REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CRIMINAL CASE NO. 116 OF 2007

REPUBLIC……..……
PROSECUTOR

VERSUS

JOHN KIMITA MWANIKI……...…….ACCUSED

SENTENCE

The Accused was on the 27th day of November 2007, under and pursuant to the provisions of Section 203 of the Penal Code *(Cap. 63, Laws of Kenya),* convicted of the murder of -

(1) Reuben Kipngeno,

(2) Shadrack Kipkoech

(3) Rose Chemtai

Section 204 of the Penal Code provides that any person convicted of murder shall be sentenced to death.

The literal meaning to this provision is clear. The punishment for the offence of murder is death. I think the Section cannot be narrowed into any more construction harsher than it is already. The issue with which the Court of Appeal was confronted with in the case of **GODFREY NGOTHO MUTISO VS. REPUBLIC [2010] eKLR** was both one of interpretation and the larger issue of the imposition of the mandatory death penalty for particular offences such as murder, robbery with violence, and treason. The appellant in that case, argued that -

(1) the imposition of the mandatory death penalty for particular offences is neither authorized nor prohibited in the Constitution. As the Constitution is silent, it is for the courts to give a valid constitutional interpretation on the mandatory nature of the sentence;

(2) a mandatory death sentence is antithetical to the fundamental human rights and there is no constitutional justification for it. A convicted person ought to be given an opportunity to show why the death sentence should not be passed against him;

(3) the imposition of a mandatory death sentence is arbitrary because the offence of murder covers a broad spectrum making the sentence mandatory would therefore be an affront to the human rights of the accused;

*(4) Section 204 of the Penal Code is unconstitutional and ought to be declared a nullity. Alternatively, the word **"shall"** ought to be construed as **"may";***

(5) there is a denial to a fair hearing when no opportunity is given to an accused person to offer mitigating circumstances before the sentence, which is the normal procedure in all other rights for non- capital offences, that sentencing was part of the trial and mitigation was an element of fair trial;

(6) Sentencing is a matter of law and part of the administration of justice which is the preserve of the Judiciary. Parliament should therefore only prescribe the maximum sentence and leave the courts to administer justice by sentencing the offender according to the gravity and circumstance of the case.

The Attorney-General through the learned Director of Public Prosecutions conceded to the above issues in these words -

"We now concede that notwithstanding the mandatory provisions of Section 204 of the Penal Code, a trial Judge still retains a discretion not to impose the death penalty and instead impose such sentence as may be warranted by the circumstances and facts of the particular case. That is our position. The word "shall" in Section 204 should now be read as "may"."

The Court of Appeal agreed with concession by the Attorney-General, and stated that Section 204 of the Penal Code which provides for the death penalty is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial.

The Court of Appeal also concluded -

"We note that while the Constitution itself recognizes the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare Section 204 shall, to the extent it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision."

That court also observed that the arguments concerning sentencing under Section 204 of the Penal Code would also apply to other capital offences, such as treason under Section 40(3), robbery with violence under Section 296(2) and attempted robbery with violence under Section 297(2) of the Penal Code.

Whilst agreeing with that court's conclusion on the application of the arguments on Section 204, to other capital offences, I would observe that the mandatory death sentence set out in Sections 40(3) *(treason),* 204 *(murder),* S. 296(2) *(robbery with violence)* and attempted robbery with violence *(section 297(2)* of the Penal Code, is underpinned by Section 71(1) of the former Constitution, and Section 26(3) of the current Constitution of Kenya. Section 71(1) of the former Constitution provided that -

"71(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted."

Section 71(2) of the former Constitution also gives 5 specific instances where a person may lawfully be deprived of his life -

(1) in defence of person or property,

(2) in effecting a lawful arrest, or prevention of escape from lawful custody,

(3) in suppressing a riot, insurrection or mutiny,

(4) prevention of commission of a crime,

(5) death as a result of an act of war.

Article 26(1) & (3) of the current constitution say -

"26 (1) Every person has the right to life

(2)

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

Other than the other five occasions when a person may deprived of his life *(S.71(2) of the former Constitution - which would now constitute extra-judicial killings),* the punishment for capital offences were and are underpinned by the current Constitution, and it would not therefore be either correct or accurate to declare that the Constitution does not say that when a conviction for murder is recorded only the death sentence shall be imposed. If it were not so, what meaning would we give to the current, let alone the former Constitutions when the current Constitution says - **"a person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law."**

I probably missed some provision but the current constitution specifically allows deprivation of life under some written law in addition specifically, under Section 26(4) ***"abortion"*** to save the life of the mother. Strangely also, life is not one of those fundamental rights which may not be limited under Section 25 of the Constitution. *(the rights to freedom from torture and cruel, inhuman or degrading treatment or punishment, freedom from slavery or servitude, the right to fair trial and the right to an order of habeas corpus).*

The real question, which begs an answer is whether the death penalty underpinned by Article 26(3) & (4) of the current Constitution is consistent with the right to life under Article 26(1). And the Constitutional question would be whether those provisions are consistent with each other? That is a question probably for another forum and for another day. It is not answered by conceding that the word **"shall"** in Section 204 shall mean **"may".** If this be so what would happen to a myriad of other statutes where the expression is deliberately used to express the intention of Parliament?

The statutes that readily came to mind is the Sexual Offences Act, 2006 *(No. 3 of 2006)* where punishment are graduated, not according to the offence, but rather the age of the victim, shall the courts also pun with the words **"shall"** to mean **"may"?** What would one do with war on drugs in the Drugs Narcotics and Psychotropic Substances Act where again the punishment is also graduated in terms of value of the drug, narcotic or psychotropic substance? Will we again pun the mandatory provisions and confer discretion to the courts? Not a bad idea, but can we imagine the chaos it would engender with minimal sentences? It would be a field day particularly in the lower courts which have jurisdiction in these and other statutes. The High Court would simply be inundated with applications for revision.

However back to my case. The accused said in mitigation that he was arrested when he was 20 years of age. He is now 24 years. His parents were displaced in 2006 in the notorious and infamous cycle of ethnic cleansing prior to general elections every five years. His parents are IDPs in some congested camp. He is remorseful. He does not deserve a sentence of death, his counsel Mr. Macharia told the court.

Mr. Omwenga learned State Counsel said, the accused was a first offender, and should be treated as such.

Taking the above submissions into account, and holding the view that Article 26(2) *(on deprivation of life)* is inconsistent with the right to life preserved under Article 26(1) of the Constitution, and sending a deterrent warning to perpetrators of ethnic clashes everywhere in the land, north and south, east and west that we are in this geographic expression called Kenya together and none has any more right to be here than another, I hereby sentence the accused to thirty (30) years imprisonment without an

option for parole for the first 20 years.

There shall be orders accordingly, and the accused is reminded of his right to appeal within 14 days on both the conviction and sentence.

Dated, delivered and signed at Nakuru this 10th day of June 2011

M. J. ANYARA EMUKULE
JUDGE