



THE TASKFORCE ON THE REVIEW OF THE MANDATORY NATURE OF THE DEATH PENALTY IN KENYA

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BACKGROUND

The Penal Code and the Kenya Defence Forces Act provide for offences that fetch the death penalty.

Kenyan *Penal Code* provides for a mandatory death penalty for the crimes of

- Murder, robbery with violence , attempted robbery with violence , administering an oath purported to bind a person to commit a capital offence and treason .

The Kenya Defence Forces Act , 2010 also provides for a mandatory death sentence for;

- aiding the enemy, communication with the enemy, spying offences by service member or officer when in action' ,offences by a person in command when in action misconduct in action ,advocating for Governmental change by force, mutiny, failure to suppress mutiny

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INTRODUCTION

- On 14 December, 2017 the Supreme Court of Kenya, in *Francis Karioko Muruatetu and Wilson Thirimbi Mwangi vs Republic & 6 others*, delivered a judgment that had the effect of outlawing the mandatory nature of the death sentence.
- The Supreme Court::
 1. Declared the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code unconstitutional.
 2. Remitted to the High Court the case for re-hearing on sentence only, in conformity with the judgment.
 3. Directed the Attorney General, the Director of Public Prosecutions and other relevant agencies to prepare a detailed professional review in the context of the Judgment and order, with a view to setting up a framework to deal with sentence re-hearing of cases similar to that of the petitioners.

4..Directed that any necessary amendments, formulations and enactment of statute law, be done to give effect to the judgment and on the parameters of what ought to constitute life imprisonment.

The court further added that for the avoidance of doubt, the Supreme Court order:

- Does not abolish the death sentence.
- Applies to all capital offences
- Resentencing order applies to all offenders in circumstances similar to the petitioners (ie. persons convicted of capital offences.)

THE REASONING IN THE MURUATETU CASE

- Specifically, the Court stated that,

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution which is an absolute right.”

THE TASKFORCE

- Following the above orders, the Attorney General constituted a Task Force comprising representatives of the Office of the Attorney General/Department of Justice, Kenya Law Reform Commission, National Crime Research Centre, Power of Mercy Advisory Committee, Office of the Director of Public Prosecutions, Parliament of Kenya, Judiciary, Kenya National Commission on Human Rights, Ministry of Interior, the Prison Service, and Probation and After Care Department.

TASKFORCE TORS

1. To prepare a detailed professional review with regard to the death penalty in the context of the Judgment and the Order made in the Petition with a view to –
 - Setting up a legal framework to deal with sentence re-hearing cases similar to that of the Petitioners;
 - Reviewing the legislative framework on the death penalty in Kenya;
 - Recommending a guide to death sentencing;
 - Formulating parameters of what ought to constitute life imprisonment;

TORS Cont...

- Formulating amendments and enactment of a law to give effect to the judgment;
- Preparing and forwarding a progress report to the Supreme Court within twelve (12) months from the date of the Judgment;
- Creating awareness and sensitizing stakeholders and the public on the Judgment and its implications and take into account their views on the same;

TORS Cont...

2. consider and prepare proposals upon undertaking comparison studies with other jurisdictions that have had equivalent situations;
3. carry out any other relevant function ;and
4. carry out such other functions as may be necessary or incidental to the foregoing.

TASKFORCE'S RECOMMENDATIONS

The taskforce has taken the bold step to recommend the abolition of the death penalty by proposing to categorize murder as,

- aggravated Murder,
- First Degree Murder
- Second Degree Murder
- Manslaughter

Aggravated Murder involves the 'rarest of rare' offences , with a recommendation that the offender is liable to life imprisonment with no parole and if this recommendation is rejected by stakeholders, then , this is the only offence that could fetch the death penalty, at the discretion of the judge

The elements of the aggravated murder will be:

- intentional and premeditated;
- aggravated by any one or more of the following facts:
 - vulnerable victim (child, elderly or persons with disability)
 - victim is a public officer in the course of duty
 - victim of hate crime (eg. religious, sexual orientation, race, ethnicity)
 - multiple victims (includes genocide, acts of terrorism causing death, and grave breach of *Geneva Convention* involving wilful killing (s.3))

Recommendations cont...

The Task Force has also made recommendations on sentence rehearing for :

- all offenders on death row as at the time of the decision (14 December 2017);
- all capital offenders whose sentence has been commuted to life imprisonment; and
- any offenders sentenced to death after the decision in *Muruatetu* but without regard to or compliance with the court's declaration (ie. have not taken into account mitigating factors), and who have exhausted all appeal mechanisms.

Based on known figures, the Task Force estimates that there are approximately 8000 of these.

The Task Force benefited a lot from the experiences of Malawi, Uganda and South Africa in making recommendations on sentence rehearing .

Recommendations cont....

The parameters of life imprisonment

The comparative analysis undertaken by the Task Force revealed that in most jurisdictions a life sentence is tempered with the possibility of parole.

Except for aggravated murder, the Taskforce proposes retaining the current provision of remission for offenders serving a term of imprisonment that is less than three years, and introducing a new system of parole for offenders serving a sentence of three years or more, including a life sentence.

Recommendations cont...

- Parole will not be automatic. Eligibility will be determined by the sentencing court in accordance with established parameters.

A court imposing a sentence on an offender may increase or decrease the period of ineligibility for parole if the court is satisfied, having regard to the circumstances of the offence and the character and circumstances of the offender, that the objectives of deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denunciation may be met by any other period of ineligibility.

- A judicial officer who departs from the established parameters must give reasons in writing for doing so.

Recommendations cont....

- The Taskforce had also made recommendations on the amendment of laws, institutional and administrative measures that would support the other recommendations.

WAY FORWARD

The Taskforce handed over its progress report to the Attorney General who transmitted it to the Chief Justice in accordance with the Supreme Court orders.

We are currently in the process of determining exactly how many inmates are there for re-sentencing to facilitate categorization in terms of

- Longest serving (20 years and longer);
- Vulnerability (elderly ie. offenders over 60 years of age, offenders with disabilities, offenders who are terminally ill, women);
- Murder
- Robbery With Violence

CHALLENGES TO THE TASKFORCE WORK

- public opinion favours retention of the death sentence for different reasons including arguments that this is the only effective punishment for violent and grave crimes, lack of faith in the justice institutions , cultural beliefs and taboos
- The fact that it is recognised in the Constitution and the penal code makes it hard to convince people against it
- Recommendations on legislative review is subject to public participation and parliamentary approval
- Recommendations on institutional arrangements for parole and sentence re-hearing call for adequate funding a lot of good will from the Judiciary.

HOPE FOR ABOLITION ?

- Moratorium on the death penalty is a step in the right direction
- Removing the mandatory nature of the death penalty offers leeway to reduce the use of the death penalty.
- Continuous campaigns against the penalty may eventually bear fruit, including giving example of the fact that e,g Kenya is a state party to the Rome Statute that does not recognise the death penalty even for very grave crimes against humanity.
- Political good will. If for example the Taskforce's recommendation is accepted by political leaders, Kenya would be able to abolish the death penalty this year!

THANK YOU

ASANTENI

