

IN THE CONSTITUTIONAL COURT OF ZIMBABWE
HELD AT HARARE

CASE NO. CCZ 47/2015

In the matter between:

CUTHBERT TAPUWANASHE CHAWIRA
MASIMBA MBAYA
GEORGE MUNYARADZI MANYONGA
JACK SAKALA
LIVISON SITHOLE
JACK NYATHI
BUSANI TSHUMA
KILLIAN MPOFU
WISDOM GOCHERA
EZRA MANENJI
KUDAKWASHE TAONANGWERE
FARAYI LAWRENCE NDLOVU
GOVERNOR MUSAWAIRE
LYTHON MATHE
and

MINISTER OF JUSTICE, LEGAL AND
PARLIAMENTARY AFFAIRS

THE COMMISSIONER OF PRISONS &
CORRECTIONAL SERVICES

THE ATTORNEY GENERAL

1st Applicant
2nd Applicant
3rd Applicant
4th Applicant
5th Applicant
6th Applicant
7th Applicant
8th Applicant
9th Applicant
10th Applicant
11th Applicant
12th Applicant
13th Applicant
14th Applicant

1st Respondent

2nd Respondent

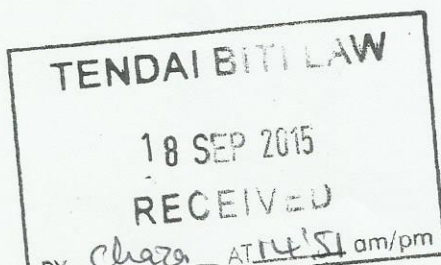
3rd Respondent



RESPONDENTS' HEADS OF ARGUMENT

BACKGROUND

1. The 14 applicants were all convicted of murder and sentenced to death by different judges under varying circumstances.



2. The applicants have been incarcerated for periods that range from 3 to 20 years and have been on the death row for periods ranging from 2 to 18 years.
3. It is their contention that subjecting them to such a lengthy period on the death row **"results in permanent stress, constant fear, resulting in extreme physical psychological and emotional harm"**.
4. It is their further contention in paragraph 13 of the founding affidavit that they 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."
5. In view of the alleged torture they claim they have been subjected to whilst awaiting the death sentence, applicants argue that it will be unconstitutional to execute them. They therefore argue that their death sentences be commuted to life sentences.
6. Applicants further contend that pursuant to the repeal of the former Constitution, the position of the law under the new Constitution should be that defined by the Supreme Court in the case of **Catholic Commission for Justice and Peace v The Attorney General and Others 1993 (1) ZLR 242 SC**

7. The applicants argue that because the new Constitution does not have a provision similar to section 15 (5) of the old Constitution which provided that delays in executing the sentence of death did not amount to inhuman and degrading treatment or punishment, the CCJP case should now be taken as good law which is consistent with the new Constitution because the new Constitution does not have such a provision.
8. Section 15 (1) of the former Constitution prohibited inhuman or degrading treatment or punishment. Section 15 (5) of the same Constitution however provided that:
- 15 (5) "Delay in the execution of a sentence of death, imposed upon a person in respect of a criminal offence of which he has been convicted, shall not be held to be a contravention of subsection 1".
9. With all due respect, the suggestion that the CCJP case restates the law cannot be the case. The Catholic Commission for Justice and Peace case was decided some twelve years ago. It has since been overtaken by events. The Supreme Court had an opportunity to decide in the case of **S v Nyambo 2005 (1) ZLR 443 (S)** whether the ruling as stated in the CCJP case still remained binding. **Cheda JA** sitting with **Sandura JA** and **Gwaunza JA** departed from the ruling in the CCJP case. Coming to the conclusion that delays in carrying out executions in cases involving persons sentenced to death no longer amounted to cruel inhuman degrading treatment or punishment.

10. In arriving at an appropriate decision in that case the Supreme Court was guided by the provisions of the former Constitution then and stated as follows, **State v Nyambo 2005 (1) ZLR 443 S at 445 B-E.**

"Mr Katsande submitted that the delay of 10 years before the execution of the death penalty amounted to a violation of the appellant's fundamental rights and that it should be commuted to life imprisonment. This is based on the decision in Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General and Ors supra, where the Supreme Court set aside sentences of death and substituted them with life imprisonment. The appeal was decided in June 1993. However, subject to that judgment, in November of that year, Parliament enacted the Constitution of Zimbabwe Amendment (No. 13) Act 9 of 1993 (the Amendment Act), which provided as follows in Section 2; Section 15 of the Constitution is Amended by the insertion after subsection (4) of the following subsections:-

(5) Delay in execution of a sentence of death, imposed upon a person in respect of a criminal offence of which he has been convicted, shall not be held to be a contravention of subsection (1)

.....

In view of the provisions of the Amendment Act, the Appellant is therefore not entitled to the relief he is seeking."

In view of the above Constitutional Amendment, the court therefore departed from the dictum in the Catholic Commission for Justice and Peace case, meaning that a delay in carrying out the death sentence no longer amounted to torture or inhuman and degrading treatment or punishment.

11. The argument therefore that the Catholic Commission for Justice and Peace case is a basis for restating the law cannot be sustained.
12. Dismissing the appeal in the Nyambo case, the Supreme Court held that in view of the provisions of section 15 (5) of the Constitution, there was no basis to interfere with the sentence and refused to commute the sentence of death to life.
13. In arriving at that decision, the court made reference to the constitutional provisions.
14. The court overlooked the decision in the Catholic Commission for Justice and Peace case and made particular reference to the provisions of the former Constitution itself.
15. In coming up with an appropriate decision *in casu*, the court should therefore be guided by the provisions in the new Constitution of Zimbabwe.
16. Just as the Supreme Court in *S v Nyambo* was guided by the provisions in the prevailing Constitution at the time the Constitutional Court in this case should be guided by the provisions in the new Constitution.

THE DOCTRINE OF SEPARATION OF POWERS

17. There has since been promulgated a new Constitution as at the 22nd of May 2013, and the relevant provisions of our Constitution which matter in this case are section 48 (2) (e) and section 112. The Constitutional provisions are clear commutation of sentence is to be done by the

President in terms of section 48 (2) (e). It is submitted that what applicants in fact are seeking is an exercise of the President's prerogative of mercy and this right is provided for under section 112 of the Constitution.

18. The Constitutional Court should therefore refuse to intrude into the executive domain, by exercising powers that the Constitution prescribes to the President.
19. There is need not to lose sight of what each arm of government can do. Functions assigned to the executive cannot be transferred to the judiciary. Neither can functions reserved for the judiciary be exercised by the executive.
20. There is indeed need not to lose sight of what each arm of government can do. If at all there has been a breach of the applicants' rights caused by the delays in conducting executions, the important question to be answered is what can the judiciary do about it?
21. It is humbly submitted that the unavoidable remedy which the applicants conveniently avoid addressing is that the executions be expedited and carried out to avoid applicants being further subjected to what they term cruel inhuman and degrading treatment or punishment.
22. If applicants are however calling for their sentences to be commuted to life sentences, then it is humbly submitted that they have invoked the power of mercy as defined in section 112 of the Constitution of Zimbabwe.

23. In terms of Section 2 of the Constitution of Zimbabwe the Constitution is the supreme law of this land. Section 2 provides as follows: -

Supremacy of Constitution

"(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency

(2) The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them."

24. The provisions of section 112 of the Constitution place the obligation to exercise the power of mercy on the President. Further, in terms of the supreme law of the land commutation of the death sentence is also an obligation placed upon the executive. Section 112 of the Constitution provides for the power of mercy and states as follows: -

"112 POWER OF MERCY

(1) The President after consultation with the Cabinet, may exercise the power of mercy, that is to say, may -

- (a) Grant a pardon to any person concerned in or convicted of an offence against any law;*
- (b) Grant a respite from the execution of a sentence for any offence for an indefinite or specified period;*
- (c) Substitute a less severe punishment for that imposed for any offence; or*
- (d) Suspend for a specified period or remit the whole or part of a sentence for any offence or any forfeiture imposed in respect of any offence*

*And may impose conditions on any such pardon, respite,
substitution or suspension*

(2)

(3) *The grant of a pardon or respite from execution of sentence or
the substitution or suspension of a sentence must be published in
the Gazette."*

25. Put in other words by asking that the death sentence be commuted to life sentences, applicants are asking for a less severe punishment to be substituted for the death sentence as provided for under section 112 of the Constitution.
26. The supreme law of this land places the obligation to exercise the power of mercy on the executive, and not on the judiciary.
27. The applicants must not therefore seek to impose on the judiciary functions explicitly set on the executive. Respondents therefore maintain that applicants are asking that the prerogative of mercy be exercised and that the person to properly exercise such power is the President after consultation with the Cabinet.
28. While the doctrine of separation of powers is an integral part of our law, there is however need not to lose sight of what each arm of government can do, and the judiciary should not be persuaded to intrude into the executive domain.
29. In terms of section 48 (2) (e) of the Constitution commutation of sentence of death is an obligation assigned to the President.

Applicants therefore need to address their request for pardon to the right arm of government.

30. To further substantiate this averment respondents wish to draw the Court's attention to the provisions of section 48 (2) (e) of the **Constitution (No. 20) Act, 2013** which provides that: -

"(2) A law may permit the death penalty to be imposed only on a person convicted of murder committed in aggravating circumstances, and

(a) The law must permit the court a discretion whether or not to impose the penalty;

(b) The penalty may be carried out only in accordance with a final judgment of a competent court;

(c) The penalty must not be imposed on a person

(i) Who was less than 21 years old when the offence was committed or

(ii) Who is more than seventy years old;

(d) The penalty must not be imposed or carried out on a woman; and

(e) The person sentenced must have a right to seek pardon or commutation of the penalty from the President (emphasis added)

31. The provisions of section 48 (2) (e) of the Constitution of Zimbabwe are clear. Section 48 (2) (e) of the Constitution confers a right on all persons sentenced to death, the right to seek a pardon or commutation of their death penalty from His Excellency the President of the Republic of Zimbabwe.

32. Such a right extends to all persons sentenced to death including persons in the situation of the applicants upon whom the death penalty was imposed prior to the promulgation of the new Constitution but in respect of whom the sentence has not yet been carried out. Applicants' application seeking to direct the Constitutional Court to take steps to make sure there is commutation of the death sentences imposed upon them is therefore misplaced. The remedy to what the applicants seek is succinctly set out in section 48 (2) (e) of the Constitution. The avenue to seek relief from this Court is therefore a misdirection by the applicants.

JUSTIFICATION FOR THE DEATH PENALTY

33. It has been argued under paragraph 69 of the Applicants' heads of argument that the death penalty is unconstitutional as it violates the prohibition against cruel inhuman and degrading treatment or punishment. Paragraph 69 of the applicants' heads of argument states as follows:

"In S v Makwanyane, the South African case in which the death penalty was declared unconstitutional, the Constitutional Court held that the death penalty violated the prohibition against inhuman and degrading treatment because, inter alia,

- 1. Sentencing is almost inherently arbitrary;*
- 2. The death penalty does not treat the guilty party as a human being worthy of respect and dignity;*
- 3. The death penalty is irremediable ; and*
- 4. Cruelty inevitably flows from the interminable delays which convicted persons face when awaiting execution as well as the nature of the execution itself."*

34. The death sentence has however been used as a form of punishment for murder by different societies throughout history. The willful taking of an innocent life calls for a severe penalty and there are many countries which still retain the death penalty as an option for such cases. It meets society's need for adequate retribution for heinous offences and is a deterrent to the most violent of the world's crimes.
35. The death sentence, it is humbly submitted is an acceptable form of punishment and cannot therefore be classified as amounting to cruel, inhuman, degrading treatment or punishment. It is not without justification and is thus not unconstitutionally severe.

CONCLUSION

36. It is therefore humbly submitted that the remedy which applicants seek is not within the ambit of this court to grant, particular regard having been given to the provisions of the supreme law of the land.
37. The application to have the sentences of death commuted to life is therefore misplaced.
38. Accordingly, the application should be dismissed with costs.

DATED at HARARE this 16th day of SEPTEMBER, 2015.

Mudi

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