

**IN THE COURT OF APPEAL OF TANZANIA  
AT BUKOBA**

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

**CRIMINAL APPEAL NO. 441 OF 2015**

**OSCAR JOSIAH.....APPELLANT**

**VERSUS**

**THE REPUBLIC.....RESPONDENT**

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

**(Matogolo, J.)**

**dated the 2<sup>nd</sup> October, 2015**

**in**

**Criminal Sessions Case No. 06 of 2014**

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**JUDGMENT OF KILEO, JA (Dissenting on Sentence)**

**22<sup>nd</sup> & 26<sup>th</sup> February, 2016**

**KILEO, J.A.:**

I have read the draft judgment prepared by my learned brother, Mmilla, JA. I totally agree with the conclusion reached with regard to conviction of the appellant. There was ample evidence on record showing that the appellant threw the new born baby into the bush who subsequently died of hypoglycemia & hypothermia. According to PW1, the doctor who performed the autopsy, hypoglycemia is lack of sugar in the blood while hypothermia is lack of warmth. PW1 testified that a newly born

baby is supposed to be breastfed within half an hour of its birth and has to be kept warm. When the appellant threw the newly born child in the bush he must have intended its death.

My only concern in this case is the death penalty which was imposed. In a number of my dissenting decisions on the death sentence I have expressed my views why I do not support the death penalty. Among those cases to mention just a few are **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)

This Court in *Mbushuu v. Republic*, [1997] TLR 97 held 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.”**

Though the Court then found that the death penalty offends the provisions of article 13 (6) (d) and (e) of the constitution, it did not declare it unconstitutional.

In my opinion the death penalty violates the right to life which is enshrined in both the Universal Declaration of Human Rights and article 14 of our Constitution.

Again, the death penalty not only dehumanizes the convict but also the entire society, as it was once noted by Renny Cushing, (Director of Murder Victims' Families for Human Rights) *"If we let murderers turn us to murder, we become what we say we abhor"*.

It is unfortunate that in murder cases in our jurisdiction an appellant has only one level of appeal unlike other cases which might originate from Primary Courts where an appellant has three levels of appeal.

The death penalty is irreversible.

The most common and most cogent argument against death penalty is that sooner or later, innocent people will get killed, because of mistakes or flaws 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 will be convicted of crimes. Where death penalty is used 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 my conviction that death penalty is not proper because we may kill people who could otherwise be innocent. 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'.*

I have no doubt that a criminal should be punished for his or her wrong doing. However, in my view, the death penalty is nothing but a remnant of an outmoded system based on criminal vengeance: that he or

she who takes life should suffer the same fate. This does not apply to the other crimes.

Conclusively, no matter what the reasons others might hold regarding the death penalty I still hold the position that it violates the right to life which is protected in our Constitution. In my opinion life imprisonment would be more appropriate for the appellant.

**Dated at Bukoba** this 25<sup>th</sup> 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**