**IN THE CONSTITUTIONAL COURT OF ZIMBABWE CASE NO /2015**

**HELD AT HARARE**

In the matter between:-

**CUTHBERT TAPUWANASHE CHAWIRA 1ST APPLICANT**

**MASIMBA MBAYA 2ND APPLICANT**

**GEORGE MUNYARADZI MANYONGA 3RD APPLICANT**

**JACK SAKALA 4TH APPLICANT**

**LIVISON SITHOLE 5TH APPLICANT**

**JACK NYATHI 6TH APPLICANT**

**BUSANI TSHUMA 7TH APPLICANT**

**KILLIAN MPOFU 8TH APPLICANT**

**WISDOM GOCHERA 9TH APPLICANT**

**EZRA MANENJI 10TH APPLICANT**

**KUDAKWASHE TAONANGWERE 11TH APPLICANT**

**FARAYI LAWRENCE NDLOVU 12TH APPLICANT**

**GOVERNOR MUSAWAIRE 13TH APPLICANT**

**LYTHON MATHE 14TH APPLICANT**

AND

**MINISTER OF JUSTICE, LEGAL &**

**PARLIAMENTARY AFFAIRS 1ST RESPONDENT**

**THE COMMISSIONER OF PRISONS &**

**CORRECTIONAL SERVICES 2ND RESPONDENT**

**THE ATTORNEY-GENERAL 3RD RESPONDENT**

**FIRST APPLICANT’S FOUNDING AFFIDAVIT**

I, **CUTHBERT TAPUWANASHE CHAWIRA** do hereby make oath and state that:-

1. I am the First Applicant in this matter. The facts I depose hereto are fully within my knowledge and to the best of my belief true and correct. To the extent that I make many averments of law and research, I do so, on the basis of advice from counsel which advice I fully accept.

**THE ACTORS**

1. I was born on the 20th of January 1970. I am currently a death row prisoner incarcerated at Chikurubi Maximum Prison. My Prison Number is 641/13.
2. I was convicted of murder and sentenced to death by Malaba J as he then was on the 26th of September 2000 after having been arrested on the 6th of October 1999. I have thus spent 15 years on death row. I confirm that I am married with a wife who since has moved on. I have three children the oldest who is 19 years.
3. The brief facts of the murder I was involved in was that I was involved in an armed robbery with others, which resulted in the death of the manager then at Fairmile Motel in Gweru. The actual murder was committed by an accomplice of mine but I was convicted on the basis of the doctrine of common purpose.
4. The 2nd Applicant Masimba Mbaya, is currently a prisoner incarcerated at Chikurubi Maximum Prison. He was arrested in 1998 and convicted and sentenced to death by Justice Guvava on the 30th of April 2004 following a murder during the course of armed robbery that took place in Bromley, Ruwa.
5. The 2nd to the 14th Applicants are all death row prisoners serving at Chikurubi Maximum Prison. I provide their full details in respect of their names, age, date of arrest, date of sentence, sentence, CRB Number, Court, number of years incarcerated, number of years on death row in the following schedule.

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| --- | --- | --- | --- | --- | --- | --- | --- | --- | --- | --- |
| **P/No** | **Name** | **Age** | **Offence** | **D.O.A** | **D.O.S** | **Sentence** | **CRB** | **Court** | **No of years incarcerated** | **No. Of years on death row** |
| 641/13 | George Manyonga | 40 | Murder | 22.06.95 | 21.02.97 | Death | 23345 | H/Court/Hre | 20 | 18 |
| 644/13 | Jack Sakala | 34 | Murder | 14.01.00 | 15.02.01 | Death | 02/01 | H/Court/Hre | 15 | 14 |
| 645/13 | Livison Sithole | 37 | Murder | 19.01.01 | 28.02.1 | Death | 10/01 | H/Court/Mtre | 14 | 14 |
| 646/13 | Jack Nyathi | 40 | Murder | 27.12.00 | 13.02.01 | Death | 05/01 | H/Court/Byo | 15 | 14 |
| 647/13 | Busani Tshuma | 41 | Murder | 27.03.00 | 01.02.02 | Death | 94-6/01 | H/Court/Gweru | 15 | 13 |
| 648/13 | Killion Mpofu | 35 | Murder | 25.01.01 | 30.05.02 | Death | 30/02 | H/Court/Gweru | 14 | 13 |
| 649/13 | Wisdom Gochera | 39 | Murder | 21.09.01 | 27.06.02 | Death | 112/02 | H/Court/Hre | 14 | 13 |
| 650/13 | Ezra Manenji | 63 | Murder | 21.01.12 | 08.02.13 | Death | 30/13 | H/Court/Byo | 3 | 2 |
| 659/14 | Masimba Manenji |  | Murder | 21.11.98 | 30.04.04 | Death | 18/2000 | H/Court/Hre | 17 | 11 |
| 660/14 | Taonangwere Kudakwashe | 23 | Murder | 07.03.03 | 08.07.05 | Death | 4227/03 | H/Court/Hre | 12 | 10 |
| 634/14 | Governor Musawaire | 43 | Murder | 29.05.04 | 29.04.06 | Death | 216/04 | H/Court/Hre | 11 | 9 |
| 633/14 | Lython Mathe | 35 | Murder | 09.12.09 | 15.07.11 | Death | 101/11 | H/Court/Byo | 6 | 4 |

1. Our address for the purpose of this action is care of our legal practitioners of record Tendai Biti Law from 28 Rowland Square, Milton Park, Harare.
2. The **First Respondent**, the Minister of Justice, Legal & Parliamentary Affairs, is a Minister duly appointed by the President in terms of the Constitution of Zimbabwe. He is the Minister responsible for the **Administration of the** **Prisons Act [Chapter 7:11]** and he is also cited in that he is also the Minister responsible for administering the Constitution of Zimbabwe. His address for service is 6th Floor, Block A, New Government Complex, Central Avenue, Harare.
3. The **Second Respondent** is the Commissioner of Prisons and Correctional Services. He is appointed by the President in terms of the **Prison’s Act [Chapter 7:11].** He is cited as such as an interested party who may wish to make comments on the present application. His address for service is care of Prisons Headquarters, Mbuya Nehanda Street, Harare.
4. The **Third Respondent** is the Attorney General of Zimbabwe appointed as such in terms of **Section 114 of the Constitution of Zimbabwe**. As the Attorney General, he has a direct interest in this matter and is therefore cited as such for this reason. His address for service is care of 4th Floor, Block A, New Government Complex, Central Avenue, Harare.

**CAUSE OF ACTION**

1. As the above schedule will show, the majority of us the Applicants, have been incarcerated for periods that range from 6 years to 20 years and we have been on death row for periods that range from 4 years to 18 years.
2. It is our respectful contention that subjecting us to such a lengthy period on death row, results in permanent stress, constant fear, resulting in extreme physical psychological and emotional harm.
3. Our contention in this matter is that we are entitled to the right to human dignity protected by **Section 51 of the Constitution of Zimbabwe.** In addition we are entitled to protection from torture or cruel inhuman or degrading treatment or punishment. We contend that subjecting us to lengthy periods of imprisonment, amounts to a breach of our right to human dignity and our right not to be subjected to physical or psychological torture or to cruel inhuman or degrading treatment or punishment.
4. This is thus a constitutional application which we bring in our own names and right on the basis that our constitutional rights protected by **Section 51 and Section 53 of the Constitution** have been breached. That being so because of the torture we have been subjected to whilst waiting for a long time on death row, it will be unconstitutional to execute us and therefore our sentence should now be committed to that of life imprisonment.

**LOCUS STANDI**

1. We bring the instant application in terms of **Section 85 (1) (a) of the Constitution of Zimbabwe**. We are acting in our own individual interest. We also believe that our court action is in the interest of the public and therefore meets fully the requirements of **Section 85 (1) (d) of the Constitution of Zimbabwe.**

**CONDITIONS IN ZIMBABWEAN PRISONS**

1. Zimbabwean prisons, are a torture and are unbearable.
2. Before dealing with our conditions in death row prison, I wish to state that at all the prisons in Zimbabwe and certainly those that I have been to namely Hwahwa prison, Harare Central Prison, Chikurubi Maximum Prison and Harare Remand Prison are deplorable.
3. Prisoners sleep on the floor as there are no beds. There are little or no adequate blankets so during the winter period prisoners are subjected to serious assaults from the cold weather.
4. In addition all the above prisoners suffer from the challenges of inadequate food. There are periods in respect of which we have been subjected to less than one meal a day consisting largely of sadza and water coloured with some spices. Most of the time we are subjected to a meal comprising vegetables and beans. The diet is not balanced at all and is not sufficient to afford proper dignity to a prisoner.
5. Of greater concern too is that in these prisons the health facilities are inadequate. The State and prison authorities cannot provide adequate drugs. Some of the prisoners suffer from high blood pressure others from different forms of diabetic including diabetic A. Yet the prisons cannot supply the adequate medicine and a lot of prisoners are dying in prison cells.
6. The prisons are cold and lifeless. There are just massive pillars of grey with a little natural light. At Harare Remand for instance most of the prisoners are kept in Block C which is a block on the second floor designed to look after at least 40 prisoners but at any given time, there are over 300 prisoners in Block C alone.
7. Those like myself charged with the serious offences were kept in private cells. As a D Class Prisoner I was kept in a tiny little cell which I shared with other 5 inmates. We could hardly move and breath in that prison whose area of space was 1.5 by 3 metres.
8. There are no bathrooms or toilets in these little cells and as prisoners we used as a toilet, a 20 litre plastic container we called **‘gamashura’**.
9. It is this container that has to carry our waste and every day we have the embarrassment of carrying it two stairs down to the public toilets in the ground floor.
10. There are no newspapers or tissues in these toilets and sometimes prisoners resort to using the Bible as toilet roll.
11. Prisons gates are opened at 7 am to allow those that will be going to Remand Court to go and report. We are then locked up around 4 pm when the lights are switched off. However if the truck carrying prisoners from Remand has not yet arrived, we have to wait for the same before we are locked up in.
12. The worst days in prison are the weekends. Because there are no prisoners going to Court, you are locked up as early as 3 pm in the afternoon. On weekends, you are subjected bodily searches. All of you are called up on a Sunday morning and are made to crouch in a courtyard. Thereinafter you are asked to totally undress and then walk back to your cell naked in front of everyone else. This is degrading.
13. Food in prison is as horrible as it is regularly unavailable Prisoners can go for weeks feeding on sadza without any gravy but just water interfered with some cooking powder. There is malnourishment and lot of the prisoners are dying of hunger from opportunistic diseases that are benefiting from weak immune systems.

**DEATH ROW CONDITIONS**

1. If conditions are bad for general prisoners I maintain that there are worst for prisoners on death row. We the prisoners on death row are in a prison within another prison.
2. From 2000 to 2013, I was housed at Harare Central Prison. Harare Central Prison, is the only prison in Zimbabwe specifically designed for death row prisoners.
3. However, in 2013, there were more than 70 prisoners on death row with the result that 14 of us were then transferred to Harare Remand Prison where I am currently incarcerated.
4. The **Prisons Act [Chapter 7:11] defines in Part XVlll** how condemned prisoners are to be treated. **Section 106** makes it clear that every prisoner sentenced to death shall be confined in some safe place within a prison and, if possible, shall be kept apart from other prisoners and shall be placed under constant observation both by day and by night.
5. **Section 107** denies, the right of any person to visit the same save where permission has been granted by the Commissioner.
6. In Zimbabwe, from experience, the above are taken literally.
7. At Harare Remand Prison, condemned prisoners are confined in little tiny cells that measure approximately 2 metres by 3.5 metres. The reality being that, one’s stretched arm can easily touch the other walls.
8. The light is kept constantly on and there is constantly supervision in these cells.
9. There is a single window high up the grey walls of the prison which hardly admits any light as it is and is several metres high.
10. At Harare Central Prison, as at Chikurubi, we are kept in solitary confinement for 23 hours per day and are only allowed out for exercise at intervals of 30 minutes per session in the morning and in the afternoon.
11. Further, at Harare Central Prison, there are no toilets in our little cells and we have to use the **‘gamashura’** container referred to above. At least at Chikurubi Maximum Prison there is a little toilet inside but however it cannot be flashed from inside or outside and we have to use buckets of water to clean our mess.
12. Until recently the only book allowed in the prison cells was the bible. Now, we are now allowed to have access to books censored and approved by the prison authorities.
13. There are no newspapers or television although at Chikurubi Maximum Prison we are now allowed the benefit of a little radio.
14. Our meals at Chikurubi are three meals per day. However the meals are horrible consisting largely of sadza and vegetables and sometimes with beans. In tough times we have sadza with the boiled water that euphemistically can be called gravy.
15. The physical conditions are thus tough. A lot of the prisoners, whether on death row or not die. The First Respondent has the figures and I would urge him to provide the same before this Honourable Court.
16. The physical pain caused by confinement in prison is horrendous. The physical pain caused by being in solitary confinement for 23 hours per day is unbearable.
17. However the greatest suffering of death row prisoners is psychological. My colleagues and I are nervous and anxious. Many of us suffer from severe paranoia as well as systematic headaches.
18. Quite a few of us, are definitely suffering from psychiatric and bipolar challenges and I would urge the authorities to cause examinations of all of us. I have no doubt that the following fellow inmates, need urgent psychiatric evaluation. That is to say Killian Mpofu, Lython Mathe and Livison Sithole. I am not a medical expert, however, I live with the above named inmates and I have absolutely no doubt from the way they speak and their behaviour that they have been affected mentally.
19. The conditions in our prisons are tough and they have had a serious effect on prisoners’ health. The mortality rate of prisoners is very high. Tens of prisoners are dying every year. In my own case, I was tried with four other accused persons but they are all now late.
20. The frequency of prison deaths of our comrades really affects us and compounds the degraded mental condition that we suffer from.
21. The psychological effect on death row, called the death row syndrome, is unbearable. There is no question that adverse psychological processes are associated with our incarceration which from my experience include the following:-
22. A sense of helplessness and defeat;
23. A sense of wide spread, hopeless and mental fatigue accompanying a perception of helpless vulnerability;
24. Emotional emptiness characterised by loneliness and a deadening of feelings for yourself and others
25. A decline in mental and physical acuity.
26. Most of us have become chronically unstable, with fluctuating moods and recurrent depression along with the severe deterioration or mental incapability including slowness, confusion forgetfulness and lethargy.
27. The prison conditions are bleak and are characterised by rigid security, isolation limited movement and austere conditions. To put it differently, we are subjected to dehumanising and debilitating conditions.
28. The greatest challenge in prison, is the fear associated with the knowledge that you are never going to get out and you will be executed. The knowledge that there is no parole and hope in many of us whose automatic appeals to the Supreme Court have been dismissed.
29. There is nothing as challenging to a human being as living a life without hope. Most of us have no hope that we will live and we are just sitting in dark waiting to be executed.
30. At Harare Central Prison executions were carried out during my time there. The following executions took place at the time that I was at Harare Central Prison of prisoners that I knew namely Zuda Chimuchenga, Joshua Nyamazana (who came from Gokwe), Antony Muuzhe, Chidhumo, Masendeke, Elias Chauke and a prisoner know as Bigboy.
31. The last execution if I recall, took place in 2005 and involved Mandhla Masina. I knew all these prisoners personally. We had stayed together for many years.
32. The challenge with execution is that none of the prisoners have any idea who the next one will be. Thus during the night, which is the period where those to be executed are taken away we hardly sleep.
33. In addition if we see any unusual behaviour on the part of the prison guards we freeze and enter into psychological trauma.
34. After an execution we go for days without eating or feeling anything or being able asleep.
35. Indeed I can bring to the court’s attention that there were days during those days when executions were so frequent. We caused commotion and literally fought with the prison guards on the basis that there were feeding us, and pretending to be nice to us but meanwhile there were plotting to remove us and execute us.
36. The prison guards themselves, used to play us up and threaten us with execution. There is no greater psychological threat than what we went through.
37. Being in prison as well puts a toil on members of our families. In my own case my wife left and only my children come to visit me only on holidays.
38. I must say that we are allowed visitors for duration of 15 minutes each after two weeks but most of us do not receive visitors.
39. Society has written us off and no one considers us as human beings.
40. We are the hidden sore of a very conflicted society.
41. We are not normal people and the only think that has kept us going, is the fact that we have all converted to Christianity and survive by praying and the faith that only our lord will save us.
42. Our favourite verse is **Isaiah 43 v 25** which reads as follows:-

*“I, even I, am he who blots out your transgressions, for my own sake, and remembers your sins no more”*

1. What is unfair to us is that unlike other countries where there are serious killers and hardened criminals all of us without exception are not hardened seasoned criminals. We committed crimes virtually on the spare of the moment.
2. Under ordinary circumstances we would therefore deserve a second chance. It is our contention that perhaps there ought to be some form of judicial review to consider our cases.
3. I cannot find words to express to this Honourable Court the physical effect of confinement on death row and the psychological effect of confinement on death row. What I can say to this Honourable Court is that yes we committed crimes which we are sorry of but no one in this world must be put on death row and that capital punishment itself must be abolished. It is backward and antiquated and has no relation to the human rights enshrined in our Bill of Rights.

**INTERNATIONAL LAW**

1. The mass of international law I am advised now regards delays in execution as torture. I make reference to **Article 3 of the European Convention of Human Rights** which has been tested in a number of decisions.

1. In addition to rights provided **by Domestic & European Law** there are also a number of declarations and covenants including the **International Covenant on Civil and Political Rights (ICCPR)**. Death row phenomenon cases typically arise in violations of the **ICCPR Article 7**.
2. **Article 7 of the ICCPR** provides that “*no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment*”. The plethora of decisions that have been written under these Articles, will be dealt with in counsel’s Heads of Argument. In addition to the above, clear positions has also been adopted by the **Privy Council of the United Kingdom**, Courts in the West Indies and in South Africa.
3. These cases will be dealt with in Counsel’s Heads of Argument. A large bulk of these case, were examined by the Zimbabwean Supreme Court in the case of ***Catholic Commission Justice & Peace v the Attorney General & Others 1993 (1) ZLR 242***.
4. It is also necessary to bring the court’s attention that in many of the jurisdictions, particularly in the United State of America, delays in execution are brought about by a series of cross appeals noted on behalf of the condemned prisoners.
5. In the Zimbabwean system, there is an automatic right of appeal against any prison sentence. It takes on average of 18 months between the High Court judgment and the Supreme Court judgment usually confirming the lower court decision on capital punishment. Thus there are no significant delays in the appeal process and all the delays, are not as a result of the actions of condemned prisoners.
6. However, the majority of opinion, even in those jurisdictions where cross appeals exists, is that delayed execution amounts to inhuman and degrading treatment.
7. I also need to bring to attention the fact that the old Zimbabwean Constitution, initially provided for protection from inhuman treatment in **Section 15** of the same. **Section 15 (1)** provided that no person shall be subject to torture or to inhuman or degrading punishment or other such treatment.
8. However, the constitutional amendment that was brought by **Act No.9 of 1993**, inserted a new **Section 15 (5) in the Constitution** which read as follows:-

*“Delay in the execution of a sentence of death, imposed upon a person in respect of a criminal offence of which has been convicted shall not be held to be a contravention of Subsection 1.”*

1. I contend that the absence of this provision in the current constitution which provision was inserted by the policy makers in response to the **Catholic Justice Peace** case above, is evidence that the framers of the new Constitution, intended that, our Constitution be interpreted on the basis of the normal standards that I have cited above.
2. I therefore contend that this Honourable Court should restate the decision in the **Catholic Commission Justice Peace** case, which is in fact consistent with international standards.
3. **Section 53 of the Constitution of Zimbabwe** makes it clear that no person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.
4. **Section 53 of the Constitution of Zimbabwe** is equivalent to **Article 7 of the International Covenant on Civil and Political Rights** which provides that no one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment. The similar provision is found in **Article 3 of the European Convention on Human Rights, Article 5 of the American Convention on Human Rights, Article 5 of the African Charter on Human and Peoples’ Rights and Article 16 of the Convention** against torture and other cruel inhuman or degrading treatment or punishment.
5. I contend that it is now accepted, that the death row phenomenon I have described above constitutes cruel, inhuman or degrading treatment. This I believe is now trite and I make reference to a rich body of jurisprudence for instance ***Pratt and Morgan v The Attorney General of Jamaica, 1993 (4) ALL ER 769, Soering v. United Kingdom (11) Eur.Human Rights Report 439 (1989)***.
6. The similar approach, has been followed in cases in Canada see ***Minister of Justice v, Burns and Rafay, 2001 SCC 9 (S.C Canada 22 March 2001).***
7. In other African countries the Ugandan Supreme Court has also embraced these arguments, holding that a delay of more than three years between the confirmation of a prisoner’s death sentence on appeal and execution constitutes cruel, inhuman or degrading treatment or punishment in violation of their national Constitutions. See ***Kigula & Others v Attorney General, 2006 Supreme Court, Consti. Appeal No. 3 (Uganda 2009).***
8. The whole subject of the death row phenomenon, has listed mountains of legal literature. I draw the court’s attention to a few these articles.

*“Death row phenomenon, Death row syndrome and their effect on capital cases in the US, Karen Harrison and Anouska Tamony, Internation Journal of Criminology 2010,* [*www.internetjournalof*](http://www.internetjournalof) *criminology.com; Death row phenomenon violate human rights published by Cherisse Heidi Alcantara Cleofe, Frank C. Newman Intern, Human Right Advocates; The United States Tortures before it kills: An examination of the death row experience from a Human Rights Perspective. A position paper by the Center for Constitution Rights, October 10, 2011.”*

1. Many of these articles will show the torment and torture that death row prisoners are subjected to. One lives, waiting to be executed. One does not know when it will happen. Sometimes prisoners guards themselves use the threat of hanging to intimidate death row prisoners.
2. I am fully aware, that the First Respondent in his personal capacity, knows and has experienced the inhuman and degrading status quo of having to wait the death row. In the 60s, he was sentenced to death row, and was only served by virtue of his age. He is familiar with the death row phenomenon, and the death row syndrome. His testimony and experience is more horrendous than ours.
3. I therefore contend that in respect of all of us the Applicants, the Court must issue a declarator to the effect that subjecting us to execution, would amount to inhuman and degrading treatment.

**PRAYER**

1. I want to make it clear to this Honourable Court that this application in no way seeks to undo the grave effect and consequences to innocent persons of the crimes we were convicted of. In this regard I want to apologise for the pain we have caused and the crimes we have committed. However I wish to restate that despite the commission of these crimes we are still human beings and we are entitled to the enjoyment and protection of Zimbabwe’s laws and indeed the constitution of Zimbabwe. **Section 2 of the Constitution of Zimbabwe** makes it clear that it is the supreme law of the country.
2. I maintain that subjecting us on death row for the periods that I have described above is an assault on our right to human dignity and indeed an assault on our right not to be subjected to physical or psychological torture.
3. That being the case, I now respectfully pray for an order in terms of the draft.

**Thus Sworn and Signed at Harare on this day of June 2015.**

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**CUTHBERT TAPUWANASHE CHAWIRA**

Before me:-

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**COMMISSIONER OF OATHS**