



REPUBLIC OF KENYA

OFFICE OF THE ATTORNEY GENERAL AND DEPARTMENT OF JUSTICE

REPORT ON THE QUESTION OF THE DEATH PENALTY, PURSUANT TO ITS DECISION 18/117 AND RESOLUTION 22/11 OF THE HUMAN RIGHTS COUNCIL

Background

The Constitution of Kenya provides for the right to life of every person save in the execution of the sentence of a court in respect of a criminal offence under the laws of Kenya of which a person would have been convicted. The death sentence in Kenya is limited to the offences of treason, murder and robbery with violence. However, the offences of robbery with violence and attempted robbery with violence did not carry the death sentence until 1973 when the Penal Code was amended to provide for it.

The death penalty remains an emotive subject worldwide, eliciting strong responses from both retentionists and abolitionists. Proponents of the death penalty say it is an important tool for preserving law and order as it deters crime and costs less than life imprisonment. They argue that retribution honours the victim, helps console grieving families, and ensures that the perpetrators of heinous crimes never have an opportunity to cause future tragedy. On the other hand, those who oppose the death sentence argue that it is the ultimate cruel, inhuman and degrading punishment and it represents an unacceptable denial of human dignity and integrity.

Several provisions of the Constitution of Kenya, 2010 are directly relevant to the substantive and procedural rights of persons accused of committing crimes. Article 26(3) which stipulates that a person shall not be deprived of life intentionally, except to the extent authorized by written law. In other words, the Constitution permits the death penalty if provided for by law. It is important to note, however, that the wording of Article 26(3) is permissive that is it does not make the death penalty mandatory, and it is

also restrictive, i.e. the intentional deprivation of life – the death penalty – is an exception to the general right to life.

Closely related to the right to life, and likewise directly relevant to the issue of sentencing, is the right to freedom and security of the person guaranteed in Article 29, which includes protection from *inter alia* any form of violence from public sources, and being treated or punished in a cruel, inhuman or degrading manner. With respect to procedural rights for those accused of a crime, Article 50 of the Bill of Rights guarantees the right to a fair trial, including the right to be informed of a charge with sufficient detail to answer it, to adduce evidence, and to appeal a conviction.

In regards to the obligations of legislators relating to the Bill of Rights, Article 21 dictates that it is the fundamental duty of every State organ “to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights” and specifically “to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.” Article 24 of the Constitution addresses the limitation of rights and fundamental freedoms, such as the exception to the right to life provided for in Article 26(3) as noted above. In this respect, Article 24 provides that a right may be limited only to the extent that it “is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including ... the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

A landmark ruling by the Supreme Court in December 2017 declaring the mandatory death penalty unconstitutional reopened the debate as to what purpose the death penalty serves in the criminal justice system and whether its continued existence in statutes adds value. In the case of *Francis Karioko Muruatetu & Another vs. the Republic, Petition No. 15 & 16 of 2015 (consolidated)* the Supreme Court declared the mandatory nature of the death sentence unconstitutional. The Court further directed that *the Judgment* be placed before the Speakers of the National Assembly and the Senate, the Attorney-General, and the Kenya Law Reform Commission, for any necessary amendments, formulation and enactment of statute law, to give effect to the judgment

on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment.

It is on this premise that the Taskforce on the Review of the Mandatory Death Sentence under Section 204 of the Penal Code was set up (hereinafter referred to as 'the Taskforce'). The Taskforce finalized its work and submitted a final report containing comprehensive recommendations on the legislative amendments on all laws affected by the *Muruatetu* decision.

Current Position

Since there are no existing express statutory procedures under which resentence hearing can be conducted in Kenya, the High Court and Magistrates' Court are resentencing eligible offenders by invoking their inherent jurisdiction to implement the decision of a superior court in order to give effect to the *Muruatetu* decision. This is in line with paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines which states that:

"Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bounded by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it."

The High Court of Kenya in *Criminal Misc Application No. 22, 23 and 35 Of 2018 (Consolidated)* restated and affirmed the following guidelines for consideration of applications for re-sentencing:

- a. age of the offender;*
- b. being a first offender;*
- c. whether the offender pleaded guilty;*
- d. character and record of the offender;*
- e. commission of the offence in response to gender-based violence;*
- f. remorsefulness of the offender;*
- g. the possibility of reform and social re-adaptation of the offender;*
- h. any other factor that the Court considers relevant.*

The court made it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process.

Though the *Muruatetu* Judgment referred to murder, the Court of Appeal in *William Okungu Kittiny vs. Republic* ([2018] eKLR) confirmed that the same can also be applied in other cases where the law provides for a mandatory sentence where it was stated:

"...The appellant was sentenced to death for robbery with violence under Section 296 (2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296 (2) and 297 (2) is death. By Article 27(1) of the Constitution, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence ... is a discretionary ..."

The courts have also held that for re-sentencing, in addition to applying the *Muruatetu* case, the courts must also keep in mind the objectives of sentencing in the Sentencing Policy Guidelines, 2016, namely; retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation.

Most recently in 2021, the Supreme Court proceeded to issue directions which would help give guidelines on how the *Muruatetu* case would be applied. The court further directed that the Judiciary sentencing policy guidelines to be revised in tandem with the new jurisprudence in the *Muruatetu* case.

The Office of the Attorney-General and Department of Justice is also working on coming up with the necessary amendments, formulation and enactment of statute law, to give effect to the supreme court judgment on the mandatory nature of the death sentence in respect to sentences of Murder as provided for under Sections 203 and 204 of the Penal Code.

With regards to the parameters of what ought to constitute life imprisonment, the Taskforce proposed for life imprisonment to be retained in the laws tampered with parole. To this end, the State is therefore in the process of developing of a Correctional Services Policy which has policy guidelines on issues touching on Parole, Probation and Aftercare.

