# Mbushuu alias Dominic Mnyaroje and Another v. Republic

Court of Appeal (Corum: Makame, Ramadhani and Lubuva, JJA): January 30, 1995
Criminal Appeal No.142 of 1994

Constitutional Law-constitution- interpretation-standards of decency-concepts like torture, cruel, inhuman and degrading treatment subject to evolving standards of decency

Constitutional Law-constitution- contravention-article 13(6)(d) and (e) of Constitution-death penalty and its execution under s.197 Penal Code inhuman, cruel, and degrading punishment –whether saved by article 30(2) of Constitution

Evidence- corroboration- purpose-not to give validity or credence to deficient suspect or incredible evidence but only to confirm or support sufficient, satisfactory and credible evidence

The High Court of Tanzania convicted the two appellants of murder of Saidi s/o Jingu. The deceased was a herd's boy keeping cattle and goats for one Naftali s/o Ngamaa. On September 6, 1984, the deceased was killed and cattle and goats robbed. On the basis of the evidence of two people who received the stolen animals, and who were earlier arrested and detained for the murder and named other people other than the appellants as the people who gave the animals, the trial Judge convicted the appellants. After submissions on the Constitutionality of the death sentence, the learned trial Judge declared the sentence unconstitutional and committed each of the appellants to life imprisonment.

The appellants appealed against conviction on the grounds that their evidence as well as the corroborating evidence was not reliable. The State supported the conviction but appealed against sentence arguing that the death penalty was not cruel, inhuman and degrading punishment. The appeals were consolidated.

One of the issues for determination was whether the death penalty is one of the instances where due process of law would deny a person his right to life and its protection, and contravened article 13(6)(d) and (e) of the Constitution.

Held:
1.  The purpose of corroboration is not to give validity or credence to evidence, which is deficient or suspect or incredible, but only to confirm or support evidence that is sufficient and satisfactory and credible. If a testimony fails of its own inanities the question of its

needing or being capable of giving corroboration does not arise. Since PW1 and PW6 were not credible, they could not corroborate any other evidence. As such, the appellants were not properly identified as the persons who took the stolen animals to PW1.

2. Article 13(6) (d) seeks to protect the dignity of a person in the execution of a punishment. Torture, inhuman punishments and degrading punishments are prohibited. Punishments, which are not prohibited, have to be executed in such a way as to protect the dignity of a person.

3. The definition of torture in the United Nations General Assembly December 9, 1975 resolution (Resolution 3542) as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment excludes pain or suffering arising only from inherent in or accidental to lawful sanctions.

4. Concepts like torture, cruel, inhuman and degrading treatment are subject to evolving standards of decency and have to be interpreted in the light of present-day conditions.

5. The death penalty is inherently inhuman, cruel, and degrading punishment and its execution also offends article 13(6)(d) and (e) of the Constitution.

6. Article 30(2) of the Constitution allows derogation from basic rights of the individual in public interest. A law that allows derogation should be lawful in that it should not be arbitrary, and it should be proportional in that the limitation should not be more than reasonably necessary.

7. The death penalty as provided for in s. 197 of the Penal Code was not arbitrary and was a measure reasonably necessary to protect society, and is therefore saved by article 30(2) of the Constitution. It was therefore not unconstitutional.

Both appeals allowed. Conviction for murder quashed and sentence of life imprisonment set aside.

**Legislation considered:**
1. African Charter on Human and Peoples' Rights Article 4
2. American Convention on Human Rights Article 4
3. Constitution of the Republic of Bangladesh Article 32
4. Constitution of the Republic of Ghana Article 13(1)
5. Constitution of the Republic of the Philippines Article 111(1)
6. Constitution of the Republic of Tanzania Articles 13(6) (e), 14, 30(2), 64(5)
7. Constitution of the United States of America Article Fifth Amendment
8. Draft Constitution of the Republic of Uganda Article 52
9. European Convention on Human Rights and Fundamental Freedoms Article 2(1)

10. Indian Constitution Article 21
11. International Covenant of Civil and Political Rights Article 6(1)
12. Penal Code s.197

**Cases cited:**

1. Abolt v. Att. Gen. of Trinidad and Tobago [1979] 1 WLR 1342
2. Aziz Abdallah vs. R. [1991] TLR 71
3. Bacher Singh v. State of Punjab [1933] 1 ISCR 154
4. Barret Satcliffe v. Jamaica UN Doc CCPR/6/E 44/D/R 988 s. 3.4 and 3.5
5. Catholic Commission for Justice and Peace in Zimbabwe v. Att. Gen. [1993] 1 ZLR 242
6. D.P.P. v. Daudi Pete [1993] TLR 22
7. D.P.P. v. Kilbourne [1973] AC 729
8. D.P.P. v. Lenganzo Nyanje Crim. Appeal No. 68 of 1980 (unreported)
9. Furman v. Georgia (1972) 408 US 238
10. Kututia Ole Pumbun v.Att.Gen. [1993] TLR 159
11. Michael de Freitas v. George Ramoutar Benny [1976] AC 239
12. Ndlovu v. the State [1988] LRC (Const) 442
13. R. v. Asha Mkwizu Hauli Cr. Sess. Case No. 3 of 1984 (DSM) (unreported)
14. State v. Petrus [1985] LRC (Const) 699
15. Said Mwamwindi [1972 HCD No. 212
16. Trop v. Dulles 356 V 586
17. Tyrer v. United Kingdom 2 EHRR 1
18. Uganda v. Shah [1966] EA 30

**Other materials considered:**

1. Attorney for the Damned by Clarence Darrow (1957) Simon and Schuster, New York at p.92
2. Chambers 20th Century Dictionary
3. The Abolition of the Death Penalty in International Law
4. The International Law of Human rights (Oxford University Press) 1983 at p.130
5. The United Nations General Assembly

Rweyongeza for the appellants
Korosso for the State