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Kenya: Important judgement highlights unfairness and cruelty of the Death Penalty in the country

Amnesty International welcomes the judgement delivered on 30 July 2010 by the Court of Appeal of Kenya, declaring mandatory death penalty for murder as inconsistent with the spirit and letter of the constitution and raising important questions on the application of the death penalty in the country.

The judgement, delivered unanimously by a three-judges bench, ruled that Section 204 of the Penal Code, which provides for a mandatory death sentence in murder cases, is “antithetical to the Constitutional provisions on the protection against inhuman or degrading punishment or treatment and fair trial”, as it does not provide individuals concerned with an opportunity to mitigate their death sentences.

The cases of the appellant Godfrey Ngotho Mutiso as well as of other prisoners who had been sentenced to death for murder will now have to be re-examined by the High Court of Kenya, to allow for consideration of mitigating factors in their cases.

The importance of this judgement, however, is not limited to the elimination of mandatory death penalty for murder. While reaffirming that the Constitution recognises the death penalty as a lawful form of punishment, the judgment highly contributes to the debate on the issue of capital punishment in Kenya by raising important points.

Further, the Court expressly states that the reasoning behind its rejection of the mandatory death penalty in this case might also apply to other capital crimes contemplated in the Penal Code, such as treason, robbery with violence and attempted robbery with violence.

It also raises the question of the “obvious injustice of the *death row syndrome*,” by making reference to a recent judgment issued by the Ugandan Constitutional Court which found that prolonged periods on death row amount to cruel, inhuman or degrading treatment.

The new Constitution, which was approved in a referendum on 4 August 2010, regrettably retains a provision that allows for the imposition of the death penalty. In the judgment issued on 30 July, the judges observe that “human society is constantly evolving and therefore the law, which all civilized societies must live under, must evolve in tandem”. While taking note of the retention of the death penalty in the draft Constitution, the judgement concludes that “the dynamism of society will take care of future developments.

Amnesty International welcomes the judgment making the mandatory death penalty for murder unconstitutional and urges the authorities of Kenya to immediately:

-set up procedures to allow for reconsideration by the High Court of the cases of all prisoners who had been mandatorily sentenced to death for murder;

-amend provisions in the Penal Code allowing for the mandatory imposition of the death penalty for treason, robbery with violence and attempted robbery with violence;

-establish an official moratorium on executions, in line with United Nations General Assembly resolutions 62/149 and 63/168 and African Commission on Human and Peoples' Rights resolution calling on state parties to the African Charter on Human and Peoples' Rights to observe the moratorium on the death penalty (*ACHPR/Res.136(XXXVIII).08*)

-commute all death sentences in the country to terms of imprisonment;

-promote in the country a meaningful debate on the application of the death penalty with a view to abolishing it.

Background information:

The judgement was delivered by the Court of Appeal of Kenya following in the appeal of Godfrey Ngotho Mutiso vs. Republic Kenya, which was first heard on 19 January 2009.

The last execution in Kenya was carried out in 1987. In August 2009 the President commuted to life imprisonment the death sentences of more than 4,000 prisoners while stating that an "extended stay on death row causes undue mental anguish and suffering, psychological trauma, anxiety, while it may as well constitute inhuman treatment".

For further information, see also:

-Kenya: New Constitution offers a basis for better protection and fulfillment of human rights but measures to end impunity still needed (AFR 32/011/2010):

<http://www.amnesty.org/en/library/asset/AFR32/011/2010/en/7e84c40a-391f-48a8-ab6f-9759bd81275d/afr320112010en.html>

-4000 Kenyans on death row get life: <http://www.amnesty.org/en/news-and-updates/good-news/4000-kenyans-death-row-get-life-20090805>

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