IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., JUMA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 340 OF 2015

JOSEPH STEVEN KIMARO.....1ST APPELLANT
ROBERT RAPHAEL KIMARO.....2ND APPELLANT
VERSUS
THE REPUBLIC..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania atArusha)

(Massengi, J.)

Dated 4th day of February, 2015
in
Criminal Session No. 1 of 2014

JUDGMENT OF KILEO, J. A. DISSENTING ON SENTENCE ONLY

5th & 13th October, 2015 &

KILEO, J.A.:

I have had the occasion to read the judgment that was prepared by my learned brother, Hon. Mr. Justice Juma. I am in full agreement with the decision that was reached with respect to the guilt and conviction of the appellants.

The evidence at the trial left no doubt that the two appellants were responsible for the killing of the deceased who was the first appellant's very close friend and benefactor. In addition to the appellants' confessions there was the evidence of PW1 who recounted the whole matter from the time he

was approached to provide transport on hire to the Kilimanjaro International Airport where the deceased was picked up by the two appellants and how subsequently, on the way, having dragged the deceased from the vehicle returned without her. Several personal belongings including visa card were found with the 1st appellant. There was no way that the appellant could escape culpability.

What I do not support is the death penalty.

In **Abdi Adam @ Chakuu vs. Republic**- Criminal Appeal No 157 of 2009 and on several other cases I gave a dissenting decision with regard to the death penalty. My stand in this case is the same as in the **Abdi Adam @ Chakuu** case and the other cases where I sat involving the death penalty. I will take the liberty to reproduce here what I stated in that case:

> "As for the sentence of death imposed on the appellant, I would not however endorse it because I am of the settled mind that it is unconstitutional.
>
> 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 though 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 in this country– from High Court or Resident Magistrate with Extended Jurisdiction to the Court of Appeal.

Death is one penalty which makes error irreversible and the chance of error is inescapable when based on human judgment. An English jurist, William Blackstone once said, *"Better that ten guilty persons escape than that one innocent suffer."*

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

Professionals in the justice system know that innocent people have been executed

As earlier pointed out, if a sentence of death is executed, a review (if circumstances so dictate) of the decision, which resulted in the carrying out of the execution will not be of any use to the person concerned or to the state and the community concerned. If anything there will be regrets that could have been avoided.

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 convicts 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'.

Also, in the United Kingdom,Timothy Evans, was tried and executed in 1950 for the murder of his baby daughter Geraldine. An official inquiry conducted 16 years later determined that it was Evans's fellow tenant, serial killer John Reginald Halliday Christie, who was responsible for the murder. Christie also admitted to the murder of Evans's wife as well as five other women and his own wife. Christie may have murdered other women, judging by evidence found in his possession at the time of his arrest, but it was never pursued by the police. Evans was pardoned posthumously following this, in 1966. The case prompted the abolition of capital punishment in the UK in 1965.

Harry Foggle, Chief Justice of VI Judicial Circuit, Florida once said:

"In my own experience, I know of four persons convicted of first degree murder and sentenced to death who were later found to be innocent"

Illinois Governor Gorge Ryan appointed a 14 member Commission on capital punishment to examine Illinois death penalty. He declared the nation's first moratorium on executions. The governor commented that his state's death penalty was fraught with error, noting:

"The Illinois capital punishment system is so fraught with error and has come so close to the ultimate nightmare: the state's taking of innocent life"

(Obtained from reprieve.org website)

In Tanzania we cannot boast to have a perfect investigation, prosecution and trial system. We may have condemned people to death who did not commit the crime.

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. **"an eye for an eye"**. 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.

The death penalty is the premeditated and cold-blooded killing of a human being by the state. As stated in The **Mbushuu**case –supra, it is a cruel, inhuman and degrading punishment.
It violates the right to life as proclaimed in the Universal Declaration of Human Rights as well as the right to life which is protected in our Constitution- see Article 14. Further to that I am of the humble view also that since we do not give life, then we have 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.

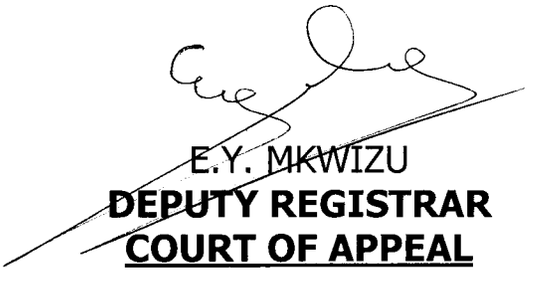
Another point is the fact that death is certain for each one of us – so what kind of punishment is a death penalty anyway? In my opinion life imprisonment would be more appropriate in the circumstances of the case and it is the one I would have imposed."

The above position remains to be my stance unto this day.

DATED at **ARUSHA** this 12th day of October, 2015.

E. A. KILEO
JUSTICE OF APPEAL

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



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL