsel urged this court to take into account the provisions of section 24 of the Penal Code which gives discretion to a court in determining sentence.
9. Indeed, section 204 of the Penal Code provides that the punishment for murder is a mandatory sentence of death. That provision of the law has existed for a very long time. The Constitution of Kenya 2010 did not outlaw the death penalty. However the Supreme Court, in case of **Muruatetu** stated that though the death penalty was constitutional, its mandatory nature was unconstitutional. The Supreme Court went ahead to say that trial courts have a discretion to either pronounce the death sentence or to pronounce other appropriate sentences, depending

on the circumstances of each case. In this particular case, both counsels for the defence and counsel for the prosecution have urged me to pronounce a sentence other than the death sentence. None of them has suggested duration of the sentence.

10. From the decision of the Supreme Court in the **Muruatetu** case, this court has discretion to pronounce a sentence other than the statutory sentence of death. The accused is a first offender. The deceased was his wife. The evidence is that he hit her on the head with a pestle causing instant death. The reason or reasons which led to such an act are not known, as the accused himself did not give any explanation. He denied committing the offence in a very short statement, which he was entitled to. I have seen the accused in court, and it is true he has been in and out of hospital a number of times, the allegations being that he has had a mental illness, but which the court found did not amount to insanity. He is a teacher and the child who was born by the deceased has been left without any parent to take care of him or her.

11. This court also noted from the demeanor of the accused in court, and his being in and out of hospital a number of times, that he could have been depressed. He has been in custody since 2013 though he was given bond of Kshs.300,000/= with one surety on 16th November 2017 and was so released for some months before judgment was delivered.

12. An innocent life has however been lost, I have also not been given any formal Victims Impact Report. Looking at the circumstances of the case however, my view is that the death penalty is not the most appropriate sentence as both the prosecution and the defence also agree on that.

13. A death has occurred. It was a painful death. I sentence the accused to serve twenty (20) years imprisonment. He has a right of appeal against both conviction and sentence within fourteen days.

Dated and delivered at Garissa this 1st day of November, 2018.

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George Dulu

JUDGE