

IN THE COURT OF APPEAL OF TANZANIA
AT BUKOBA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MMILLA, J.A.)

CRIMINAL APPEAL NO. 114 OF 2015

GOZBERT HENERICO.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Bukoba)

(Matogolo, J.)

dated the 22nd April, 2015

in

Criminal Session No. 7 of 2012

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

10th & 26th February, 2016

KILEO, J.A.:

I have had the occasion to read the draft judgment of my brother justice Mmilla, J. A. I entirely agree with him regarding the conclusion reached on the appellant's culpability. There was overwhelming evidence tendered at the trial which left no doubt as to the appellant's guilt. There were eye witnesses at the scene. Though the crime was committed at night there was light from a 'koroboi' which enabled the witnesses to identify the appellant who was very well known to them prior to the

incident. But above all, the appellant confessed to the killing before his relative who also happened to be an authority in the village.

What I do not endorse is the death penalty.

I have, in the past, given a number of dissenting judgments on the death penalty. These dissenting judgments, to mention just a few include: **Abdi Adam @ Chakuu vs. Republic** – Criminal Appeal No. 157 of 2009, **Ezra Makota and Majuto Ismail v. Republic**, Criminal Appeal No 115 of 2015, **Keneth Jonas @ Kasase v. Republic**, Criminal Appeal no. 156 of 2014 (all unreported).

I wish to reproduce here one of my dissenting judgments which generally carries the message of my position in all my dissenting judgments:

“My considered view is as was held in **Mbushuu alias Dominic Mnyange and Another v.R** [1997] TLR 97 that **“the death penalty is inherently inhuman, cruel and degrading punishment and it is also so in its execution and it offends art 13(6)(d) and (e) of the Constitution of the United Republic of Tanzania.”**

I also hold the view that the death penalty violates the right to life which is enshrined in the Universal Declaration of Human rights to which Tanzania is a signatory. It violates article 14 of our Constitution which caters for the right to life.

The death penalty is irreversible. Flaws cannot be ruled out completely in the justice system. Witnesses (where they are part of the process), prosecutors, and judges can all make mistakes. When this is coupled with flaws in the system it is inevitable that innocent people may be convicted of crimes they never committed. When death penalty is imposed and executed such mistakes cannot be put right. Amnesty International holds the view that:-

The death penalty legitimizes an irreversible act of violence by the state and will inevitably claim innocent victims. As long as human justice remains fallible, the risk of executing the innocent can never be eliminated

An article posted on CBC news by Neil Macdonald on 13 February 2012 underscores the above conviction. He had this to say in his article on **'The death penalty debate America isn't having':**

'Add to that the fact that, according to the Death Penalty Information Centre, Texas has released 12 men from death row since 1973, usually after prisoners' advocates discovered new evidence of their innocence, much of it resulting from DNA testing.

To be clear: Texas intended to put 12 innocent men to death.

Nationwide, over the same period, the number is 140'.

Death penalty dehumanizes the convict as well as the entire society.

Renny Cushing, (Director of Murder Victims' families for Human Rights) once said:

""If we let murderers turn us to murder, we become what we say we abhor".

The death penalty is an outmoded system based on retribution: that he or she who takes another person's life should suffer the same fate. This does not however apply to other crimes. It is only in murder where the maxim *an eye for an eye* applies.

Considering that we do not have a perfect criminal justice system, considering that judges being human beings are not foolproof of error, considering that the death penalty is irreversible once executed,

considering that God is the only one who endows us with life and hence the only one who should take it, and bearing in mind that the death penalty violates both articles 13 (6) (d) and (e) and 14 of the Constitution of the United Republic of Tanzania, I would refrain from upholding the sentence of death by hanging imposed. I would in its place impose life imprisonment."

DATED at **BUKOBA** this day of February 2016

E. A. KILEO
JUSTICE OF APPEAL

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


E.F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL