

**IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA
(CORAM: KILEO, J.A., MASSATI J. A. AND ORIYO, J. A.)**

**CRIMINAL APPEAL NO 173 OF 2008
BETWEEN
KOBELI MWAHA..... APPELLANT
AND
THE REPUBLIC.....RESPONDENT
(Appeal from the decision of the High Court of Tanzania
at Dodoma
[Kwariko, J.]
dated 6th March 2008
Criminal Sessions Case no 6 of 2008)**

JUDGMENT OF KILEO, J.A. (Dissenting on Sentence)

15th March 2010 & 22nd March, 2010

I have read the draft judgment prepared by my learned brother Massati, J.A. I agree with the conclusion reached with regard to conviction. The circumstances implicating the appellant in the murder of the late Tajo s/o Sajilo lead to no other conclusion but that he is the one committed the atrocious act. As amply elaborated in the judgment prepared by Mr. Justice Massati, there was ample evidence which proved that the appellant was the last person to be seen with the deceased while he was alive. That last time they were together at the appellant's home but later the decomposed body of the deceased was found in the house which belonged to the appellant and to which he alone had the key. The house was kept locked and the death of Sajilo was discovered only as a result of bad smell that

emanated from the appellant's house. Shortly after the discovery of the deceased's body in the appellant's house he was found in possession of a bicycle that belonged to the deceased. In the light of these circumstances I have no doubt in my mind that the appellant is the one who killed the deceased.

When it comes to the penalty of death by hanging for the offence of murder however, my stand has been that the sentence is unconstitutional and for that reason I would not endorse it. I took that stand in the case between **UMALO MUSSA and the REPUBLIC** (CRIMINAL APPEAL NO. 150 OF 2005- unreported). What follows below is what I stated thereby and I have not changed my position.

"This Court, in **Mbushuu alias Dominic Mnyange and Another v R**, [1995] TLR 97, though it did not find the death penalty to be unconstitutional, nevertheless it held **that the penalty is inherently an inhuman, and degrading punishment and it is also so in its execution and it offends Article 13 (6) (d) and (c) of the Constitution of the United Republic of Tanzania.**

What concerns me most is the fact that once the penalty has been executed, it cannot be reversed. Admittedly, we are human beings, we are not perfect and as such sometimes we may err. That is why we have a

system whereby in certain situations a person can appeal from the Primary Court level to the Court of Appeal. Such a person has three levels of appeal – i.e. District Court, High Court and Court of Appeal. It is not so with the person charged and convicted of murder. This person has just one level of appeal – from High Court or Resident Magistrate with Extended Jurisdiction to Court of Appeal.

That we can sometimes err is borne out through reviews that have been conducted of our decisions in the past.

As earlier pointed out, if a sentence of death is executed, a review (if circumstances dictate) of the decision, which resulted in the carrying out of the execution will not be of any use to the person concerned.

Another aspect of the death penalty, which concerns me is the fact that this is the only penalty where we do to the culprit according to what he did – i.e. **“tit for tat”**. In my humble opinion we are reducing ourselves to the level of the accused, it is like saying: **“he killed and we must also kill him”** – Yet we do not do likewise for those who rob, steal, rape etc. We do not do to them what they did.

no right to take it, no matter what the other person has done. It is only God who gives life and it is Him alone who should take it.

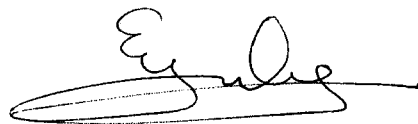
Another point is the fact that death is certain for each one of us – so what kind of punishment is a death penalty, anyway? Life imprisonment would be more appropriate in the circumstances of the case and it is the one I would have imposed.”

DATED at DODOMA this 19th day of March, 2010



E. A. KILEO
JUSTICE OF APPEAL

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



E. Y. MKWIZU
DEPUTY REGISTRAR