APPLICATION OF THE DEATH PENALTY IN TANZANIA*
RICHARD Z. SHILAMBA∗

I. INTRODUCTION

The United Republic of Tanzania is in East Africa. It is bordered on the North by Kenya and Uganda, on the East by the Indian Ocean, on the South by Mozambique, Malawi and Zambia and on the West by Rwanda, Burundi, Lake Tanganyika and the Democratic Republic of Congo. The United Republic of Tanzania includes the Islands of Zanzibar and Pemba and other offshore islands in the Indian Ocean. The total geographical area of Tanzania is 945, 100 square kilometers with a population of 34,569,232 people. Tanzania is among the Commonwealth African countries that maintain capital punishment as part of their penal laws.

<table>
<thead>
<tr>
<th>Time spent in Prison</th>
<th>Male</th>
<th>Female</th>
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<tbody>
<tr>
<td>(a) Less than 2 months</td>
<td>538</td>
<td>33</td>
</tr>
<tr>
<td>(b) 2-6 months</td>
<td>952</td>
<td>93</td>
</tr>
<tr>
<td>(c) 6 months-2 years</td>
<td>2334</td>
<td>272</td>
</tr>
<tr>
<td>(d) 2-4 years</td>
<td>1633</td>
<td>143</td>
</tr>
<tr>
<td>(e) 4-6 years</td>
<td>684</td>
<td>68</td>
</tr>
<tr>
<td>(f) 6-8 years</td>
<td>239</td>
<td>19</td>
</tr>
<tr>
<td>(g) 8-10 years</td>
<td>83</td>
<td>10</td>
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<tr>
<td>(h) 10 years</td>
<td>31</td>
<td>3</td>
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Total Murder Remandees 6494 596
Grand Total 7090


II. INTERNATIONAL AND REGIONAL STANDARDS RELATING TO THE DEATH PENALTY AND THEIR RELATIONSHIP TO NATIONAL LAW

The death penalty violates the right to life guaranteed under International and Regional Human Rights instruments to which Tanzania is a party. It is the ultimate cruel, inhuman, and degrading punishment. Tanzania is a member of the United Nations, which in 1948 adopted the Universal Declaration of Human Rights. The Declaration guarantees each person's right to protection from deprivation of life, and categorically states that no one shall be subjected to cruel or degrading punishment. Tanzania therefore, being a member of the United Nations has pledged to respect this right in her laws and practices.

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On 11 September 1976, Tanzania ratified the 1966, International Covenant on Civil and Political Rights which establishes restrictions and provides safeguards on the death penalty ‘in countries which have not abolished it’. However, Tanzania has not yet ratified the 1989 Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty by prohibiting states that are parties from carrying out executions and requiring them to take all necessary measures to abolish the death penalty within their jurisdiction. Furthermore, Tanzania is not a party to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment. On 18 February 1984, Tanzania ratified the 1981 African Charter on Human and Peoples’ Rights, which provides in Article 4 that: ‘Human beings are inviolable. Every human being shall be entitled to respect for his life and integrity of his person. No one may be arbitrarily deprived of this right’.

Tanzania however follows a dualist system of treaty application, whereby terms of International and Regional human rights standards including those relating to death penalty become applicable in the country after ratifying and incorporating them into domestic laws. Nearly all the above mentioned human rights instruments ratified by Tanzania have not yet been fully domesticated and remain therefore unenforceable in the country.

III. TANZANIAN CRIMINAL JUSTICE SYSTEM

The Criminal Court system consists of Primary Courts, District/Resident Magistrates’ Courts, the High Court and the Court of Appeal of Tanzania. Magistrates and Judges in the system are helped to reach a just decision by Prosecutors. Police Prosecutors prosecute accused persons in District/Resident Magistrate Courts. State Attorneys prosecute accused persons in the High Court. Advocates are assigned to represent indigent accused persons in the High Court. The courts in Tanzania apply customary law, statutory law and English common law. Juvenile criminal justice is primarily administered under the Children and Young Persons Ordinance of 1937, Chapter 13. Zanzibar also has its own criminal justice system which deals with criminal cases internal to Zanzibar.

By December 2003, mainland Tanzania had 735 members of the bar of which 641 members were actively practicing advocates. During that year more than 80 percent of the practicing advocates were based in the country’s largest city of Dar Es Salaam. Based on the current population of 34,569,232 people, there is one advocate for every 53,930 people. The High Court is the Court of first instance for serious offences like murder and treason. In conducting trials, a Judge in the High Court sits with assessors whose opinions are not binding. For serious offences attracting the death penalty - murder and treason, an accused person(s) must have legal representation. Trials in the High Court cannot commence before a preliminary inquiry (committal proceedings) is held in a subordinate court (District/Resident Magistrate courts) as per sections 178, 243 and 244 of the Criminal Act Procedure, 1985.

Section 173 of the Criminal Procedure Act, 1985, empowers the Minister for Justice to vest any Resident Magistrate with power to try any category of offences including murder, which would ordinarily be tried by the High Court. Section 175 of the Act further provides that every sentence of death passed by a subordinate court exercising power conferred upon it under section 173, shall, if the accused does not appeal to the Court of Appeal, be confirmed by the High court.

The Court of Appeal of Tanzania

Appeals from High Court and those from subordinate courts exercising extended jurisdiction power go to the Tanzanian Court of Appeal. Appeals from the High Court of Zanzibar also go to the Tanzanian Court of Appeal.

Military Courts

1 Speech by Mutabazi Julius, the acting president of the Tanganyika law Society at the 21st Admission Ceremony of New advocates on 15 December, 2003 at High Court of Tanzania, Dar Es Salaam
Tanzanian law provides for military courts which do not deal with civilians.

IV. ISSUES AND PROBLEMS ON OFFENCES PUNISHABLE BY THE DEATH PENALTY IN TANZANIA

A. The Right to Life and Offences Punishable by the Death Penalty

Article 14 of the Constitution of the United Republic of Tanzania guarantees the right to life in the following terms: ‘Every person has a right to live and subject to law, to protection of his life by the society’. The right to life is therefore restricted by the word ‘subject to law’. Due to this restriction, Tanzania criminal laws establish three types of offences which carry the death penalty:

1. Murder

It is provided under section 196 of the Tanzania Penal Code, Chapter 16, that ‘[A]ny person who of malice aforethought causes the death of another person by unlawful act or omission is guilty of murder’. Section 197 of the code underlines that ‘any person convicted of murder shall be sentenced to death’. Section 26 concludes by stating that ‘Where any person is sentenced to death, the sentence shall direct that he shall suffer death by hanging’. Thus, the death penalty for murder is a mandatory punishment which, after conviction, leaves courts with no option other than passing the sentence and directing convicts to be hanged. In practice, however, most prosecutions for murder end up with the verdict of manslaughter, which does not carry the death penalty. In terms of statistics, as of 1 April 2003, accused persons who were charged of murder but ended-up being punished for manslaughter were as follows:

<table>
<thead>
<tr>
<th>Time in Prison</th>
<th>Male</th>
<th>Female</th>
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<tbody>
<tr>
<td>(a) Less than 6 months</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>(b) 6 months-1year</td>
<td>8</td>
<td>1</td>
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<tr>
<td>(c) 1-3 years</td>
<td>28</td>
<td>3</td>
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<tr>
<td>(d) 3-5 years</td>
<td>118</td>
<td>8</td>
</tr>
<tr>
<td>(e) 5-10 years</td>
<td>219</td>
<td>11</td>
</tr>
<tr>
<td>(f) 10-15 years</td>
<td>63</td>
<td>9</td>
</tr>
<tr>
<td>(g) 15-20 years</td>
<td>52</td>
<td>0</td>
</tr>
<tr>
<td>(h) 20-30 years</td>
<td>25</td>
<td>2</td>
</tr>
<tr>
<td>(i) More than 30 years</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>515</td>
<td>34</td>
</tr>
<tr>
<td>Grand Total</td>
<td></td>
<td>549</td>
</tr>
</tbody>
</table>


Convictions for murder are therefore passed in cases where there is overwhelming evidence to establish beyond reasonable doubt that an accused committed murder. In these circumstances, by 1 April 2003, persons who were on death row in Tanzania mainland prisons were 370, of which, 359 were males and 11 were females.

There are, however, categories of persons who are exempted from being sentenced to death. Section 26 of the Penal Code exempts persons under eighteen years of age from the death penalty. Such juveniles are to be detained ‘during the President’s pleasure…in such place and under such conditions as the Minister for

Legal Affairs may direct’. Section 197 in its proviso exempts pregnant women from being sentenced to death instead they are to be sentenced to life imprisonment if convicted of murder.

2. Treason
Treason, under sections 39 and 40 of the Penal Code is punishable by the death penalty. However ‘misprision of treason’ as per section 41 of the code is punishable with life imprisonment. In practice, however, no person in treason cases has been sentenced to death since 1961, when the country became independent. The phrase provided in the Penal Code for sentencing treason convicts is ‘shall be liable on conviction to suffer death.’ Tanzanian courts have interpreted this phrase as merely setting the upper limit, but not as a mandatory sentence.

3. Misconduct of Commanders or any service man in presence of enemy
The first Schedule to the National Defence Act No. 24 of 1966 permits imposition of the death penalty for traitorous conducts by Commanders or any service man in the presence of an enemy. The death penalty under this law, however, is not mandatory, as it is in many other cases3.

V. HUMAN RESOURCES QUALITY AND EFFECTIVENESS
Tanzania obtained independence on 9 December 1961 and the country procrastinated in enshrining the Bill of Rights in her Constitution. From that time, the country was led by an Independence Constitution which had no Bill of Rights. In such circumstances, training of Police, Lawyers, Prison Officials and general human rights practices were inadequate and derogated from human rights. Due to this historical reason, there was limited human rights training to the Police, law students, Prison officers and other officers involved in the criminal justice system. A human rights course was and still is not compulsory in nearly all the government training systems including the government largest University of Dar es Salaam, Faculty of Law.

Generally, staff in the Criminal Justice System are being inadequately remunerated for their services; hence they lack motivation and morale for performing their work efficiently and effectively. It is therefore evident that the Criminal Justice System lacks experts on death penalty related human rights. Due to the lack of motivated, competent and qualified staff on human rights, the late Court of Appeal Justice Nyalali expressed his concerns in this regard by saying that ‘It would seem that the failure to obtain the necessary evidence was due to a mixture of incompetence, negligence and lack of seriousness on the prosecution side. This unsatisfactory state of affairs appears to have persisted even in respect of the proceedings before this court’4.

VI. ADEQUACY OF NON-HUMAN RESOURCES
The government has tried to ensure that the judiciary is well equipped across the country with non-human resources for purposes of facilitating effective performance of its work. The resources however are inadequate to ensure a just, expeditious and effective dispensation of justice in the country’s criminal judicial system. The government also fully acknowledges existence of this resources inadequacy. The President of the United Republic of Tanzania in this regard stated that, ‘I fully recognize that some of the problems facing the judiciary, are such as shortage of stationery, transport, office equipment, facilities, and the like as well as inadequate salaries, late payment of court assessors and so on’5. These problems including lack of up to date and modern facilities and equipment such as law reports, computers, internet access and motivation remain a problem up to the year 2004.

VII. LEGAL REPRESENTATION

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3 Code 11, 12, 13, 14, 16 and 17 of the First Schedule to the National Defence Act No. 24 of 1966
5 Opening Address by the President of the United Republic of Tanzania, His Excellency Benjamin William Mkapa, at the Judges and Magistrates Seminar, Karimjee Hall, Dar Es Salaam, 16 December 1996
In Tanzania, legal representation for an accused person is both a constitutional and a statutory right. The Constitution of the United Republic of Tanzania, which guarantees the right to a fair hearing\(^6\), carries with it the right to legal representation\(^7\).

Section 310 of Criminal Procedure Act, 1985 declares that ‘[A]ny person accused before a criminal court, other than a Primary Court may as of right[emphasis added] be defended by an Advocate of the High Court’. Thus, no conviction can be allowed to stand on appeal if the right to obtain legal representation was denied or disregarded. In the case of *Mesawarieki v Republic*\(^8\), the Tanzanian Court of Appeal quashed the appellant’s conviction and set aside the sentence of death and ordered the appellant be retried because the trial High Court Judge Munuo, allowed the appellant to proceed to defend himself on a serious charge of murder, attracting the death penalty, without availing him with the services of legal representation.

Under Section 3 of the Legal Aid (Criminal Proceedings) Act No. 21 of 1969, it is provided that where in any proceeding it appears to the certifying authority that it is desirable, in the interests of justice, that an accused should have legal aid in the preparation and conduct of his defence or appeal and that his means are insufficient to enable him to obtain such aid, the certifying authority may certify that the accused ought to have free legal aid. It is normally procured that where an accused is charged with a serious offence like murder; the interests of justice require that the accused should be legally represented at his trial.

In practice most poor accused persons do not obtain good legal representation because they get lawyers assigned and paid by the government only 100,000 Tanzanian Shillings (which is equivalent to US $ 100) for the entire case. According to my interview with criminal case advocates, they are all against this token amount and they claim that they ought to have been paid at least 3000,000 Tanzania Shillings for the entire work\(^9\). As result of such poor remuneration, the defense counsels undoubtedly do not exert enough effort in such cases.

VIII. ADMISSION OF EVIDENCE

Prosecuting and sentencing a person to death is a largely a matter of production and presentation of evidence in court. Oral, documentary and circumstantial evidence, if proved are admissible under the Tanzania Evidence Act No. 6 of 1967. Documentary evidence if proved by production of primary (that is, original) or secondary (that is, certified copies of) documents for inspection by the court, are admissible under section 66 and 67 of the Evidence Act respectively. Statements of fact and law are also admissible under section 36-40 of the Act. The prosecution side is required to prove by evidence beyond reasonable doubt that the accused intentionally committed a criminal offence.

Given forgery and corrupt practices of some reported government and political leaders, it is possible that a person may be sentenced to suffer death by hanging and be executed basing on forged, fabricated or corruptly obtained or admitted evidence\(^10\). There is confirmed and unconfirmed information that some criminal justice officials holding higher and lower ranks in the Police Department, District/Resident Magistrates’ Courts and even in the High Court are involved in corrupt practices. Corruption is reportedly said to be prevalent in opening case files; setting hearing dates; tracing case files; the use of temporary court injunctions; getting copies of judgments and court proceedings; granting of bail; issuing attachment orders; chamber applications; payment of assessors, and so on. What counts is money - those with money will always have judgments in their favour\(^11\).

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\(^6\) art13(6)(a)

\(^7\) *Haruna Said v R* (1991) TLR 131

\(^8\) (1993) TLR 139

\(^9\) Comments by practicing advocates including Prof. L. P. Shaidi, practicing advocate and Criminology and Penology Course coordinator, Faculty of Law, University of Dar es salaam, Tanzania.

\(^10\) In the year 2003, Tanzania was ranked 75 out of 102 countries ranked from least to most corrupt countries in the world by Transparency International, Corruption Perception Index viewed on 8 October 2003 at <http://www.globalcorruptionreport.org>. Moreover, Christina John, Acting head of the Tanzania Prevention of Corruption Bureau while making a presentation at the Prevention of Corruption workshop held in Dar es salaam 2 December 2003 quoted in Local News paper “Polisi waongoza Kwa Rushwa”, Nipashe 3 December 2003, reported that among all government departments, the Police is leading in having the highest number of corruption allegations besides the Judiciary and the Central government.

\(^11\) Opening Address by the President of the United Republic of Tanzania, His Excellency Benjamin William Mkapa, at the Judges and Magistrates Seminar, Karimjee Hall, Dar Es Salaam, 16 December 1996
Human rights standards related to ‘diminished responsibility’ maintain that mentally impaired people should not be held criminally responsible for their acts. The United Nations Committee on Crime Prevention and Control recommended in 1988 that ‘persons suffering from mental retardation or extremely limited mental competence’ should not be subjected to the death penalty. In 1989, the U.N. Economic and Social Council adopted a resolution which recommended the same.

Tanzania, however, still applies the old fashioned ‘M’Naghten Rules’ which presume that every person is sane unless it is proved that as a result of a disease of the mind at the material time he was incapable of understanding what he was doing or he was incapable of knowing that what he was doing was wrong. This is a high degree of proving insanity, which leaves a lot of people, who commit offences like murder under mental problems or delusions, without a defence.

Consequently, in the case of Saidi s/o Mwamwindi v R the accused was sentenced to death (and executed) despite the fact that a famous psychiatrist, one Dr Pendaeli, had testified that the accused had a mental disease called catatonic schizophrenia. The same thing happened in the case of R v Asha Mkwizu Haul, where two prominent psychiatrists, Dr K F Rugeiyamu and Dr W S Pendaela (both consultant psychiatrists), testified that the accused was mentally sick. The same thing happened in Director of Public Prosecutions v Leganzo Nyanje where the psychiatrists had confirmed that the accused was mentally sick of paranoid schizophrenia but yet he was sentenced to death.

A person suspected to have committed murder or treason may, through identification parade be identified, charged, prosecuted and sentenced to death. Such a person, once it is established that he/she was wrongly identified, is entitled to compensation under Section 61 of the Criminal Procedure Act as if he were a victim of a crime. It is therefore true to say that parade identification of death penalty case suspects is dangerous for not being 100 percent reliable, that is why Sir Clement de Lestang, commented that

A conviction resting entirely on identification invariably causes a degree of uneasiness, and…(T)here may be a case in which identification is in question and if any innocent people are convicted today I should say that in nine cases out of ten- if there are as many as ten- it is in a question of identity.

Justice Mwalusanya cautions us in his own clear words that

The possibility of a judicial error, for whatever reason, assumes ever greater importance because the death penalty is irreversible, it is the end of the matter, and it cannot be corrected. And mind you convictions for murder in error (after the appeals) are not rare. I am of the considered view that the risk of executing the innocent is great under the present system…… It is just human nature that it happens so.

The Tanzania Law Reform Commission underlines that execution is an irrevocable act and can be inflicted on the innocent person. There have been many established cases of conviction of innocent persons. A good example is the case of Timothy Evans who was hanged in 1950 for the murder of his daughter; the murder was probably done by John Christie who was hanged in 1952 for the murder of seven people in the house he shared with Timothy Evans. Since both have been executed it can never be proved whether there has been a miscarriage of justice, although it remains an enormous likelihood.

Although section 26(2) of the penal code, 1945 specifically provides that the death penalty shall not be pronounced on or recorded against any person who, in the opinion of the court, is under 18 years of age, there are conflicting decisions as to whether this age limit refers to the time of commission of the offence or during sentencing. In the case of R.v. Lubasha Maderenya and Tegai Lebasha, the High Court

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13 Saidi s/o Mwamwindi v R (1972) HCD 212
14 R v Asha Mkwizu Hauli Dar es Salaam, High Court Criminal Sessions Case No. 3 of 1980 (unreported)
15 DPP v Leganzo Nyanje Criminal Appeal No. 68 of 1980 (unreported).
17 Republic v Mbushuu alias Dominic Mnyaroje and Kalai Sangula (1994) TLR 154
19 c16 of the Revised Laws of Tanzania Mainland
20 High Court (Mwanza) Criminal Sessions Case No. 143 of 1977.
Lugakingira, J.) did not impose death penalty on one of the accused who was below 18 years at the time of commission of the murder. During the hearing of the Appeal, the Court of appeal reversed this decision.21

Circumstantial evidence also known as presumptive evidence (i.e. evidence established by way of circumstances without proving the point in question directly) are used in courts to determine the guilt of a person accused of murder or treason. Such kind of evidence may therefore lead to passing a death sentence on an innocent person.

IX. THE RIGHT TO APPEAL

Section 5(1) of the Appellate Jurisdiction Act No.15 1979 provides that any person sentenced to death on a trial held by the High Court or by a Subordinate Court exercising extended powers may appeal to the Court of Appeal against the conviction or raise any ground of appeal. The courts are obliged under section 323 of the Criminal Procedure Act, 1985 to inform a convict of his right to appeal and of the period within which his appeal should be preferred. If no appeal is lodged, the sentence has to be confirmed by the High Court if given by a Subordinate Court exercising extended jurisdiction power as provided under section 175 of the Act. In practice, however, the prisoners and prison officials frequently express their concerns by reporting that the right to appeal is always undermined due to mainly three reasons: (i) courts delay in giving prisoners their judgments for facilitating their appeal processes and sometimes the judgments are never given to them; (ii) courts do not fix dates for hearing appeals;(iii) prisoners are not given updated information on the current developments of their appeals.22

X. IMPLEMENTATION OF THE DEATH SENTENCE

Section 26 of the Tanzanian Penal Code provides that ‘when any person is sentenced to death, the sentence shall direct that he shall suffer death by hanging’. In the past, studies show that hangings in countries maintaining the death penalty were done publicly and this practice created a lot of problems including a perception that those governments were brutal.23 Hence hangings became and currently remain to be the most hidden part of the penal process in those countries including Tanzania.24 Actual hangings therefore have been carried out with considerable bureaucratic secrecy. However, reports show that from 1995 to present, when the President of the United Republic of Tanzania H.E Benjamin William Mkapa came to power, no person sentenced to suffer death by hanging has been executed.25 This, however, does not mean that there have never been executions by hanging or by any other torturous means in Tanzania. Said Mwamwindi for example was sentenced to suffer death by hanging and was executed.26 One leading doctor described the process of execution by hanging as slow, dirty, horrible, brutal, uncivilized and unspeakably barbaric. The prisoner is dropped through a trapdoor, to eight and a half feet with a rope around his neck. The intention is to break his neck so that he dies quickly. If the hangman gets it wrong, and the prisoner is dropped too far, the prisoner’s head can be decapitated or his face can be torn away. If the drop is too short then the neck will not be broken but instead the prisoner will die of strangulation. There are documented cases of botched hangings in Tanzania and there are cases in which hangings have been messed up causing the prison guards to pull on the prisoner’s legs to speed up his death or use a hammer to hit his head.27

Although it is argued by the government that some other means which are not painful can be used for execution, current studies show that ‘No execution can be carried out painlessly in all available methods;

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23 Republic v Mbushuu alias Dominic Mnyarore and Kalai Sangula (1994) TLR 154
24 ibid
26 Said s/o Mwamwindi v R (1972) HCD 212
27 Mbushuu (n 22) at pg 152
for instance electrocution, lethal injection, hanging etc can take many minutes for the person to die. A good example is that of John Louis Evans who was electrocuted in Alabama in April 1983 after being convicted of murder in 1977. According to eyewitness accounts, it required three separate jolts of 1,900 volts over a 14-minute period before he was officially pronounced dead. During the second charge, smoke and flame erupted from his left temple and leg. The third was after the doctor put a stethoscope to his chest and said he was still not certain that he was dead.

XI. MINISTERIAL PAROLE PROCEDURE FOR PRISONERS

The government enacted the Parole Boards Act, 1994 which provides a ministerial mechanism and procedure for releasing some prisoners who qualify under the Act to be released before their terms of imprisonment come to an end. The proceedings under the Parole system under the Act begin with an officer in charge of a prison proposing names of prisoners who meet conditions of parole and forwarding the names to the Regional Prison Officer for his attention and further actions. The Regional Prisons Officer forwards the names to the Regional Parole Board.

The Act also allows a prisoner who meets the parole conditions provided under section 4, to send his application for release on Parole to the Regional Parole Board. The Regional Parole Board after consideration and if satisfied, forwards the Prisoners’ documents to the National Parole Board which scrutinizes the documents and forwards them to the Minister of Home Affairs who has power under section 6 of the Act, to grant or refuse to grant the Prisoners’ release on Parole.

However, capital offences punishable by the death penalty are not eligible for parole under the Act.

XII. PRESIDENTIAL PARDON

When the Penal Code is read together with Sections 325(1), (2) and (3) of the Criminal Procedure Act Number 9 of 1985, we find that the President is empowered to commute death penalty sentences or pardon the convicts. However, the President is not obliged under the laws to commute death sentences or pardon death penalty convicts. The Presidential commutation or pardon therefore is just a privilege and not a right of persons on death row.

Presidential clemency to prisoners normally given at the end of every year or on a certain special event, has always excluded prisoners sentenced to death.

XIII. PRISON CONDITIONS

The Constitution of the United Republic of Tanzania prohibits human rights abuse against detainees and prisoners by providing that human dignity shall be protected in all activities pertaining to detainees and prisoners and in the execution of a sentence.

Although the government tries to protect and promote dignity of prisoners, persons sentenced to death awaiting execution on death row are reportedly being kept under terrible and torturous conditions in prisons. According to section 71 of the Prisons Act, 1967 and also regulation 21(2) and regulation 33 of the Prisons (Prison Management) Regulations GN No 19 of 1968, once a person is sentenced to death, he is immediately installed on a death row in a blue uniform. He is kept in virtual solitary confinement in an individual cell which is so small that he can touch both walls with his arms outstretched. The only permitted reading material, if provided, is the Bible or other religious tracts. The light in his cell is never turned off and prisoners are kept under surveillance by prison guards who constantly remind them of their impending fate and tell them gruesome stories of executions which have gone wrong. From the time the High Court tells a murderer that he is to be hanged, he will often wait in suspense for more than four years before he is finally taken to the Gallows. This delay causes appreciable mental suffering and constitutes a form of prolonged mental torture of persons on death row. According to regulation 33 of the Prisons

28 <http://Canadaonlineabout.com/library weekly>
29 art 13(6) (d) and (e) of the Constitution
30 Republic v Mbushuu alias Dominic Mnayojo and Kalai Sangula (1994) TLR 155
31 Business Times (local newspaper), 2 April 1993
(Prison Management) Regulations GN No 19 of 1968, the amount of diet and the amount of physical exercises allotted to a prisoner on death row is at the discretion of the Principal Commissioner of Prisons, and is generally inadequate for keeping them at a standard minimum health condition.

Generally, prison conditions are harsh and life threatening due to poor: sanitation, ventilation, nutrition, cleanliness and heath services\(^{32}\), Danford Kamenya who is the Mbeya Municipality Assistant Heath Officer reported in the year 2003 that a total of 101 prisoners and detainees at the Ruanda Prison in Mbeya Region had died due to infectious diseases and beatings over the past two years\(^{33}\).

XIV. TANZANIAN ARGUMENTS FOR AND AGAINST THE APPLICATION OF THE DEATH PENALTY.

A. The government and some Tanzanians’ justification on the effectiveness of the death penalty.

1. It is permissible under International Human Rights Instruments

   The government and some people supporting death penalty rely on some Human Rights Instruments for example Article 6(2) of the International Covenant on Civil and Political Rights, the Convention against Torture and other Cruel, Inhuman and Degrading Punishment of 1987 and The UN General Assembly Resolution number 32 of 1961 permitting imposition of the death penalty for serious crimes. Public pressure against the death penalty founded on international human rights instruments emphasize that the UN Commission on Human Rights at its 1989 Session in Geneva agreed by consensus that the death penalty is cruel and degrading punishment. The Commission agreed to forward to the UN General Assembly a draft second Optional Protocol to the International Covenant on Civil and Political Rights aimed at abolishing the death penalty. The UN General Assembly accepted the draft and passed it in 1989. Consequently, many member countries including countries in Southern Africa like South Africa, Angola, Mozambique, Mauritius and Namibia have abolished the death penalty in their penal laws.

   Furthermore, the Amnesty International Stockholm Declaration passed by delegates of about 200 from Africa, Asia, Europe, Middle East, North and South America and Caribbean region declares that death penalty is inhuman, degrading and cruel punishment and should be abolished.

2. It has an effective deterrent effect

   People supporting application of the death penalty in Tanzania argue that by executing murderers we effectively deter potential killers from committing murderers.

   The vital question put forward in opposing this argument is based on whether the death penalty protects society more than other punishments such as life imprisonment. If the death sentence is not a superior deterrent, then the same social purpose could be achieved by the use of life imprisonment. Over the years, a large number of studies have been carried out. Some have compared the position before and after abolition of the death penalty in particular countries and between different countries with and without the death penalty. Mr. Roger Hood, who is the Director of the Center of Criminological Research at the University of Oxford, has examined carefully all these various studies and reached the categorical conclusion that the research so far carried out has failed to provide scientific proof that execution has a greater deterrent effect than life imprisonment\(^{34}\). Although some people intuitively believe that capital punishment must have a powerful deterrent effect, Tanzanian death penalty abolitionists argue that: (i) most murders are committed on the spur of the moment in emotional circumstances. Clearly the death penalty has no effect on crimes of passion which are committed impulsively and without any thought being given to the penal consequences; (ii) Many murderers are mentally disturbed persons who will not have the mental capacity to be influenced in their conduct by the death penalty (iii) The relatively few planned and

\(^{32}\) Legal and Human Rights Centre Tanzania Human Rights Report 2003 pp 13-16


pre-meditated murders tend to be perpetrated by criminals who are often supremely confident that they will escape detection and arrest.35

3. **It is permissible by God according to the holy books, namely the Bible and the Koran**

Punishment for wrongdoers in the Bible, as laid down in Exodus 21:12 and 14, 23-25, Genesis 9:6 and Deuteronomy 9:11 and 12 are based on return for what has been done: death for death, eye for eye, tooth for tooth and hand for hand. Similar punishments are proclaimed under the Koran 5:36.

On the other hand, all religious books prohibit arbitrary deprivation of one’s life. The Bible says “[T]hou shalt not kill”36. Christian and Islamic Religions do not support the ugly aspects of the death penalty. For example, the Catholic Church through Pope Paul II, when releasing the new *Universal Catechism* stated that the death penalty is allowed by the church as a last resort for the preservation of public order, provided it is carried out in a timely and compassionate manner. As demonstrated above the death penalty in Tanzania is not carried out in a timely and a compassionate manner. Execution by hanging renders untold suffering; the delay in carrying out the sentence causes untold mental suffering; and horrible conditions in the death cells which are unfit for human habitation. This too cannot be described as execution of the death penalty in a timely and compassionate manner. Any properly informed Christian or member of the Islamic religion can not support the death penalty under the present form and conditions in which it is carried out.37

4. **It was useful and has been permissible from the day human beings started to live on earth**

The oldest Code of Laws in the world promulgated by Hammurambi, King of Babylon B.C 2285 –2242 proclaimed that

- if you cause the loss of an eye, your eye shall be taken, if you shatter a limb, your limb shall be shattered and if you cause loss of a tooth, your tooth comes out.38

It is always contested in responding to this argument that most things, including modes of punishment applied in uncivilized societies of ancient times have changed in this modern and more civilized world.

5. **It is cheaper to execute persons on death row rather than incurring expenses to meet their life imprisonment daily basic needs**

It is frequently argued on behalf of the Tanzania government that ‘we should execute dangerous murderers rather than wasting large sums of public money in keeping these persons locked up in maximum security prisons’.39

Public opinion differs with this government stand; it is felt that executing a person on death row is more expensive than just incurring expenses to meet their life imprisonment basic needs. The late Justice Mwalusanya maintained in this regard that

> it is a morally unacceptable argument that we should kill criminals because it is cheaper to do so. Considerations of economy can not justify the taking of life. Moreover the imposition of a sentence of life imprisonment can help to assuage the survivors of the victims of murder in an effective way by way of compensation. Murderers imprisoned for life will be put to work whilst in prison and at least part of

35 Republic v Mbushuu (1994) TLR 146.
36 The fifth of the Ten Commandments in the Holy Bible Exodus 20 and Deuteronomy 5
39 MR. Mwambe learned State Attorney who duly argued on behalf of the Attorney General in the case of Republic v Mbushuu alias Dominic Mnyaroje and Kalai Sangula (1994) TLR 168
the profits generated by such work shall be used to pay compensation to the survivors. However, that can not be achieved if the murderers are sentenced to death.\textsuperscript{40}

6. The Death Penalty is still accepted by the majority of Tanzanian people and the Government has received no complaints from the majority condemning it.

The Government of Tanzania has several times expressly stated that it has no plans to abolish the death penalty because it is accepted by nearly all people in Tanzania. In Tanzania- Zanzibar for example, the Minister of State in the President’s Office responsible for Constitutional Affairs, Adam Mwakanjuki, stated that the Government believes that the death penalty is still accepted by the people of Zanzibar because the Government has received no complaints condemning it. He emphasized that Zanzibar will therefore never be swayed by ongoing crusades worldwide against the death penalty.\textsuperscript{41}

Specifically, there has been no collection of information from the general public to ascertain how many Tanzanians are for and against the death penalty. In this regard we are informed that

“There may be a majority of Tanzanians who support the death penalty blindly, and these are not enlightened and are not initiated or aware of the ugly aspects of the death penalty. Apparently it is so because the death penalty is carried out in secrecy. It is clear that many people base their support for the penalty on an erroneous belief that capital punishment is the most effective deterrent punishment. The composition of the members of the Tanzania Nyalali Commission was quite representative, with a broad spectrum of the enlightened members of Tanzania society, and they unanimously reached the conclusion that the death penalty is a cruel, inhuman and degrading punishment and should be abolished.\textsuperscript{42}

B. Obstacles in the Effective Application of International Standards

1. The International Covenant on Civil and Political Rights of 1966

Article 6(2) of the International Covenant on Civil and Political Rights does not prohibit member countries including Tanzania from imposing the death penalty for serious crimes.

2. The Convention against Torture and other Cruel, Inhuman and Degrading Punishment of 1987

Although Tanzania has not yet ratified this Convention, most Government and political leaders are aware of its provisions. The Covenant provisions permit imposition of death penalty if it is prescribed by law.

3. The UN General Assembly Resolution Number 32 of 1961

This resolution declares that the death penalty should be imposed for very serious crimes.

4. The Declaration on the Protection of All Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of December, 1975 (resolution 3542 (XXX)):

According to this declaration, torture is defined as

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an

\textsuperscript{40} Mwalusanya J, in the case of Republic V. Mbushuu alias Dominic Mnyaroje and Kalai Sangula (1994) TLR 168

\textsuperscript{41} See the article ‘Death Penalty to Stay’ in Daily News, October 23, 2003

\textsuperscript{42} Republic v Mbushuu alias Dominic Mnyaroje and Kalai Sangula (1994) TLR 162-163.
act he has committed, intimidating him or other person. *It does not include pain or suffering arising only from, inherent in or accidental to, lawful sanctions* (emphasis provided).

That is why, relying on these and other related international human rights instruments permitting imposition of the death penalty, Tanzania maintains the death penalty under her penal laws and practices.

**XV. TRENDS IN HUMAN RIGHTS AND THE DEATH PENALTY IN TANZANIA**

Tanzania obtained her independence from Britain on 9th December 1961 and from that time the country was led by an Independence Constitution which had no bill of rights. In such circumstances, several administrative practices and training of Police, Lawyers, and Prison Officials were inadequate and derogated from human rights and that is considerably the reason why from that time the country maintained the death penalty in her penal laws and practices.

Civil society commenced and tirelessly demanded the Government to include the bill of rights in the Constitution of the United Republic of Tanzania. However, the Government procrastinated in accepting expressly, the insertion into the Constitution of the Bill of Rights, for 27 years. Human rights defenders tirelessly continued to urge the Government and sensitize the general public on the importance of introducing in the Constitution, the bill of rights. Finally, the Government and the general public accepted this. Tanzania introduced for the first time a bill of rights in the Constitution in 1984 by enacting the Constitutional Amendment Act No. 5 of 1984, which came into force in 1988. Article 13(6) (e) of the Constitution strongly prohibits torture and inhuman and degrading punishment. Article 14 guarantees the right to life by providing that every person has a right to live and to protection of his life by the society, subject to law.

Civil society again tirelessly called upon the Government to remove from the Constitution, claw back clauses (i.e. subject to law or in accordance to law). Interestingly, last year the Government proposed to Parliament to pass the 14th Constitutional Amendment Bill of October 2003, in order to remove from the Constitution some of these claw back clauses, so that the government could respond to several years of public outcry against such clauses, which restrain even the right to life in the Constitution.

The first serious scrutiny of the death penalty in Tanzania was in the early 1990s. In 1991 a Commission was formed under the Chairmanship of the late Chief Justice Francis Nyalali to recommend changes to the Tanzania political system. The Commission, popularly known as the Nyalali Commission recommended amongst other things, the abolition of capital punishment for being a barbaric form of punishment and morally unsupportable. There has been no follow up of any sort to this recommendation.

At the Tanzanian Court of Appeal, while setting aside the sentence of life imprisonment for murder, and declaring the death penalty to be constitutional in Tanzania, the Justices of Appeal Makame, Ramadhan and Lubuva, JJA while responding to several issues raised by the trial Judge, made many important observations against the death penalty including the following:

> “We may observe here that we are aware of the drive to abolish the death penalty worldwide. But that has to be done, as the learned Trial Judge has aptly put it, by deliberate moves “to influence public opinion in a more enlightened direction” and “this is perfectly legitimate in democracy”. On the aspect that “the death penalty has ugly aspects and is immorally unsupportable, there is no question. We have already made a finding that the death penalty is cruel, inhuman and degrading.”

As of this time, there has been no follow-up on this important Court of Appeal observation. There is therefore a hope that, if we tirelessly continue to campaign against the death penalty in Tanzania, make strategic follow-ups on the Nyalali Commission and the Tanzanian Court of Appeal observations, the death penalty confidently may be abolished in the near or distant future in Tanzania.

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Moreover, article 2 of the 1950 European Convention on human rights provides that “A state may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war…”, Protocol Number 13 to the European Convention on human rights opened for signature in 2002 abolishes death penalty in all circumstances. Thus, no one should be subjected to death penalty and execution for any act happened during peace time or war. This is a good development for our efforts to abolish death penalty not only under our Tanzania Penal Code but also under our National Defense Act No. 24 of 1966 permitting application of death penalty in the country.

There has been no publicity concerning this best practice from Europe to abolish death penalty in all circumstances also in our country.

XVI. CONCLUSION

In view of the above findings, we need to tirelessly intensify and join our efforts in this important human rights campaign against the death penalty. We need to enlighten people on the ugly aspects of the death penalty. We need to urge Government authorities to comply with international standards abolishing the death penalty.