

## **OXFORD UNIVERSITY DEATH PENALTY RESEARCH UNIT**

### **Q&As: Timothy Bryant, Lawyer, Kenya**

**Please could you tell us a bit about your legal practice and where your work on capital cases fits within this?**

In Kenya, advocates are rarely specialists – I am therefore a jack of all trades, master of none. Most of my broader legal practice relates to property conveyancing, as well as some commercial work, e.g. on contracts and leases. My work on capital cases is done on a pro bono basis, but work on criminal cases takes up only around 10% of my time.

**Are there any notable patterns among the capital cases you deal with in Kenya?**

Yes, the most common offences are those of robbery with violence, and the death penalty mostly impacts the poor.

**Can you tell us about one of the most notable capital cases that you've dealt with?**

I was counsel for the appellant in the case of [Mutiso v Republic](#) (2010) before the Court of Appeal, which involved a defendant who had been found guilty of being the main instrument behind a 'mob justice' killing that took place in Mombasa in 2004. As he was convicted of murder, he received a mandatory death sentence. We could not, on the facts, challenge the conviction itself, so we fought on the sentence.

I had argued against the mandatory death penalty before the Court of Appeal at various points since 2003, with different benches outright rejecting the argument. In *Mutiso*, however, the Court of Appeal found that the mandatory death penalty was incompatible with the constitution, as it violated the defendant's right to a fair trial, constituted cruel, inhuman or degrading treatment or punishment, and violated the right to life.<sup>1</sup>

During the course of the protracted hearings in *Mutiso*, with discussions with the government taking over one year, in 2009 the President proclaimed the [largest mass commutation of death sentences in Kenya's history](#), with 4,000 sentences commuted. We ascribe the commutation to the arguments in the *Mutiso* case. Credit must be given to the Death Penalty Project (DPP) for their superb assistance in the development of those arguments.

**Kenya is an 'abolitionist de facto' country which has not carried out an execution for several decades. How does this impact the cases you work on?**

The last execution in Kenya that was officially sanctioned by a court took place in 1987, for the offence of treason following an attempted coup in 1982. Since then, on the face of it, no executions have taken place.

However, under the 'de facto abolition' position, Kenya still carries out executions but does so behind the façade of extrajudicial killings.

**Could you explain the problem of extrajudicial killings in Kenya and how it relates to the death penalty?**

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<sup>1</sup> The constitutionality of the mandatory death penalty in Kenya was later addressed by the Supreme Court of Kenya, resulting in the 2017 [Muruatetu judgment](#) and subsequent [2021 directions](#) on the same decision.

Because of weaknesses in the criminal justice process in Kenya, it can be difficult for the authorities to secure convictions. Instead, extrajudicial killings of those believed to be criminals are impliedly authorised. Those who are selected are targeted and shot, with very little investigation of the perpetrators

During 2023, the NGO [Missing Voices](#) recorded 118 extrajudicial killings in Kenya. But these killings are carried out within the constraints of some internal rules. For example, the suspected criminal or their parents, or both, are warned in advance that if they don't change their behaviour, or move to another location, they will be killed.

This avenue provides the executive branch of the Government the ability not to sign the death warrants of prisoners on death row. This system avoids some of the drawbacks of the US system, where the appeals process in the federal court system might take 10 years, which Kenya could probably not afford to sustain.

### **Why do so many capital cases in Kenya involve robbery with violence offences?**

The death penalty is a mandatory sentence for robbery with violence and attempted robbery with violence. Because of the vagueness of the legislation, the level of 'violence' involved can be merely a shove, or the presence of two people carrying out a robbery together. This means that someone could steal a mobile phone worth very little and receive a mandatory death sentence.

If you go to death row in Kenya, to the maximum-security prisons, 80-85% of death row prisoners have been convicted of a crime which did not involve killing. Those convicted are unfortunate enough to be mostly poor young men who can never afford a defence lawyer, and for robbery with violence, you are not entitled to a state-appointed lawyer at trial.

The use of the death penalty for robbery with violence was brought into law in 1973. The legislation was very poorly drafted, drawing on archaic colonial-era wording, and was debated for only half an hour in Parliament at the time. The offence sweeps up far too many people, who may have committed a crime, but don't really deserve the death penalty.

The best way forward would be forward Parliament to redraft the legislation. This has already been suggested by judges: in 2016, the High Court [found the robbery with violence provisions unconstitutional](#) due to uncertainty contained within the impugned provisions, and gave the Attorney-General and Parliament 18 months to redraft the legislation, but no action was ever taken.

### **How did you come to be working on capital cases? Was this something you envisaged when beginning your legal training?**

No, I didn't envisage it at the outset. During my university studies and at law school, the death penalty was not on the agenda. I did pauper briefs (cases in which lawyers are appointed by the state) at the Court of Appeal for five years, and began to notice the trend in the prosecution policy of the Director of Public Prosecutions. That's when I began my efforts to fight against the mandatory death sentence.

I was alarmed at the fact that the death penalty were being handed down automatically in cases where there had been no intention to cause death. Even going back to ancient times, as far back as Hammurabi's Code, there has been the principle that the sentence must

relate to the crime. And when you asked people why this was happening, they would just respond: Parliament said so.

I began looking into cases outside of Kenya that could help us to challenge this. I was aware of the work of the DPP in Uganda, on the [\*Attorney General v Kigula\*](#) (2009) case (in which the mandatory death penalty was found unconstitutional), and the judgment of the South African Constitutional Court in [\*State v Makwanyane\*](#) (1995) (in which the death penalty was found unconstitutional). Then later I was introduced to Parvais Jabbar and Saul Lehrfreund from the DPP.

**What do you think are the prospects of abolition of capital punishment in Kenya in the coming years?**

On paper, I think the prospects are pretty good, because of the drafting of the Constitution of Kenya.

Under [Article 24](#) of the Constitution, which concerns limitations of rights and fundamental freedoms, section 2(c) prohibits the limitation of a “right or fundamental freedom so far as to derogate from its core or essential content” – limitation of a right cannot extinguish the right itself. For example, under Article 25, the right to a fair trial is specified as a non-derogable right.

Meanwhile [Article 26](#), which provides for the right to life, also states under section 3 that: “A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law.” If there is a right to life, and a penal section (‘other written law’) permits the deprivation of that life, aren’t you depriving the core content of the right?

This is a simple argument, but I think that this incompatibility presents a powerful Constitutional challenge to the retention of the death penalty in Kenya.

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