REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL CASE NO. 115 OF 2008

REPUBLIC…….....PROSECUTOR

VERSUS

MILTON KABULIT……..……1ST ACCUSED

JAMES KAMAIS…….....…….…….2ND ACCUSED

FRANCIS KARENGA…….....…..…….3RD ACCUSED

DAVID EIPA…….....…….……4TH ACCUSED

JOSEPH CHACHA…….....…….……..5TH ACCUSED

JANATHAN MERIMUG…….....……6TH ACCUSED

KOIKOI ENONI ENONO……..…….…..……..7TH ACCUSED

RULING

In my long judgment delivered on sentence I convicted the 1st - 4th and 7th accused of the murder of the deceased, SILENCE CHIRARA a national of ZAMBIA, then working for the WORLD FOOD PROGRAMME at Lokichogio Town, Turkana County, within the expansive Rift Valley Province of Kenya. I then directed Counsel for the accused as well as State Counsel to make submissions on why the five convicted accused should not suffer the ultimate punishment of death for murder.

In so directing counsel I was mindful of the decision of the Privy Council in the case of REYES VS. the QUEEN [2002] AC 235 *(an appeal from the Court of Appeal of Belize a tiny enclave in the Northern Eastern tip of South America formerly called British Guyana)*, wherein the Judicial Committee of the Privy Council held that the **imposition of a mandatory death sentence on all those convicted in Belize was disproportionate and inappropriate.** Lord Bingham said -

"… to deny the offender the opportunity, before sentence has been passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate, is to treat him as no human being should be treated and thus deny him his humanity, the core right of which Section 7 exists to protect (para. 43)."

Section 7 of the Constitution of Belize provides -

"No person shall be subjected to torture or to inhuman or degrading treatment or punishment."

I was also reminded of the decision by our own Court of Appeal in **GODFREY NGOTHO MUTISO VS. REPUBLIC***(Criminal Appeal No. 17 of 2008, at Mombasa)*, where the Court of Appeal, *(Omolo, Waki & Onyango Otieno JJA),* after reviewing decisions by the Supreme Court of Uganda in **SUSAN KIGULA & 416 OTHERS VS. ATTORNEY-GENERAL** *(Constitutional Petition No. 6 of 2003),* **A.G. VS. KIGULA & 417 OTHERS**, *(Constitutional Petition No. 3 of 2006)* the Zimbabwean case of **CATHOLIC COMMISSION FOR JUSTICE and PEACE IN ZIMBABWE VS. the ATTORNEY-GENERAL & OTHERS (1993) 2 LRC 277),** and reference to UN Conventions on Human Rights *(Universal Declaration of Human Rights (1948)*, the International Covenant on Civil and Political Rights (1966) and the African Charter on Human and Peoples Rights, 1981 and a host of other cases from the Commonwealth came to the conclusion that - *Section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial.*

These were the thoughts paramount in my mind in the case of **REPUBLIC VS JOHN KIMITA MWANIKI [2011] eKLR *(High Court at Nakuru Criminal Case No. 116 of 2007)*** where I called upon counsel for the accused and the State to submit whether the mandatory death sentence prescribed under Section 204 of the Penal Code, *(for cases of murder),* was the appropriate punishment in that case. In a Ruling delivered on 10th June 2011, I held the view that Article 26(3) of the Constitution of Kenya *(which provided for taking away of life)* was antithetical to Article 26(1) *(which guaranteed life as a fundamental right)* and gave effect to that right in the manner contemplated by Article 20(3) of the Constitution that the courts are enjoined to so construe and interpret the Constitution in a manner which gives full force and effect to the fundamental right or freedom.

In this case, although both Mr. Cheche, Counsel for the 1st - 4th accused, and Mr. Wambeyi Counsel for the 7th accused expressed disagreement *(as expected)* - on the conviction of their clients, *(the accused),* both Counsel submitted against the imposition of either the mandatory death penalty under Section 204 of the Penal Code, *(Cap. 63, Laws of Kenya),* or at the discretion of the court, a sentence of life imprisonment. These were their submissions.

According to Mr. Cheche, the 1st - 4th accused should not be sentenced to death and relied on the provisions of Article 26(1) of the Constitution which states that every person has a right to life, and that not even the State has a right to take away the life of any person.

Mr. Cheche also submitted that no execution has been carried out in Kenya over the last quarter century, and that keeping convicts on death row is torture, and hence the commutation by the President of the death sentence upon such convicts to imprisonment for life. The sentence should be certain so that a convicted person knows the length of the time he will spend in prison and that *(such a certain sentence),* disqualifies a person from being imprisoned for life, and that the only certainty is death. Counsel submitted that a sentence of life imprisonment is not dignified, and urged the court to pass a sentence which is neither death nor life imprisonment.

Mr. Wambeyi learned counsel for the 7th accused, associated himself fully with the submissions of Mr. Cheche. He however added that the 7th accused who is between 30 - 32 years of age has a wife and two children one of whom was only one year old when the 7th accused was arrested. Counsel submitted that the 7th accused is a pastoralist, a member of the marginalized group within Article 56 of the Constitution. He has been in custody since the year 2009 that is three years ago. Counsel urged the

court to exercise its discretion and impose a non-custodial sentence.

On his part, Mr. Omari State Counsel who held brief for Mr. Omutelema. Counsel who prosecuted this case, submitted that marginalization is not an issue in passing sentence. The law applies to all, and that a death sentence does not breach the Constitution, and urged the court to hand down a sentence which is in accord with the law.

In brief replies to the submissions by State Counsel, Mr. Cheche urged the court to consider the time the accused have spent in custody whereas Mr. Wambeyi urged the court to uphold the Constitution on the question of both the death penalty and marginalization.

I have considered the submissions by both counsel for the accused and the State. The question or issue is whether the death penalty should imposed upon the 1st - 4th and 7th accused, and if not should the sentence be for life, or for a time determinate.

Whereas I agree with the submission by Mr. Omari that death penalty is not *per se* in breach of the Constitution, it is however now accepted as a matter of judicial precedent that where a statute imposes a mandatory death penalty, that the penalty is not the only punishment which the trial court must pass or impose upon the accused.

The death penalty is a subject of emotive debate. **Mahtama Gandhi**, the great apostle of non-violence protest and hero of the struggle for Independence from colonialism in the Indian sub-continent famously said of punishment in kind -

"an eye for an eye would make the whole world blind."

The authors of a Guide to sentencing in capital cases (The Death Penalty Project Ltd) 2007 say -

"Humanity\'s yearning for respect, tolerance and equity goes a long way back in history and although societies in general have in many respects made great strides in the technological, political, social and economic fields, contemporary grievances remain very much the same as they were hundreds, even thousands of years ago."

Historically speaking the earliest recorded case of murder was that of **Cain** who killed his brother **Abel.** When called upon by the Supreme Judge (God) to account for his deed, **Cain** put in a disclaimer that he did not know where his brother Abel was, and asked - **"Am I my brother\'s keeper" -** i.e. that is, he was not his brothers keeper.

When the Supreme Judge told him that the blood of Abel which he had spilt upon the earth cried to Heaven for revenge, **Cain** realized the enormity of his crime, and cried in fear that any one who found him would be at liberty to kill him in return. The Supreme Judge assured Cain that any one who killed Cain would suffer vengeance seven-fold *[from the Supreme Judge]*.

Despite the fact that Cain was not at all remorseful for the murder of his brother, Cain was not sentenced to death but to a life of hard labour he would earn his livelihood by the sweat of his brow - ***"when you will till the ground, it shall no longer yield its strength to you. A fugitive and a vagabond you shall be on earth."***

However **Moses** writing his Second Book **EXODUS 21:12-16** following subsequent developments between the Children of Israel, and Yahweh, writes

"He who strikes a man so that he dies shall surely die" (verse 12),"

"However if he did not lie in wait, but God delivered him into his hands, then, I will appoint

you a place where he may flee" (verse 13),

"But if a man acts with premeditation against his neighbor, to kill him by treachery, you shall take him from my altar that he may die" (verse 14),

"He who kidnaps a man and sells him, if he is found in his hand, shall surely be put to death" (verse 15),

"And he who curses his father or his mother shall surely be put to death" (verse 16).

All the above was however wiped away in the NEW TESTAMENT, by the founder of Christianity, JESUS CHRIST who said -

"You have heard (of old), that it was said - "An eye for an eye and a tooth for a tooth, but I say to you not to resist an evil person. But whoever slaps you on your right cheek turn the other cheek to him", Matt. 5:38-39).

but many countries still maintain the old injunctions in **"EXODUS"** of Moses.

In most of our traditional societies in Africa, unless it was a case of outright revenge, the death of a victim did not follow with the death of the assailant. Discussions would be entered into immediately between members of the assailant\'s family and those of the victim\'s and invariably, an arrangement would be reached under which the victim\'s family would be compensated in one form or another for the loss of a member of the victim\'s family. This is still very common among many clans in both South and North Rift, and Eastern and North-Eastern in the nomadic communities. The lack of recognition of this mode of dispute resolution leads to backlog of criminal cases in particular in these areas. Witnesses are generally reluctant to testify once these arrangements have been entered into. They believe a State trial may very well lead to conviction of a member of the assailant\'s family when the victim\'s family has already received compensation.

This is of course not the situation in this case. This however illustrates the point that there is need to look at the **"death penalty"** (which is in effect the collective revenge by the people through the state machinery the **"judicial system"** - the Police, the Prosecution, the judicial officers and Judges, and the Prison Services," to extract a **"death"** for a **"death".** There is consequently a worldwide awakening and movement to look at the **"death penalty"** as the ultimate punishment for certain prescribed offences such as murder, robbery and treason in Kenya, and most Commonwealth Countries which still retain the death penalty. There are other offences such as drug trafficking, kidnapping and terrorism charges - mass murder for which the punishment is death in some countries.

According to the publication of **Penal Reform International** *(April 2011)* about **149** states and territories have abolished the death penalty in law, or in practice, **47** retain the death penalty while **81** states have ratified international and regional instruments that provide restrictions on the use of the death penalty and its ultimate abolition and **23** countries carried out executions in 2010.

For us in Kenya, there are many such international instruments to which Kenya is a party. There is the Universal Declaration of Human Rights 1948, The African Charter on Human and Peoples Rights, the International Covenant on Civil and Political Rights to cite but several. These instruments make provision for the eventual abolition of the death penalty.

The contention by the proponents of abolition of the death penalty is that even where the death penalty still exists, an accused person should not be sentenced to death without first giving him or her an opportunity to mitigate.

For instance the text of the African Charter on Human and People\'s Rights places a high premium

on the requirement of due process where the right to life is threatened. Article 4 thereof reads -

"Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person, No one may be arbitrarily deprived of his life."

The African Commission on Human Rights commenting on this Article in the matter of the **FORUM OF CONSCIENCE VS SIERRA LEONE 223/98** said -

"The right to life is the fulcrum of all other rights. It is the fountain through which all other rights flow and any violation of this right without due process amounts to arbitrary deprivation of life ….. The execution and arbitrary deprivation of the right to life was contrary to Article 4."

Internationally the right to life as a human rights standard was recognized by the organization of American States in the American **Declaration on the Rights and Duties** of Man adopted in 1948, and elaborated upon by the **American Convention on Human Rights** adopted **in 1969.** Articles I and XXVI of the Declaration recognize the right to life and the right not to receive cruel, infamous or unusual punishment respectively. Article 4(2) of the Convention provides that the death penalty may only be imposed for the most serious crimes.

I think with respect to contrary opinion that crimes of murder, robbery with violence, or treason and for which an accused has been found guilty are serious crimes which have led to either loss of life, or serious threat to the life of other persons, *(in the case of robbery with violence),* and to the Nation in the case of treason. The question is what guiding principles should the trial court consider in sentencing an accused found guilty and convicted of those offences for which death penalty is mandatory.

In the South African case of **STATE VS. MAKWANYANE 1995 (3) S. A. SA 391, para. 4, (Constitutional Court of South Africa),** Chaskalson P. said

"Mitigating and aggravating circumstances must be identified by the court, bearing in mind that the onus is on the State to prove beyond reasonable doubt the existence of aggravating factors, and to negative beyond reasonable doubt the presence of any mitigating factors relied on by the accused, due regard must be paid to the personal circumstances and subjective factors that might have influenced the accused person\'s conduct, and these factors must then be weighed with main objectives of punishment, which have been held to be - deterrence, prevention, reformation and retribution. In this process any relevant considerations should receive the most scrupulous care and reasoned attention, and the death sentence should only be imposed in the most exceptional cases - where there is no reasonable prospect of reformation and the object of punishment would not be properly achieved by any other sentence."

In the United States, the Supreme Court **(in the case of LOCKETT VS. OHIO 57 C Ed. 2a 973)** held that an Ohio death penalty statute which specified a limited number of relevant mitigating factors but excluded others, violated the Eighth and Fourteenth Amendment prohibitions against cruel and inhuman punishment because it did not permit the sentences to consider a necessary range of circumstances including the defendant\'s age, character, record or the circumstances of the offence.

In the Inter American Commission\'s decision in **DOWNER VS. JAMAICA**, the Commission said *inter alia* -

"Mitigating factors may relate to the gravity of the particular offence, or the degree of culpability of the particular offender, and may include such factors as the offender\'s character and record, subjective factors that might have motivated his or her conduct, the design and manner of execution of the particular offence, and the possibility of reform and social re-adaptation of the offender …."

In the Carribean where the death sentence is retained for the worst of cases of murder, the Caribbean Court of Appeal, said in the case of **TRIMMING HIGH** *(13th October 2005)* -

"The unqualified right to life that the cases affirm means that there is no mandatory death penalty. It means that there must be no implicit approach that a bad case of murder will attract the death penalty unless there are mitigating circumstances. The death penalty can only be imposed if the judge is satisfied beyond reasonable doubt that the offence calls for no other sentence but the ultimate sentence of death."

The object of sentencing, it must be remembered, is not to reflect the court\'s subjective reaction to a crime but to impose a sentence that reflects the abhorrence of society …."

In summary the various International Commissions on enforcement of Human Rights and in particular the right to life have developed the following criteria on whether or not to sentence an accused to death where the relevant law imposes the death sentence. These are -

(1) the type and gravity of murder,

(2) mental state, including of diminished responsibility;

(3) other partial excuses including an element of provocation or undue influence;

(4) lack of pre-meditation;

(5) Character;
(6) Remorse;

(7) Capacity for reform and continuing dangerousness;

(8) Views of the victim\'s family;

(9) Delay up until time of sentence and prison conditions;

(10) Guilty pleas,

(11) Prison conditions.

In this case all the accused were subjected to a mental assessment by a duly qualified psychiatrist before they were charged with the offence of murder. I did express strong suspicion in my judgment of the misleading and undue influence upon the 1st and 3rd Accused in particular by the 5th Accused *(who I acquitted as suspicion however strong, is not a safe basis for conviction of an accused).* There was no provocation.

There were no pleas of guilty. There were no views expressed by the victim\'s kin or counsel watching brief for them. I would however expect any such party to believe in the due process of law taking place. In light of the delay of nearly six months before the break-through in the investigations leading to the arraignment of the accused in court, the time taken in the trial of the accused was reasonable. The prison conditions at G.K. Prison Nakuru where the accused are detained are standard with those elsewhere in Kenya.

As already observed Mr. Cheche urged the court to impose a sentence certain in time or period, and not a life sentence which under the Prison\'s Act *(Cap. 90, Laws of Kenya)* means, imprisonment for the natural life of the prisoner without parole or prospect of being released after serving a minimum period of time.

In his paper **"Outlawing Irreducible Life Sentences: Europe on the Brink?,** (in Federal Sentencing Reporter, Vol. 23, *(No. 1 at p. 40)*, Dirk van Zyl Smit says -

"No human being should be regarded as beyond improvement and should have the prospect of being

released."

Whereas I agree with the above sentiments, the murder committed in this case was grave. It is the type of murder which courts in South Africa, the U.S.A. and the Caribbean Commonwealth have described as where the accused-

"… have no reasonable prospect of reformation and the object of punishment would not be properly achieved by any other sentence,"

and such courts have proceeded to sentence the accused to death.

I doubt that purposes of punishment - deterrence, prevention reformation and distribution would be achieved in respect of these accused if they were given light sentences. As detailed in my long judgment *(137 pages),* this was a deliberately well planned, coordinated and executed crime, against an innocent international civil servant. It is not a wonder or surprise that counsel for the accused did not express any remorse on the part of any of the accused.

However as I argued in the case of **REPUBLIC VS. JOHN KIMITA MWANIKI [2011] eKLR,** Article 26(3) of the Constitution which provides for the death penalty is inconsistent with Article 26(1) which guarantees every person the right to life and the courts are obligated by Article 20 (3) in applying the Bill of Rights to (a) *to develop the law to the extent that it does not give effect to a right or fundamental freedom, and* (b) *to adopt the interpretation that most favours the enforcement of the right or fundamental freedom, and under Article 20(4)(a) to promote the spirit, purport and objects of the Bill of Rights.* Besides, under Article 19(3)(a) the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State, and the Bill of Rights applies to all law and binds all state organs and all persons.

Counsel for the accused asked the court to impose neither a death sentence nor a sentence of life imprisonment upon the accused, and even a non-custodial sentence.

I am however of the considered view that no person convicted of the offence of murder, should be granted the luxury of a non-custodial sentence. The whole object of promoting deterrence, reinformation and retribution would be rendered meaningless.

Taking the above considerations into account, and considering that the accused never expressed any remorse for the offence they committed, and further considering submissions by counsel for the accused, that the court should impose a determinate sentence, I think the proper sentence to pass against the five accused is only one. A long imprisonment term. I therefore sentence each of the accused to fifty-six years imprisonment and I further order that the accused shall not be eligible for parole until each of them has served not less than 30 years of the term hereby imposed.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 26th day of January, 2012

M. J. ANYARA EMUKULE

JUDGE