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CAPITAL PUNISHMENT, THE DEATH ROW PHENOMENON AND THE SUPREME COURT OF NIGERIA: *ONUOHA KALU V THE STATE* [1998] 12 S.C.N.J. 1

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The issue of constitutionality¹ of capital punishment and some aspects of the punishment came before the Supreme Court of Nigeria in *Onuoha Kalu v The State*.² This was the first time that the issue was properly raised in the Supreme Court. The full court (consisting of seven justices of the Court³) gave a unanimous decision affirming the constitutionality of the death penalty in Nigeria. This judgement was delivered in December, 1998.

A review of this case is now necessary and desirable for three reasons. One, apart from the issue of capital punishment being of international interest and concern, there has been a controversy surrounding the constitutionality of capital punishment in Nigeria since the enactment of the 1979 Nigerian Constitution.⁴ Arguments had been advanced that the Constitution has impliedly abrogated capital punishment in Nigeria.⁵ The case has now settled the legal point though the social controversy remains.⁶ Secondly, the issue of prolonged detention of prisoners under death sentences (the death row phenomenon) was raised but was not adjudicated upon by the court. The issue, particularly, the appropriate remedy for such victims. In cases from other jurisdictions, the death sentences were

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1. This case was decided under the Constitution of the Federal Republic of Nigeria, 1979. This Constitution has now been replaced by the Constitution of the Federal Republic of Nigeria, 1999. The provisions of the 1979 Constitution cited herein are in *pari materia* with those of the 1999 Constitution. The corresponding sections are shown herein the footnotes.
 2. [1998] 12 S.C.N.J. 1. See also (1998) 13 N.W.L.R. (Pt. 583) 531.
 3. M.L. Uwais, C.J.N, S.M.A. Belgore, A.B. Wali, I.L. Kutuigi, M.E. Ogundare, E.O. Ogwuegbu, and A. I. Iguh, JJSC.
 4. The Constitution of the Federal Republic of Nigeria, 1979. Although this Constitution has been replaced by another Constitution of the Federal Republic of Nigeria, 1999, the provisions relevant to the article are in *pari materia* though the numbering of the sections in the 1999 Constitution may vary.
 5. See: Nwabueze, *The Presidential Constitution of Nigeria* (1982) pp. 48, 412 and 441-2; Okagbue, "The Law and Human Dignity: Some Aspects of Inhuman and Degrading Treatment", (1985). *Nig. Current Law Review* 213; and Ikhiriale, "Death Penalty in Nigeria: A Constitutional Aberration", *Journal of Human Rights Law and Practice*, Vol. 1. No. 3/Vol. 2, Nos. 1&2, Nov. 1991-92, p. 40.
 6. There has been a small but strong and vocal movement in the country against capital punishment. In addition to n. 5 above, see: Okagbue, "the Death Penalty From a Human rights Perspective", 1995 *Nigerian Current Law Review*, 143. Okagbue, *The Death Penalty as Effective Deterrent to Drug Abuse and Drug Trafficking: Myth or Reality?* (Lagos: Nigerian Institute of Advanced Legal Studies, 1991); A. A. Adeyemi, "Death Penalty in Nigeria: Criminological Perspectives" in Bola Ajijola (ed.), *Narcotics, Law and Policy in Nigeria* (Lagos: Federal Ministry of Justice, (1990), 282 and in (1988 -91). *Nigeria Current Law Review* 1 and D. A. Ijalaye, "Capital Punishment: Quo Vadis Nigeria?", in I. A. Ayua, *Law, Justice and the Nigerian Society — Essays in Honour of Justice Mohammed Bello* (Lagos: Nigerian Institute of Advanced Legal Studies, 1995), 188.

commuted to life imprisonment.⁷ There are important indications from the Supreme Court in the case that this may not be the remedy applicable in Nigeria to such cases. Thirdly, death row cases have now been filed in the high courts subsequent to and consequent upon the decision of the Supreme Court. There are strong indications that the ambit and scope of the Supreme Court decision has not been properly understood by some of the courts.⁸ There is therefore the need to articulate the arguments and the judgements in *Kalu's case*. These and further arguments that counsel could advance in the cases are examined in this article.

FACTS AND ISSUES IN THE CASE

The facts of the case are that the accused was on 6 March 1984, arraigned before the Lagos High Court on a charge of murder allegedly committed on 24 August 1981. On 30 July 1985, the trial court found the accused guilty. The court imposed the mandatory death sentence prescribed for the offence under section 319 (1) of the Criminal Code of Lagos State.⁹ The accused lodged an appeal against his sentence and conviction to the Court of Appeal. The Lagos Division of the Court of Appeal on 7 June 1995 in a unanimous decision, dismissed the appeal, and affirmed the conviction and sentence passed on the appellant. The appellant further appealed to the Supreme Court.

The issue of constitutionality of death penalty was raised neither at the trial High Court nor at the Court of Appeal. However, Supreme Court, upon his application, granted him leave to raise the issue before the court. Thus with the leave granted by the Supreme Court, the two issues before the court now reads:

1. Was the Court of Appeal right in holding that the appellant was properly arraigned in accordance with the rule in *Kajubo's case* and, if not, should the appellant be retried or acquitted?
2. Whether section 319 (1) of the Criminal Code of Lagos State is not inconsistent with section 31 (1) (a) of the Constitution of the Federal Republic of Nigeria and therefore null and void and if so, whether the affirmation of the death sentence by the Court of Appeal was correct.

The first issue was resolved against the appellant. The Supreme Court held that his arraignment was properly conducted in the trial court. This issue is not part of our focus here. The second issue addressed the issue of constitutionality of the death penalty in Nigeria. This issue was divided into three sub-issues, namely,

1. Whether capital punishment is compatible with the provisions of the Constitution of the Federal Republic of Nigeria, 1979,
2. Whether the mode of execution prescribed i.e. hanging, violates provisions of the Constitution, and
3. Whether the prolonged detention under sentence of death (i.e. the death row phenomenon) is a cruel and inhuman treatment under the terms of section 31 which violates the 1979 Constitution.

7. Some are discussed later in this article.

8. See Sam Amadi, "Limiting Access to Court to enforce Fundamental Rights: *Onuaha Kalu v. Attorney General of the Federation and ors*", *The Huri-Laws Newsletter; A Quarterly Review of Human Rights Law and Practice*, October-December 1999, pp. 11-13.

9. Cap 31, Laws of Lagos State of the Federal Republic of Nigeria, 1973, now Cap, 32, Laws of Lagos State of the Federal Republic of Nigeria, 1994.

The issue of capital punishment is an important one that transcends national boundaries. Therefore, the case of *Onuoha Kalu v The State*, apart from having an important constitutional significance, is also one of immense international interest. The issues were extensively argued before the court. The appellant's counsel is a leading human rights lawyer, activist and a Senior Advocate of Nigeria (SAN). Apart from counsel to the parties, others including the Attorney General of the Federation and other prominent Senior Advocates filed briefs as *amici curiae*. As is now the case in novel human right cases, relevant authorities from jurisdictions across the world were cited and reviewed by the court. We shall now examine the relevant facts of the case and how the Supreme Court found its way through the maze of seemingly conflicting cases from different countries.

JUDGEMENT OF THE SUPREME COURT

1. Constitutionality of Death Penalty in Nigeria

The main thrust of appellant's argument against the death penalty prescribed for murder in section 319 (1) of the Criminal Code of Lagos State was that the punishment violates sections 30 and 31 (1) of the 1979 Constitution of the Federal Republic of Nigeria. Therefore, the punishment is therefore invalid, null and void. The constitutional provisions¹⁰ relied upon are as follows:

Section 30

- (1) Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.¹¹

Section 31

- (1) Every individual is entitled to respect for the dignity of his person, and accordingly –
 - (a) no person shall be subjected to torture or to inhuman or degrading treatment.¹²

The Supreme Court held that the death penalty is constitutional under the Nigerian Constitution. Iguh JSC., delivering the lead judgement of the court described the position under the 1979 Constitution thus:

Under section 30 (1) of the Constitution, therefore, the right to life, although fully guaranteed is nevertheless subject to the execution of a death sentence of a court of law in respect of a criminal offence of which one has been found guilty in Nigeria. The qualifying word *save*, used in section 30 (1) seems to me to be unmistakable key to the construction of that provision. In my view, it is plain that the 1979 constitution can by no stretch of the imagination be said to have proscribed or outlawed the death penalty. On the contrary, section 30 (1) of the Constitution permits it in the clearest possible terms, so long as it is inflicted pursuant to the sentence of a court of law.¹³

His Lordship holding that the provisions of the Constitution must be read together and not disjointly, further cited section 213 (2) (d) of the Constitution which makes provisions

10. The relevant provisions are *in pari materia* with those of the current Constitution.

11. See now section 33 (1), 1999 Constitution.

12. Now section 34 (1), 1999 Constitution.

13. At p. 30.

for appeals to the Court of Appeal in cases in which a sentence of death has been passed by the High Court and section 220 (1) (e) which provides for a further appeal to the Supreme Court where the Court of Appeal affirmed a death sentence. His Lordship described the effect of these provisions thus:

It is plain to me that apart from section 30 (1), there are also provisions of Section 213 (2) (d) and 220 (1) (e) of the Constitution which, again, in no mistakable terms, recognise the death penalty as a form of sentence. I have also taken great care to go through the entire 1979 Constitution and have been unable to find any single section thereof which abolished or outlawed the death penalty. And I ask myself, having regard to the combined effect of sections 30 (1), 213 (2) (d) and 220 (1) (e) of the Constitution, whether it can be seriously argued as the appellant now appears to do, that section 319 (1) of the Criminal Code of Lagos State which prescribes the death sentence is inconsistent with Section 31 (1) (a) or, indeed, with any other section of the Constitution. I think not. To argue otherwise, if I may say with respect, will tantamount to embarking on an exercise aimed at defeating the clear provisions of the Constitution.¹⁴

The Supreme Court also rejected the contention of the appellant that the death penalty *per se* amounts to inhuman treatment. According to the court, the plethora of authorities from various jurisdictions cited to it on the issue falls into two categories — those upholding capital punishment and those rejecting the punishment. The crucial distinction between these cases, according to the Supreme Court, depended on whether the constitutions/ documents interpreted in the cases gave an unqualified right to life. Iguh, JSC, delivering the lead judgement said as follows:

Upon a careful perusal of the various foreign authorities to which our attention was drawn by the appellant, the opinion that the death penalty *per se* amounts to torture, inhuman and degrading treatment and, therefore, intrinsically unconstitutional seems to me a minority view. Indeed, a close study of those decisions reveals that the foreign jurisdictions that have similar provisions in their Constitutions as ours have repeatedly pronounced the death penalty to be constitutionally valid. The decisions tended to turn on the crucial question of whether the right to life therein contained is *qualified* or *unqualified*. If *qualified*, the death penalty was, in the main, held to be *constitutional*. If *unqualified*, however, the death penalty was, rightly in my view, declared to be *unconstitutional*.¹⁵

The views expressed in the lead judgement is unanimous. Other justices of the court read concurring judgements stating the same conclusions. The court held that the matter of abolition of the death penalty in Nigeria is not a matter for the courts but one for the legislature. They emphasised that the Supreme Court will not usurp the functions of the legislature by embarking on any exercise of judicial legislation.

14. At p. 31.

15. At p. 31. The cases where the death penalty was affirmed because of the qualified nature of the right to life in the Constitution are: *Mbushuu and Anor v The Republic* (Criminal Appeal No. 1342 of 1994, decided on 31/1/95, by the Tanzanian Court of Appeal); *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General Zimbabwe and others* [1993] (4) S.A. 239 (Supreme Court of Zimbabwe); *Bacan Singh v The State of Punjab* [1983] (2) SCR 583, the Supreme Court of India; *Earl Pratt and Anor v Attorney General for Jamaica and others* [1994] 2 A.C. 1, (Privy Council) and in America, the death penalty was held not to be intrinsically unconstitutional in these cases: *Gregg v Georgia* 428 US 153

2. Mode of Execution and the Death Row Phenomenon

The appellant attacked the mode of execution prescribed, i.e. hanging as a cruel, inhuman and degrading punishment within the ambit of section 31 (1) of the Constitution. The appellant also raised the issue of his prolonged confinement under a sentence of death. He argued relying on *Pratt v Attorney General for Jamaica*,¹⁶ that he had spent an unduly prolonged time in detention under a death sentence. This he submitted, constitutes a violation of section 33 (1) of the Nigerian Constitution which forbids cruel and inhuman treatment. He therefore urged to commute to life imprisonment, the death sentence imposed on him.

The Court held that it had no jurisdiction to pronounce on these issues since they do not arise within the present appeal. The issues arose not in the trial of the appellant, but after the conviction. They could only form the subject of another action for the enforcement of the appellant's fundamental rights in the High Court. The Supreme Court pointed out that this was the procedure adopted in the cases cited by the Appellant which were all civil cases filed in separate proceedings before their respective courts of first instance.¹⁷ In spite of the stance of the Supreme Court on these issues, there is much *obiter* from the judges of the court. The most significant is that of Belgore JSC, on the appropriate remedy for prolonged stay in the death row. His Lordship opined thus:

At any rate, if after the death sentence has been passed and the accused is in prison custody, if anything arises outside the normal custody that amounts to "torture or inhuman or degrading treatment" that will be a cause of action under Fundamental rights but not militating against the sentence of death. In such a case, the death sentence stands, but a new cause of action has arisen and can be separately enforced and remedied. "Inhuman or degrading treatment" outside the inevitable confinement in the death row will not make illegal the death sentence; rather it only gives ground for an enforceable right under the Constitution.¹⁸

(1976); *District Attorney for Suffolk District v James Watsons and others* [1980] 381 Mass. 648; *Jurek v Texas* 428 US [1976] and *Woodson v North Carolina* 428 US 242 (1976). The Supreme Court distinguished these cases on the ground that the death penalty in these cases was set aside due to the qualified nature of the right of life in the Constitution considered therein: *Jones Wittenberg* 33 F. Supp 707 (Constitution of Hungary) and *The State v Makwanyane and another* [1995] 6 BCLR 665 (CC), [1995] SACLR Lexis 218 (the Constitutional Court of South Africa). Another reason why the death penalty was declared unconstitutional in the case was on account of the arbitrary, discriminatory and selective nature of its exercise at all material times in South Africa (see Kalu's case at p. 333 per Iguh, JSC). The Supreme Court pointed out that in *Furman v Georgia* [1972] 408 US 238 (which was heavily relied upon by the appellant), the US Supreme Court held that the imposition of the death sentence under Georgian and Texas statutes constituted cruel and unusual punishment in violation of the Eighth and Fourteen Amendments, because under those statutes, the juries had untrammelled and irreconcilable discretion to impose or withhold the death penalty at will: see Kalu's case at p. 35, per Iguh, JSC.

16. *Op cit.* See comments on this case in Oba, A. A., "The Cruel and Inhuman Aspects of Delaying Execution of Capital Punishment: *Pratt v A.G. for Jamaica*", [1997], *Journal of International and Comparative Law*, Vol. 1, pp. 158-164.

17. Iguh JSC, at pp. 40-41 citing *Earl Pratt and Another v Attorney General for Jamaica (op cit)*, *Guerra v Baptiste and ords* [1996] 1 A.C. 397 (PC), *Riley v Attorney General Jamaica* [1983] A.C. 719 (PC).

18. At p. 53.

COMMENTS

(a) Capital Punishment

Since the advent of the 1979 Constitution, there has been much academic opinion to the effect that the provisions of the Constitution have impliedly abrogated the death penalty in Nigeria.¹⁹ The judgement of the Supreme Court in *Onuoha Kalu's* case has settled this matter. The judgement is no doubt in consonance with the provisions of the Constitution. Abolitionists will now have to focus their attention on the legislature.

Abolitionists have an uphill task in Nigeria. The views of the justices of the Supreme Court may well point to the dominant attitude to capital punishment in Nigeria. The views of Iguh, JSC, can be deduced from this statement of his:

... Nor have I found myself able to hold that this court is entitled to repeal or revoke laws ostensibly based upon notions of public policy or sanction simply because such laws, for one reason or the other, are said to be unacceptable to a group of persons or a section of society.²⁰

Wali JSC, expressed similar views:

The purport of section 30 (1) *supra* is that the death penalty is constitutionally recognised in the way and manner prescribed by law. It is not the function of the court to apply the canon of interpretation to invalidate a valid and legal legislation for the only reason that such a legislation is not in line with its social thinking or is not liked by a fractional section of the Nigerian people.²¹

Uwais CJN was content with putting it thus: "The position in Nigeria is very clear. Death sentence is a reality."²²

Belgore JSC, puts his own views more forcefully:

Therefore, it is clear that much as the victim of a murderous assault was entitled to life, so also is the murderer liable to death for his deed.²³ The Constitution recognises death sentence . . . Nigeria is not peculiar in its Constitution and provision of death sentence therein and in other statutes. Not up to ten per cent of the sovereign nations of the world abolished death sentence. Abolition of death sentence is not an indication of civilisation, rather in some cases it is based on historical circumstances of some countries. At any rate in this country, due to our Constitution, it is not the function of the courts of law to abolish the sentence of death, the responsibility is on the legislative body.²⁴

The briefs filed by Dr Okafor San also opposed abolition of capital punishment. Of all the briefs filed in the case — and indeed many of them are excellent and well researched — his was the one that the justices quoted and cited the most. Dr Okafor submitted thus concerning capital punishment:

19. See n. 5 *supra*.

20. At p. 42.

21. At p. 56.

22. At p. 50.

23. This echoes the Biblical and Quranic "life for life" approach. See *The Bible* (RSV), Exodus 21:24; Lev. 24:17 and Deu. 19:21; and *The Quran*, 2:178, 5:48 and 42:40.

24. At p. 52.

The abolition of the death penalty is a very weighty matter involving policy where decision should be a function of conscious and deliberate act of the highest policy formulating and law-making organ of the State involving, where feasible, the opinion of the people in a referendum. The eventuality of self-help and revenge killing in the wake of dismay and disillusion at the abolition of the death penalty should not be under-estimated.²⁵

The above shows the obstacles to abolition of capital punishment in Nigeria. The case in question itself, that is *Kalu's case* is really a poor argument for its abolition. It was a murder case. The appellant stabbed the deceased to death with a broken bottle. This type of murder is usually perpetrated by the most feared hooligans in the society. It is not a case in which even sentiment is in favour of the appellant.

However, section 31 of the Constitution is not totally relevant to capital punishment. The tests of cruelty and inhumanity are still applicable where the death sentence is prescribed for some categories of offences which normally are non-capital offences. As of today, capital punishment is prescribed for the offences of murder,²⁶ armed robbery²⁷ and treason.²⁸ It is submitted here that although the legislature has the power to prescribe punishments for offences, it will be cruel and inhuman if they decide to extent capital punishment to, say, petty theft.

There is also the suggestion that public execution constitutes inhuman and degrading treatment.²⁹ These are issues which can be raised when the opportunity presents itself.

(b) Is Hanging Inhuman?

The appellant also contended that hanging constitutes a cruel and inhuman treatment. This matter was not decided upon by the Supreme Court on procedural grounds. It is however doubtful that the Supreme Court will not decide this issue in favour of any appellant in the foreseeable future. The preponderance of judicial decisions cited in *Kalu's*

25. Quoted by Ogundare JSC, at p. 69.

26. Section 319 Criminal Code, (applicable generally in slightly modified forms in the Southern States of Nigeria, text in Cap. Laws of the Federation of Nigeria, 1990); and Sections 221 (culpable homicide), 227 (abetment of suicide of a child or lunatic), 229 (life convict attempting culpable homicide) and 302 (brigandage with culpable homicide) Penal Code (applicable generally with slight modifications in the various states in Northern Nigeria, text in Cap. 89, Laws of Northern Nigeria, 1963). The modifications are significant in the northern state of Zamfara which has now adopted the Shari'ah as its basic law. The Shari'ah Penal Code which was passed by the Zamfara State House of Assembly is not at hand, but the Draft Shari'ah Penal Code (January, 2000) prescribes capital punishment for the following offences: *Zina* – adultery and fornication when committed by a married Muslim (section 128); rape (section 129); sodomy (section 131 (b)), incest (section 133 (b)); *Hiraba* – robbery in which murder occurs but property was not seized (section 153 (c)); robbery in which murder was committed and property was actually seized (section 153 (d) – death by crucifixion); intentional homicide (section 200 (a)); death resulting in trial by ordeal (section 404); witchcraft and *juju* (section 406); possession of criminal charms (section 407); cannibalism (section 408); and unlawful possession of human corpse or any part thereof (section 409).

27. Section 402, Criminal Code.

28. Sections 37 (treason), 38 (instigating invasion of Nigeria) and 49A (treachery) of the Criminal Code. These are also applicable to the northern states, see: the Penal Code (Northern States) Federal Provisions Act, Cap. 345, Laws of the Federation of Nigeria, 1990.

29. Aguda, *The Judiciary in the Government of Nigeria* (Ibadan, New Horn, 1983): at p. 172-173.

case does not favour the appellant's arguments here. In *Singh v The State of Punjab*,³⁰ the Indian Supreme Court held thus:

By no stretch of the imagination can it be said that the death penalty either *per se* or because of its execution by hanging constitutes an unreasonable, cruel or unusual punishment prohibited by the Constitution.³¹

Again, in *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General Zimbabwe*,³² the Supreme Court of Zimbabwe held that:

... the constitutionality of the death penalty, *per se*, as well as the mode of execution by hanging, are also not susceptible of attack.³³

Even, in *Pratt and another v Attorney General for Jamaica*³⁴ the Privy Council held that under the terms of the Jamaican Constitution, hanging cannot be held to be an inhuman punishment for murder.³⁵

Dr Okafor San also agreed with this view. He said thus:

It is only where the method of execution is so brutal or abhorrent or involves exorbitant or excessive pain that it can constitute torture, inhuman or degrading treatment. Hanging *per se* which is applied in Nigeria has not been shown to fit this qualification.³⁶

The constitution also prohibits 'degrading treatment'.³⁷ It has been suggested that hanging as a means of execution violates this clause.³⁸

(c) Death Row Phenomenon

This is the second time the Supreme Court heard arguments but declined to adjudicate on this issue.³⁹ However, the arguments on this issue are in favour of the victims of prolonged confinement on the death row. There is an overwhelming consensus in this regard. It is safe to assume that the Supreme Court will, without any hesitation, declare prolonged confinement under death sentence as a cruel and inhuman treatment which violates section 31 (1) of the Constitution. Beyond this, it is difficult to predict. In *Pratt's case*, the Privy Council commuted the appellants' sentence of death to life imprisonment. It is doubtful whether the Supreme Court will adopt this approach. Belgore JSC, as seen in the passage earlier quoted, was clearly of the contrary view. This view is very important. And it is not

30. [1983] (2) S.C.R 583.

31. Quoted by Ogundare JSC, at p. 71.

32. [1993] (4) SA 239.

33. Quoted by Ogundare JSC, at p. 71.

34. *Op cit.*

35. Cited by Iguh JSC, at p. 37.

36. Quoted by Ogundare JSC, at p. 68-9.

37. Section 31 (1) (a), 1979 Constitution, now section 34 (1) (a), 1999 Constitution.

38. "Certain forms of capital punishment might also be considered degrading, such as "hanging by the neck" until dead": Aguda, *op cit.*, at p. 120-121.

39. In *Peter Nemi v The State* [1994] 10 S.C.N.J. 1, although the issue was raised and argued, the Supreme Court declined to adjudicate on the issue because it was not properly raised before the Court, the procedural defect being that the issue was not included in any of the grounds of appeal filed in the case.

a singular view. A similar decision was reached by the High Court of Rhodesia in *Dhlamini v Carter* No. 2⁴⁰ where Beadle CJ held thus:

If during the course of his punishment, a prisoner is subjected to inhuman "treatment", he can move the court for relief and the court will see that the treatment is stopped, but that does not affect the original "punishment" which cannot, itself be tainted with the inhumanity of the "treatment".⁴¹

The only remedy according to the court is that the delay be stopped! This case was overruled by the Rhodesian Supreme Court in the *Catholic Commission for Justice and Peace in Zimbabwe's* case where the death sentences passed on the appellants were commuted to life imprisonment. In the Indian case of *Madhu Mehta v Union of India*,⁴² the death sentences were also commuted to life imprisonment. According to Hatchard, commutation to life is the only meaning remedy possible in the circumstance.⁴³

It is not likely that the Nigeria Supreme Court will go to the extreme of *Dhlamini's* case. It is more likely that damages will be awarded. The Supreme Court has had an occasion to award damages for violation of right to life. In *Aliu Bello and ords v AG Oyo State*,⁴⁴ a convicted-armed robber sentenced to death was wrongly executed while his appeal against the conviction and sentence was still pending. The Supreme Court found that his right to life had been violated. The Court awarded damages of 7,400.00 Naira. It is likely the Belgore JSC, had this sort of remedy in mind.

One noticeable thing in *Kalu's* case is that Counsel for the appellant relied too heavily on foreign cases. It should be pointed out here that over the years, the Supreme Court indicated that in interpreting the provisions of the Nigerian Constitution, it would not embark on what it described as "a voyage of discovery" to foreign lands.⁴⁵ Counsel should in future pay closer attention to provisions of Nigerian laws. Foreign cases may be alluring, they do not overawe the Supreme Court, as the Court's decision of capital punishment in *Kalu's* case shows. There are technical arguments in Nigeria against the remedy of commutation to life imprisonment. These should concern Counsel more than citing of foreign cases.

In human rights cases relating to the death row problem, the Supreme Court is not sitting on the substantive criminal appeal. Therefore the sentence would not be in issue. What will be in issue is the violation of the appellant's right to freedom from cruel, inhuman and degrading treatment.

40. [1968] (1) RLR 136.

41. *Ibid*, at p. 155.

42. Cited in Hatchard, *op cit*, at p. 317.

43. Hatchard, *op cit*, p. 315.

44. [1985] 5 N.W.L.R. (Pt. 45) 828.

45. In *Nafiu Rabiu v The State* (1981) 2 N.C.L.R. 293, Sir Udo Udoma, JSC, stated the position as regards foreign cases thus: "I might add that in my opinion, it is not a correct approach to proper interpretation of our present Constitution to begin by looking to the meaning or interpretation of a statutory provision of Constitution of other countries with different wordings. But of course, foreign constitutions or statutes with identical provisions accepted as *in pari materia* with the relevant provisions of our Constitution will naturally carry some weight in their persuasive influence, bearing in mind always, that even in such cases, circumstances may be at variance. (See *Olaleke Obadara & Others v President, Ibadan West District Council Grade 'B' Customary Court, Iddo* (1965) N.M.L.R. 39", at p. 327.

Another problem lies in the fact that some offences carry mandatory capital punishment. If the Supreme Court has no power to vary such sentence when deciding that criminal appeal, how then can it claim to have that power in the subsequent human rights case?

Again, the court is *functus officio* as regards the sentence. A sentence of death affirmed by the Supreme Court cannot be judicially reviewed, even by the Supreme Court itself.⁴⁶ Under the Constitution, only the exercise of prerogative of mercy can tamper with the sentence passed on a convict after the appellate procedure has been exhausted.⁴⁷ This power is constitutionally given to the executive.⁴⁸ The 1979 and 1999 Constitutions are based on the American Presidential system which is based on separation of powers between the three arms of government, viz., legislature, executive and judiciary. The executive (like other two arms of government) are very jealous of their powers. The Supreme Court will definitely not want to make an incursion into the domain of the executive. In *Pratt's case*, Lord Griffiths, speaking of the position in England, acknowledged the executive role in the matter of commutation. His Lordship said:

It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment.⁴⁹

Another obstacle is the attitude and belief of the court. The Supreme Court has shown a clear bias in favour of capital punishment. Most of the judges of the court find nothing wrong with capital punishment. In fact, the judges have shown that they thought it necessary and even desirable in certain cases. They will certainly not allow the abolitionists to gain victory through the back door.

Again, the experiences from other jurisdictions are very instructive. When the death sentence of the appellants in *Pratt's case* were commuted to life imprisonment, the Jamaican government had to commute the death sentences of 105 other convicts who had endured similarly long periods of confinement.⁵⁰ This action was met with a lot of criticism and

46. See sections 235 of the 1979 and 1999 Constitutions respectively which provide thus: . The "finality" of the decisions of the Supreme Court was enunciated in *Adigun v Attorney General Oyo State* No. 2 (1987) 4 S.C.N.J. 61 and *Architects Registration Council of Nigeria, In Re: Majoroh v Prof. Fassassi* (1987) 6 S.C. 8. In *Majoroh's case* the Supreme Court stated the position thus: "What are the powers of this court to review itself? Certainly, there are no Constitutional or statutory powers in this Court to review its order once a judgement is delivered. And so the powers could only be inherent. In other words, whatever jurisdiction we could be said to possess to review ourselves could only be inherent. And these we have fully considered in the *Adigun's case*... Before a Court finally determines a case placed before it, it is seized with jurisdiction whether or not it has jurisdiction. But, and this is of utmost importance, once the Court has finally determined the issue, it is *functus officio*. That judgement, if it is by a Court lower than the Supreme Court, can only be corrected on appeal. In the Supreme Court, the decision of that Court as far as that case is concerned is final for all ages. As I said in the *Adigun No. 2 Case*, it is final in the sense of real finality." It is final forever. Only a legislation *ad hominem* can alter it", per Eso, JSC, at pp. 10-11.

47. See sections 215 and 235 of the 1979 and 1999 Constitutions respectively.

48. See sections 175 and 212 of the 1999 Constitution.

49. At p. 774.

50. Hatchard, "A Question of Humanity: Delay and the Death Penalty in Commonwealth Courts", (1994) 20 *Commonwealth Law Bulletin* 309, at p. 315.

considerable concern which is not surprising, given the high murder rate in Jamaica.⁵¹ The commutation of the death sentences of the appellants and 20 other condemned prisoners following the decision in *Catholic Commission for Justice and Peace's* case in Zimbabwe generated an intense debate. The government responded swiftly by passing the Constitution of Zimbabwe Amendment (No. 12) Act, 1993 which provides that delay in execution and conditions under which prisoners are held will not lead to alteration of the sentence.⁵² Thus in the death row cases now filed in the High Courts in Nigeria, counsel will have to labour to convince the court to grant commutation to life imprisonment as a remedy.

It would have been easy to agree with the position taken by Belgore JSC, but for the Nigerian situation. Cases are unduly prolonged at every stage of the criminal process. Apart from the interminable adjournment guarantee, cases take very long in the trial courts. The appellant system is no better. Delays above seven years between the date of conviction by the High Court and the final determination of the appeal by the Supreme Court are not unusual in capital cases.⁵³ If the Supreme Court merely awards damages to victims of the death row without commuting the death sentence to life imprisonment, it is doubtful whether the situation will improve. The Supreme Court should therefore consider the remedy of commutation in order to spur the executive to reform the criminal process. Mere award of damages will not have any real impact on the criminal process. In the first place, how much do you award for such suffering? The award of ridiculously low sums cannot be ruled out. The principles governing the award of damages in human rights cases was laid down by the Supreme Court in *Minister of Internal Affairs v Shugaba*⁵⁴ as follows:

That in cases involving an infraction of fundamental rights of a citizen, the court ought to award such damages that would serve as a deterrent against naked, arrogant, arbitrary and oppressive abuse of power as in this case.⁵⁵

The award of Three Hundred and Fifty Thousand Naira (N350,000.00) as "compensatory and exemplary damages" by the trial court in the case would seem justified on the parameter

51. *Ibid*, p. 315.

52. *Ibid*.

53. Capital offences are generally unbailable in Nigeria. Therefore, apart from the slow appellate process, the period of detention pending trial and during the trial is also generally very long as these cases indicate: In *Peter Nemi's* case, *op cit.*, the appellant was arrested on 9/12/82, convicted on 28/2/86, his appeal to Court of Appeal dismissed on 29/3/90, appeal filed on 26/4/90, and appeal was dismissed on 14/10/94. Appeals determined last year show the same trend: *Idemudia v The State* (1999) 5 S.C.N.J. 47, offence committed 19/11/85, appeal to Supreme Court determined 7/5/99; *Sunday Omini v The State* (1999) 9 S.C.N.J. 1, offence committed 8/10/90, appeal to Court of Appeal dismissed 7/11/95, appeal to Supreme Court dismissed 24/9/99. However, the latest reported cases show a marked improvement which point to a change of judicial attitude to capital cases in Nigeria: *Richard Igago v The State* (1999) 12 S.C.N.J. 140, offence committed 6/7/91, appeal to Court of Appeal dismissed 21/12/95, appeal to Supreme Court dismissed 3/12/99; and *Jonathan Igbi v The State* (2000) 2 S.C.N.J. 63, offence committed 25/5/86, convicted 31/7/91, appeal to Court of Appeal dismissed 17/9/98, appeal to Supreme Court dismissed 11/2/2000. The next few appeals will show whether or not this is a definite trend.

54. (1982) 3 N.C.L.R. 915.

55. Per Karibi-Whyte at p. 928.

stated by the Supreme Court.⁵⁶ However, in this same case the Supreme Court more or less deviated from these principles. In reducing the damages awarded by the trial court to Fifty Thousand Naira (N50,000.00) the Supreme Court said thus:

In my opinion, the sum of N50,000.00 is adequate compensation for the injury done to the respondent. The damages of (N350,000.00) awarded is to be paid from public funds, and the functionaries responsible for this injury will not bear any part of the burden. It is not in the public interest that a citizen whose revulsion for naked and arbitrary exercise of executive power should bear in addition be made to bear such financial burden.

This decision has had a very adverse effect on the quantum of damages awarded in subsequent human rights cases.⁵⁷

In *Aliu Bello v AG Oyo State* (supra), the appellant asked for Twenty Five Thousand Naira (N25,000.00) but Supreme Court awarded a mere sum of Seven Thousand Four Hundred Naira (N7,400.00). The Supreme Court did not place the proper value on human life in that case. It may be that the Supreme Court was influenced by the fact that the appeal in that case lacked merit. This cannot be the right approach. If the appeal had been a borderline case, would not the fact that the appellant had already been executed and the dire

56. *Shugaba Abdulrahman Darman v Minister of Internal Affairs* (1981) 2 N.C.L.R. 459. The Applicant, a prominent politician was then the majority leader of the Borno State House of Assembly. He was wrongfully deported from the country on the ground that he was not a Nigerian. There was no doubt that he was a victim of a carefully executed political intrigue and abuse of power by the federal government which was controlled by a political party different from the applicant's.

57. The decision has opened a flood gate of curious, sentimental and irrelevant considerations in the award of damages in human rights cases as the following two High Court decisions (unreported) but reproduced in the *Journal of Human Rights Law and Practice*, Vol. 4, Nos. 1,2,3, Dec. 1994 illustrate: *Abdulahi and ors v The Attorney General Lagos State* (at p. 285 of the Journal) where the applicants were detained for a period ranging from six to eleven years without trial. They claimed *inter-alia*, Fifty Thousand Naira (N50,000.00) each as damages. The court awarded them Ten Thousand Naira (N10,000.00). The Court stated the basis of the assessment thus: "I have awarded this *token* compensation for a number of reasons: 1. The economy of the country is overstretched; 2. The compensation money is from the tax-payer's purse and affects every good citizen of this country ; 3. To discourage any member in authority to watch his or her acts than to throw the country into reckless spending on account of unbridled and excess behaviours [the meaning is not clear, but, this is the text as reported in the Journal]; 4. To discourage any member of the public who might be inclined to pursue a bravado by putting himself or herself on the path of the law for a brush with the hope of financial gain; 5. And above all, to put every member of the society on the alert to obey and respect the law of the land" (*Ibid*, at p. 289); and *Adeyemi and ors v The Inspector General of Police and ors* (*Ibid*, at p. 290) where the period of detention of the applicants without trial ranged from three to six years, the court in awarding Ten Thousand Naira to the 1st and 5th applicants held thus: "In the light of the authority of *Shugaba* which the applicants counsel relied upon in claiming damages, it is not right that tax payers be made to pay excessive damages in such circumstances as the actual offenders who actually initially arrested and detained 1st and 5th applicants can no longer be traced. And even when they are found, they will not be made independently to bear any part of the burden. I award N10,000 damages to the 1st and 5th applicant each for the non-challant approach to the liberty of citizens exhibited by the officials concerned in the arrest and detention of both applicants" (*Ibid*, at pp. 300-301). In the case, the records of the 1st and 5th applicants could not be traced. It was not known which police officers arrested and detained them. They would have languished perpetually in custody if they had not brought the application for their release!

consequences of allowing his appeal tilted the scale against him? One should have thought that it is a case that calls for the award of exemplary damages. Secondly, it is not likely that sums awarded to a condemned person can ever be claimed. Governments do not normally want to pay damages awarded against them. Bureaucratic obstacles by way of filling interminable forms and presenting documents will be employed to frustrate any ambitious heirs. Thirdly, the death row cases are different from wrongful execution as was the case in *Aliu Bello's* case. In *Aliu Bello*, the victim is dead and gone, but in the death row cases he has not. He is alive but deprived of his humanity in a daily anguish over his impending execution. This torture and suspense is worse than death.⁵⁸

The Supreme Court should therefore realise that capital cases ought to be treated with expedition.⁵⁹ Capital punishment has its responsibilities. One of them is the avoidance of unnecessary delays. A condemned person has the right to be put out of his misery as quickly as possible. This burden is on the government to discharge. Lord Griffiths aptly pointed this out in *Pratt's case* when His Lordship said:

In their Lordship's view a state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve. . . If the appellate procedure enables the prisoner to prolong the appellant hearings over a period of years, the fault is to be attributed to the appellant system that permits such delay and not to the prisoner who takes advantage of it. Appellate procedures that echo down the years are not compatible with capital punishment. The death row phenomenon must not become established as a part of our jurisprudence.⁶⁰

The Nigerian situation is worse. The delay has become inherent in the system. It does not require any effort on the part of the prisoner. But there is no valid reason for this. There is no reason why in Nigeria capital cases should not be given accelerated hearing. There should be a mandatory time limit within which the lower court should forward records of proceedings in capital cases to the appellant court.⁶¹

It is submitted that the Supreme Court has the power to commute death sentences in such circumstances to life imprisonment or any other term of imprisonment. This power is perhaps to be found in the Fundamental Rights (Enforcement Procedure) Rules,⁶² Order 6 (1) of which provides that:

At the hearing of any application, motion or summons under these Rules, the Court or Judge concerned may make such orders, issue such writs, and give such directives

58. "Persecution is worse than slaughter": *Quran* 2:191 and 217.

59. The most recent reported appeals seem to indicate that the Supreme Court is addressing this problem, see: *Richard Igago v The State* (1999) 12 S.C.N.J. 140, offence committed 6/7/91, appeal to Court of Appeal dismissed 21/12/95, appeal to Supreme Court dismissed 3/12/99; and *Jonathan Igbi v The State* (2000) 2 S.C.N.J. 63, offence committed 25/5/86, convicted 31/7/91, appeal to Court of Appeal dismissed 17/9/98, appeal to Supreme Court dismissed 11/2/2000.

60. At p. 786 of the judgement (*op cit*).

61. The preparation of the record of proceedings for the appellant court in capital cases is the duty of the lower court.

62. Statutory Instrument No. 1 of 1979, made by the Chief Justice of the Federation pursuant to the powers conferred on him under section 42 (3) of the 1979 Constitution (Now section 46 (3), 1999 Constitution).

as it or he may consider just or appropriate for the purpose of enforcing or securing the enforcement of any of the Fundamental Rights provided for in the Constitution to which the complainant may be entitled.

It has been argued and rightly too, that this Order has given very wide powers to the courts in respect of remedies for human rights violations.⁶³ But what happens to the Constitutional provisions that gave to the executive the power of prerogative of mercy? When there is a conflict between the Constitution and rules made under delegated authority derived from the Constitution as is the case with the Fundamental Rights (Enforcement Procedure) Rules, there is no doubt that the Constitution prevails.⁶⁴

Another line of argument is perhaps that since the Constitution does not specifically provide remedies for breach of the fundamental rights contained in the same Constitution, any remedy deemed fit by the courts must be taken as having constitutional force, moreso, the remedies provided under the Fundamental rules (Enforcement Procedure) Rules. It can also be argued that the Constitution leaves to courts to exercising their inherent powers as regards the remedies for breaches of fundamental rights. The Constitution recognises and preserves the inherent powers and sanctions of the courts.⁶⁵ These powers include commutation to life imprisonment as illustrated by *Pratt's* case.

This and the other arguments highlighted above are the formidable arguments which Counsel to the appellant should prepare for when the death row phenomenon finally comes properly for adjudication before the Supreme Court.

(d) Procedural Matters

The Supreme Court was right to have declined to pronounce on issues of hanging and delay in execution. The jurisdiction of the Supreme Court in the appeal in *Kalu's case* relates to the criminal case. Its jurisdiction emanates from section 233 (2) of the Constitution which reads thus:

An appeal shall lie from the decisions of the Court of Appeal to the Supreme Court as of right in the following cases:

(d) decisions in any criminal proceedings in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court.

The post conviction human rights matters such as treatment of prisoners awaiting execution cannot properly form part of the criminal law issues envisaged by this sub-section. Human rights matters are civil matters which have procedures separate and distinct from the criminal procedure. What the appellant sort to do is tantamount to converting a criminal appeal into a first instance hearing of a civil case. A criminal appeal cannot be converted to a civil action. Again, the Supreme Court can only hear appeals in criminal and civil cases

63. See Chinonye Obiagwu, "The All Powerful Order 6 Rule 1", *Human Rights Newsletter*, January – March, 1998, Vol. 1 No. 2, p. 36.

64. Sections 1 (3) of both 1979 and 1999 Constitutions.

65. See section 6 (6) (a), 1999 Constitution.

from the Court of Appeal. It is not a court of first instance in this sort of cases. The two issues raised are issues for another action at the High Court. This was the procedure adopted even in the cases relied on by the appellant. The Supreme Court was right to have insisted that the appellant go first to the High Court, then to the Court of Appeal before the issues can be heard in the Supreme Court.

CONCLUSION

The case of *Onuha Kalu v The State* makes a very interesting and enlightening reading. This is due in the main to the plethora of judicial decisions from various jurisdictions across the world cited in the well-researched briefs at the disposal of the court. This reflects, no doubt, the international input that has become emblematic of human rights cases all over the world due to the activities of international human rights organisations.⁶⁶ Counsel should however take note that in interpreting the provisions of the Nigerian Constitution the Supreme Court is more interested in arguments based on local statutes and case law. Foreign cases are used as persuasive authorities only, and even then, the statutes interpreted must be in *pari materia* with the local provisions in issue. Counsel should also take note of the procedural aspects of litigation. Many important human rights cases have failed solely for procedural reasons alone.⁶⁷ This may be due to the novelty of the issues involved. It is hoped that the procedural pitfalls are now well known and will be avoided by counsel in future.

The decision of the Supreme Court in *Kalu's case* has settled the question of constitutionality of capital punishment in Nigeria. The abolitionists can only look in the direction of the legislature for reforms. From what has been discussed above, it will not be an easy task. In Nigeria, there is a strong support for capital punishment especially in homicide cases. This position is perhaps strengthened by cultural and religious factors that form a considerable influence on the outlook in the country.

The Supreme Court also indicated that hanging is not a cruel and inhuman manner of executing the death penalty. However, this issue is still open as it was not clear whether the Supreme Court considered the issue as part of the issues arising for determination in the case.

The legal consequences of prolonged confinement in the death row are also yet to be settled. Indications are that the Supreme Court will be reluctant to commute death sentences to life imprisonment. There are many legal arguments that can be advanced in support of that position. However, the issue is more moral than legal. It is hoped that the Supreme Court will look carefully at the implications of their perceived attitude. They should not take any stance that will perpetuate the death row phenomenon in the Nigerian criminal

66. For role of NGOs see Hatchard, *op cit.*, p. 316, and Mohammed, "Individual and NGO Participation in the Human Rights Litigation Before the African Court on Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights" [1999], *Journal of African Law* Vol. 43, 201.

67. For example: *Fawehinmi v Gen. Abacha* (case commenced under wrong procedure); *Peter Nemi v The State*, *op cit.* (death row issue not covered by any ground of appeal); and *Ogugu v The State* (1994) 9 N.W.L.R. (Pt. 366) 1 (death row issue improperly raised on appeal without having been raised at the lower courts).

process. Awarding damages is not the solution. The problem is one that need not have arisen. The solution lies in eliminating the factors that make the criminal process agonisingly slow. This should be of urgent concern to the present government, a democratically elected government, operating under a constitution that respects the rule of law and human rights.



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