

THE APPLICATION OF THE DEATH PENALTY IN KENYA:
A CASE OF TORTUROUS DE FACTO ABSTINENCE.
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I. INTRODUCTION

This paper sets out to examine the application of the death penalty in Kenya. It examines the Kenyan national legal framework against the backdrop of international and regional instruments dealing with the death penalty. The paper also considers Kenya's stand on and initiatives towards the abolition of the death penalty in light of a heightened campaign in the world legal order calling upon states that have not abolished the death penalty to do so.

From the very outset, it is the writers' view that the application of the death penalty in Kenya is as torturous to the death row inmate as it is to the researcher attempting to make his/her way through the dark cloud that surrounds available data on the application of this mode of punishment in the Kenyan penal system. The available data content is minimal compared to the dry law touching on the subject in question. There is therefore need for long term, in-depth, research aimed at unearthing more data in Kenya in order to provide an accurate picture of the status of Kenya in the application of the death penalty.

To the death row inmate in Kenya, the process is torturous. They await their fate with anguish and agony; personal suffering, as well as that of family and friends, inflicted by being kept in the dark by the state as to when it finally intends to proceed with the execution. The treatment of death row inmates in Kenya, when viewed against international and regional instruments prescribing the standards for their treatment, will be found wanting. But first, a look at these instruments:

A. *International and Regional Instruments Relating to the Death Penalty.*

Kenya as a member of the international community is bound by certain international obligations that have a bearing on the application of the death penalty.

1. *The Universal Declaration of Human Rights (1948)*

As a member of the international community, Kenya is bound by norms of customary international law which find expression in, among other instruments, the Universal Declaration of Human Rights.¹ The following provisions are pertinent: Article 1 which provides, 'All human beings are born free and equal in dignity and rights' and Article 5 which provides, 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. The Death Penalty is regarded as an affront to the dignity of a convicted person. It is also argued that the treatment of a death row inmate as well as the method of execution of the Death Penalty amount to torture, cruel, inhuman and degrading treatment and punishment.

2. *The International Covenant on Civil and Political Rights (1966)*

Kenya is a party to the International Covenant on Civil and Political Rights² which it acceded to on 23rd March 1976. Article 6 of this Covenant guarantees every human being the right to life³ but at the same time provides for the death penalty⁴ so long as the death penalty is meted out for the most serious crimes⁵, in

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¹ Adopted and proclaimed by General Assembly Resolution 217 A (III) of 10th December 1948.

² GA. Res 2200A (XXI), 21 UN. GA OR supp No. 16 p52, UN doc A/6316 (1966), 999 UNTS 171. It entered into force on 23rd March 1976.

³ art 6 (1) which provides, 'Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.'

⁴ art 6 (2) which provides, 'In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not

accordance with the law in force at the time of commission of the crime and pursuant to a final judgment rendered by a competent court. Article 6 also provides for the right of any person sentenced to death to seek pardon or commutation of the sentence.⁶ It also prohibits the imposition of the death sentence for crimes committed by persons below eighteen years age and further provides that the death sentence shall not be carried out on pregnant women.⁷ Concerning abolition, Article 6 provides that nothing in the article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the Covenant.⁸ Finally, under Article 7, no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.⁹

3. *The Second Optional Protocol to the International Covenant on Civil and Political Rights (1989)*

This is the international instrument that has expressly shown its disapproval of the death penalty. It exclusively provides for the abolition of the death penalty. It was adopted by the United Nations General Assembly on 15th December 1989 and entered into force on 11th July 1991. It is noteworthy that Kenya is not a party to this international instrument. Article 1 thereof provides that no one within the jurisdiction of a State Party to the Protocol shall be executed¹⁰ and that each State Party shall take all necessary measures to abolish the Death Penalty within its jurisdiction.¹¹ The above provisions as reflected particularly in the International Covenant on Civil and Political Rights and its Second Optional Protocol demonstrate the difficult compromise that the United Nations had to make to accommodate, on the one hand, states that are reluctant to abolish the death penalty and those that are, on the other hand willing to abolish it. Even in the case of the abolitionist states, this compromise is further reflected in the language of Article 1 (1) of the Second Optional Protocol in the use of the phrase 'shall take all necessary measures', rather than giving State Parties a time frame within which to abolish the death penalty.

4. *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)*

Kenya is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which it acceded to on 23rd March 1997. Article 1 defines torture as involving the intentional infliction by a public official of severe pain or suffering, whether physical or mental, on a person for such purposes as punishing him for an act he has committed, or intimidating or coercing him.¹² Under Article 2, each State Party is required to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.¹³ This article also rules out justification of torture under any circumstances whatsoever.¹⁴

Death row convicts may and are known to be subjected to acts of torture and therefore the above Convention is relevant to any discussion concerning the death penalty.

contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This Penalty can only be carried out pursuant to a final judgment rendered by a competent court.'

⁵ The phrase 'most serious crime' is not defined under the Covenant.

⁶ art 6 (4)

⁷ art 6 (5)

⁸ art 6 (6)

⁹ Read with art 5 of the Universal Declaration of Human Rights

¹⁰ art 1 (1)

¹¹ art 1 (2)

¹² art 1 (1) provides, 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.'

¹³ art 2 (1)

¹⁴ art 2 (2) and (3). sub-art (2) provides, 'No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.' sub-art (3) provides, 'An order from a superior officer or a public authority may not be invoked as a justification of torture.'

5. Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty¹⁵

These Safeguards are to be read with the International Covenant on Civil and Political Rights.¹⁶ The safeguards are to the effect that (i) capital punishment may be imposed only for the most serious crimes; (ii) capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission; (iii) persons below 18 years of age at the time of commission of the crime shall not be sentenced to death, nor shall the death sentence be carried out on pregnant women, or on persons who have become insane; (iv) capital punishment may be imposed only when the guilt of the person charged is based upon clear and convincing evidence; (v) capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after a fair trial; (vi) anyone sentenced to death shall have the right to seek pardon or commutation of sentence which may be granted in all cases of capital punishment; (vii) capital punishment shall not be carried out pending any appeal; and that (viii) where capital punishment occurs, it shall be carried out so as to inflict minimum possible suffering.¹⁷ The depth of these safeguards reflects the seriousness with which the Death Penalty is viewed in light of its effect on the fundamental human rights of the person charged with and convicted of a capital offence.

6. The Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child.

Kenya is a party to the UN Convention on the Rights of the Child which it ratified on 2nd September 1990, as well as the African Charter on the Rights and Welfare of the Child which it has also ratified. Article 37 (a) of the Convention provides:

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below 18 years of age.¹⁸

Article 16 (1) of the Charter provides for protection of the child from all forms of torture, inhuman or degrading treatment and especially physical or mental injury or abuse, neglect or maltreatment, including sexual abuse. Article 17 (2) (a) of the Charter requires states to ensure that no child who is detained or imprisoned or otherwise deprived of his/her liberty is subjected to torture, inhuman or degrading treatment or punishment.

7. The African Charter on Human and Peoples' Rights (1981)

Also at the regional level, Kenya is a party to the African Charter on Human and Peoples' Rights¹⁹ which it acceded to on 23rd January 1992. Article 4 of the Banjul Charter, as it is so called, provides that human beings are inviolable and that every human being shall be entitled to respect for his life and the integrity of his person and further that no one may be *arbitrarily* deprived of this right.²⁰

Article 5 provides that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. It also prohibits all forms of exploitation and degradation of man particularly slavery, slave trade, *torture, cruel, inhuman or degrading punishment and treatment.*

¹⁵ Approved by the Economic and Social Council of the UN vide Res. 1984/50 of 25 May 1984 upon the recommendation of the Committee on Crime Prevention and Control.

¹⁶ See in particular para 5 of the Safeguards which expressly refers to art 14 of the International Covenant on Civil and Political Rights concerning the right to a fair trial.

¹⁷ paras 1-8 of the Safeguards

¹⁸ Read with art 6 (5) of the International Covenant on Civil and Political Rights and para 3 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty

¹⁹ Banjul Charter Adopted on 27th June 1981 in Nairobi, Kenya. OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982). Entered into force on 21st October 1986.

²⁰ The prohibition of '*arbitrary*' deprivation of the right to life tends to legitimize deprivation of the right pursuant to a court sentence.

B. *Relationship between the Regional and National Instruments and the Kenyan National Legislation.*

Kenya is a dualist state whereby municipal law and international law are, in the context of the Kenyan legal system, two different bodies of law. This means that unless international obligations are incorporated in the Kenyan legal framework through an Act of Parliament, they do not form part of the law enforceable by Kenyan courts. A case in point where the issue of a conflict between the Kenyan national legislation and an international obligation arose was the case of *Okunda v Republic*²¹ where the court had the following to say

If we did have to decide a question involving a conflict between Kenyan law on the one hand and principles or usages of international law on the other – this is how counsel for the community has put the matter to us – and we found it impossible to reconcile the two, we, as a municipal court, would be bound to say that Kenyan law prevailed.

Further, the Judicature Act²², an Act of Parliament enacted to make provisions concerning the jurisdiction of the High Court, the Court of Appeal and subordinate courts, provides as follows:

(1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-

(a) The Constitution;

(b) Subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in part 1 of the Schedule to this Act, modified in accordance with part II of that Schedule;

(c) Subject thereto and in so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August 1897, and the procedure and practice observed in the courts of justice in England at that date;

But the common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay.

The above provisions of the law have been cited extensively to underscore the fact that the courts of law in Kenya, from the lowest (subordinate courts) to the superior court, that is, the High Court, to the highest court of the land, namely the Court of Appeal, would be acting *ultra vires* their scope of jurisdiction if they endeavoured to apply international law qua international law in Kenya without it being specifically domesticated to become part of the law of the land.

II. THE CRIMINAL JUSTICE SYSTEM AND THE DEATH PENALTY IN KENYA

²¹ [1970] EA 453

²² c 8 of the Laws of Kenya, 1967, s 3

A. *The Constitutional Basis for the Death Penalty in Kenya*

The Constitution of the Republic of Kenya expressly recognizes the death penalty as a form of punishment in the penal system of the country. Section 71 of the Constitution of Kenya provides:

(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).

Section 72 (5) of the Constitution provides as follows:

If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, *unless he is charged with an offence punishable by death*, (emphasis added) be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

Section 74 (1) of the Constitution provides that no person shall be subject to torture or to inhuman or degrading punishment or other treatment. Section 74(2) provides:

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 foregoing provisions clearly show that the death penalty in Kenya is a constitutional form of punishment. Section 74 (2) must be read subject to Section 74 (1) so as not to appear to foreclose avenues of challenging the malpractices associated with the execution of the death penalty. Any description of punishment therefore, however lawful, must not amount to cruel, inhuman, degrading treatment or punishment. This, it is submitted, is where the practice in Kenya, in the treatment of death row convicts, departs from the law.

B. *Offences Punishable by the Death Penalty in Kenya*

There are four civil offences and several martial offences punishable by the Death Penalty in Kenya.

1. Civil Offences

The following four civil offences carry a mandatory death sentence:

(a) *Treason*

Section 40 (3) of the Penal Code²³ provides that any person who is guilty of the offence of treason shall be sentenced to death.

(b) *Murder*

Section 203 of the Penal Code provides that any person convicted of murder shall be sentenced to death.

(c) *Robbery with Violence*

²³ c 63 of the Laws of Kenya

Section 296 (1) of the Penal Code provides that any person who commits the felony of robbery is liable to imprisonment for 14 years together with corporal punishment not exceeding twenty eight strokes. Sub-section (2) thereof provides that if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

(d) Attempted Robbery with Violence

Section 297 of the Penal Code creates the offence of attempted robbery which is committed by any person who assaults any person with the intent to steal anything from him. Sub-section (2) thereof provides that if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

2. Martial Offences

Martial offences in Kenya are created by the Armed Forces Act²⁴. These are considered below.

(a) Acts aimed at aiding the Enemy

Under Section 14(1) of the Armed Forces Act, any person subject to the Act who does any of the acts listed there under with the intention of aiding the enemy shall be guilty of an offence and liable, on conviction by court martial, to suffer death or any other punishment provided by the Act.

(b) Communicating with or giving Intelligence to the Enemy

Under Section 15(1) of the Act, any person subject to the Act who, with intent to assist the enemy communicates with or gives intelligence to the enemy, or any unauthorized person shall be guilty of an offence and shall be liable, on conviction by the court martial, to suffer death or any other punishment provided by the Act.

(c) Misconduct by Persons in Command

Section 16(1) of the Act provides for offences relating to misconduct by persons in command with intent to assist the enemy which, upon conviction by the court martial, attract the death sentence or any other punishment provided by the Act.

(d) Mutiny

Section 25 of the Act provides for the offence of mutiny which also attracts the Death Penalty or any other punishment provided for by the Act.

C. The Death Penalty in Kenya: Optional or Mandatory?

An examination of the civil offences stated above reveals that in Kenya, the moment one is convicted of a civil offence that attracts a death penalty, the courts have no option but to mete out the death sentence. The practice that is commonly referred to as consideration of mitigating circumstances is limited to the extent of determining the alternative offence of which the accused may be convicted, for example, manslaughter instead of murder or simple robbery instead of robbery with violence. But the moment the trial judge or magistrate fails to be convinced that there is need to convict the accused of the lesser offence and proceeds to convict on the principal offence of either treason, murder, robbery with violence or attempted robbery with violence as the case may be, then the judge or magistrate must proceed to mete out the Death Penalty.

²⁴ c 199 of the Laws of Kenya

In the case of Martial Offences, the position is different because there is an option of 'any other sentence provided for under the Act' in respect of all offences punishable by the death penalty.

D. Mode of Execution of the Death Penalty in Kenya

The Prisons Act²⁵ provides that when any person is sentenced to death, he shall be hanged by the neck until he is dead and the sentence shall be carried out in such manner as the Commissioner (of Prisons) shall direct.²⁶ This evidences a disparity with the standard prescribed in the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty which provide for a method that inflicts the minimum possible suffering.²⁷

E. Court Structure and Jurisdiction in Relation to the Application of the Death Penalty

The High Court of Kenya has unlimited original jurisdiction in all civil and criminal matters.²⁸ Consequently, it can hear and determine any criminal matter regardless of the penalty to be meted out in the matter. More specifically, murder and treason are offences triable only by the High Court as a court of first instance. Robbery with violence and attempted robbery with violence are triable by the High Court and any subordinate court presided over by a Chief Magistrate, a Principal Magistrate or a Senior Resident Magistrate.²⁹ An automatic right of appeal from a conviction and death sentence from a trial conducted by the High Court lies to the Court of Appeal.³⁰ Appeals from the subordinate courts presided over by the Chief Magistrate, Principal Magistrate or Senior Resident Magistrate lie to the High Court.³¹

III. FAIR TRIAL: ADEQUATE AND EFFECTIVE DISPENSATION OF CRIMINAL JUSTICE

A. Pre-Trial

1. Investigation

In Kenya, the principal agency that investigates offences punishable by the death penalty is the Kenya Police.³² Investigative procedures right from the time of arrest of the death row suspect are provided for under the Criminal Procedure Code.³³ Problems that hamper investigations are caused mainly by inadequate and ineffective technology and administrative structures and they put the investigative stage of the criminal justice process into disrepute. They include the following:

(a) Lack of or inadequate forensic technology and expertise within the investigative arm of the police

Kenya has only two trained forensic document experts. The number of ballistic experts is not known but this could be evidence that they are negligible in number and that they are rarely in touch with the everyday life of the researcher and common Kenyan.

(b) Late arrival of police at scene of crime and tampering with evidence

²⁵ c 90 of the Laws of Kenya

²⁶ s 69

²⁷ para 9 of the Safeguards

²⁸ s 60 of the Constitution of Kenya

²⁹ Criminal Law Amendment Act (Act Number 5 of 2003). Previously, all these offences were triable only by the High Court.

³⁰ s379 of the Criminal Procedure Code.

³¹ s347 of the Criminal Procedure Code.

³² Established by the Kenya Police Act, c 84 of the Laws of Kenya.

³³ c75 of the Laws of Kenya

It is common to encounter a situation where the police in Kenya cannot reach a scene of crime due to lack of transportation or lack of fuel for the available vehicles. By the time these officers reach the scene of the crime, more often than not the evidence has been tampered with or destroyed altogether. A case in point involves the murder on 14th September 2003 of one Mbai, formerly the Chairman of the Devolution Committee of the Constitution of Kenya Review Commission. He was shot in the living room of his house. By the time the police arrived at the scene of crime two hours later, the blood on the sofa set where he fell had been cleaned up, on the instructions of a neighbour.³⁴

(c) Attitude of law enforcement officers and perception of the populace

It is to be noted that deliberate efforts are currently being made by the Government, assisted by public interest NGOs, to retrain members of the police force, in order to ensure that they are socialized to live harmoniously with and provide the requisite services to the populace. However, the oppressive mentality of the old crop of members of the force who constitute the majority still subsists. This is the case notwithstanding the fact that their motto is 'Utumishi Kwa Wote', that is, 'Service to All'. The police see their role as being that of striking terror in the hearts and minds of the populace that they should serve rather than being friendly and helpful. Added to this is the fact that there are increasing reports in the media of involvement by members of the police force in a crime wave involving carjackings, violent robberies and murders. This has not endeared the police to the populace who now view the police with suspicion. This in turn makes investigative work arduous since no witness is willing to co-operate freely with the police in investigation of crime.

(d) Demoralized investigative officers

In Kenya, the police force is one of the public sectors with the lowest pay and poorest working conditions, leading to lack of morale of its members. A demoralized officer is a poorly performing officer. The police cannot therefore be expected to carry out their duties with zeal. Indeed they are tempted to and do take bribes from crime suspects in order to influence the outcome of an investigation. This is a major challenge to the investigative process in Kenya.

(e) Use of torture to extract information and confessions from suspects

Although torture is prohibited in Kenya,³⁵ reports of torture of suspects by the police abound in Kenya. This is particularly so during attempts by the police to extract confessions from suspects. This has resulted in the enactment of the Criminal Law Amendment Act (Act No. 5 of 2003) which precludes the admission in evidence in court of any confession by an accused person, unless the confession was made before a trial magistrate and was voluntarily obtained. The moment any confession is obtained through torture, the credibility of the criminal trial process is called into question.

B. Trial

1. Legal Representation

Persons accused of murder and treason are entitled to free legal representation provided by the state if they cannot afford to hire a lawyer.³⁶ This system of representation has been criticized since the state cannot afford to pay the lawyers adequately. As such, many lawyers who opt to provide legal representation under this scheme are those who are young and inexperienced and are willing to receive meagre pay just to meet basic survival needs. Well experienced and established lawyers who are doing well in private practice do not apply to be considered in the scheme. The effectiveness of legal representation in the circumstances may therefore be found to be wanting.

³⁴ The Standard Newspaper, June 18, 2004, p 1

³⁵ s 74 of the Constitution of Kenya

³⁶ Surprisingly, accused persons in the cases of robbery with violence and attempted robbery with violence are not entitled to state sponsored legal representation in spite of the fact that these offences also attract the Death Penalty. This is a weakness in the state policy governing the free legal representation scheme.

2. *The Role of Assessors*

All trials before the High Court have to be in the presence of assessors.³⁷ Assessors are expected to be masters of fact.³⁸ The number of assessors to be present at such trial is three.³⁹ The qualifications for assessors are also provided for under the Act. The practice in Kenya is that assessors sit in murder trials at the High Court when it is exercising original jurisdiction. It is to be noted that since independence, no treason trials have been conducted by the High Court.

3. *Qualifications of the Prosecutor*

The right to a fair trial entails that the person who discharges the function of a prosecutor in a criminal trial should be competent and qualified. This was considered in the case of *Roy Richard Elirema and Vincent Joseph Kessy v Republic*.⁴⁰ Here the Court of Appeal of Kenya held that the appointment of people who were not qualified under the law to prosecute a criminal matter violated the accused person's right to a fair trial by a competent and impartial court. The court said

In Kenya, we think, and we must hold that for a criminal trial to be validly conducted within the provisions of the Constitution and the [Criminal Procedure] Code, there must be a prosecutor, either public or private, who must play the role of deciding what witnesses to call, the order in which those witnesses are to be called and whether to continue or discontinue the prosecution. These roles cannot be played by the trial court, for if it does so there would be a serious risk of the court losing its impartiality and that would violate the provisions of Section 77(1) of the Constitution. For one to be appointed as a public prosecutor by the Attorney-General one must either be an advocate of the High Court of Kenya or a police officer not below the rank of Assistant Inspector of Police... Kamotho and Gitau were not qualified to act as prosecutors and the trial of the appellants in which they purported to act as public prosecutors must be declared a nullity.

4. *Bail*

It should be noted that although generally an accused person is to be entitled to bail pending trial, in capital offences, the accused person is not entitled to bail as a matter of law.

C. Post-Trial Procedures

These are set out in the Criminal Procedure Code.⁴¹ They are considered below.

1. Appeal

When an accused person is sentenced to death, the court shall inform him of the time within which, if he wishes to appeal, his appeal should be preferred.⁴²

(a) *Practical Problems with the Appeal System*

Cases of appeals dragging on for years on end without being heard are manifold. The problems are basically structural. The country has less than 50 High Court and Court of Appeal judges combined in

³⁷ s 262 of the Criminal Procedure Code, c 75 of the Laws of Kenya

³⁸ There is now substantial literature among critics of the criminal justice system questioning the relevance of the system of trial by assessors, particularly considering that unlike the jury system, the assessors' verdict in Kenya's criminal justice system is not binding upon the trial judge. This has been dismissed as a give and take philosophy, that is, the statute provides for trial by assessors and then takes their verdict away. See generally P.L.O. Lumumba *A Handbook on Criminal Procedure in Kenya* (P.L.O. Foundation, 1998 Nairobi) 186.

³⁹ s 263 of the Criminal Procedure Code.

⁴⁰ Mombasa Criminal Appeal No. 67 of 2002 (CA)

⁴¹ pt X, ss 330-332

⁴² s 330

number to serve a population of over 30 million people. This is grossly disproportionate. Although there is no comprehensive data on the number of appeals pending before the High Court and Court of Appeal in Kenya, the available statistics paint a gloomy picture.

The following data from the Seventh Annual Report of the Standing Committee on Human Rights⁴³ illustrates the situation.

EXCERPT

Delay in Hearing Cases and Appeals

During the period in review, the Committee has continued to receive complaints from both remand and convicted inmates alleging delay in the finalization of their cases.

It is a truism that justice delayed is justice denied; it is also the destruction of peoples' trust in the legal system which negatively impacts on the entire justice and democratic process. The table below succinctly illustrates the problem.

	Name	Status	Case No.	Prison	Charge	Length of Delay
1.	Said Mabugu Mzirwa	Remand	26/02 HC Mombasa	Shimo-La- Tewa	Murder	1 year
2.	Javan Mwakireti	Remand	7/02 HC Mombasa	Shimo-La-Tewa	Murder	1 year
3.	Jitendra Javal	Remand	7/2000 Kiambu	Nairobi	Murder	1 year 1 month
4.	Joseph Kamande & 3 others	Remand	42/99 Thika	Industrial Area	Murder	1 year 4 months
5.	Joseph Wafula Mukenya	Convicted		Kamiti Main	Robbery with Violence	1 year 9 months
6.	Mohammed Basir	Remand	3/01 HC Mombasa	Shimo-La- Tewa	Murder	2 years
7.	Jeremiah Sabaya	Remand	31/01 HC Mombasa	Shimo-La- Tewa	Murder	2 years
8.	Juma Hassan Madeso	Remand	23/01 HC Mombasa	Shimo-La- Tewa	Murder	2 years
9.	Lewa Hamisi Chilifi	Remand	10/00 H Mombasa	Shimo-La- Tewa	Murder	3 years
10.	Juma Hassan Tutsu	Remand	29/00 HC Mombasa	Shimo-La- Tewa	Murder	3 years
11.	Margaret Wangare Maina	Convicted	HCCA 165/99	Langata Women's	Murder	3 years
12.	James Willy Mwanzia	Convicted	HCCA 739/98 Nairobi	Kamiti Main		4 years
13.	Martin O. Mukubwa	Remand	2390/98	Bungoma	Manslaughter	4 years
14.	Charo Mwanzala	Remand	1/99 H.C Mombasa	Shimo-La- Tewa	Murder	4 years
15.	Shida Kazungu Mkundi	Remand	11/99 H.C Mombasa	Shimo-La- Tewa	Murder	4 years
16.	Kenga Kombe	Remand	3/98 HC Mombasa	Shimo-La-Tewa	Murder	5 years
17.	Charles Malinda	Remand	9/98 HC Mombasa	Shimo-La- Tewa	Murder	5 years
18.	Mohammed Bosar Ali	Remand	30/98 HC Mombasa	Shimo-La-Tewa	Murder	5 years
19.	Charles Malomere & Others	Convicted	HCCA 1386/98, 1393/98,	Kamiti Main	Robbery with Violence	5, 5, 4 years

⁴³ This was the precursor to the Kenya National Commission on Human Rights. This data is as of May 2003 and is obtained from reports made to the Kenya National Commission on Human Rights. This data is available at pages 23 and 24 of the report and is based on complaints made to the Committee. There could be worse cases of justice delayed that are unreported.

			165/99			
20	Ronald Lusabe	Convicted	HCCA 1123/97	Kamiti	Robbery with Violence	7 years
21	Malik Abduila Wabuire	Remand	4/2000 Bungoma, formerly 12/98 Busia	Bungoma	Murder	5 years
22	Fredrick Kiiru & Others	Remand	7/98 HC Nairobi	Industrial Area	Murder	5 years
23	Fredrick Wanda Wataka & Others	Remand	6197/95 HC Bungoma	Kamiti	Robbery with Violence	6 years
24	James Muchache Waitthaka	Remand	7/98 Nairobi. Retrial 85/02 Nairobi	Kamiti	Murder	6 years
25	Phillip Odali	Convicted	HCCA 15/8/96	Kamiti	Murder	6 years
26	Chengo Jefwa	Remand	SPM's Kilifi 1548/97	Shimo-La-Tewa		6 years
27	Peter Charles	Remand	HCCA 441/96	Kamiti	Robbery with Violence	7 years
28	Ephantus Mugo	Convicted		Kamiti	Manslaughter	8 years
29	Protas Kaita	Remand	21/95 HC Bungoma	Bungoma	Murder	9 years
30	John Mburu	Convicted	C.A Unknown	Kamiti Main		13 years
31	George Gituara	Convicted	C.A Unknown	Kamiti	Robbery with Violence	14 years
32	William Wambiri	Convicted	CA 133/87	Kamiti	Robbery with Violence	16 years

This data is as of May 2003 and is obtained from reports made to the Kenya National Commission on Human Rights. There could be worse cases of justice delayed that are unreported.

2. Certificate as Authority for Detention

A certificate under the hand of the Registrar or other officer of the court that the sentence of death has been passed, and naming the person condemned, shall be sufficient authority for the detention of that person.⁴⁴

3. Report to President

The law requires that as soon as a sentence of death has been pronounced, the presiding judge forwards to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him and containing any recommendations or observations on the case as the presiding judge may think fit to make.⁴⁵ The President, after considering the report, shall communicate his decision to the judge and the judge shall cause that decision to be entered in the records of the court.⁴⁶

4. Death Warrant, Commutation of Sentence and Pardon

The President shall issue a death warrant, or an order for the sentence of death to be commuted, or a pardon under his hand and the public seal of Kenya to give effect to the decision. If the sentence of death is to be carried out, the warrant shall state the place where and the time when the execution is to be carried out, and shall give directions as to the place of burial or cremation of the body of the person executed. If the sentence is commuted for any other punishment, the order shall specify that punishment. If the person sentenced is pardoned, the pardon shall state whether it is free, or to what conditions, if any, it is subject. There is a proviso that the President's warrant may direct that the execution shall take place at such time and at such place and that the body of the person executed shall be buried or cremated at such place as shall be appointed by some officer specified in the warrant.⁴⁷ The warrant or order or pardon of the President

⁴⁴ s 331

⁴⁵ s 332(1)

⁴⁶ s 332(2)

⁴⁷ s332(3)

shall be sufficient authority in law to all persons to whom it is directed to execute the sentence of death or other punishment awarded, and to carry out the directions given in the order in accordance with its terms.⁴⁸

5. *The Prerogative of Mercy*

This is provided for by Section 27 of the Constitution of Kenya under which the President can pardon a person convicted of an offence⁴⁹, or substitute a less severe form of punishment for a punishment imposed on such person⁵⁰ or remit the whole or part of a punishment imposed on such person⁵¹. Section 28 establishes the Advisory Committee on the Prerogative of Mercy. It is made up of the Attorney-General and not less than three nor more than five other members appointed by the President, of whom at least one shall be a person qualified to practise in Kenya as a medical practitioner.

Section 29 of the Constitution which is relevant to the death penalty provides that 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 other information derived from the record of the case or elsewhere as he may require, to be considered at a meeting of the Committee 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. The President is not obliged to act in accordance with the advice of the Committee.⁵²

IV. KENYA: THE DE FACTO ABSTINENT

For the purposes of this paper, the writers shall refer to those states that have totally abolished the death penalty from their statute books as de jure abstinent whereas those that still have the death penalty in their statute books but do not, as a matter of practice, carry out execution of death row convicts shall be referred to as de facto abstinent. In the above dichotomy, Kenya perfectly falls within the latter category, that is, de facto abstinent. This flows directly from the fact that since the execution of the infamous August 1st 1982 coup plotters after the court martial trials that ended in 1985, the state of Kenya has not officially sent any other convict to the gallows and there are no signs that any other convict on death row shall face the hangman's noose in the near future.⁵³

In actual fact, it is doubted whether the Prisons Department in Kenya still maintains a hangman on its payroll considering that the only hangman, the executioner of the 1982 coup plotters in Kenya, has since retired from his bizarre job. But in the meantime, the anguish and torture of those on death row since then, and the anguish of their families, continues.⁵⁴

V. KENYA'S STAND ON AND INITIATIVES TOWARDS ABOLITION OF THE DEATH PENALTY

⁴⁸ s 332(4)

⁴⁹ s 27(a)

⁵⁰ s 27(c)

⁵¹ s 27(d)

⁵² s 29(2) of the Constitution.

⁵³ See <<http://www.religioustolerance.org/execut3.html>> (18th April 2004) where under the list of countries that have recently abolished the Death Penalty it is indicated that Russia and many more countries not listed above retain capital punishment statutes on their books, but have not executed criminals in many years. Kenya, for example, executed its last prisoner on death row in 1984; Russia in 1996. An interview with the retired hangman by a local Kenyan newspaper, The Standard Newspaper, indicated that he last executed a convict in 1985. This variation in dates is part of the inconsistencies that a researcher encounters owing to lack of proper and consistent institutional data on the subject.

⁵⁴ The mental anguish suffered by convicted persons awaiting the death sentence is well documented. In the South African case of *The State vs. T. Makwanyane and M. Mchunu* Case No. C.C.T/3/94, the court noted that a prolonged delay in the execution of the death sentence may in itself be a cause for the invalidation of a sentence of death that was lawfully imposed. In Kenya, there has never been a challenge of the constitutionality of the Death Penalty before the Constitutional Court in spite of the virtual permanence of death row convicts in prison.

The Kenya Law Reform Task Force on the Reform of Penal Laws and Procedures recommended in 1997 that the Death Penalty be abolished.⁵⁵ There have been promises made in the past by the state of its intention to abolish the Death Penalty in Kenya. The greatest impediment to the success of efforts towards this end has been the fortification of this penalty within the Constitution of the Republic of Kenya which is the supreme law of the land. The relevant provision in the Constitution would have to be repealed by Parliament first.

On 25th February 2003, the newly elected President of Kenya, Mwai Kibaki, released 28 prisoners who had each spent between 15 and 20 years under sentence of death by order of the former President.⁵⁶ The death sentences of 195 other convicts were on the same day commuted to life. Announcing the order of the President, the Vice-President and Minister for Home Affairs and National Heritage, Moody Awori, under whose docket the Prisons Department falls, also stated that he (the Minister) wanted the Death Penalty in Kenya abolished and that he planned to introduce a Bill in Parliament to that effect.⁵⁷ At the same forum, the Commissioner of Prisons, Abraham Kamukil, while praising the unprecedented move by the Government, said that the death penalty should be abolished because it claims innocent lives.⁵⁸

The current Minister for Justice and Constitutional Affairs, Kiraitu Murungi, has been at the forefront of calling for the abolition of the death penalty. He is on record as having rallied Parliament on two occasions through Private Member Motions during his tenure as an opposition M.P. in 1994 and 2000, for the abolition of the death penalty. On both occasions, however, his attempts met opposition from the previous KANU regime. On March 10th 2004, the same Minister, while addressing the National Constitutional Conference at the Bomas of Kenya, restated the Kenya Government's opposition to the death penalty saying it had no place in modern society – or in the Draft Constitution.

From the foregoing, it is safe to opine that the official Kenyan Government position in respect of the death penalty is an abolitionist stand, at least if the statements by the above mentioned Government officials are anything to go by. Indeed, the Constitution of Kenya Review Commission had initially in September 2002 proposed that the death penalty be abolished.⁵⁹ However, it is to be noted that when it came to voting in March 2004, the delegates at the Constitutional Review Conference who included Members of Parliament, voted for the retention of the death penalty for those found guilty of murder, treason or defilement.

This was a setback to the anti-death penalty campaign in Kenya as the Constitutional review process provided the most opportune moment and forum where the death penalty in Kenya could have been consigned to the museums of legal history.

VI. OBSTACLES TO RESEARCH ON THE DEATH PENALTY IN KENYA

The Kenya Human Rights Commission, an NGO, has estimated that as of September 2002, there were 1,270 prisoners on death row in Kenya's notoriously overcrowded maximum security prisons.⁶⁰ There is no comprehensive database from which one can tap and get information on the death penalty at a go. Efforts to obtain data from the Prisons Department in Kenya are almost always met by a reference to the nascent Kenya National Commission on Human Rights which is still in the process of setting up sufficient databases on matters involving human rights, including the death penalty.⁶¹

VII. CONCLUSION

The voting at the Bomas Constitutional Conference at which the proposal to abolish the death penalty was rejected, dealt a blow to the efforts geared towards the abolition of the death penalty in Kenya. This may be directly attributed to inadequate public campaigns against the death penalty owing to unavailability of data

⁵⁵ See Government of the Republic of Kenya *Report of the Task Force on the Reform of Penal Laws and Procedures* (October 1997) pp 76-77. One of the writers, Mrs. Joy K. Asiema, was the Joint Secretary to the Task Force.

⁵⁶ Daily Nation Newspaper, 26 February 2003.

⁵⁷ <<http://web.amnesty.org/library/Index/ENGACT>>

⁵⁸ Ibid.

⁵⁹ See the Constitution of Kenya Review Commission *Main Report* (18 September 2002) ch 17, p 258, para 41

⁶⁰ The fact of the appalling prison conditions in Kenya has now been publicly admitted by the Vice-President and Minister for Home Affairs and National Heritage, the Honourable Moody Awori.

⁶¹ The National Commission on Human Rights was established in 2002 by the Kenya National Commission on Human Rights Act, Act No. 9 of 2002. As at 16th April 2004, when the writers visited its library, no concrete data on the subject was available.

which would be useful in sensitizing the public on the breaches of human rights associated with the death penalty. Added to this is the backlog of cases which a lean Kenyan judicial system has to grapple with in order to keep pace with the demands of justice. As a result, many death row convicts have waited for the hearing of their appeals against their death sentences for as long as 10 years or more.

Also, efforts to obtain information on the death penalty from the Prisons Department have been hampered by the absence of an accurate and detailed system of record keeping. It is therefore not easy to undertake meaningful reform without the availability of data to demonstrate the need for the reform. Given that pronouncements as to the Government's intention to abolish the death penalty have in the recent past been made by top Government officials, active campaigns should now be spearheaded especially by lobby groups in Kenya. The urgency is even more pronounced now than ever before, in view of the zeal and enthusiasm of the political establishment of the day, which must be taken advantage of by any reform minded pressure group.

There is therefore a need for concerted efforts by all stakeholders towards creating sufficient awareness on the undesirability of the death penalty as a penal sanction for offenders, in light of the abolitionist stand of the international legal order which has found support in the stand taken by countries such as South Africa. It is high time that Kenya joined the rest of the world in abolishing the death penalty, that is, in becoming a *de jure* abstinent.