*JAJI  MWALUSANYA VS HUKUMU YA KIFO.*

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Mwaka 1994 katika mahakama kuu mkoani Dodoma mbele ya Jaji Mwalusanya J, watu wawili Mbushuu Mnyaroje na Kalai Sungula walikutwa na hatia ya kosa la mauaji ambapo waliua mtu na kupora mifugo yake.

*Walikutwa na kosa la mauaji ya kukusudia (murder) kinyume na kifungu cha 196 cha Penal Code Cap 16. Walitakiwa kupewa hukumu ya kifo kwa mujibu wa kifungu cha 197 cha Penal Code, Kunyongwa mpaka kufa kwa mujibu wa kifungu cha 26 cha Penal Code.*

Kabla jaji hajatoa hukumu wakili wa Mbushuu na Sungula wakili Rweyongeza aliibua hoja kuhusiana na adhabu ya kifo kwamba hukumu ya kifo ni kinyume kabisa cha katiba ya jamhuri ya muungano wa Tanzania ya 1977 ibara 13(6)(d) na (e) kwa maana kwamba hukumu ya kifo ni ya kikatili,ya mateso, inayotweza utu wa mtu na isiyo ya kibinadamu. Wakili Rweyongeza alienda mbali zaidi na kusema hukumu ya kifo ni kinyume cha katiba ibara ya 14 inayotoa haki ya kuishi, kwa hoja hizo aliiomba mahakama isitoe hukumu ya kifo kwa wateja wake kwani hukumu hiyo ni unconstitutional!

Jaji Mwalusanya alikubaliana moja kwa moja na wakili Rweyongeza kwanza kwamba hukumu ya kifo ni adhabu ya mateso, kinyume cha utu na ubinadamu na ya kikatili, Jaji Mwalusanya alisema ukatili wa hukumu ya kifo unaonekana katika utekelezaji wa hukumu wake kwani si wa kistaarabu hata kidogo.

*"One leading doctor described the process as slow, dirty, horrible, brutal, uncivilized and unspeakably barbaric"*

*Mwalusanya anasema mfungwa huachiwa umbali wa 8 feet akiwa amefungwa kitanzi shingoni lengo likiwa ni kuvunja shingo yake ili afe haraka na mara nyingine iwapo mnyongaji amemkosa mfungwa kisawasawa au shingo haijavunjika ipasavyo basi mnyongaji humpiga mfungwa risasi ya mguu au humpiga na nyundo kichwani kuharakisha kifo chake.*

Mwalusanya anasema serikali inawafundisha raia kuua kwa kutekeleza hukumu ya kifo. Kama serikali inataka raia waheshimu maisha ya watu basi serikali inatakiwa iache kuua. Kama kila anayeua ni lazima naye auawe kwanini serikali isiajili wabakaji maalumu kwa ajili ya kuwabaka wale wanaobaka wengine badala yake hukumu ya ubakaji ni miaka 30 jela. Kuthibitisha kuwa hukumu ya kifo ni ya kikatili kinyume cha utu serikali inakumbwa na guilt conscience yaani inasutwa na ndiyo maana hata hukumu ya kifo hutekelezwa kwa usiri mkubwa mno.

*Jaji mwalisanya anasema hukumu ya kifo ni kinyume na ibara ya 14 ya katiba ya Jamhuri ya muungano wa Tanzania inayotoa haki ya kuishi kwa kila mtanzania. Sababu zingine ni ucheleweshwaji wa utekelezaji wa hukumu hiyo ya kifo na mazingira mabaya ambayo wafungwa wanaosubiri kunyongwa huhifadhiwa.*

Jaji Mwalusanya baada ya kupinga vikali kicriticise vikali kifungu cha sheria cha kanuni ya adhabu ya makosa ya jinai (Penal Code) kifungu cha 197 na kukitangaza kuwa kinapingana na katiba yaani Unconstitutional, aliwahukumu Mbushuu Mnyaroje na Kalai Sungula kifungo cha maisha jela kila mmoja badala ya hukumu ya kifo.

*Cha ajabu Mbushuu Mnyaroje na Kalai Sungula walikata rufaa kwenda mahakama ya Rufani ya Tanzania kwa sababu kwamba hawakuridhishwa na ushahidi uliotolewa dhidi yao na kwamba hawakuhusika na mauaji yoyote.*

Pia kwa upande mwingine Mwanasheria Mkuu wa Serikali alikata rufaa dhidi ya hukumu ya Jaji Mwalusanya kuhusiana na hukumu ya Kifo Katika mahakama ya Rufani ya Tanzania Corum ya majaji watatu ambao ni Lubuva J, Ramadhani J, na Makame J ilipokaa na kusikiliza rufaa hiyo.

Majaji wa mahakama ya Rufani walijikita kwenye kuipinga vikali hukumu ya Jaji Mwalusanya, kwanza walikubaliana rufaa kwamba ushahidi hautoshelezi, pili walitengua hukumu iliyotolewa na Jaji Mwalusanya ya kifungo cha maisha kwa watuhumiwa hao badala yake waliwaachia huru Mbushuu Mnyaroje na Kalai Sungula. Pamoja na hayo walipinga vikali hoja za Mwalusanya dhidi ya hukumu ya kifo

Katika hoja zao majaji wa Rufani huku wanasema Mwalusanya alikosea kutangaza kifungu cha 197 cha Penal Code kuwa unconstitutional kwani haki ya kuishi inayotolewa kwenye katiba ibara ya 14 siyo absolute inatakiwa kuwa subjected to

the law, kwa maana kwamba kila mtu ana haki ya kuishi kwa mujibu wa sheria hivyo kama ukivunja sheria haki yako ya kuishi inaondolewa kwa mfano sheria imekataza kuua hivyo ukiua haki yako ya kuishi inaondolewa kwa wewe pia kuhukumiwa kifo.

Sababu ya pili ni ibara 30(2) ya katiba inayoruhusu kutotekeleza baadhi ya haki kwa mujibu wa sheria. Kwa mujibu wa mahakama ya Rufani hukumu ya kifo hutolewa kwa maslahi ya umma ili kuilinda jamii dhibi ya wauaji, kwamba jamii haipendi watu waue hivyo kuweka hukumu ya kifo ni kuilinda jamii dhidi ya mauaji.

Kwa hukumu hii ya mahakama ya Rufani ya Tanzania hukumu ya kifo inaendelea kuwa halali nchini Tanzania japokuwa in practical hukumu hii imekuwa haitekelezwi nchini Tanzania kwa zaidi ya miaka 18 sasa hali ambayo imepelekea walio hukumiwa kifo kufikia zaidi ya mia nne gerezani nchini Tanzania. Hii inatokana na kelele nyingi sana kutoka kwa watetezi wa haki za binadamu na jumuiya za kimataifa.

*Case Summary:*

The two accused Mbushuu alias Dominic Mnyaroje (first accused) and Kalai s/o Sangula (second accused) were on 13 May 1994 convicted of murder contrary to s 196 of the Penal Code cap 16 by this Court. They were supposed to get a death penalty by virtue of s 197 of the Penal Code, and the death penalty is to be by hanging as per s 26 of the Penal Code. Before the death penalty was imposed, counsel for the accused (on dock brief) Mr Rweyongeza raised a point to the effect that the death penalty is unconstitutional and so it should not be imposed.

Mwalusanya J Held:

*(i) Death penalty offends the right to the dignity of a person in the way the sentence is executed and therefore it offends article 13(6)(d) of the Constitution of the United Republic of Tanzania;*

*(ii) Death penalty is inherently cruel, inhuman and a degrading punishment and the process of execution by hanging is particularly gruesome, generally sordid, debasing and generally brutalising, and it offends article 13(6)(e) of the Constitution of the United Republic of Tanzania;*

*(iii) From the wording of article 14 on the right to life in the Swahili version of the Constitution of the United Republic of Tanzania, which is the controlling version, both the right to life and the right to protection of one's life by society is subject to the claw-back clause and is therefore not absolute;*

*(iv) The petitioners have managed to prove on a balance of probabilities that hanging, as the way of carrying out the death penalty, is a cruel, inhuman and degrading punishment;*

*(v) The petitioners have only evidential burden to show that a right has been infringed and once they have succeeded to show that then it is for the state to prove on a balance of probabilities that the law being attacked as unconstitutional is lawful law and that it is saved by article 30(2) of the Constitution of the United Republic of Tanzania and therefore it is in the public interest;*

*(vi) The Republic has failed to prove on a balance of probabilities that the death penalty is in the public interest*;

*(vii) For a law to be lawful it should meet the proportionality test and it should not be arbitrary; the Government in this case has failed to prove on balance of probabilities that the present law restricting the right to life is proportionate and the carrying out of the sentence is not arbitrary;*

(viii) *The provisions of the Penal Code on the death penalty do not have adequate safeguards against arbitrary decisions and do not provide effective control against abuse of power by those in authority when using the law;*

(ix) *Death penalty is contrary to article 13(6)(a) of the Constitution of the United Republic of Tanzania because there is no appeal against the decision of the President not to commute the sentence even if it is unreasonable or discriminatory;*

(x) *In construction of provisions of the Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms, a generous and purposive method should be applied.*

*Death penalty in its present form is unconstitutional*