REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA

Criminal Appeal 17 of 2008

GODFREY NGOTHO MUTISO.....APPELLANT
AND
REPUBLIC.....RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Mombasa (Sergon, J.) dated 29th February, 2008

in

H.C.CR.C. NO. 55 OF 2004)
****

JUDGMENT OF THE COURT

Introduction:

1) The appellant before us raises an issue of singular historical moment in this country in relation to the offence of murder and the penalty of death attendant thereto. We make reference to *"murder and the penalty of death"* because that was the issue upon which the appeal was restricted and submissions thereon made. We say *"historical"* because the offence of murder and the punishment for it has been with us as a country for 70 years of colonialism through various Orders in Council, and now for more than 45 years of independence under the Penal Code. That is more than a century, but, as far as we know, no serious challenge has been made on the substantive offence or the punishment for it.

2) The offence of murder and the punishment for it are provided for in the Penal Code under ***section 203*** as read with ***section 204*** 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 who is convicted of murder shall be sentenced to death."**

For completion of the elements of the offence, *"malice aforethought"* is established when evidence proves any

one or more of the following circumstances:

(a) an intention to cause the death of or to do grievous harm to any person, whether that person is the person actually killed or not;

(b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) An intent to commit a felony;

(d) An intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony."

That is ***section 206*** of the Penal Code. When none of those elements are proved but there is otherwise an unlawful killing of another human being, the person commits the felony of manslaughter under ***section 202*** which is punishable under ***section 205*** by a term of imprisonment extending to life. In some countries the distinction between the two levels of killing would be denoted by referring to the murder as *"first degree"* or *"second degree"*.

It is imperative from the outset, not only to specify and clarify the issue raised by the appellant, but more importantly to identify what the appellant does not challenge. We shall do so presently, but first, the brief facts of the matter before us.

The facts:

3) The appellant was convicted by the superior court, Sergon J, sitting with three assessors in Mombasa, for the offence of murder contrary to ***section 203*** as read with ***section 204*** of the Penal Code. It had been alleged in the Information filed by the Attorney General, that on the 4th day of November, 2004 at Mkomani village in Kongowea location of Mombasa District, jointly with others not before court, he murdered ***Patrick Waweru Gachuki*** (*"the deceased"* hereinafter).

4) From the evidence tendered by the prosecution through 9 witnesses, the superior court found as proved facts that the appellant lived in a Swahili-type house in Mkomani village in Mombasa. He owned two mobile phones. At about 1 p.m. on 4th November, 2004, he was having a bed rest when someone walked into his house and walked away with the two mobile phones. He made a report of the incident at Nyali Police Station. In the meantime he made his own inquiries which apparently led to the deceased as the thief. The deceased was a frequent visitor in a nearby bar known as Corner Pub where his girlfriend, ***Josephine Ayuma Otieno*** was a waitress. The appellant was also a frequent customer at the pub and was well known by Josephine and the manager of the pub. At about 4 p.m. on the same day, the appellant went to the pub accompanied by his brother. They were served with some

soft drinks and the appellant informed the manager that the deceased had stolen his mobile phones and he was looking for him. The two left the pub. Later in the evening, at about 9 p.m. the deceased went to the pub and was informed by Josephine that the appellant was looking for him on allegation that he had stolen his mobile phones. The deceased denied the allegation and said he was going to see the appellant. Just then the appellant's brother accompanied by two other persons, all known to Josephine, arrived at the pub. They told the deceased that the appellant was waiting for him at his house and he followed them. Half an hour later, Josephine was informed by another person, who also testified at the trial, that the deceased was being beaten up at the residence of the appellant. Josephine and that other person went to the scene and found the appellant, his brother and his brother-in-law beating up the deceased outside the corridor of his house. The corridor was fully lighted by electricity. The deceased was half naked and his hands were tied behind his back. The appellant was holding a whip with which he was assaulting the deceased. Josephine and the other witness were chased away and branded thieves as the assault on the deceased continued. She returned with two other witnesses who also knew the appellant and they testified at the trial. They also found the appellant holding a Somali sword and a whip while another man was holding a wooden plank. Both were assaulting the deceased calling him *"thief …. thief"*. The matter was reported to Nyali Police Station and two officers arrived at the scene and rescued the deceased. One of the officers testified that on arrival at the scene he found a crowd of people who were standing and watching helplessly at three men beating the deceased next to the appellant's house. They found the appellant holding a rubber whip with which he was beating the deceased. They saw deep cuts on the deceased's chest. They also saw one of the assailants hold the deceased's head and bash it against the wall prompting bleeding through the mouth. The police arrested the appellant while the other two escaped and the deceased was taken to hospital where he was admitted for treatment. Six hours later, he died while undergoing treatment. An autopsy carried out on the body revealed multiple cuts and bruises all over the body, swellings on the lips and bruises on the face. There was also haemorrhage below the skin of the skull and the pathologist was of the opinion that the deceased died as a result of intra-cranial haemorrhage due to head injury.

The appellant's defence was that after his phones were stolen he made a report to Nyali Police Station and went back to his house to rest. At about 9 p.m., he heard some people screaming. He rushed out and found some *kanzu*-wearing crowd beating up the deceased on suspicion that he was one of the many African thieves in the area. He intervened to save the deceased and called the police who arrived at the scene and collected the deceased. The police also requested him to accompany them to the station to assist in contacting the deceased's family. He was subsequently arrested as a suspect and later charged for the offence of murder.

5) The case was summed up to the assessors and they returned unanimous opinion that the appellant was guilty as charged. The learned Judge evaluated all the evidence and believed the eyewitnesses and the police officers who connected the appellant with the offence. He made findings that the appellant, jointly with two others who were still at large, not only committed the act of assaulting the deceased but did so with the common intent to cause grievous harm or death. He found in the process that the appellant's defence was an obvious and blatant lie which only served to corroborate the independent evidence available.

6) Upon conviction, the appellant was sentenced to *"suffer death in the manner authorized by law"*. And the manner authorized by law in this country for execution of the death penalty is to hang by the neck until death is confirmed.

The appeal:

7) The appellant was aggrieved by his conviction and sentence and drew up a memorandum of appeal in person raising 8 grounds to challenge it. That memorandum of appeal was subsequently abandoned when an advocate, Mr. William O. Wameyo was appointed to represent him and he filed a *"supplementary memorandum of appeal"* raising two major issues.

8) The two grounds of appeal were couched as follows:

> *"1. The imposition of a mandatory death sentence upon the appellant was arbitrary and unconstitutional and the execution of the same in the instant case would amount to: -*
>
> *a) An inhuman and degrading punishment in breach of Section 74 (1) of the Constitution of the Republic of Kenya.*
>
> *b) An arbitrary deprivation of life in breach of Section 71 (1) and 70 (a) of the Constitution of the Republic of Kenya.*
>
> *c) A denial of the appellant's rights to fair trial in breach of Section 77 of the Constitution of the Republic of Kenya.*
>
> *2. The appellant was upon being arrested detained for a period exceeding 14 days in clear breach of section 72 (2) (b) (sic) of the Constitution thereby violating the appellant's constitutional protection of the right to reward (sic) liberty."*

The second ground was abandoned at the hearing of the appeal.

9) The hearing of the appeal commenced in Mombasa on 19th January, 2009 and was partly heard when Mr. V.S. Monda, Senior State Counsel appearing for the State, requested for an adjournment to consult with the Attorney General and obtain instructions on the issues of law raised which he observed, and we agreed in granting the adjournment, were of utmost importance to this country. We made an order that the Attorney General or the

Director of Public Prosecutions (DPP) should handle the matter in person. On the resumed hearing in Nairobi, on 18th March, 2009 the DPP, Mr. Keriako Tobiko appeared and sought a further adjournment on the ground that consultations were being made with the relevant ministries and departments of Government in respect of the interpretation of the constitutional issues raised by the appellant. We gave more time to the Attorney General.

10) The hearing resumed on 28th May, 2009 when Mr. Tobiko assisted by Mr. Monda and Mrs. Okumu for the State, and Mr. Wameyo appearing with Mr. Timothy Bryant for the appellant, informed the court that the appeal would proceed to hearing. The appellant thereupon completed his submissions and Mr. Tobiko responded at some length before seeking an adjournment to carry out further research and file authorities. The adjournment was granted and an order made for early re-listing of the appeal. The matter was however not relisted for almost one year, but on 15th April, 2010, Mr. Tobiko appeared and disclosed that the President had on 3rd August, 2009, issued a blanket commutation of all death sentences imposed against all death row convicts in the country including the appellant here. The commutation was on advice of the Advisory Committee on Prerogative of Mercy and the powers were exercised under ***sections 27, 28*** and ***29*** of the Constitution. Mr. Tobiko further disclosed that there had been further consultations between key Government Ministries and the Office of the Attorney General and his instructions were to retract all the submissions made on behalf of the State and to state that the Attorney General conceded the arguments put forward on behalf of the appellant.

Asked by the court whether there was any intention by Parliament to amend ***section 204*** of the Penal Code, Mr. Tobiko responded that the State was only conceding to the arguments covering this appeal and similar cases of murder, but not other offences which attract the death penalty. For completeness, such other offences are Treason under Section 40 and aggravated robbery under ***section 296 (2)*** of the Penal Code.

11) While the concession by the Attorney General was appreciated by the appellant, he still contended that it did not affect the constitutional challenge made by him, since the finding of this Court in his favour would entitle him to a reconsideration of his sentence, now commuted, and probably receive a reduced sentence, a risk he was ready to take. We accordingly set down the matter for this judgment.

12) For our part, we think the Attorney General is at liberty to exercise his right to be heard or not to be heard as counsel before any court. It is also within his province to concede the appeal before us if he is so persuaded. Such concession will be taken into account, but that will not preclude the court from considering the

matter on merits and on the material placed before it.

13) We also think the Attorney General, not necessarily the current holder of that office, in a matter of grave historical significance and public interest as the one before us, ought to have exercised his constitutional role in advising the Government on the law, long before an appellant such as the one before us, raised the issue, prompting frantic *"consultations between relevant ministries and government departments"* on how to respond to it.

14) As will be seen shortly, and indeed it is axiomatic, human society is constantly evolving and therefore the law, which all civilized societies must live under, must evolve in tandem. A law that is caught up in a time warp would soon find itself irrelevant and would be swept into the dustbins of history.

Mr. Tobiko did not disclose the nature of the consultations held between various Government ministries and departments which led to the concession of this appeal. But he disclosed that the President has already granted a blanket amnesty to all death row inmates. It is an open secret that in Kenya, despite hundreds, possibly thousands, of serious crime offenders, having been sent to the gallows by the courts since independence in 1963, only a handful of them have been executed leaving the prisons inundated with a huge number of death row inmates. The post sentence process is the responsibility of the Executive arm of Government but it does not appear to have been competently addressed as provided under ***section 27*** to ***29*** of the Constitution.

15) ***Sections 27*** and ***29*** provide as follows: -

"27. The President may –

(a) grant to a person convicted of an offence a pardon, either free or subject to lawful conditions;

(b) grant to a person a respite, either indefinite or for a specified period, of the execution of a punishment imposed on that person for an offence;

(c) substitute a less severe form of punishment for a punishment imposed on a person for an offence;

(d) remit the whole or part of a punishment imposed on a person for an offence or of a penalty or forfeiture otherwise due

(e) remove in a whole or in part the non-qualification or the disqualification of a person, arising out of or in consequence of the report of an election court under the provisions of the National Assembly and Presidential Elections Act, from registration as an a elector on a register of electors or from nomination for election as an elected member of the National Assembly.

29. (1) Where a person has been sentenced to death (otherwise than by a court-martial) for an offence, the President shall cause a written report of the case from the

trial judge, together with such information derived from the record of the case or elsewhere as he may require to be considered at a meeting of the Advisory Committee on the Prerogative of Mercy; and after obtaining the advice of the Committee he shall decide in his own judgment whether to exercise any of his functions under section 27.

(2) The President may consult with the Committee before deciding whether to exercise any of his functions under section 27 in a case not falling within subsection (1), but he shall not be obliged to act in accordance with the advice of the Committee."

Section 28provides for the membership of the committee and it is noteworthy that the Attorney General is first on the list, although it is not clear whether he is the chairman, as chairmanship is not provided for**.**

16) The President, on the advise of the Advisory Committee may well have been responding to the obvious injustice of the **"death row syndrome"**; a syndrome exemplified by one South African inmate during the apartheid era in that country, lamenting in a rendition now in song:

"When you are on death row you see big things in all little things. You appreciate everything; every second that you breath; The clock keeps ticking; time is running out, You can smell it … you can smell death every second. My time could come anytime.

It is frustrating to wait for someone to tell you when you will die. What makes life interesting is that we do not know when we shall die;

That is why we live without fear of death, even though we know death is inevitable.

But to live knowing that you will be told when you are going to die, is like death itself."

17) Nearer home in Uganda, the Constitutional court on the petition of 417 inmates who had been on death row for an average of 10 years, some as long as 20 years, declared, following the Zambian case of **Catholic Commission for Justice and Peace in Zimbabwe vs. the Attorney General & Others (1993) 2LRC 277,** that prisoners did not lose all their constitutional rights and freedoms upon conviction; only those rights inevitably removed from them by law either expressly or by implication. The court found that the prolonged delay on the death row had adverse effect on the condemned prisoners' physical and mental state as a result of *"the death row syndrome"* which, as internationally accepted, amounts to cruel, inhuman or degrading treatment which is prohibited by the constitution. In the end the court set a time limit of three years for holding any person on death row after completion of the appellate process. That was in the case of **Susan Kigula & 416 others vs. A.G (Constitutional Petition No. 6 of 2003) (Uganda)**.

18) The Constitutional Court was upheld in their decision on that issue by the Supreme Court on appeal which was decided on 21st January, 2009 (**A.G. vs. Kigula & 417 others, Constitutional Appeal No. 3 of 2006 (Uganda)**). In affirming the decision, the Supreme Court stated as follows: -

"Article 121 sets up a permanent body called the Advisory Committee on the Prerogative of Mercy which is chaired by the Attorney General. We see no reason why

this committee, charged with advising the President, should not process the cases of all persons sentenced to death as a matter of priority and without unreasonable delay and advise the President accordingly. Likewise, once advised, we see no reason why the President may not make his decision without unreasonable delay. One has to bear in mind that a person's life and liberty is at stake here. In our view, the President must not delay to take a decision whether to pardon, grant a respite, substitute a lesser sentence or remit the whole or part of the sentence. The law envisages that even the President will act without unreasonable delay. To hold otherwise, would mean that the President could withhold his decision indefinitely or for many years, and the person would remain on death row at the pleasure of the President. In our view this would be contrary to the spirit of the Constitution.

The Constitutional Court held that a period of more than three years from the time when the death sentence was confirmed by the highest appellate court would constitute inordinate delay. We agree. As soon as the highest court has confirmed sentence, the Advisory Committee on the Prerogative of Mercy and the Prisons authorities should commence to process the applications of condemned persons so that the President is advised without unreasonable delay. In that way, a person sentenced to death would spend considerably less time on death row without knowing conclusively his fate. The appeal process itself will in all probability have taken several years. If the President decides that the death sentence be carried out, so be it.

In the circumstances, we agree with the Constitutional court that to hold a person beyond three years after the confirmation of sentence is unreasonable."

19) Unfortunately in this country no one, as far as we are aware, has raised the issue of whether the delay in execution of prisoners who have been on death row for a long period of time is inconsistent with constitutional provisions and such issue is not raised before us in this appeal. The appeal before us, as correctly po

inted out by Mr. Bryant, was filed before the Ugandan Supreme Court decision in the ***Kigula*** case (supra). The blanket commutation of sentences granted by the President to death row inmates in August 2009, may well have been triggered off by the Ugandan decision, but we do not put it beyond that suspicion. It may also be that the Advisory Committee woke up to its obligations under the law. Be that as it may, that act of grace and magnanimity on the part of the President does not, in our view, address the issues arising now and in future since courts in our country continue to hand out death sentences in accordance with the written law.

<u>Clarifying the issues</u>:

20) The appellant raises constitutional issues pertinent to **Chapter V**, **"Protection of Fundamental Rights and Freedoms of the Individual",** and there may well be a jurisdictional question as to whether this Court is competent to deal with those issues. This Court is a creature of statute which under ***Section 64 (1)*** of the Constitution.

> *"……shall be a superior court of record, and which shall have such jurisdiction and powers in relation to appeals from the High court as may be conferred on it by law".*

The **Appellate Jurisdiction Act (Cap 9)** Laws of Kenya was enacted to confer the jurisdiction and regulate the court's functions.

21) ***Section 84*** of the Constitution provides for the enforcement of the protective provisions under Chapter V. In relevant part it states as follows:

> **"84. (1) Subject to subsection (6), if a person alleges that any of the provisions of sections 70 to 83 (inclusive) have been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, <u>without prejudice to any other action with respect to the same matter which is lawfully</u> <u>available</u>, that person (or that other person) may apply to the High Court for redress."**

(emphasis added).

The added emphasis indicates to us that the High Court does not have exclusive jurisdiction in such matters. ***S. 84 (7)*** also provides for appeal to this Court as of right, on matters determined by the High Court.

At all events, constitutional issues are matters of law and this Court has previously, in appropriate cases, admitted arguments on constitutional issues which were raised for the first time on first or second appeal. See for example **<u>Albanus Mwasia Mutua v Republic</u> Cr. Appeal No. 120/04** relating to the contravention of sections 72 and 77 of the Constitution.

We hold, in view of the foregoing, that this Court has the jurisdiction to explore and adjudicate on the constitutional issues raised in this appeal.

22) As stated earlier we must at the outset clarify the issue raised by the appellant, both in his supplementary memorandum of appeal, and in submissions of counsel. We begin by eliminating what he does not seek.

The appellant does not challenge his conviction for the offence of murder. He does not challenge the constitutionality of the offence itself or the death penalty prescribed by law for it. Nor is it his case that the death penalty *perse* is inhuman and degrading. If the appellant had made those challenges he would have been treading on very thin ice.

On the facts and the law, we find no merit in the appeal against conviction and would have upheld the superior court on its findings. As for the offence of murder and the death penalty, those are issues which lie in the realm of the peoples' representatives in Parliament or the people themselves in a referendum.

23) As was stated by the Privy Council in **<u>Reyes v The Queen</u> [2002] 2 AC 23** at page 245 and 246 paragraphs 25 and 26: -

"25. In a modern liberal democracy it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal, so as to attract penal consequences, and to decide what kind and measure of punishment such conduct should attract or be liable to attract. The prevention of crime, often very serious crime, is a matter of acute concern in many countries around the world, and prescribing the bounds of punishment is an important task of those elected to represent the people. The ordinary task of the courts is to give full and fair effect to the penal laws which the legislature has enacted. It is sometimes described as deference shown by the courts to the will of the democratically-elected legislature. But it is perhaps more aptly described as the basic constitutional duty of the courts which, in relation to enacted law, is to interpret and apply it.

26. When (as here) an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation. If there is an issue (as here there is not) about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the constitution to decide whether the enacted law is compatible or not. Decided cases around the world have given valuable guidance on the proper approach of the courts to the task of constitutional interpretation……A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to reconsider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society: see Trop v Dulles 356 US 86, 101."

24) The supreme court of Uganda also in the ***Kigula*** case (supra) recognised that the death penalty has existed for as long as human beings have been on earth. Sometimes it is arbitrarily imposed and carried out in all sorts of methods such as burning on the stake, crucifixion, beheading, shooting, and others. The court cited several international instruments on human rights including the **"Universal Declaration of Human Rights"** which was adopted and proclaimed by the United Nations General Assembly on 10th December 1948; the **"International Covenant on Civil and Political Rights",** adopted on 16th December 1966; the **"African Charter on Human and Peoples Rights"** of 1981, to name a few; to illustrate that the death penalty remains despite strong proclamations about the *"right to life, liberty and security of the person"*.

25) Having said that, the court observed, and it has indeed been evident since 1968 when the constitutionality of the death penalty was challenged in the United States of America, (see *White, the Death Penalty in the Nineties* (University of Michigan 1991), that the death penalty should be abolished; hence the optional protocol adopted by the General Assembly in 1989 encouraging state parties to *"take all necessary measures to abolish the death penalty within its jurisdiction"*, and the Convention against Torture and other cruel, inhuman or degrading treatment or punishment, in 1987. Many countries of the world, including England have since abolished the death penalty.

26) 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. As stated earlier, however, the dynamism of society will take care of future developments. Pending such developments, the death penalty remains a lawful sentence in Kenya and appears set to remain so for a long time to come.

The issue for determination:

27) The issue raised by the appellant therefore revolves around the *"right to life"* and the constitutional guarantees for its enjoyment. He complains about the notion, so freely pronounced by the courts in this country upon a conviction for murder, that the death penalty is mandatory. He holds the position that although the death penalty may not itself be inhuman and degrading, not everyone convicted of murder deserves to die, and therefore, a sentencing regime that imposes a mandatory sentence of death on all proven murder cases, or all murders within specified categories, is inhuman and degrading because it requires sentence of death, with all the consequences such a sentence must have for the accused person, to be passed without any opportunity for the accused to show why such sentence should be mitigated; without consideration of the detailed facts of the particular case or the personal history and circumstances of the offender and in cases where such sentence might be wholly disproportionate to the accused's criminal culpability.

28) The Constitution of Kenya provides for protection of all fundamental rights and freedoms of the individual and in relevant part, as follows: -

> **"70. Whereas every person in Kenya is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –**
>
> **(a) life, liberty, security of the person and the protection of the law;"**

Section 71 (1) specifically provides for protection of "right to life" in the following terms: -

> **"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."**
>
> (emphasis added).

It is evident that ***sections 203*** and ***204*** of the Penal Code reproduced in paragraph 2 above, are envisaged in the

emphasized portion. There is further constitutional protection from inhuman treatment in ***section 74 (1)***, thus:-

> **"74. (1) No person shall be subject to torture or to inhuman or degrading punishment or other treatment."**

That protection however has a claw back provision in subsection (2) thus:

> **"74 (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963."**

The appellant also invokes ***section 77*** of the Constitution which makes provisions to secure protection of the law and includes the provision that a person charged with a criminal offence, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

It is the appellant's case that all those provisions have been violated in his case.

29) The issue raised by the appellant is not a novel one and he did not pretend that it was. That is why learned counsel for him placed a wealth of authorities in a huge volume covering decisions made on the issue in other jurisdictions of the globe and particularly the Commonwealth. We are indebted to counsel for that assistance but we are unable to cite all the authorities at the risk of elongating further this long judgment. We have carefully read them and perhaps we may simply list them for the record:

1. *Twoboy Jacob vs. Republic*
   Misc. (Criminal appeal No. 18 of 2006)

2. *Susan Kigula & 414 (sic) others vs. A.G.*
   (unreported) Constitutional Petition 6 of 2003 (Malawi).

3. *Francis Kafantayeni & 5 others vs. A.G*
   (unreported) Constitutional case 12 of 2005 (Malawi).

4. *Reyes vs. The Queen (2002) 2 AC 235.*

5. *Fox vs. Republic (2002) 2 AC 284*
   (Appeal from St. Christopher and Nevis).

6. *Boyce and Joseph vs. The Queen (2005) 1 AC 400 (appeal from Barbados).*

7. *Republic vs. Hughes (2002) 2 AC 259 (appeal from St. Lucia)*

8. *Woodson vs. North Carolina (1976) 428 US 280.*

9. *Bowe and Davis vs. The Queen (2006) UKPLC 10 (appeal from the Bahams).*

10. *Mithu vs. Punjab (1983) 25 CR 690.*

11. *Yassin vs. Attorney General of Guyana 347 – 460.*

12. *Lubuto vs. Zambia (Communication No. 390 of 1990; 17/11/95).*

13. *Chisanga vs. Zambia (Communication No. 1132 of 2002; 18th November, 2005.*

14. *Albanus Mwangi Mutua vs. Republic*
(Criminal Appeal No. 120 of 2004 (Kenya).

15. *Attorney General vs. Susan Kigula & 417 Others*
(Constitutional appeal 63 of 2006).

30) In making their submissions on the basis of those authorities Mr. Wameyo and Mr. Bryant took turns to persuade us, in summary, that: -

- 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.

- Mandatory death sentence is antithetical to 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.

- 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.

- 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"*.

- there is a denial to a fair hearing when no opportunity is given to an accused person to offer mitigating circumstances before sentence, which is the normal procedure in all other trials for non-capital offences. Sentencing was part of the trial and mitigation was an element of fair trial.

- 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 offenders according to the gravity and circumstances of the case.

31) Those are the submissions conceded by the Attorney General when the DPP stated:

> *"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".*

32) The common thread running through the authorities cited before us is that the provisions of the law invoked by the appellant herein are in *pari materia* with those considered in other jurisdictions and were largely influenced by, and in some cases lifted word for word from international instruments which Kenya has ratified. We are satisfied therefore that those decisions are persuasive in our jurisdiction and we make no apology for applying

them. We particularly find persuasive force in the decisions of the Privy Council on matters which emanated from the Caribean Islands of Bahamas, Belize, Barbados, St. Lucia, Guyana and St. Christopher and Nevis. We allude to the cases of *Bowe* and *Davis*; *Reyes; Boyce and Joseph; Hughes*; *Yassin*; and *Fox* (supra) respectively. Those cases were considered and applied in jurisdictions which are closer home in Malawi (*Kafantayeni* (supra) (High Court) and *Twoboy Jacob* (Supreme Court of Appeal), and in Uganda (the *Kigula* case) in two courts.

33) In all those cases, the mandatory nature of the death penalty was considered and the court held that it violated the protection against subjection to inhuman or degrading punishment or treatment. In examining the issue, the Privy Council in *Reyes case* examined the Common Law of England which was generally bequeathed on all former colonies and stated on *the "penalty of murder"*:

> **"10. Under the common law of England there was one sentence only which could be judicially pronounced upon a defendant convicted of murder and that was sentence of death. This simple and undiscriminating rule was introduced into many states now independent but once colonies of the Crown.**
>
> **11. It has however been recognised for very many years that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other mercy-killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are by no means equally heinous. The Royal Commission on Capital Punishment 1949 – 1953 examined a sample of 50 cases and observed in its report (1953) (Cmd 8932), p 6, para 21 (omitting the numbers of the cases referred to):**
>
> > **'Yet there is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder. To illustrate their wide range we have set out briefly … the facts of 50 cases of murder that occurred in England and Wales and in Scotland during the 20 years 1931 to 1951. From this list we may see the multifarious variety of the crimes for which death is the uniform sentence. Convicted persons may be men, or they may be women, youths, girls, or hardly older than children. They may be normal or they may be feeble-minded, neurotic, epileptic, boarderline cases, or insane; and in each case the mentally abnormal may be differently affected by their abnormality. The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood. The crime may be committed in order to carry out another crime or in the course of committing it or to secure escape after its commission. Murderous intent may be unmistakable, or it may be absent, and death itself may depend on an accident. The motives, springing from weakness as often as from wickedness, show some of the basest and some of the better emotions of mankind, cupidity, revenge, lust, jealousy, anger, fear, pity, despair, duty, self-righteousness, political fanaticism; or there may be no intelligible motive at all.'**

34) We are in no doubt, that if a similar survey was conducted in Kenya, a similar array of offenders would register.

With that background, the issue was summarized and answered in a passage subsequently applied in other cases

from the *Hughes case* as follows: -

> **"The issue here is whether it is inhuman to impose a sentence of death without considering mitigating circumstances of the commission of the offence and the offender; whether the dignity of humanity is ignored if this final and irrevocable sentence is imposed without the individual having any chance to mitigate; whether the lawful punishment of death should only be imposed after there is a judicial consideration of the mitigating factors relative to the offence itself and the offender.**
>
> **…….**
>
> **"It is and has always been considered a vital precept of just penal laws that the punishment should fit the crime. If the death penalty is appropriate for the worst case of homicide, then it must surely be excessive punishment for the offender convicted of murder whose case is far removed from the worst case. It is my view that where punishment so excessive, so disproportionate must be imposed on such a person courts of law are justified in concluding that the law requiring the imposition of the same is inhuman. I am driven firmly to one conclusion. To the extent that the respective sections of the Criminal Codes of the two countries are interpreted as imposing the mandatory death penalty those sections are in violation of section 5 of the Constitution."**

The mandatory requirement of the death penalty was declared to be inhuman treatment or punishment and in violation of constitutional provisions which are similar to ours; by not allowing for indivualised consideration of the offender and the commission of the offence.

35) The Supreme Court of Uganda which has a more modern Constitution than ours, analysed the issue in admirable fashion in the *Kigula case* and came to the same conclusion. In relevant passages, the court stated:

> **"A trial does not stop at convicting a person. The process of sentencing a person is part of the trial. This is because the court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. This is clearly evident where the law provides for a <u>maximum</u> sentence. The court will truly have exercised its function as an impartial tribunal in <u>trying and sentencing</u> a person. But the court is denied the exercise of this function where the sentence has already been pre-ordained by the Legislature, as in capital cases. In our view, this compromises the principle of fair trial….**
>
> **In our view if there is one situation where the framers of the Constitution expected an inquiry, it is the one involving a death penalty. The report of the Judge is considered so important that it forms a basis for advising the President on the exercise of the prerogative of mercy. Why should it not have informed the Judge in passing sentences in the first place.**
>
> **Furthermore, the administration of justice is a function of the Judiciary under article 126 of the Constitution. The entire process of trial from the arraignment of an accused person to his/her sentencing is, in our view, what constitutes administration of justice. By fixing a mandatory death penalty, Parliament removed the power to determine sentence from the Courts and that, in our view, is inconsistent with article 126 of the Constitution.**
>
> **We do not agree with learned counsel or the Attorney General that because Parliament has the powers to pass laws for the good governance of Uganda, it can pass such laws as those providing for a mandatory death sentence. In any case, the Laws passed by Parliament must be consistent with the Constitution as provided for in article 2 (2) of the Constitution.**
>
> **Furthermore, the Constitution provides for the separation of powers between the Executive, the Legislature and the Judiciary. Any law passed by Parliament which has the effect of tying the hands of the judiciary in executing its function to administer justice is inconsistent with the Constitution. We also agree with Prof. Sempebwa, for the**

respondents, that the power given to the court under article 22 (1) does not stop at confirmation of sentence. This implies a power NOT to confirm, implying that the court has been given discretion in the matter. Any law that fetters that discretion is inconsistent with this clear provision of the Constitution.

We are of the view that the learned Justice of the Constitutional Court properly addressed this matter and came to the right conclusion. We therefore agree with the Constitutional Court that all those laws on the statute book in Uganda which provides for a mandatory death sentence are inconsistent with the Constitution and therefore are void to the extent of that inconsistency. Such mandatory sentence can only be regarded as a maximum sentence."

Conclusion:

36) We may stop there as we have said enough to persuade ourselves that this appeal is meritorious and the Attorney General was right to concede it. 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 recongises 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.

We have confined this judgment to sentences in respect of murder cases, because that was what was before us and what the Attorney General conceded to. But we doubt if different arguments could be raised in respect of 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. Without making conclusive determination on those other sections, the arguments we have set out in respect of ***section 203*** as read with ***section 204 of the Penal Code*** might well apply to them.

37) The appellant in this case was entitled to have his antecedents and other mitigating factors recorded for purposes of assisting the President in exercise of the prerogative of mercy but no information was recorded. The learned Judge of the superior court simply imposed the death penalty upon convicting the appellant. In doing so the learned Judge was in error because under ***section 329*** of the Criminal Procedure Code, he was entitled, before passing sentence, to receive such evidence as he thought fit in order to inform himself as to the proper sentence to pass. The consequence is that we have no information on which we can assess the correct sentence. We are informed that the death sentence was commuted to life imprisonment, but again that is not because of any

information supplied by the court. The appellant may well be deserving of the death penalty or life imprisonment in view of the gravity of the offence committed and the circumstances of the deceased's death, or a lesser penalty, but then again, making such findings would be arbitrary. We must re-emphasize that in appropriate cases, the courts will continue to impose the death penalty. But that will only be done after the court has heard submissions relevant to the circumstances of each particular case.

38) In all the circumstances of this case, the order that commends itself to us is to remit the case to the superior court with the direction that the court records the prosecution's as well as the appellant's submissions before deciding on the sentence that befits the appellant.

It is so ordered.

Dated and delivered at Nairobi this 30th day of July, 2010.

R.S.C. OMOLO
……..
JUDGE OF APPEAL

P.N. WAKI
……...……
JUDGE OF APPEAL

J.W. ONYANGO OTIENO
……..
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR