



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL CASE NO 35 OF 2012

JACKSON MAINA WANGUI 1ST ACCUSED/PETITIONER

JOSEPH KIRERO SEPI.....2ND ACCUSED/INTERESTED PARTY

VERSUS

REPUBLIC.....PROSECUTION/RESPONDENT

RULING

Introduction

1. The petitioner and interested party have been charged in **Nairobi High Court Criminal Case No 35 of 2012** with the offence of murder contrary to section 203 as read with section 204 of the Penal Code. They are alleged to have shot dead one Kevin Onyango Oduor at the petitioner's club known as the Click Club on 8th May 2012. The petitioner and the interested party pleaded not guilty to the charge on 13th of November 2012 and their trial commenced. One witness has already testified.
2. The petitioner then lodged the present application by way of Notice of Motion dated 23rd November 2012. The interested party supports the application in which the petitioner challenges the legality and constitutionality of the death penalty.
3. The petitioner has in the said application posed nine interrelated questions pertaining to the legality and constitutionality of the death penalty, as well as the manner of its application within the Kenyan judicial system. These questions are as follows:
 1. *Whether an accused person charged with the offence of murder is entitled to know with certitude, at the date of taking plea, what possible sentence he stands to suffer in the event the trial court finds him/her guilty of the offence of murder and whether such an accused person is entitled to know how such sentence will be executed in the event of a conviction.*
 2. *Whether punishment by a mandatory death sentence prescribed under section 204 of the Penal Code, Cap 63 of the Laws of Kenya or any other written law, is authorized by or under the*

Constitution of Kenya and whether it is contrary to the general rules of international law and/or treaties and conventions ratified by Kenya, and if so, whether it offends the provisions of Article 26 of the Constitution of Kenya?

3. ***Whether a mandatory death sentence erodes the dignity of individuals and arbitrarily deprives an accused person his inherent right to life and other fundamental rights and freedoms enshrined under Articles 24,26, 28 and 29 of the Constitution of Kenya 2010 and if so, whether such sentence is unconstitutional?***
 4. ***Whether a mandatory death sentence deprives a Court of law the discretion and right to consider mitigating circumstances in which an offence of murder was committed?***
 5. ***Whether or not, in convicting an accused person in respect of the offence of murder, a trial court in Kenya can lawfully pass a minimum sentence or any other sentence other than a mandatory death sentence? If so, when and under what circumstances can a court of law prescribe a minimum sentence in respect of a conviction for the offence of murder?***
 6. ***Whether the Commissioner of Prisons has and can lawfully exercise discretion and defer a death sentence indefinitely and/or leave it to the sole discretion of the President?***
 7. ***Whether the President of the Republic has lawful authority to commute a death sentence to life imprisonment in the absence of any Constitutional or written Statutory provision authorizing such an act?***
 8. ***Whether a mandatory death sentence constitutes an inhuman and/or degrading treatment and whether it erodes a person's inherent dignity?***
 9. ***Whether the Penal Code can lawfully limit or deprive a citizen his or her right to life when the Constitution does not expressly authorize a death sentence?***
4. The application, which is supported by the affidavit sworn by the petitioner, Jackson Maina Wangui, is based on several grounds. He contends, among other things, that the High Court has, prior to the promulgation of the new constitution, given conflicting decisions on the propriety of the mandatory death sentence prescribed under section 204 of the Penal Code; and that no judicial decision has been given on the propriety of the said sentence after taking into account the general rules of international law and treaties or conventions ratified by Kenya which now form part of the laws of Kenya under the new Constitution.
 5. He contends further that the mandatory death sentence is unfair, unjust, undignified, inhuman, cruel and degrading and is a breach of the general rules of international law and a violation of the right to life enshrined under Article 26 of the Constitution and is therefore inconsistent with the Constitution.
 6. The petitioner alleges that as no judicial or legislative measures are currently being undertaken to nullify or abolish the death sentence, he is uncertain of his fate and the court's ability to exercise discretion during sentencing in the event the trial court convicts him of the alleged offence of murder that he is currently facing.
 7. It is his contention that the right to life and human dignity is a fundamental right that belongs to every individual, is not granted by the state and the state cannot therefore take it away through a mandatory and degrading death sentence; that Kenya has ratified and domesticated the provisions of Article 6 and 7 of the International Covenant on Civil and Political Rights which prohibit torture, cruel, inhuman or degrading treatment or punishment and that therefore a mandatory death sentence has no validity and can no longer be lawfully enforced under the Kenyan legal system; that the sentence is inconsistent with the general rules of international law, is repugnant to justice, and is unreasonable and unjustifiable in an open and democratic society that is based on human

dignity, equality and freedom.

8. He therefore prays that the Court interprets the provisions of the Constitution in order to confirm whether a mandatory death sentence would accord with Kenya's obligations under the International Covenant on Civil and Political Rights which prohibits torture, cruel inhuman or degrading treatment or punishment.
9. When the application came up before the court, the court ruled that it raised critical and weighty constitutional matters of public importance and it was therefore referred to the Chief Justice for the constitution of a three judge bench to hear it, hence the present bench. It was argued before us on 26th June 2014.

Submissions by the Petitioner

10. Briefly summarized, the petitioner's case as set out in his pleadings and written submissions is that he has been charged with the offence of murder, but that as a result of the current situation in relation to the legality of the mandatory death sentence in Kenya, he is uncertain of the sentence likely to be imposed on him should he be found guilty and convicted of the offence. He contends that this uncertainty goes against the principles of *nullum crimen, nulla poena sine lege and jus certum*, that the law must be certain and no person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed in a written law.
11. The petitioner argues that the mandatory death sentence is inconsistent with the provisions of the Constitution in that it infringes the fundamental rights and freedoms provided for under article 2 (5) and (6), 10, 20, 22 (1) and (4), 23 (1) and (3), 24, 25 (a), 26, 28, 29, and 47 (2) of those charged, convicted of the offence and sentenced to death. This is because they are thereafter kept in prisons for years while awaiting execution of the sentence. He asks the court to find that the undue delay in execution of the sentence is unconstitutional as it subjects the convict to cruel and inhumane punishment.
12. The petitioner argues further that the mandatory death sentence is unconstitutional as it interferes with the independent exercise of judicial authority and independence. According to the petitioner, the mandatory nature of the death sentence deprives the court of the power to exercise its discretionary power whereas the Commissioner of Prisons exercises discretionary powers in commuting capital sentences.
13. He contends that the discretion of whether or not to punish by death should not be exercised by a non – judicial institution like the President or the Prisons Department through the prerogative of mercy as such exercise is not subjected to constitutional safeguards and can be exercised arbitrarily yet there is no avenue to challenge its exercise. The petitioner argues that it is only the courts of law that have heard the evidence that can evaluate each case on its peculiar circumstances and judiciously exercise discretion and sentence a convicted person to death, life imprisonment or to a precise term of imprisonment.
14. In his oral submissions, Mr. Bowry argued that the status of the petitioner is that he has been charged, has pleaded not guilty, the hearing is to proceed, but he does not know with certitude what penalty he will face upon conviction, and it is this doubt that he seeks to have clarified by the court. He submitted that this matter is unique, of mammoth significance and with no legal precedent; that it raises a dilemma that needs to be resolved; does not relate to the law but the application of the law by the judicial system and law enforcement agencies; and has grave consequences in law enforcement and public policy.
15. Mr. Bowry asked the court to take judicial notice of the fact that for the last 27 years, since 1987, no execution has taken place as a result of lawful judgments, convictions and sentences; and that for those two decades, the imposition of the death penalty is academic only and does not exist in the country, a state of affairs that cannot be attributed to the law or judicial officers with a duty

under the law.

16. Mr Bowry submitted further that the petitioner's concern is with the pre-trial and trial position; that he is entitled to know the exact consequences of his conviction; that he does not know whether the death penalty will be carried out or not; and that an authority can convert it unilaterally into a life sentence.
17. Counsel submitted further that the petitioner is concerned also with who determines what a life sentence means; that it is a fundamental right of an accused person to know the consequence of his wrong doing; and the court should tell him exactly what he is liable for upon conviction. Mr. Bowry submitted that this right cannot be left to whimsical application of law; and that it goes to the legitimate expectations of a person charged with murder.
18. It was his submission that there are conflicting decisions as to whether section 204 of the Penal Code grants the court a discretion in sentencing; that there is data to suggest that murder convicts can be sentenced to a term of years; and that the death penalty is not mandatory. According to Mr. Bowry, in 2009, all death row convicts had their sentences commuted to life; that there are death row inmates whose fate hangs in the balance; and there are those facing trial such as the petitioner who do not know whether, upon conviction, one will be hanged or will be held in prison for years.
19. It was his contention that if judicial sanctity is to be respected, then there must be certainty; that no-one, neither the Commissioner of Prisons nor the Executive, should have the power to vary a sentence; and the court should decide what the fate of the accused should be.

Submissions by the Interested Party

20. Through his Counsel, Mr Naeku, the interested party supported the petitioner's arguments. It was his contention that contrary to the argument by the respondent that the matter of the constitutionality of the death sentence has already been dealt with, it was still open to this court to reconsider the decisions that have addressed the issue of the death penalty. He relied on the English decision in **R vs Taylor (1950) 2KB 368** and **R vs Gould (1968) 1 All ER 849** for the proposition that where the law has been misapplied or misunderstood, the court can mould new rules to serve new situations; and that as this court is constituted as a constitutional court, it has the final word on the issue.
21. Mr. Naeku submitted further that **Article 51** mandates Parliament to legislate on humane treatment of persons in custody and on relevant international instruments; and that the court can and should initiate change by making bold legal changes and judicial innovations.
22. It was the interested party's contention that the mandatory death sentence provided for under the Penal Code violates the right to inherent dignity under **Article 28**; the right to life under **Article 26**, except to the extent authorized by law; that the provisions of the Penal Code do fall under the exception provided under the Constitution but that regard should be had to **Article 2** as well as **Article 51** which mandates Parliament to legislate.
23. Counsel also alleged violation of **Article 29**, contending that where a person is forced to wait indefinitely for execution of the death penalty, there is violation of **Article 29(e)** which prohibits corporal punishment and **29(f)** which prohibits torture. Counsel asked the court to be guided by the Malawian decision in **Kafantayeni vs Attorney General (2007) MWHC 1** on the constitutionality of the death penalty and adopt the arguments in that case.
24. Mr. Naeku submitted further that in the enforcement of a penalty, enforcement agencies have a duty to respect dignity, and that courts have a duty to consider mitigating circumstances. It was his submission that a blanket and mandatory death sentence cannot serve to achieve a fair decision of a court of law and the court should not shy away from protecting the right to life.

Submissions By the Respondent

25. The respondent's case as presented by Ms. Mwaniki is that this application is premature as the criminal prosecution of the petitioner and the interested party has not been concluded. She submitted that the petitioner and interested party had taken their plea and one witness had testified before the petitioner filed this application. She contended that the court cannot interfere with any pre-trial issues; that what the petitioner and interested party were asking the court to do is to make a determination as to their sentence at this stage, then thereafter they will make their decision as to how to handle their defence. She contended that the court cannot act on assumptions unless the petitioner and interested party wished to plead guilty and their sentences commuted to life; in which case the issues can then be properly before the court.
26. The respondent relied on submissions and authorities filed on 20th June 2014. Its contention is that the trial procedure is very clear and is set out in **section 274 – 329 of the Criminal Procedure Code**; that **section 274** provides for the information to be read to the accused, and the accused to plead; and that it is not until the accused person is convicted that the court, under section 330, informs the accused of his sentence and of the right to appeal.
27. The respondent argued that no court is duty bound to inform the accused person of the consequences of conviction once a person pleads not guilty; that one must go through a full trial; and that not informing the accused of the penalty he is to face upon conviction does not amount to violation of any rights under any constitution in the world.
28. Ms. Mwaniki submitted that under **Article 50(2)(b)**, one is presumed innocent, and one is entitled to know the charge facing him; that under **Article 50(2)(h)**, one is not to be convicted for an act or omission if the act or omission was not an offence in Kenya or under international law. It was her submission that none of these rights has been violated and no evidence has been tendered to show the alleged violation; that the accused have been correctly charged before the court with the offence of murder contrary to section 203 of the **Penal Code**; that the mandatory death sentence is provided for in law; that section 24 and 25 of the Penal Code provides the death sentence as one of the penalties that an accused person can lawfully be sentenced to; and that **Article 26(3)** allows the death sentence, with the Penal Code being the written law contemplated under the said Article and the International Covenant on Civil and Political Rights which Kenya has ratified.
29. Counsel submitted that there is therefore no dilemma in law in Kenya on the death sentence; that the issue of the constitutionality of the death sentence has been addressed by the Court of Appeal in **Joseph Njuguna Mwaura vs Republic Criminal Appeal No 5 of 2008**, and it has not been overturned; that the death penalty has been reaffirmed in **Kevin Adika vs Republic – Criminal Appeal No.102 of 2005**; and that these two decisions overturned the decision in **Godfrey Ngotho Mutiso vs. Republic Criminal Appeal No. 17 of 2008** on issues of mitigation.
30. According to Ms. Mwaniki, in **Joseph Njuguna Mwaura –vs- Republic**, the Court of Appeal was aware that there were no executions since 1987 but was not convinced that the death penalty was not a fit sentence; that the Court correctly held that if Kenyans wished to remove the death sentence, they could go to their legislators; and that the death penalty did not violate any rights and should remain.
31. The respondent pointed out that in other jurisdictions such as India, the Penal Code provides for various sentences including the death penalty, imprisonment and fines, unlike the Kenyan Penal Code which provides only for death for the offence of murder; and further, that the Constitution of India also recognizes the death sentence for serious offences as illustrated in the case of **Devender Pal Singh Bhullar & Another vs the State of NCT (SC.D No. 16039 of 2011)**. Ms. Mwaniki therefore urged the court to dismiss the petition and order the petitioners to go back to trial as they had not demonstrated that their rights have been violated.

Issues for Determination

32. There are no factual disputes with regard to the present application, raising, as it does, matters of law pertaining to the legality and constitutionality of the death penalty. It is also, we believe, undisputed that the court has jurisdiction under **Article 165(3)** of the Constitution to determine the issues raised in the application. What does arise for consideration is whether, as argued by the respondent, any or all of the issues raised have already been considered and determined, which implies that this court cannot properly address itself to them.

33. The issues that the application raises as summarized and addressed by the parties are as follows:

1. *The right of an accused person to know with certitude what sentence he stands to suffer at the date of taking plea;*
2. *The legality and constitutionality of the mandatory death sentence;*
3. *The mandatory death sentence and exercise of the courts' discretionary powers;*
4. *Obligations under general rules of international law and international treaties and conventions;*
5. *Enforcement of the death sentence*
6. *The President's authority to exercise the power of mercy*
7. *what constitutes life imprisonment*

34. In addressing our minds to these issues, we shall deal with the issues that are closely related or interlinked together.

Analysis and Determination

The Right of an Accused Person to Know with Certitude what Sentence he Stands to Suffer at the Date of Taking Plea

35. The rights to which an accused person is entitled to under the Constitution of Kenya are set out at Article 50(2) as follows:

“Every accused person has the right to a fair trial, which includes the right—

(a) to be presumed innocent until the contrary is proved;

(b) to be informed of the charge, with sufficient detail to answer it;

(c) to have adequate time and facilities to prepare a defence;

(d) to a public trial before a court established under this Constitution;

(e) to have the trial begin and conclude without unreasonable delay;

(f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(g) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of

this right promptly;

(i) to remain silent, and not to testify during the proceedings;

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(k) to adduce and challenge evidence;

(l) to refuse to give self-incriminating evidence;

(m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

36. As a starting point therefore, the simple answer to the first issue raised by the petitioner and supported by the interested party is that the right that he seeks to assert is not guaranteed by the Constitution, at least not directly. One may argue, however, that it can be inferred that there are other rights necessary for a fair trial that are not set out in Article 50(2), given the use of the word "includes".

37. If one makes this inference and asserts, as does the petitioner, that he has a right to know with certitude what sentence he stands to suffer at the date of taking plea, the question is whether the situation with regard to the death penalty in Kenya is such as violates this right.

38. As conceded by Mr. Bowry in his reply to the respondent's submissions, the law on the death penalty is clear. What the petitioner and interested party are dissatisfied with is what they allege to be the illegality and unconstitutionality of this sentence, and the confusion and lack of clarity in its application. The basis of this contention is the fact that there have been conflicting decisions on the death penalty, and whether or not a person convicted of an offence that carries the death penalty such as murder and robbery with violence can be sentenced to life imprisonment or to a term of imprisonment.

39. To illustrate this uncertainty, the petitioner has relied on, among others, the decision of the Court of Appeal (Omolo, Waki and Onyango Otieno JJ. A) in **Geoffrey Ngotho Mutiso vs. Republic (supra)** in which the court held that:-

"...On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, 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. 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 that section 204 shall, to the extent that 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.”

40. The petitioner also cites Emukule J.’s decision in **Republic vs. John Kimita Mwaniki Criminal Case No 116 of 2007** in which he sentenced the accused, whom he found guilty of murder, to a term of imprisonment for thirty years on the authority of **Mutiso vs Republic**; Korir J.’s decision in **Republic vs. Mohamed Abdow Mohamed Criminal Case No. 86 of 2011** in which the court discharged the accused, who was facing a charge of murder; and Mutuku J.’s decision in **Republic vs. Stephen Wekesa Wasike Garissa Criminal Case No. 1 of 2011** in which, after finding the accused guilty of murder, the court sentenced him to 20 years’ imprisonment.

41. The petitioner has also drawn attention to the decision of Warsame J. (as he then was) in **Republic vs. Dickson Munene & Another Criminal Case No. 11 of 2009** where he expressed the opinion that the Court of Appeal was wrong in its decision in **Mutiso vs Republic**, and that the President had disregarded his constitutional obligation by commuting death sentences to life imprisonment in 2009.

42. We observe that the petitioner also cites the decision of the five-judge bench of the Court of Appeal (Mwera, Warsame, Kiage, Gatembu-Kairu and Mohammed JJ.A) in **Joseph Njuguna Mwaura & 2 Others vs. Republic Criminal Appeal No. 5 of 2008**, the latest decision to consider the issue of the death penalty, delivered slightly under a year ago on 18th October, 2013. We are of the view that this case provides answers to several of the issues raised in the application before us, but we shall revert to it later in this ruling.

43. With regard to certainty of sentence, Section 203 and 204 of the Penal Code provide as follows:

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

204. Any person convicted of murder shall be sentenced to death.

44. At section 24 of the Penal Code, which is titled “**Different Kinds of Punishment**” it is provided as follows:

“The following punishments may be inflicted by a court—

(a) death;

45. Section 25 of the Penal Code provides with regard to the sentence of death that:

“Where any person is sentenced to death, the form of the sentence shall be to the effect only that he is to suffer death in the manner authorized by law.”

46. Thus, the death penalty is expressly provided for in the law. It is also not one of the rights that cannot be limited under Article 25, which provides that:

“Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited—

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of habeas corpus.”

47. The death penalty is in fact contemplated and is indeed mandated under Article 26 of the Constitution, of which 26(1) guarantees the right to life, but provides at 26(3) that **“A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.”** (Emphasis added)
48. Consequently, where a person is charged with an offence punishable by death such as murder, one is certain from the outset that the penalty is death, as this is the penalty prescribed by law. The response to the first two issues raised by the applicant is therefore that the applicant and interested party are indeed entitled to know the sentence that they will meet should they be found guilty; but that the said sentence is clearly provided for in the law and the constitution, and is therefore not contrary to the law and the constitution.
49. We appreciate that the decision in **Mutiso vs Republic** and the three subsequent decisions of the High Court in **Republic vs. John Kimita Mwaniki**, **Republic vs. Mohamed Abdow Mohamed** and **Republic vs. Stephen Wekesa Wasike** (supra) may have muddled the issue and muddied the waters somewhat. However, in our view, this is not a matter that lends such uncertainty to the law as to render a prosecution such as the petitioner and interested party are facing a violation of their rights as accused persons.
50. It is our view that the issue in those cases was one of interpretation of the law, and that the uncertainty in the law has been addressed by the Court of Appeal in **Joseph Njuguna Mwaura – vs- Republic**. The court express itself in that case as follows:

“We hold that the decision in Godfrey Mutiso vs R to be per incuriam in so far as it purports to grant discretion in sentencing with regard to capital offences. Our reading of the law shows that the offences of murder contrary to section 203 as read with 204 of the Penal Code, treason contrary to section 40 of the Penal Code, administering of oaths to commit a capital offence contrary to section 60 of the Penal Code, robbery with violence contrary to section 296 (2) of the Penal Code and attempted robbery with violence contrary to section 297 (2) of the Penal Code carry the mandatory sentence of death.”

51. As judges sitting in the High Court, albeit as a three judge bench of the High Court, we cannot, as the petitioner, and more explicitly, the interested party, invited us to do on the authority of **R vs Taylor** (supra), purport to sit and resolve the alleged conflict in the decisions emanating from the High Court and the Court of Appeal on the death penalty. First, as noted above, the latest decision from the appellate court has addressed itself to the issue with clarity.

52. More importantly, however, as the Court of Appeal held in **Peter Ng’ang’a Muiruri vs Credit Bank Limited And Another Civil Appeal 203 of 2006:**

“Any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them. As the late Nyarangi JA once remarked in the case of The

***Owners of the Motor Vessel “Lilians” vs Caltex Oil Kenya Ltd [1989]KLR 1
“Jurisdiction is everything. Without it, a court has no power to make one
more step”.*** (Emphasis added)

53. We fully agree. As a High Court exercising constitutional jurisdiction, although comprising three judges, we have no jurisdiction to review decisions of the Court of Appeal. Such uncertainty as may be deemed to exist in Kenyan law with regard to the death penalty as has not been sufficiently addressed by the Court of Appeal can only be addressed by the Supreme Court.

The Legality and Constitutionality of the Mandatory Death Sentence and whether it is a Violation of Articles 24, 26, 28 and 29 of the Constitution.

54. The petitioner and interested party have asserted that the death penalty is illegal and unconstitutional for violating the rights of accused persons guaranteed under Articles 24, 26, 28 and 29 of the Constitution. Article 24 of the Constitution provides the circumstances under which rights and fundamental freedoms may be limited. As observed above, Article 25 contains the rights and fundamental freedoms which may not be limited, while Article 26(3) permits limitation of the right to life ***“to the extent authorised by this Constitution or other written law.”*** In so far therefore as the death penalty is permitted by the Constitution and the Penal Code as the penalty prescribed for certain offences, it is not a derogation of the right to life.

55. Is it unconstitutional for violating Articles 28 and 29 of the Constitution? Article 28 provides that ***“Every person has inherent dignity and the right to have that dignity respected and protected.”*** At Article 29, the Constitution guarantees freedom and security of the person and provides that it includes the right not to be ***“subjected to corporal punishment”; or “treated or punished in a cruel, inhuman or degrading manner.”***

56. This question was also the subject of consideration by the Court of Appeal in **Joseph Njuguna Mwaura**, and the court expressed itself with regard thereto as follows:

“We must now consider whether the death sentence as envisaged under our law amounts to cruel and inhuman or unusual punishment which is prohibited by the Constitution.

Black’s Law Dictionary (9th Edition) defines torture as ‘the infliction of intense pain to the body or mind to punish, to extract a confession or information or to obtain sadistic pleasure,’ and cruel and unusual punishment as ‘punishment that is torturous degrading, inhuman, grossly disproportionate to the crime in question or otherwise shocking to the moral sense of the community.’ Inhuman treatment is defined as ‘physical or mental cruelty that is so severe that it endangers life or health’.

57. The Court went on to conclude as follows:

“Based on these definitions cruel, inhuman and degrading punishment is that which is done for sadistic pleasure, in order to cause extreme physical or mental pain, and that is disproportionate to the crime, so that it causes moral outrage within the community.

We do not think that the death sentence falls within these definitions. The death sentence is not done for the sadistic pleasure of others. It cannot also be said to be shocking to the moral sense of the community due to the fact, as we have stated above, that it has now been endorsed by the people of Kenya through the referendum, and by the fact that it continues to exist in our statute books with constitutional underpinning.

We also do not consider that the deprivation of life as a consequence of unlawful behaviour is grossly disproportionate. In Kenya, death is a penalty for what can be considered as the most serious of crimes. It is a proportionate punishment for the offences committed, which in many cases result in the loss of life, and the loss of dignity for the victims.”

58. In the circumstances, and bearing in mind that we are bound by the decisions of the Court of Appeal, we believe we have nothing further to add on this issue.

The Mandatory Death Sentence and Exercise of the Court’s Discretionary Powers

59. The petitioner contends that the provision of a mandatory death sentence deprives a court of law of the discretion to consider mitigating circumstances in which the offence of murder was committed. Again, this is a matter that was considered at length by the Court of Appeal in **Joseph Njuguna Mwaura**. The Court considered the decision in **Godfrey Mutiso vs Republic** with regard to the court’s discretion on the death penalty and stated as follows:

“The import of this decision is that mitigation is now required to determine the appropriate sentence in cases where there had been convictions for capital offences. In effect, the holding in this case introduced sentencing discretion to judicial officers in murder cases. Decisions by this Court are generally binding, but we do have the power to depart from those decisions where we consider that in the circumstances, it is correct to do so. The Court will also not follow a case that it considers per incuriam. See Dodhia vs National Grindlays Bank Ltd [1970] EA 195.

A look at all the provisions of the law that impose the death sentence shows that these are couched in mandatory terms, using the word ‘. It is not for the Judiciary to usurp the mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purport to impose another sentence that has not been provided in law. It has no jurisdiction to do so...” (Emphasis added).

60. While recognizing the binding nature of precedents from the Appellate Court, we must state in this case that we fully agree with the words of the court in **Joseph Njuguna Mwaura** cited above. The provisions of the Penal Code with respect to the death penalty leave no room for exercise of the court’s discretion with respect to sentencing. In response to the petitioner’s question on whether a trial court in Kenya can lawfully pass a minimum sentence or any other sentence other than a mandatory death sentence in respect of murder and other capital offences, the answer must be an unqualified no.

Execution of the Death Penalty and the Powers of the President to Commute the Sentence to Life Imprisonment

61. The petitioner is concerned about the manner in which the death penalty is dealt with in Kenya. He submits that the Commissioner of Prisons is mandated, under Section 69 of the Prisons Act, to direct the manner in which the sentence of death is effected by hanging by the neck until the convict is dead. He concludes therefrom that it is the Commissioner who is in charge of ensuring that the death sentence is carried out once it has been issued by the court. He therefore poses two questions with regard to the enforcement of the death penalty.

62. The first is whether the Commissioner of Prisons has and can lawfully exercise discretion and defer a death sentence indefinitely and/or leave it to the sole discretion of the President. The second relates to the power of the President and is whether the President has lawful authority to commute a death sentence to life imprisonment in the absence of any constitutional or written statutory provision authorizing such an act.

63. The starting point in considering the process of enforcement of the death penalty is, in our view, the provisions of the Criminal Procedure Code. Section 330-332 of the Code contain specific provisions with regard to the execution or commuting of the death penalty. They are in the following terms:

330. “When an accused person is sentenced to death, the court shall inform him of the time within which, if he wishes to appeal, his appeal should be preferred.

331. A certificate under the hand of the Registrar or other officer of the court that sentence of death has been passed, and naming the person condemned, shall be sufficient authority for the detention of that person.

332. (1) As soon as conveniently may be after sentence of death has been pronounced, if no appeal from the sentence is confirmed, then as soon as conveniently may be after confirmation, the presiding judge shall forward to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make.

(2) The President, after considering the report, shall communicate to the judge, or his successor in office, the terms of any decision to which he may come thereon, and the judge shall cause the tenor and substance thereof to be entered in the records of the court.

(3) The President shall issue a death warrant, or an order for the sentence of death to be commuted, or a pardon, under his hand and the Public Seal of Kenya to give effect to the decision, and -

(a) if the sentence of death is to be carried out, the warrant shall state the place where and the time when execution is to be had, and shall give directions as to the place of burial or cremation of the body of the person executed;

(b) if the sentence is commuted for any other punishment, the order shall specify that punishment;

(c) if the person sentenced is pardoned, the pardon shall state whether it is free, or to what conditions (if any) it is subject:

Provided that the President’s warrant may direct that the execution shall take place at such time and at such place and that the body of the person executed shall be buried or cremated at such place as shall be appointed by some officer specified in the warrant.

(4) The warrant, or order, or pardon, of the President shall be sufficient authority in law to all persons to whom it is directed to execute the sentence of death or other punishment awarded, and to carry out the directions therein given in accordance with the terms thereof.” (Emphasis added)

64. Thus, the power to order the execution of the death penalty, or to commute it to a term of years or a life sentence, or to pardon the person convicted, is expressly vested in the President by the law. In our view, the only power vested in the Commissioner of Prisons by the Prisons Act, contrary to the petitioner’s assertion, is to **directing the manner in which the sentence of death is effected** by hanging by the neck until the convict is dead. Section 69 of the Prisons Act whose head note reads **“Manner of execution of persons sentenced to death”** provides that **“When any person is**

sentenced to death, he shall be hanged by the neck until he is dead and the sentence shall be carried out in such manner as the Commissioner shall direct". The law is thus clear that the responsibility for determining whether the death penalty is enforced or not lies on the President; the role of the Commissioner being solely to carry out or direct the carrying out of the execution.

65. The petitioner and interested party argue that the fact that the death penalty has not been carried out in Kenya since 1987 amounts to a violation of the rights of those who are sentenced to death and have had to wait indefinitely on death row for the sentence to be carried out. They have relied on the decision of the court in **Kigula vs. Attorney General (2005) AHRLR 197 (UgCC 2005)** in which the court was dealing with a similar situation of failure to execute sentences of death, resulting in convicts spending years on death row. The court, while upholding the death penalty as constitutional, held that the delay in carrying it out was unconstitutional. It stated as follows:

"The spirit of our Constitution is that whatever is to be done under it affecting the fundamental rights and freedoms must be done without unreasonable delay. Section 34(2) of the Interpretation Act (Cap 3) Laws of Uganda, provides that 'where no time is prescribed or allowed within which anything shall be done, that thing shall be done without unreasonable delay.' A delay beyond three years after a condemned prisoner's sentence has been confirmed by the highest appellate court would tend towards unreasonable delay. I, would therefore, agree with Professor Sempebwa that those condemned prisoners who have been on the death row for five years and above after their sentences had been confirmed by the highest appellate court have waited longer than constitutionally permissible."
(Emphasis added)

66. We must observe that Kenya has a somewhat ambivalent attitude towards the death penalty. It has maintained the sentence of death in its statutes, and underpinned it in the Constitution when it promulgated the new Constitution in 2010. As observed by the court in **Joseph Njuguna Mwaura** in reference to international treaties and the constitution:

"Since the Constitution, both in the former epoch and the current, clearly envisages that the right to life is not absolute, the state can limit it in accordance with any written law."

67. The Court went further to observe as follows with regard to international conventions:

"Indeed some of the international instruments envisage a situation where the right to life may be curtailed in furtherance of a sentence imposed by a court of law. Article 6 of International Covenant on Civil and Political Rights provides that:

- 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.***
- 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime.... This penalty can only be carried out pursuant to a final judgment rendered by a competent court.***

Kenya has been party to this Covenant since May 1972. This country, however, is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights which aims at the abolition of the death penalty. This is instructive because it points out that under our law as it stands, the death sentence continues to be a valid sentence that can be passed by a court of law."

68. The Court of Appeal concluded that by sanctioning the present Constitution by way of a referendum on 4th August 2010, the people of Kenya had demonstrated that they wished to retain the limitation on the right to life contained in Article 26 (3). The court cited with approval the words of the court in **Mutiso vs Republic**:

“The appellant has not challenged Kenya to abolish the death penalty in preference to unqualified right to life and we have no information that this country has any intention of joining the countries of the world which have heeded the United Nations call to abolish capital punishment. Suffice it to say that an opportunity had arisen in the debate raging for the last two decades relating to a new Constitution which is due for a referendum on 4th August, 2010. The abolition of the death penalty is not one of the provisions in the proposed constitution and is not a contentious issue. As the draft was arrived at through a consultative and public process, it could be safely concluded that the people of Kenya, owing to their own philosophy and circumstances, have resolved to qualify the right to life and to retain the death penalty in the statute books.” (Emphasis added)

69. We thus have a situation in Kenya in which we have the death sentence permitted by the Constitution and statute, which is not in contravention of Kenya’s obligations under international law, yet we seem not to have the conviction that even after it is passed, it should be executed. The result is the situation that the petitioner and interested party decry: that persons convicted remain and have remained on death row, many of them for years, some since 1987.

70. In our view, the failure to carry out executions for years after the sentence of death has been passed, and the appellate process has come to an end amounts to an unconstitutional act and a violation of the rights of those convicted. We would therefore agree with the reasoning of the Court in *Kigula and Others -vs- Attorney General* that it amounts to cruel and degrading treatment or punishment.

71. What is to be done about it? The answer, in our view, lies with the Executive and the people of Kenya through their elected representatives in the national legislature. The President has the power to sign death warrants in respect of convicted offenders who have been sentenced to death, or commute the sentence of death to life imprisonment, which he has done in the past under powers vested in him by section 332 of the Criminal Procedure Act.

72. As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one’s natural life or a term of years. In our view, that is also the province of the legislature. Similarly, it is not the duty of the court or judicial officers, as demanded by the petitioner, to determine when and if execution of the death sentence should take place. For the court to do that would amount to the court taking on the role of judge and executioner. The execution or otherwise of the death penalty is vested by law, properly in our view, in the Executive.

Conclusion

73. The upshot of our findings in this matter, and our responses to the questions posed by the petitioner, are as follows:

- 1. An accused person charged with the offence of murder is entitled to know and is deemed to know with certitude, at the date of taking plea, what possible sentence he stands to suffer in the event the trial court finds him/her guilty of the offence of murder. The law is clear on the penalty for murder, which is death, and the manner of execution, which is death by hanging.***
- 2. The punishment by a mandatory death sentence prescribed under section 204 of the Penal***

Code, Cap 63 of the Laws of Kenya or any other written law is authorized under the Constitution of Kenya. It is not contrary to the general rules of international law and/or treaties and conventions ratified by Kenya, and does not offend Article 26 of the Constitution.

3. ***The mandatory death sentence is not unconstitutional and does not violate the fundamental rights enshrined in Articles 26, 28 and 29 of the Constitution.***
 4. ***The law that imposes a mandatory death sentence does not permit the exercise of judicial discretion in the passing of sentence.***
 5. ***A court cannot pass any sentence other than the death sentence in convicting an accused person in respect of the offence of murder.***
 6. ***There are express statutory provisions contained in section 332(3) of the Criminal Procedure Code that vest the President of the Republic with lawful authority to commute a death sentence to life imprisonment. No such authority is vested in the Commissioner of Prisons.***
74. While we are satisfied that, on the basis of existing constitutional and statutory provisions and judicial precedents, the death penalty is not unconstitutional, we are of the view that the failure to carry out the death sentence indefinitely is unreasonable and does not accord with respect for the constitutional rights of those who have been found guilty of capital offences and sentenced to death.
75. It appears that the people of Kenya, through their elected representatives, have great difficulty in deciding which way they want to go with regard to the death penalty. While they maintained the constitutional provision that permits it when they promulgated the 2010 constitution, they appear not to be satisfied that it should actually be carried out, hence the uncertainty for those who remain on death row.
76. The responsibility to issue death warrants or to commute the death penalty to life imprisonment, however, lies with the President, not the courts. As to what amounts to life imprisonment, that is a matter for the legislative branch of government. It is not for the courts to determine for the people what should be a sufficient term of years for a person who has committed an offence that society finds reprehensible to serve.
77. Further, should the people find that the death penalty is unacceptable, the responsibility to abolish it lies with the people of Kenya, through their elected representatives. It is imperative, and as soon as possible, that the ambivalence that our society demonstrates towards the death penalty is resolved one way or the other.
78. For the above reasons, the application dated 23rd November fails and is hereby dismissed but with no order as to costs.

Dated and Signed at Nairobi this 24th Day of September 2014

A. MBOGHOLI MSAGHA	FLORENCE MUCHEMI	MUMBI NGUGI
JUDGE	JUDGE	JUDGE

Delivered and Signed at Nairobi this 2nd Day of October 2014

ISAAC LENAOLA

JUDGE

Mr Bowry instructed by the firm of Bowry & Co. Advocates for the 1st petitioner

Mr Naeku instructed by the firm of Timothy Naeku & Co. Advocates for interested party

Ms Mwaniki instructed by the office of the Director of Public Prosecutions for the respondent