

THE CAPITAL OFFENDERS' PUNISHMENT AND DEATH SENTENCE DILEMMA IN KENYA

OMBOTO JOHN ONYANGO

Assistant Lecturer; Criminology And Security Management
Dedan Kimathi University Of Technology
E-Mail Address: Ombotojohn2014@Gmail.Com

ABSTRACT

In May 2013, two robbers were sentenced to death by a Kiambu court despite of their plea for a motherly mercy to the lady magistrate who correctly informed them that Death sentence was the only punishment for convicted violent robbers (Daily Nation Newspaper 4/5/3013 pg 8). Again on 29/07/2013 a Lamu court sentenced a Mr Batito Kololo for murder and kidnap of British nationals (The Standard Newspaper 30/07/2013pg7). However, despite the fact that this mode of punishment is legal in Kenya according to the laws; therefore, several other offenders have been condemned by the courts throughout the country before and after the two cases mentioned above, execution in the country has not been conducted for about thirty years; making nonsense of the statutes, and subjecting such offenders to needless wait of anguish. Based on the theories of punishment, this paper looks at death sentence in detail, assesses Kenya's dilemma and its' effects, and recommends the way forward.

Key words: *Death Sentence, Capital offenders, Legal statutes, Theories of punishment, Kenya*

DEATH SENTENCE AND KENYA'S DILEMMA

Death Sentence or Capital Punishment as it is also known is the harshest form punishment. It is the intentional infliction of death on an offender by the state as a punishment measure. Killing of perceived and convicted offenders has existed from time immemorial in almost all societies though the mode of its execution has varied. According to Mushanga (1976:164-168), in history, the offenders have been crucified, poisoned, drowned in water, stoned, burned alive, boiled in water, shot, hanged, electrocuted or given lethal injection among others to ensure that they are dead. For instance, in the year 2006; out of the 53 men who were executed in the United States of America 52 were killed through lethal injection (Lofland 2007:318).

In Kenya, historical records show that death penalty was rampant during colonial times under Governor Sir Evelyn Baring when in 1953 it was imposed on the people who administered the Mau Mau oath (KHRC 1996). However, in the post independence Kenya; there is a serious dilemma as concerns the actual use of this penalty, given that whereas it exists as a form of punishment in the legal statutes for

capital crimes such as murder and robbery with violence, and therefore the offenders are regularly sentenced to death by the courts, none has been killed as ordered by the courts for nearly 30 years. This dilemma state is caused by the widely prevalent campaigns against Death penalty by some churches and other non-governmental organizations throughout the world that have been on for decades, and the changing nature of violent crimes in our midst; where criminals have been very vicious; taking the lives of innocent victims without any serious provocation.

The dilemma is made worse by the fact that across the globe there is no uniformity and consensus on whether the capital offenders should be killed or given life or long imprisonment terms. This is proved by the fact that not all countries have death penalty in their statutes; and even in the United States of America; the world's epitome of democracy and respect for human rights, though death sentence is as old as the history of the country having been taken there by the European settlers who formed the present day America; out of the 53 states, 40 had death sentence statutes while only 13 jurisdictions did not by 1996. However, across time and space, in the larger America; capital offenders have all along been

killed by the state, with the first lawful conviction and execution being that of Captain George Kendall who was killed for being a spy of Spain in 1608 (Bohm and Haley 1996:239-299). Since Kendall's execution; thousands of executions have taken place in America, with the first woman to die in electric chair executed in 1899 at Newyork's Sing Sing Prison (Lofland 2007:326).

Kenya's unique position on death sentence is made clear by the fact that though for a long time it had been guaranteed in the Kenyan constitution as per sections 204, 40 (3), 296 (2), CAP 63, and the Criminal Procedure Code CAP 75 (Tudor 1998:133); it is hardly carried out. Therefore, several prisoners whose appeals failed in all stages of the courts continue to wait in anguish for the hangman who never comes. For example, in June 2003, 28 death row inmates in this category; most of whom had spent between 15 and 22 years waiting to be hanged were given clemency by the president. Those who were hanged in Kenya last were the 1982 coup plotters; thereafter, the then head of State – Daniel Toroitich Arap Moi never signed any more death warrants up to the time of his retirement in 2002, just as his successor Mwai Kibaki. The constitution promulgated in August 2010, does not help our dilemma state as it does not expressly allow or disallow death penalty. For instance Article 26(1) states that "every person has a right to life", this is not consistent with Article 26 (3) which states that a person can be deprived of life when authorised by the constitution or written law.

THE THEORETICAL ARGUMENTS IN SUPPORT OF, AND AGAINST DEATH PENALTY

Any punishment awarded by the courts be it imprisonment, fines, community service order, probation service, and death sentence is theoretically expected to deter, incapacitate, and or reform and rehabilitate the convicts. The punishments also serve as a retribution measure (Tewkbury (1997:111), Birzer et.al, (2004:36), and Laufer et.al, (1996:275). The deterrence theory of punishment posits that any punishment awarded to an offender should make him or her, and others who witness the punishment to avoid committing crime again after being punished based on fear. The former is referred to as specific deterrence while the latter is a general deterrence. The incapacitation theory of punishment portend that a punishment must make it impossible for an

offender to commit further crime. The desire to incapacitate an offender is normally achieved by removing the offender from the society. This can be through imprisonment where his or her freedom will be restricted as a prisoner, or by death sentence. The goal of reformation and rehabilitation is to change the character and personality of the offenders, and to make them fit back into the society as law abiding citizens.

On the other hand, the retribution theory of punishment is based on the desire to revenge against the offender for his or her criminal activities. It is "an eye for an eye" and "a tooth for a tooth" driven. Based on this theory; when judges pass their sentences, it is believed or expected that they should award sentences commensurable to the severity of the offence.

In the case of Death sentence as a punishment; two of the above theories mainly apply in its' support. The first is retribution; for instance, convicts of heinous crimes are sentenced to death to fulfil our human desire for vindictive revenge. That is, death sentence is seen to be the only proportionate punishment to the crime committed particularly where life has been lost. It is based on the feeling that the offenders who have taken the life of other human beings must also not be allowed to live. Can this explain why in Kenya, where death sentence though legal but has not been practised for nearly 30 years; the public easily lynch suspected criminals?

Death sentence has also been supported because of its incapacitating power; its' ability to stop the offender once and for all from committing more crimes since when the convict is killed as ordered by the courts, he or she will never come back again to bother the society. This is unlike in the case of imprisonment where such vicious offenders will one day be released, and in case such offenders are imprisonment for life; again, there is a chance that they will still get back into the society due to a possibility of a pardon; in Kenya, this is guided by the Power of Mercy Act of 2011.

It is also argued that death sentence has a symbolic value of power for the law enforcement officials who arrest and prosecute the capital offenders; thus in its' absence, extra-judicial executions by law enforcement officers become rampant because they may, in frustration feel that the capital offenders when arrested and presented in courts of law will 'not be adequately punished'. It is therefore prudent for

the Kenyan government to establish the veracity of the ex-judicial killings by the police as have been reported in the media of late, and also documented in the year 2007 by Prof. Philip Aston; the United Nations special rapporteur on extrajudicial killings. If the reports are correct, the government must further seek to find out the extent to which the killings can be attributed to the fact that Kenya had long suspended death penalty.

Opposition to death sentence is based on the theory that it does not offer the vital specific deterrence, and do not rehabilitate the offender. Punishment, it is argued, should make the offender in question fear to commit crime in future, and or offer the offender a chance to be reformed and rehabilitated. In death sentence both of these cannot be achieved. Those who oppose death sentence have also argued that in most cases, it is normally awarded to the economically and socially weak offenders and not to the powerful individuals. Those who belong to this school of thought posit that it is the poor ignorant masses who cannot always afford the cost of legal redress who are normally sentenced to death. The severity of the sentence vis- a-vis the possible execution in error, where the convict is actually innocent, has also led to strong opposition to the death penalty. An example of such execution in error was that of United States of America's James Adams of Florida State who was proved innocent after his execution in 1984 (Bohm and Haley 1996 : 301).

It has also been reasoned that when an offender is put to death, the real sufferers are his or her dependants such as a spouse, children, and parents among others, who never committed the crime. Such individuals may suffer great psychological anguish, social and economic loss; more so if the convict was a bread winner to the family, and the other dependants. However, in support for, and opposition of death sentence; God's position is mentioned by both sides. For instance; the bible's ten commandments' "Do not kill", the death sentence abolitionists say, means God is against any kind of killing; be it of those who have committed heinous crimes such as murder, while the pro death sentence normally relies on verses such as Exodus 21:12 "anyone who strikes a man and kills him shall surely be put to death" to justify death sentence for convicted murderers.

EXEMPT THE PRESIDENT, AND SPECIFY THE DURATION TO EXECUTION

However, despite the opposing voices; the ruthlessness of the present day criminals and the escalating rate of violent crimes in Kenya make some people; in frustration, to demand a more severe punishment for the offenders. This frustration was best echoed by the then KANU MP for Ntonyiri – Maoka Maore who, infuriated by the calls to abolish death sentence bitterly said in parliament on the convicts on death row: "*We should hang them with a high density rope until they go to their ancestors. In this way, we will have a safe and peaceful society*"¹ That kind of support for death sentence is despite the fact that even though it has been guaranteed in the Kenyan laws from independence; it has not been carried out in decades, which has made several convicts whose appeals fail in all stages of the courts to wait in anguish for as long as 20 years for the hangman who never comes.

In most cases such waiting only ends with the clemency of the president that commutes such sentence to life; and latter release of such offenders back into the society. Therefore to relive offenders from such anguish and uncertainty, if Kenya continues to maintain death sentence in its' statutes as is the case; then there is an urgent need to specify in the law the duration of time a convicted death row offender should take to be executed from the date of the final court sentence after all the appeals have failed; currently this is not the case. It is also possible that the failure to execute the convicted death row offenders in Kenya has been occasioned by the fact that a president as an individual may be reluctant to 'dirty' his or her hands by being the final individual who must decide and sign the execution warrant to authorise the killings. This paper suggest that the current and former Kenyan presidents' opinions should be sort on this matter; an if this is the case, and as a country we decide to maintain this form of punishment in our laws, then this burden of signing the execution orders should be removed from the presidents' shoulders as an individual to the group of Supreme Court judges, and the Attorney General of the republic.

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Foot Note

1. Sunday Nation Newspaper of 11/4/2004 Pg 15



A woman kicks a suspected conman arrested in Nakuru-Kenya. Studies indicate that public lynching of criminals become common where death penalty is not in place. (Picture from The Standard News papers).