



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**HIGH COURT CRIMINAL CASE NO 81 OF 2011**

**REPUBLIC .....PROSECUTOR**

**VERSUS**

**JOSIAH NYANGARI ORERO .....ACCUSED**

**SENTENCE**

1. The accused **JOSIAH NYANGARI ORERO** was charged with the offence of murder contrary to **Section 203** as read with **Section 204** of the **Penal Code** the particulars of which was that on 17<sup>th</sup> day of May, 2004 at Park Road Nairobi within the Nairobi Area murdered **ELIZABETH MUSEMBI**.
2. His trial in this case commenced on 14/1/2011 before Mwilu J (as she then was) when he took plea and on 7/8/2013 his full trial began before Korir J, when Miss Ikol for the State informed the Judge that the matter was for retrial.
3. From the records it is clear that the accused was initially charged in **High Court Criminal Case No. 95 of 2004 at Nairobi** where Ojwang J (as he then was) found the same guilty of murder, convicted and sentenced him to death as by law provided. The Accused thereafter lodged an Appeal in the Court of Appeal in **CRIMINAL APPEAL NO. 258 OF 2008 Court of Appeal at Nairobi** which appeal was allowed on the ground that his trial proceeds without the aid of assessors and ordered a retrial leading to the present proceedings.
4. On 30<sup>th</sup> January, 2017 Justice Korir found the accused guilty and convicted him of murder contrary to **Section 203** of the **Penal Code** and on 14/2/2017 the file was placed before me for mitigation and sentence under the provisions of **Section 201 (2)** as read with **Section 200 (2)** of the Criminal Procedure Code.

**MITIGATION**

5. It was submitted that the accused had been in custody since 2004 and that he is the only surviving child of a single father aged 82 years who is sickly and dependent on well wishers. He stated that he was remorseful of what happened and requested for non-custodial sentence to enable him start his life a fresh, to enable him work for his provision and that of his father. The State submitted that they did not have any previous records on the accused and urged the court to treat him as a first offender. It was submitted on behalf of the victim's family that there was only one sentence provided for in law.

**PRE-SENTENCE REPORT**

6. The report confirmed that both accused's elderly peasant parents are alive and reside in Kisii County while one of his brother is a businessman in Uganda contrary to what the accused said in mitigation. At the time of his arrest the accused was allegedly a second year student in Public Administration at Egerton University. It was indicated that the mother and the sister of the Accused alleged that occasionally the accused would engage in strange behavior as running in the homestead naked and devouring grass but this could subside upon treatment though he was an active member of church with good morals.

7. The accused stated that the deceased was one of his many friends who would occasionally visit him at Banana where he was staying with his sister and he could visit them at Baba Dogo where his brother also resided. He stated that he had suffered from cerebral malaria at the time as a result of which he was involved in a road accident. He denied being involved in suicidal attempt.

8. On the victim impact it was stated that the deceased was aged 22 years at the time of her death a final year student at Nairobi Technical Institute a role model to her younger siblings and that as a result of her death the health of both parents was compromised and that they had to sell many family assets to meet the medical and legal costs. The father of the deceased indicated that he first met the accused at his brother's home where he was warned against harassing the deceased and that the accused seemed rude and arrogant. Despite the warning the same vowed to kill the deceased when the same ended the love affair between them. The family therefore sought custodial sentence since they felt that the accused harbours bitterness towards them and there are higher chances of the same hurting them if released from custody.

9. **Section 204** of the Penal Code provides that any person convicted of murder shall be sentenced to death. There has been jurisprudential debate as to whether this makes it mandatory for the court to pass only death sentence upon conviction for the offence of murder. See **Republic v Rodgers Kutosi alias Paul Kutosi Rodgers High Court at Nairobi Criminal Case No. 50 of 2014** wherein this court stated as follows:-

***“5. Taking into account the provisions of Article 2(5) and (6) of Constitution of Kenya 2010 and Article 21(4) which provides that the State shall enact and implement legislations to fulfill its international obligation in respect of human rights and fundamental freedoms and while awaiting the outcome of THE SUPREME COURT OF KENYA AT NAIROBI PETITION NO. 15 consolidated with No. 16 of 2015 FRANCIS KARIUKI MURUATETU & ANOTHER v REPUBLIC and taking into account the provisions of Article 165(3)(a) of the Constitution, I am of the view that Mutiso's case (supra) set the right trend (in determining an appropriate sentence including death based on the facts of each case.)***

10. In this matter and without the benefit of the trial court, these circumstances are set out in the judgment:- The accused and the deceased were in some romantic relationship which was put to a stop by either the father of the deceased or the deceased herself upon which the accused vowed to kill both himself and the deceased and the same succeeded in killing the deceased but his attempt to kill himself did not succeed as both the poisoning and car accident did not kill him in his words **“When diplomacy fails we use alternative ways.”**

11. What comes out of the proceedings is a “Juliet and Romeo” affairs which ended up in the death of the deceased instead of the two of them living happy thereafter. The issue that the court has to deal with is whether the accused person, in the circumstances of this case is someone who should be given the mandatory sentence provided for in law or whether this is a situation where **“mercy ought to kiss justice?”**

12. The father of the deceased submitted that the death was as a result of the disagreement between the accused and the deceased when the same ended their love affair. The deceased was aged 22 years while the accused was aged 23 years and it seems to me that both were not properly guided on how to deal with sexual emotions and therefore could not properly work in this department of the emotions balancing it with the department of intellect and the department of the will, which to my mind is what led to the death of the deceased.

13. I have taken into account the fact that the accused has been subjected to two successful trials before the High court and one trial before the Court of Appeal during the period of time the same has been in custody for almost 14 (fourteen) years. Whereas no man has any right over the life of any other human being whether a girlfriend or a wife, the deceased had all the rights to end any relationship whether romantic or not with the accused, whether influenced by her parents or not and to continue living to enjoy her freedom in safety.

14. I have taken note of the conduct of the accused person herein, this is a young man who stabs the deceased with a kitchen knife in the early morning hours, taken what is alleged to be poison, and runs to Kiambu Town where he throws himself in front of a moving motor vehicle while in his pocket he carries two photos of the deceased and what has been described as a suicide note in the evidence before the trial court which the court found to be a confessionary statement.

15. To my mind, both the accused and the deceased were victims of faulty emotional development who should have benefited from the counseling and guidance of the accused's elder brother and the father of the deceased to enable the accused see life as being bigger than being emotionally intertwined with the deceased.

16. I am therefore of the considered view and hold that the accused has been adequately punished and the family of the deceased vindicated during the fourteen (14) years the accused has been in custody but to act as a deterrence to the younger generation who are unable to control their sexual emotions and to solve their romantic issue in a dignified manner without resorting to violence and death, the accused be and is hereby **sentenced to six (6) years of which three (3) shall be imprisonment while the last three (3) under probation** to be further counseled and guided into being an emotionally productive member of society and it is so ordered.

17. The accused has 14 days right of appeal on both judgment and sentence.

DATED, SIGNED and DELIVERED at Nairobi this 6<sup>th</sup> day of April, 2017.

.....

**J. WAKIAGA**

**JUDGE**

**In the presence of:-**

*Mrs. Kinoti for the State*

*Mr. Nyangayo for the Accused*

*Accused – present*

*Paul- court clerk*