REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

PETITION NO. 55 OF 2011

IN THE MATTER OF: AN APPLICATION BY JUMA MZURI CHOVU UNDER SECTION 22 OF THE CONSTITUTION

AND

IN THE MATTER OF: ARTICLES 2(6), 20(4), 25, 26, 28, 29 AND 50 OF THE CONSTITUTION OF KENYA, ARTICLES 6(1) & (2) OF THE POLITICAL RIGHTS & ARTICLES OF THE AFRICAN CHARTER ON PEOPLE'S AND HUMAN RIGHTS

BETWEEN

JUMA MAZURI CHOVU………………………..……........PETITIONER

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS..................….RESPONDENT

JUDGMENT

1. In his Petition dated 9th September, 2011 and filed on 20th September, 2011, Juma Mzuri Chovu (the Petitioner) sought the following orders -

(a) a declaration that the imposition of death penalty constitutes a cruel, inhuman or degrading punishment in terms of Article 25 and Article 29(f) of the Constitution of Kenya and therefore the various provisions of the law of Kenya prescribing the death sentences are inconsistent with or in contradiction of Articles 25, 26, 29 of the Constitution of Kenya;

(b) a declaration that the various provisions of the Laws of Kenya which prescribe a mandatory death sentence are inconsistent with Articles 25, 26, 28 and 29 and 50 of the Constitution of Kenya;

(c) an order for a new trial on the ground that the Petitioner has new and compelling evidence which has since become available;

(d) an order that the Respondent do pay the costs of the Petition.

2. The Petition is based upon the grounds on the face thereof, the Supporting Affidavit of William O. Wameyo, counsel for the Petitioner sworn on 20th September, 2011 in support of the Chamber Summons dated 20th September, 2011 seeking orders that the application be heard on priority and the undated

written submissions of counsel for the Petitioner filed on 8th March, 2016.

3. Though ostensibly the Petition herein is said to be grounded upon the said Article 50(6) of the Constitution, the Petitioner's real question here is whether the death penalty to which he was condemned is cruel, inhuman or degrading punishment in terms of Articles 25 and 29(f) of the Constitution. To answer this question the Petitioner's counsel raised five issues namely –

(a) Whether the court has jurisdiction to entertain this Petition;

(b) Whether the imposition of mandated death penalty is unconstitutional and incompatible with respect for fundamental human rights;

(c) Whether the death penalty is antithetical to the constitutional provisions with respect to fundamental human rights;

(d) Whether mandatory death sentence erodes and/or derogates the right to fair trial;

(e) Whether the death sentence by its very nature and application is cruel, inhuman and degrading punishment within the meaning of Article 25 of the Constitution;

(f) Whether Article 26(3) of the Constitution qualifies the right to life by validating the death sentence.

OF JURISDICTION

4. The Constitution donates to this court general jurisdiction under Article 23(1) and 165(2)(b) to hear and determine questions whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. In addition to that general jurisdiction, there is also the specific jurisdiction under Article 50(6) by Petition, for a new trial, even after an appeal from the highest court has been heard and determined. There is therefore no question as to the court's jurisdiction.

THE PETITIONER'S CASE

5. The Petition herein is purportedly brought under Article 50(6) of the Constitution which provides –

> **"50. (1) – (5)**
>
> **(6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—**
>
> **(a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and**
>
> **(b) new and compelling evidence has become available."**

6. The Petitioner was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Constitution, in Mombasa High Court Criminal Case No. 53 of 2004, and was on the evidence convicted and sentenced to death as by law provided. His appeal against both conviction and sentence was dismissed. For the Petitioner to be entitled to a new trial he must meet the threshold set out in Article 50(6)(b) that there is new and compelling evidence, an argument that the death penalty is cruel, degrading and inhuman punishment is not new and compelling evidence. New and compelling evidence would in my view include evidence of fact, for instance that the person allegedly murdered by the Petitioner is truly well and alive or that the person who committed the murder has confessed to the killing. The burden of procuring such evidence lies entirely upon the Petitioner, he who alleges must prove Section 107 of the Evidence Act (Cap 80 of Laws of Kenya) or that he has information which is specially known to him. (Section 112 of the Evidence Act).

7. There is no such evidence in this Petition. The Petitioner has therefore not met the threshold set out in Article 50(6) of the Constitution. The Petition therefore fails on that ground.

OF THE RIGHT TO LIFE

8. The issue raised by the petitioner is one of interpretation of Constitution and whether the mandatory death penalty is Constitutional. I will cover the issues on the imposition of the death penalty under the above title, the right to life. I do so well aware of the decision of a five Judge Bench of the Court of Appeal which determined that the death penalty was mandatory and lawful. I am bound by that decision of that Court in **Joseph Njuguna Mwaura, Peter Njoroge Kamau and Patrick Murigi Kitein vs.Republic** (Criminal Appeal No. 5 of 2008).

9. In that decision, the Court of Appeal considered the provisions of Article 26(3) of the Constitution –

> **"26(1) Every person has the right to life.**
>
> **(2) The life of a person begins at conception.**
>
> **(3) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law."**

10. My understanding of the Article is that a person's life which begins at conception is protected by the Constitution. That right to life is derogated from if authorized by law, for example **abortion** if carrying the foetus threatens the life of the mother. Otherwise the life of the unborn person is guaranteed, and cannot be terminated unless its existence threatens the life of another person. That is why for instance, provocation is a defence, even to a killing of another person. A sentence of death is an *ex post facto* event. It is an outcome of the due process of law. The question whether its execution constitutes an affront to human dignity as envisaged under Article 28, and therefore cruel, inhuman or degrading as envisaged under Article 28 of the Constitution is one of interpretation. If the death penalty is cruel, inhuman or degrading treatment or punishment, then the right to life cannot be derogated from as envisaged under Article 26 (3) of the Constitution.

11. Therefore keeping in mind the decision of the Court of Appeal in **Mwaura et al vs. Republic** (supra), the question which then begs an answer is whether that decision has **firstly** developed the law to the extent that it does not give effect to a right or fundamental freedom, and **secondly** it adopted an interpretation that most favours the enforcement of a right to life, and fundamental freedom. These are questions which only Supreme Court of Kenya can answer but not this court, and there is an appeal pending in the Supreme Court on the very question of the constitutionality of the death penalty. We await the definitive interpretation by that august court. I will only add a few concerns about the death penalty as expressed by others, but which concerns I share.

12. Madala J quoting Steward J from the case of **Furman vs. Georgia 408**, US at 306 stated that the death penalty is unique –

> **"The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique finally, in its absolute renunciation of all that is embodied in our concept of humanity."**

13. The above statement was recently (1991) confirmed by Scalia J of the US Supreme Court in the case of **Harmellin vs. Michigan [1991] USC120; 501US957**, and noted that even the most severe sentence of life imprisonment cannot compare with death.

ZIMBABWE

14. Describing the condition of a death row convict in **CATHOLIC COMMISSION FOR JUSTICE**

AND PEACE IN ZIMBABWE VS. ATTORNEY-GENERAL, Zimbabwe 1993 (4) 239 (ZSC) at 268 EA Gubby CJ observed –

> **"From the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanizing environment of near helplessness. It is in a place where the sole object is to preserve his life so that he may be executed. The condemned prisoner is "the living dead"…He is kept only with other death sentenced prisoners - with those whose appeals have been dismissed and, who await death or reprieve, or those whose appeals are said to be heard or are pending judgment.**
>
> **While the right to an appeal may raise the prospect of being allowed to live, the intensity of the trauma is much increased by knowledge of its dismissal. The hope of a reprieve is all that is left. Throughout all this time, the condemned prisoner constantly broods over his fate. The horrifying spectre of being hanged by the neck and the apprehension of being made to suffer a painful and lingering death is, if at all, never far from mind. Grim accounts exist of hanging performed."**

15. In the above case the court found that the incarceration of the condemned person under those conditions was in conflict with the provisions of Section 15(1) of the Zimbabwe Constitution, which like our Constitution, has entrenched guarantees against torture or inhuman and degrading treatment. The learned Judge said at paragraph 59 on the African jurisprudence.

> **said at paragraph 54 –**
>
> **"We must stand tallest in these troubled times and realize that every accused person who is sent to jail is not beyond being rehabilitated – properly counselled – or at the very least, beyond losing the will and capacity to do well.**
>
> **A further aspect which I wish to mention is the question of traditional African jurisprudence, and the degree to which such values have not been researched for purposes of determination of the issue of capital punishment."**

16. I agree with the profound observation by Madala at paragraph 17 of his judgment in the **Mwakanyange case**.

> **"17. Convicted persons in death row find themselves there for a long time as they make every effort to exhaust all possible review avenues open to them. All this time they are subjected to a fate of ever increasing fear and distress. They know not what their future is and whether their efforts will come to naught; they live under the sword of Damocles – they will be advised any day about their appointment with the hangman. It is true they might have shown no mercy at all to their victims, but we do not and should not take our standards and values from the murderer. We must, on the other hand, impose our standards and values on the murderer."**

17. Describing the "death-row" phenomenon, in **SOERING VS. UNITED KINGDOM [1989] ECHR 141 (1989) 11 ECHR 439**, the court said –

> **"From the statistics supplied by the Attorney-General and from what one gleans daily from newspapers and other media, we live at a time when high crime rate is unprecedented, when the streets of our cities and towns rouse fear and despair in the heart, rather than pride and hope, and this in turn, robs us of objectivity and personal concern for our brethren. But as Marshall J put in Furman vs. Georgia (supra)**
>
> **"The nature of a country is its ability to retain compassion in time of crisis."**

18. Payment of cows, camels, goats or domestic animals are a known form of penalty by the accused

person or his family or community to the family of the victim. Where this is practised, the payment is an acknowledgement that a life has been lost, and that another **LIFE** should not be lost in the name of retribution under the criminal law. This acknowledges the necessity of preserving life, and negating the death penalty.

19. Kriegler J, while agreeing with the conclusions reached by Chaskalson P. and endorsing the bulk of the President's reasoning and concurring with the orders he formulated, said he had two points to add, **first** by way of additional emphasis, and the **second** to indicate a somewhat different line of reasoning, said –

> **"The basic issue, as Chaskalson points out in the opening and concluding paragraphs of the main judgment, is whether the constitution, has outlawed capital punishment in South Africa. The issue is not whether I favour the retention or the abolition of the death penalty, not whether this court, parliament or even the overwhelming public opinion supports the one or the other view. The question is what the constitution says about it.**
>
> **In answering that question the methods to be used are essentially legal, not moral or philosophical. To be true the judicial process cannot operate in an ethical vacuum. After concepts like "good faith", "unconscionable" or "reasonable" import value judgments into the daily grinds of courts of law. And it would be foolish to deny that the judicial process, especially in the field of constitutional adjudication, calls for value judgments in which extra-legal considerations may loom large. Nevertheless, the starting point, the framework and the outcome of the exercise must be legal. The foundations of our state and all its organs, the rules which govern their interaction and the entrenchment of the rights of its people are to be found in an Act of Parliament, albeit a unique one. That Act entrusts the enforcement of its provisions to courts of law. The "court of final instance over all matters relating to the interpretation, protection and enforcement of these provisions is this court, appointments to which is reserved for lawyers. The incumbents are judges, not sages, their discipline is the law, not ethics or philosophy and certainly not politics."**
>
> **The exercise is to establish whether there is an invalid infringement of a right protected by Chapter Three. This "calls for a two-stage" approach, first, has there been a contravention of a guaranteed right? If so, is it justified under the limitation clause?" For the third step, one need go no further than Section 9 of the Constitution, which could not be possibly plainer -**
>
> **"Every person shall have the right to life."**

20. The learned Judge proceeded to say that -

> **"at the very least it indicates that the state may not deliberately deprive any person of his or her life. As against that general provision, Section 277(1) of the Criminal Procedure Act sanctions a judicial order for deprivation of a person's life.The two provisions are clearly not reconcilable. Therefore the latter provision is liable to be struck out under Section 4(1) of the Constitution unless it is saved by the second step of the analysis – application of the limitation clause."**

21. In the words of Kriegler J –

> **"During the second step of the exercise, one must ask whether that infringement of the right to life is reasonable and also whether it is justifiable in in an open and democratic society based on freedom and equality (SS 33(1)(a)(i) and (ii)."**

22. In his further analysis of the death penalty, Kriegler J referred to the US case of **Furman vs. Georgia –**

> **"Nearly a quarter of a century ago the US Supreme Court decided the watershed case of**

FURMAN VS. GEORGIA. In the course of a compendiously researched opinion, Marshall J reviewed virtually every scrape of Anglo-American evidence for and against capital punishment. In the course of his "long and tedious journey" (his own description) he made the crucial finding that two hundred (200) years of research had established "that capital punishment serves no purpose that life imprisonment could not serve equally well". A decade later the Indian Supreme Court surveyed the international authorities for and against the death penalty in BACHAN VS. SINGH case. Since then a great deal more has been written in support of both the abolitionist and the retentionist schools. But when all is said and done the answer is still what it was to Marshall J in FURMAN'S case. The death penalty has no demonstrable penological value over and above that of long-term imprisonment. No empirical study, no statistical exercise and no theoretical analysis has been able to demonstrate that capital punishment has any deterrent force greater than that of a really heavy sentence of imprisonment. That is the ineluctable conclusion to be drawn from the mass of data thoroughly canvassed in the written and oral arguments presented to us."

23. Langa J, quoting from the same case of **Furman vs. Georgia** (supra) said –

"… a severe punishment must not be excessive. A punishment under this principle is excessive if it is unnecessary … (i) if there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive."

BELIZE

24. In **REYES VS. THE QUEEN [2002] AC 235** at page 241, the Privy Council considering an appeal on conviction and sentence of murder by the Commonwealth of Belize (a small Caribbean country) observed –

"Under the common law of England there was one sentence which could be judicially pronounced upon a defendant convicted of murder and that was the sentence of death. This simple and undiscriminating rule was introduced into many states now independent but once Colonies of the Crown.

It has however been recognized for very many years that the crime of murder embraces a range of offences of midety varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the end mercy killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are by no means equally heinous.

A sentencing regime which imposes a mandatory death sentence on all murders or murderers within specified categories, is inhuman and degrading because it requires sentences of death with all the consequences such a sentence must have for the individual defendant, to be passed without the opportunity for the defendant to show why such sentence should be mitigated without consideration of the detailed facts of the particular case or personal history and circumstances of the offences, and in cases where such a sentence might be wholly disproportionate to the defendants sentence of death."

IN THE U.S.A.

25. In **FURMAN VS. GEORGIA** it was noted that –

"A process that accords no significance to relevant factors of the character and record of the individual offender in the circumstances of the particular offence excludes from consideration in framing the ultimate punishment of death the possibility of any merits or mitigating factors

stemming from diverse cultures of mankind. It treats all persons convicted of a designative offence not as uniquely individual beings, but as members of a faceless undifferentiated man to be subjected to the blind infliction of penalty of death."

INDIA

26. In **MATHU VS. STATE OF PUNJAB 2[1983] 1 SCR 690**, the court was construing Section 303 of the Indian Penal Code which provided –

> **"303. Punishment for murder by life convict – Whoever being under sentence of imprisonment for life, commits murder, shall be punished with death."**

Chandrachud C.J. referring to the Indian case of **JAGMOHAN SINGH VS. STATE U.P. [1973]2 SCR 541**, said –

> **"(vii) Equity and good conscience are two hall-marks of justice. A provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to circumstances in which the offences was committed, and therefore without regard to the gravity of the offence, cannot be regarded as but harsh, unjust and unfair. The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a pre-ordained sentence of death."**

SOUTH AFRICA

27. **THE STATE Vs. T. MAKWANYANGE AND M. MCHUNU [1995] EACC3, [1996] 2CHILD, [1995] 2SACR1**, (5th June 1995). Chashtalson P. after reviewing the arguments for and against the death penalty and with arguments concerning **deterrence** and **retribution** concluded that –

> **"the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue [which] has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provisions as to death penalty… on the grounds of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these antithetical views, held by the Abolitionist and the Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is ground among others, for rejecting the Petitioners' argument that the retention of the death in the impugned provision, is totally devoid of reason and purpose."**

THE ESSENTIAL CONTENT OF THE RIGHT

28. Construing Article 33(1)(b) of the Constitution of South Africa which is in *pari materia* with Article 24(2)(c) of the Constitution of Kenya 2010 that legislation limiting a right or fundamental freedom - shall not limit the right or fundamental freedom so as to derogate from its core or essential content, the South African Supreme Court said –

> **"Section 33(1)(b) provides that a limitation shall not negate the essential content of the right. There is uncertainty in the literature concerning the meaning of this provision. It seems to have entered constitutional law through the provisions of the German Constitution, and in addition to the South African Constitution, appears though not precisely in the same form, in the constitutions of Namibia, Hungary and possibly other countries as well. The difficulty of interpretation arises from the uncertainty as to what the "essential content" of a right is and how it is to be determined. Should this be determined subjectively from the point of view of the individual affected by the invasion of the right, or objectively from the point of view of the nature of the right and its place in the constitutional order, or possibly in some other ways?**

Professor Gerrie draws attention to the large number of theories which have been propounded by German scholars as to how the "essence" of a right should be discovered and how the constitutional provision should be applied. The German Federal Constitutional Court has apparently avoided to a large extent having to deal with the issue by subsuming the enquiry into the proportionality test that it applies and the precise scope and meaning of the provision is controversial."

PASSING SENTENCE AND MITIGATION

29. Section 323 of the Criminal Procedure Code [Cap 75, Laws of Kenya] provides that if the Judge convicts an accused person, or if the accused person pleads guilty, the Registrar or other officer of the court shall ask him whether he has anything to say, why sentence should not be passed upon him according to law, but the omission to ask him shall have no effect on the validity of the proceedings.

30. Although this provision states that the omission to ask an accused why sentence should not be passed upon him according to law, does not invalidate the proceedings, it would however be a cause of review of the sentence imposed upon him. In **SOERING Vs. UILE [1989] EHRR 439**, the European Court of Human Rights said –

"the Board was satisfied that the provisions requiring sentence of death to be passed on the defendant on his conviction for murder by shooting without affording him opportunity before sentence, to seek to persuade the court in all the circumstances to condemn him to death would be disproportionate and inappropriate, was to treat the defendant as no human being should be treated. It was unconstitutional."

31. In the **Mwakanyange case** Chaskalson P. said –

"It cannot be gainsaid that party, race and chance play roles in some of capital cases and in the final decision as to who should live and who should die. It is sometimes said that this is understood by Judges, and as far as possible taken into account by them. But in itself this is no answer to the complaint of arbitrariness; on the contrary it may introduce an additional factor of arbitrariness that will also have to be taken into account. Some but not all accused persons may be acquitted because such allowances are made. And others who are connected but not all, may for the same reason escape the sentence."

32. And the learned Judge President further stated –

The differences that exist between the rich and the poor, between good and bad prosecutors, between good and bad defence (attorneys), between severe and lenient Judge, between Judges who favour capital punishment and those who do not, and the subjective attitudes that might be brought into play by factors such as race and class, may in similar ways affect any case that comes before the courts and is almost certainly present to the same degree in all court systems. Such factors can be mitigated but not totally avoided by allowing convicted persons to appeal to a higher court. Appeals are decided on the record of the case and on findings made by the trial court. If the evidence on record and the findings made have been influenced by these factors there may be nothing that can be done about that appeal. There is also the fact that an error can be made. Having regard to the foregoing, it also means that persons similarly placed may not necessarily receive similar punishment, whereas unjust imprisonment is a great wrong, where it is discovered the prisoner can be released and compensated but the killing of an innocent person is irremediable."

DEATH SENTENCE IS AN AFFRONT TO HUMAN DIGNITY

33. Article 27 of the Constitution of Kenya 2010, is a short article contained in one sentence –

"27. Every person has inherent dignity and to have that dignity respected and protected."

34. Addressing himself on the same issue, Chaskalson P. in **Mwakanyange case** observed that –

> **"Death is a crime penalty and the legal process which necessarily involves waiting in uncertainty for the sentence to be set aside or carried out adds to the cruelty. It is degrading because it strips the convicted person of all the dignity and treats him or her as object to be eliminated by the State."**

35. In **MBUSHI & ANOTHER VS. REPUBLIC**, the Court of Tanzania held that the death sentence is inherently cruel, inhuman and degrading, but that it is provided for in Article 30(2) of the Constitution of Tanzania.

36. The Court of Appeal of Kenya shares that view in respect of the death penalty in Kenya. In **JOSEPH NJUGUNA MWAURA, PETER NJOROGE KAMAU & PATRICK KIBIA VS. REPUBLIC** (Nairobi Criminal Appeal No. 5 of 2008, unreported), a five (5) Judge of the Court of Appeal was categorical that the death penalty was not only lawful in Kenya but also mandatory by virtue of Article 26(3) of the Constitution which says –

> **"(1)**
>
> **(2)**
>
> **(3) A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law."**

37. To the extent that death penalty is authorized under Sections 204, (murder), Section 296(2) (robbery with violence) and 40(3) (treason), all of the Penal Code for persons found guilty of those offences, the death penalty is lawful. However the question whether the decision in the **Mwaura et al case** is consistent with other provisions of the Constitution, such as Article 20(3) and (4) is a matter which is pending a decision by the Supreme Court of Kenya. Article 20 relates to the application of the Bill of Rights, and apart from providing that the Bill of Rights applies to all law and binds all state organs and all organs (Article 20(c)) provides the manner in which the Bill of Rights shall be applied –

> **"(3) In applying a provision of the Bill of Rights, a court shall—**
>
> > **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.**
>
> **(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—**
>
> > **a. the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and**
> >
> > **b. the spirit, purport and objects of the Bill of Rights."**

38. Whether the death penalty is in accord with the right of every person to enjoy the right to life to the greatest extent considered with the nature of the right or of the fundamental freedom or whether indeed is in accord with the values that underlie an open and democratic society based on human dignity, equality, equity and freedom or meets the spirit, purport and objects of the Bill of Rights is a matter which requires a definitive opinion by the Supreme Court and until the decision in **Mwaura et al** is overturned, it is binding upon this court and all lower courts.

39. Without in any way pretending to advance the course by the Supreme Court, I would reiterate the opinion by **Chaskalson P** in the Mwakanyange case **–**

"It cannot be gainsaid that party, race and chance play roles in the court of capital cases and in the final decision as to who should live and who should die. It is sometimes said that this is understood by Judges, and as far as possible taken into account by them. But in itself this is no answer to the complaints of arbitrariness, on the contrary it may introduce an additional factor of arbitrariness that will also have to be taken into account. Some but not all accused persons may be acquitted because such allowances are made. And others, who are convicted but not all, may for the same reason escape the sentence."

40. The President of the South African Supreme Court, continued –

"The differences that exist between the rich and the poor, between good and bad prosecutors, between good and bad defense, between severe and lenient Judges, between Judges who favour capital punishment and those who do not, and the subjective attitudes that might be brought into play by factors such as race and class, may in similar ways affect any case that comes before the courts and is almost certainly present to the same degree in all systems. Such facts can be mitigated but not totally avoided by allowing convicted persons to appeal to a higher court. If the evidence on record and the finding made have been influenced by these facts, there may be nothing that can be done about that appeal.

There is also the fact that an error can be made. Having regard to the foregoing, it also means that persons similarly placed may not necessarily receive similar punishment.

Whereas unjust imprisonment is a great wrong, where it is discovered the prisoner can be released and compensated, that the killing of an innocent person in irrediamable."

"Death is a cruel penalty and the legal process which necessarily involves waiting for the sentence to be set aside or carried out adds to the cruelty. It is degrading because it strips the convicted person of all the dignity and treats him or her as an object to be eliminated by the state."

41. In conclusion, the distinguished Judge President, after reviewing many cases concluded –

"I am satisfied in the context of our constitution the death penalty is indeed a cruel, inhuman and degrading punishment."

42. SACHS J in his concurring Judgment also agreed that Section 9 of the South African Constitution guarantees unqualified right to life. He states at page 389 –

"This court is unlikely to get another case which is emotionally and philosophically more elusive, and textually more direct. Section 9 states "<u>every person shall have the right to life</u>." The <u>unqualified</u> and <u>unadorned</u> words are binding on the state and on the face of it, outlaw capital punishment. Section 33 does allow limitations on fundamental rights, yet in my view, executing someone is not limiting <u>that the person's life, but extinguishing it</u>."

43. Nearer home however, the Supreme Court of Uganda agreed with the conclusion of the Constitutional Court of Uganda that the death penalty was not cruel and inhuman *per se*, but that the **waiting in death row** was cruel and inhuman. In the words of Okello JA, after reviewing the evidence on prison conditions concluded –

"The above evidence has not been controverted. It portrays a very grim picture of the conditions in the condemned section of Luzira Prison. They are demeaning physical conditions coupled with treatment meted out to the condemned prisoners during their confinement, as depicted by the above evidence, are not acceptable by Ugandan standards and also by civilized international communities. Inordinate delays in such conditions indeed constitute cruel, inhuman or degrading treatment prohibited by Article 24 and 44(a) of the Constitution of Uganda."

44. So on questions of delay in execution after confirmation of the sentence by the highest appellate court, the Ugandan Constitutional court determined that a period of three years was adequate to allow the committee on prerogative of mercy to determine whether or not to grant mercy to the prisoner on death row. The court also determined that the sentence of death would automatically be commuted to life imprisonment upon the expiration of the three years following the determination of appeals by the highest court.

DETERMINATION AND CONCLUSION

45. The Constitution of Kenya, Article 24(2) (c) declares that a provision in legislation limiting a right or fundamental freedom.

> **"shall not limit he right or fundamental freedom so far as to derogate from its core or essential content".**

46. The South African Constitution equivalent provision does not include the expression **"core",** it only has the phrase, **"essential content"**. Our Constitution refers to **"core** and "**essential content"** though the South African Court declined to define what constitutes **"essential content"**, or how to determine it, it nevertheless found inconsistency between section 277 (1) of the Criminal Procedure Act (which sanctions a judicial order for deprivation of life, and section 9 of the Constitution of South Africa), and struck out section 277 (1) as being **firstly** inconsistent with section 4(1) of the Constitution (the supremacy clause), and **secondly** that the death penalty was not justified in an open and democratic society based on freedom and equality.

47. While 24(2) (c) of the Constitution of Kenya is more explicit than section 33 (c) (i) and (ii) of the Constitution of South Africa our Constitution provides that a limitation shall not derogate from its core and essential content. The issue in this Petition is the right to life. The question then becomes, what is a **core** and **essential** content of the right to life? The answer must be that the core and essential content of the right to life, is **"life**".

48. Article 26(1) says "**Every person has a right to life".** Article 26(3) limits that right by reference to other written law. The right to take away life is provided for in the Penal Code. Article 24(2) (c) however prohibits a limitation which derogates from the core or essential content of a right. What is **core content** of the right to life, but life itself.

49. A judge does not need to be an **abolitionist** or a **retentionist** to arrive at the above conclusion. It is my humble view that the provision is both plain, unambiguous and admits of no other conclusion. This conclusion is, in my humble view, also consistent with Article 20 (3) of the Constitution which obligates the Court in mandatory (not permissive) terms that in applying any provision of the Bill of Rights the court shall -

> **(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.**

50. Besides, and in addition, Article 20 (4) enjoins every 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, equality, equity and freedom, and**
>
> **(b) the spirit, purpose and objects of the Bill of Rights.**

51. In my humble view therefore a prisoner in death row suffers from psychological torture contrary to

Article 25 (e) (which guarantees his right against torture and cruel and inhuman treatment or punishment), and the provision of the Penal Code which impose the death penalty may well be inconsistent with the provisions of Article 26 (1) of the Constitution guaranteeing the right to life.

52. Lastly, whereas opinion is divided, the death penalty is unconstitutional in South Africa, Zimbabwe and most Western countries , it is constitutional in Uganda and Tanzania, the verdict is still out there in the Supreme Court of Kenya, whether the death penalty contravenes in Article 25 (a) (freedom from torture and cruel and inhuman or degrading treatment or punishment), the right to life (Article 26 (1), human dignity (article 28), and the right to fair hearing (Article 50).

53. In the meantime, as already stated in the earlier passages of this Judgment, this court and the courts below are bound by the decision of the Court of Appeal – **Mwaura et al vs Attorney General** that the death penalty is both Constitutional and mandatory.

54. For those reasons, the Petition herein dated 9th September, 2011 is hereby dismissed with no order as to costs as this is a public interest litigation.

55. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 30th day of June, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Wameyo for Petitioner

Miss Lutta holding brief for Respondent

Mr. Silas Kaunda Court Assistant