



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**CRIMINAL CASE NO.11 OF 2009**

REPUBLIC .....PROSECUTOR

VERSUS

- 1. DICKSON MWANGI MUNENE .....1<sup>ST</sup> ACCUSED
- 2. ALEXANDER CHEPKONGA FRANCIS .....2<sup>ND</sup> ACCUSED

**SENTENCE**

The two accused persons were convicted for the offence of murder contrary to section 203 as read with 204 of the penal Code. Section 203 of the Penal Code reads;

**“Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.”**

And section 204 reads as follows;

**“Any person convicted of murder shall be sentenced to death.”**

I have heard the mitigation by Mr. Kilukumi and Mr. Murgor for the accused persons. I have also seen the report filed by the prosecution on behalf of the family of the deceased.

It was the submissions of Mr. Kilukumi and Murgor Advocates that death is not the only sentence available to this court in respect of the conviction entered against the two accused persons.

In my understanding a person can either be charged with a felony or misdemeanor. In all instances where a person is convicted for a misdemeanor, the court is granted the liberty to impose a sentence of its discretion. There are instances where the maximum/ceiling is set by the statute. In my view in all cases of misdemeanor, the option of imposing a particular sentence is left for the trial court. However where a person is charged and convicted for a felony, the statute either fixes the minimum or maximum and even sometimes gives a leeway to the court to impose a discretionary sentence. Furthermore there are instances where the hands of the court are tied by the relevant statute or section as to the manner and specific sentence to be imposed. See the sexual offences Act No.3/2006 and the psychotropic substances Act.

My understanding of criminal law is that, when it comes to sentencing, the section either uses the words “shall or is liable”. Where the word “shall” is used or employed, the discretion of the court has been deliberately and intentionally restricted by Parliament. If Parliament in its wisdom has restricted the

liberty of the court, it is not the duty of the court to put words or meaning which are non-existent in the statute or particular section. That is a basic and elementary rule of interpretation.

It has been argued that the court of appeal in **Godfrey Ngotho Mutiso v Republic (2010) eKLR** held that the imposition of the mandatory death sentence for a person convicted for murder or robbery with violence c/s 296(2) is inconsistent with the letter and spirit of the Constitution. The Court of Appeal in that decision recognized and appreciated that the former Constitution **recognized death penalty imposed as being lawful**. The court went further and stated that the Constitution does not say anywhere that when a conviction for murder is recorded, **only the death sentence shall be imposed**. The court then declared that section 204 of the Penal Code 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**. Was that the case or position in so far as the former Constitution is concerned?

Section 71(1) of the former Constitution provided;

**“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 Laws of Kenya of which has been convicted.”**

The key words no deprivation of life save in execution of a sentence imposed in respect of a criminal offence. The criminal offence leading to the deprivation of life must be one known and recognized under the laws of Kenya. There must have been a conviction resulting from a criminal trial. It is important, at this stage to restate that murder is an offence provided under the penal code. The sentence for murder has been clearly provided under section 204 of the penal code. The deprivation of life through a criminal sentence is in my **view a lawful act recognized under the former Constitution**. The offence of murder is defined under section 203 of the penal code. The penalty therefor is prescribed in a written law, section 204 of the Penal Code.

What about the current Constitution? Section 26(1);

**“Every person has a right to life.”**

Section 26(3);

**“A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law.”**

Under article 26(1) the Constitution defines or has a basic principle of law, the right to life. However, the Constitution does not declare in absolute and clear manner that the said right **should be enjoyed without any restriction or inhibition**. Under article 26(3) the Constitution imposes an encumbrance or a restriction that the **said right cannot be absolute**. The right to life can be taken away or deprived through written law or in a manner indicated by the Constitution.

As we all know Constitution is like a structure and we need to fill the details through legislation, policy or where it is not clear, an interpretation from the court. Under article 24 (1) of the Constitution, a right or fundamental freedom can be limited or restricted in its enjoyment through written law, in so far as that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In doing so, one key factor is the importance of the purpose of the limitation. Perhaps it is essential to understand the basis and purpose of imposing a particular sentence for a particular offence. The paramount consideration in sentencing in criminal is the safety of the society, as we all abhor transgressions against fellow citizen or human beings.

Our Constitution is the legal and legitimate expression or reflection of our collective will or aspiration. And because it is the Supreme law, it lays the framework and foundation for a democratic society. The people of Kenya have stated in the Constitution the manner their affairs to be governed by the Executive, Parliament and Courts. They have full confidence in the legal system, which is based on the will of the people. In that regard, every citizen has **equal protection in the eyes of the law**. As a court we must

respect and comply with the provisions of the Constitution and statutes as they reflect the will of the people. The will of the people is generally manifested through legislations enacted by parliament. Such legislation must be in conformity with the letter and spirit of the Constitution. Largely the Constitution and statutes are a reflection of our values and customs. If Kenyans preferred the abolition of death penalty, nothing would have been much easier to express that in the Constitution and in the Penal Code.

The abolitionist theory, is largely and overwhelming focused or based on the rights of the living. Justice must address itself to the dead and the living beings in the same manner. The focal or focus point for the abolitionist is to promote human rights and respect for the Rule of Law. Our laws as currently drafted and enacted provide for the imposition of death penalty. Nothing more, nothing less. It is our obligation as a court to implement and enforce the law as it is and not according to the best practices in existence. In any case who has said that death penalty is repugnant to our sense of justice and morality. The debate about right to life is in my view looking a serious issue broad eye's view. It is one sided and does not reflect the rights of the deceased and his family members. We cannot afford to forget the painful and devastating side of the victim. It is an imparted theory, which is likely to cause grave injustice to many Kenyans who were deprived of their loved ones. It is a miscarriage of justice to say our statutes or Constitution prohibit the imposition of death sentence. It is true that death sentence deprives one of his right to life, but it is done within the boundaries of the law, therefore lawful.

It is also alleged that death penalty is a cruel and inhuman punishment but what about the loss of life, as a result of the unlawful act of the accused. In my view loss of someone's life is equal and amounts inhuman treatment. The person who is responsible for the loss must pay for it in equal measure or commensurate to the suffering of the victim or his family. There are circumstances where the offence had been planned and executed in a cruel and inhuman and degrading manner. There are instances where a person commits mass murder and gross violation of human rights and dignity. We must therefore impose the correct and lawful sentence provided under our law.

In that regard I think the decision of the President in 2009 to commute all existing death penalty sentences to life imprisonment was utter disregard of his Constitutional responsibility. The President should have exercised his cardinal responsibility of signing of all pending death warrants. To fail to exercise a legal duty is an abrogation of trust and breach of duty. I also think the recent decision of the Court of Appeal and that of my brother Justice Emukule is a significant step in the wrong direction. My position, is that, the law as currently in existence provides for death penalty notwithstanding the noble view of my brother Justice Emukule.

Now having taken into consideration all the factors in this case, I am of the humble view that the **only available sentence for a person convicted for murder is death**. The mandatory use of the word '**shall**' gives me no option or route other than to impose death penalty. Consequently I sentence the two accused person to suffer death as prescribed by law. Orders accordingly.

**M. WARSAME**  
**JUDGE**  
**12/10/2011**