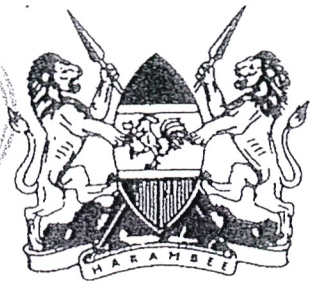


Mhameul to  
take up

Approved for tabling.



~~PT~~  
SNA  
28/10/15  
per per law  
By the Hon  
Florence Wanjau  
On witness of  
28/10/2015  
*[Signature]*



PARLIAMENT OF KENYA  
THE NATIONAL ASSEMBLY  
ELEVENTH PARLIAMENT  
( THIRD SESSION - 2015 )

THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL  
AFFAIRS

# REPORT

ON THE PETITION ON REVIEW OF CRIMINAL LAWS (PENAL  
CODE AND CRIMINAL PROCEDURE CODE) TO ALIGN THEM  
WITH THE PROVISIONS OF THE CONSTITUTION OF KENYA

CLERK'S CHAMBERS,  
PARLIAMENT BUILDINGS,  
NAIROBI.

OCTOBER, 2015

V.26

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## LIST OF APPENDICES

1. Minutes of the sitting that adopted the report on the Petition
2. Attendance list of Members who attended the sitting that adopted the report
3. The Petition

## **1.0 PREFACE**

**Mr. Speaker Sir,**

On behalf of the Departmental Committee on Justice and Legal Affairs and pursuant to Standing Order 216(5), it is my pleasure and duty to present to the House, the Committee's Report on the Petition on review of criminal laws (Penal Code and Criminal Procedure Code) to align them with the provisions of the Constitution of Kenya, 2010.

### **1.1 Committee Membership**

The Committee on Justice and Legal Affairs was constituted by the House on Thursday 16<sup>th</sup> May, 2013 comprising of the following members:

1. The Hon. Samuel Chepkong'a, M.P. – **Chairperson**
  2. The Hon. Priscilla Nyokabi, M.P. – **Vice Chairperson**
  3. The Hon. Njoroge Baiya, M.P.
  4. The Hon. Muriithi Waiganjo, M.P.
  5. The Hon. Ndirangu Waihenya, M.P.
  6. The Hon. Florence Kajuju, M.P.
  7. The Hon. Kang'ata Irungu, M.P.
  8. The Hon. Benson Mutura, M.P.
  9. The Hon. John Njoroge Chege, M.P.
  10. The Hon. William Cheptumo, M.P.
  11. The Hon. Mohamed Abdi Haji, M.P.
  12. The Hon. James Bett, M.P.
  13. The Hon. Sammy Koech, M.P.
  14. The Hon. Moses Cheboi, M.P.
  15. The Hon. Paul Bii, M.P.
  16. The Hon. Charles Gimose, M.P.
  17. The Hon. Johana Ng'eno, M.P.
  18. The Hon. Boniface Otsiula, M.P.
  19. The Hon. David Ouma Ochieng, M.P.
  20. The Hon. Neto Agostinho, M.P.
  21. The Hon. Kaluma Peter, M.P.
  22. The Hon. Fatuma Ibrahim Ali, M.P.
  23. The Hon. Ben Momanyi Orori, M.P.
  24. The Hon. T. J. Kajwang', M.P.
  25. The Hon. (Bishop) Mutua Mutemi, M.P.
  26. The Hon. Olago Aluoch, M.P.
  27. The Hon. Christine Oduor Ombaka, M.P.
  28. The Hon. Munuve G. Mati, M.P.
  29. The Hon. Mwamkale William Kamoti, M.P.
-



## 1.2 Committee's Mandate

The Departmental Committee on Justice and Legal Affairs derives its mandate from provisions of Standing order 216(5) which defines functions of the Committee as being to:-

- a) *investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;*
- b) *study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;*
- c) *study and review all legislation referred to it;*
- d) *study, assess and analyze the relative success of the ministries and departments measured by the results obtained as compared with their stated objectives;*
- e) *investigate and inquire into all matters relating to the assigned ministries and departments as may be deemed necessary, and as may be referred to it by the House or a minister;*
- f) *vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those understanding order 204 (Committee on appointments); and*
- g) *make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.*

In accordance with Second Schedule of the Standing Orders, the Committee is mandated to deal with the following subjects:-

- a) Constitutional Affairs;
- b) The administration of law and justice;
- c) The Judiciary;
- d) Public prosecutions;
- e) Elections;
- f) Ethics ,Integrity and anti-corruption; and
- g) Human rights.

**Mr. Speaker Sir,**

On 10<sup>th</sup> March, 2015 pursuant to Standing Order 227, you conveyed to the House a Petition on review of criminal laws (Penal Code and Criminal Procedure Code) to align them with the provisions of the Constitution of Kenya, 2010.

The Petition is dated 17<sup>th</sup> June, 2015 and is signed by one Mr. Joseph Mwathi Nyanjui. In a nutshell, the Petitioner seeks the following prayers:-

- a. Review the existing criminal laws (Penal Code and Criminal Procedure Code) to align them with the provisions of the Constitution of Kenya, 2010.
- b. Amendments of various laws including section 24(a), section 25, section 40(3), section 60, section 204, section 296(2), section 297 (2) of the Penal Code and section 361 of the Criminal Procedure Code.

The Petitioner draws the attention of the National Assembly to the following:-

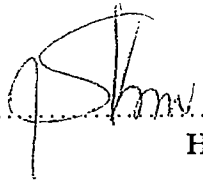
- (i) That the existing criminal law procedure constrains judicial officers in the exercise of discretion at sentencing which violates Article 160 of the Constitution on the independence of the judiciary when making judicial decisions.
- (ii) That the death row convicts have been living in psychological torture due to uncertainty of the sentence. It was the petitioner's position that unlike person charged with murder, persons accused of robbery with violence are not entitled to state funded legal representation during trial yet the sentences are the same.

The Petition was committed to the Departmental Committee on Justice and Legal Affairs pursuant to provisions of Standing Order 227. The Committee considered the Petition pursuant to Article 119 of the Constitution of Kenya, 2010 and other enabling laws.

### **1.3. Acknowledgements**

The Committee wishes to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate.

It is now my pleasant duty and privilege, on behalf of the Departmental Committee on Justice and Legal Affairs, to present this report to the House.

SIGNED  DATE *28th October 2015*  
Hon. Samuel Chepkong'a, M.P.  
(Chairperson)  
Departmental Committee on Justice and Legal Affairs

## **2.0 BACKGROUND**

The petition signed by one Mr. Joseph Mwathi Nyanjui, a death-row inmate at Kamiti Maximum Security Prison, was received by the Clerk of the National Assembly's office on 23<sup>rd</sup> February, 2015.

In a nine point petition the Petitioner prays that the National Assembly, through the Departmental Committee on Justice and Legal Affairs, reviews the existing criminal laws, particularly the Penal Code and the Criminal Procedure Code, to align and conform them to the provisions of the Constitution of Kenya, 2010.

The Petitioner proposed various amendments to the criminal laws, including amendment to section 24(a), section 25, section 40(3), section 60, section 204, section 296(2), section 297 (2) of the Penal Code and section 361 of the Criminal Procedure Code.

## **3.0 CONSIDERATION OF THE PETITION AND FINDINGS**

At its sitting of 8<sup>th</sup> of September, 2015, the Committee considered the petition and observed that the prayers sought by the Petitioner were an ongoing discourse in the House. The debate on the issues raised started during the 2010 constitution making process and Parliament was still engaging on the same.

## **4.0 RECOMMENDATIONS**

Having considered the petition in line with the Constitution and the provisions on Petitions to Parliament (Procedure) Act, and the House Standing Orders of, the Committee recommends as follows:-

1. The Departmental Committee on Justice and Legal Affairs incorporates the Petitioner's prayers with regard to legal representation for persons charged with capital offences in the new Legal Aid Bill, 2015 which was before it for consideration.
2. The Departmental Committee on Justice and Legal Affairs incorporates the petitioner's prayers with regard to the abolition of mandatory death sentence into the proposals to amend the Criminal Procedure Code, Cap. 75 and Penal Code, Cap. 63 which are now before the Departmental Committee on Justice and Legal Affairs for pre-publication scrutiny.

.....END.....

# APPENDIX 1



**MINUTES OF THE SIXTY SIXTH SITTING OF THE DEPARTMENTAL COMMITTEE  
ON JUSTICE AND LEGAL AFFAIRS HELD ON THURSDAY, 22<sup>ND</sup> OCTOBER, 2015  
AT 10.30 A.M. AT THE MEDIA CENTRE, MAIN PARLIAMENT BUILDING**

**PRESENT**

Hon. Samuel Chepkonga, M.P. - **Chairperson**  
Hon. Priscilla Nyokabi, M.P. - **Vice Chairperson**  
Hon. Neto Agostinho, M.P.  
Hon. Ben Momanyi, M.P.  
Hon. Benson Mutura, M.P.  
Hon. Charles Gimose, M.P.  
Hon. Kang'ata Irungu, M.P.  
Hon. Johanna Ngeno, M.P.  
Hon. John M. Waiganjo, M.P.  
Hon. Olago Aluoch, M.P.  
Hon. Kamoti Mwamkale William, M.P.  
Hon. Mohamed Abdi Haji, M.P.  
Hon. Moses Cheboi, M.P.  
Hon. Paul K. Bii, M.P.  
Hon. Tom J. Kajwang', M.P.  
Hon. Ndirangu Waihenya, M.P.

**APOLOGIES:-**

Hon. Njoroge Baiya, M.P.  
Hon. (Bishop) Robert Mutemi, M.P.  
Hon. David Ochieng, M.P.  
Hon. John Njoroge Chege, M.P.  
Hon. James Bett, M.P.  
Hon. Boniface Otsiula, M.P.  
Hon. Dr. Christine Ombaka, M.P.  
Hon. Munuve Mati John, M.P.  
Hon. Peter Kaluma, M.P.  
Hon. William Cheptumo, M.P.  
Hon. Florence Kajuju, M.P.  
Hon. Fatuma Ibrahim, M.P.  
Hon. Sammy Koech, M.P.

**SECRETARIAT**

Ms. Ella Kendi - Clerk Assistant III  
Mr. Ronald Walala - Legal Counsel II  
Mr. Yezzel Jillo - Serjeant-at-arms

**MIN No. 221/2015:-**

**PRELIMINARIES**

The Chairperson called the meeting to order at twenty minutes past ten in the morning with a word of prayer from himself. He informed Members that the only agenda for the meeting was consideration and adoption of reports on Petitions.

**MIN No. 222/2015:-**

**REPORT ON THE PETITION ON THE ELECTION OF THE CHAIRPERSON OF THE AGRICULTURAL SOCIETY OF KENYA (ASK)**

The Committee considered and adopted the report, the same having been proposed by Hon. Charles Gimose and seconded by Hon. Moses Cheboi. No Member dissented to the adoption.

**MIN No. 223/2015:-**

**REPORT ON THE PETITION ON ENACTMENT OF LEGISLATION TO PROVIDE FOR THE REGISTRATION OF PROPERTIES IN KENYA**

The Committee considered and adopted the report, the same having been proposed by Hon. Johanna Ng'eno, MP and seconded by Charles Gimose. No Member dissented to the adoption.

**MIN No. 224/2015:-**

**REPORT ON THE PETITION ON REVIEW OF CRIMINAL LAWS (PENAL CODE AND CRIMINAL PROCEDURE CODE) TO ALIGN THEM WITH THE CONSTITUTION OF KENYA**

The Committee considered and adopted the report, the same having been proposed by Hon. Moses Cheboi, MP and seconded by Hon. Charles Gimose. There was no dissenting voice to the adoption of the report.

**MIN No. 225/2015:-**

**REPORT ON THE PETITION TO AMEND THE CONSTITUTION OF KENYA, 2010**

The Committee considered and adopted the report, the same having been proposed by Hon. Johanna Ng'eno and seconded by Hon. Moses Cheboi. No Member dissented to the adoption.

**MIN No. 226/2015:-**

**REPORT ON THE PETITION FOR MANDATORY VOTER REGISTRATION AND COMPULSORY VOTING**

The Committee considered and adopted the report. The adoption was proposed by Hon. Agostino Neto and seconded by Hon. Muriithi Waiganjo, subject to the inclusion in the recommendations a clause that *"the proposal to issue Identity cards to persons of 16*

years and above is currently being considered by the Committee and Commission for the Implementation of the Constitution". No Member dissented to the adoption of the report.


**MIN No. 227/2015:-**            **REPORT ON THE PETITION FOR INTRODUCTION OF "ANTI-HOMOSEXUALITY BILL"**

The Committee considered adopted the report after it had been proposed by Hon. Agostino Neto and seconded by Hon. Moses Cheboi. No Member dissented to the adoption.

The Committee, at the same time, resolved to include in the recommendations, the finding that "it's against Article 45 of the Constitution".

**MIN No. 228/2015:-**            **ADJOURNMENT**

There being no other business to transact, the sitting adjourned at forty four minutes past eleven o'clock in the morning.

Signed.....  
(Chairperson)

Date.....



# APPENDIX 2



KENYA NATIONAL ASSEMBLY  
ELEVENTH PARLIAMENT

**DEPARTMENTAL COMMITTEE ON JUSTICE & LEGAL AFFAIRS**

MEMBERS' ATTENDANCE


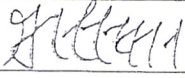
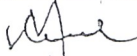
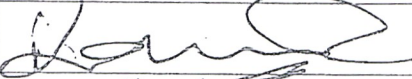

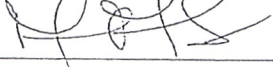
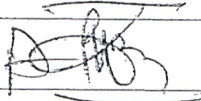
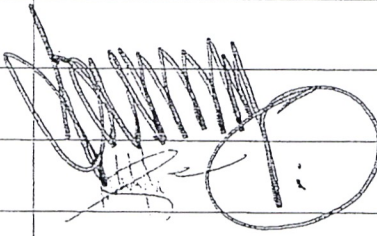
Date: 22<sup>nd</sup> October 2015

Venue: MEDIA CENTER, MAIN PARLIAMENT BUILDING

Agenda: ADOPTION OF REPORTS ON THE FOLLOWING PETITIONS:

1. ELECTION OF THE CHAIRPERSON OF THE AGRICULTURAL SOCIETY OF KENYA
2. ENACT A LEGISLATION REGARDING THE REGISTRATION OF PROPERTIES IN KENYA
3. REVIEW OF CRIMINAL LAWS (PENAL CODE AND CRIMINAL PROCEDURE CODE) TO ALIGN AND CONFORM WITH THE CONSTITUTION OF KENYA, 2010
4. AMEND THE CONSTITUTION OF KENYA, 2010
5. MANDATORY VOTER REGISTRATION AND COMPULSORY VOTING
6. LEGISLATION ON THE SUBJECT OF ANTI-HOMOSEXUALITY

	NAMES	SIGNATURE
1.	Hon. Samuel Chepkonga (Chairperson)	
2.	Hon. Priscila Nyokabi (Vice Chairperson)	
3.	Hon. Agostinho Neto	
4.	Hon. Ben Momanyi Orori	
5.	Hon. Benson Mutura	
6.	Hon. Boniface Otsiula	
7.	Hon. Charles Gimose	
8.	Hon. Christine Ombaka (Dr.)	
9.	Hon. David Ochieng'	
10.	Hon. Fatuma Ibrahim	
11.	Hon. Florence Kajuju	
12.	Hon. Irungu Kang'ata	
13.	Hon. James Bett	

14.	Hon. Johanna Ngeno	
15.	Hon. John Munuve	
16.	Hon. John M. Waiganjo	
17.	Hon. John Njoroge	
18.	Hon. John Olago Aluoch	
19.	Hon. Kamoti W. Mwamkale	
20.	Hon. Mohamed Abdi Haji	
21.	Hon. Moses Cheboi	
22.	Hon. Njoroge Baiya	
23.	Hon. Paul K. Bii	
24.	Hon. Peter Kaluma	
25.	Hon. Robert Mutemi (Bishop)	
26.	Hon. Sammy Koech	
27.	Hon. T.J. Kajwang	
28.	Hon. Waihenya Ndirangu	
29.	Hon. William Cheptumo	

George Gazemba

For: The Clerk of the National Assembly

# APPENDIX 3



PETITION TO THE NATIONAL ASSEMBLY ON REVIEW OF CRIMINAL LAWS (PENAL CODE AND CRIMINAL PROCEDURE CODE) TO ALIGN AND CONFORM WITH THE CONSTITUTION OF KENYA 2010

THE CLERK OF NATIONAL ASSEMBLY,  
LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE,  
PARLIAMENT BUILDING,  
NAIROBI.

*Mr Akeme PLC  
ALSO CSJ.90 &  
supervise folio 2  
& also pending  
24/01*

*D/legal*

*pse process  
CSA 23/2/15*

Dear Sir,

RE: PETITION OF THE NATIONAL ASSEMBLY ON REVIEW OF CRIMINAL LAWS (PENAL CODE AND CRIMINAL PROCEDURE CODE) TO ALIGN AND CONFORM WITH THE CONSTITUTION OF KENYA 2010

UNDER ARTICLE 119 (1) OF THE CONSTITUTION OF KENYA I, THE UNDERSIGNED DEATH ROW INMATE AT KAMITI MAXIMUM SECURITY PRISON AND ON BEHALF OF ALL DEATH ROW INMATES IN THE REPUBLIC OF KENYA

DRAW THE ATTENTION OF THE HOUSE TO THE FOLLOWING:-

1. The death row convicts have been living in psychological torture due to uncertainty of the sentence. Death penalty is defined as the ultimate cruel, inhuman and degrading punishment that is an irrevocable and unacceptable denial of human dignity and integrity.
2. That unlike person charged with murder, persons accused of Robbery with violence are not entitled to state funded legal representation during trial yet the sentences are the same.
3. That constitutional petition no 318 of 2011 at High Court of Kenya at Nairobi **JOHN SWAKA VS THE DPP AND 2 OTHERS** was dismissed. The petition sought to move the state to provide legal representation to robbery with violence accused persons. That the proposed legal aid bill is yet to be presented to parliament and no legal mechanism exists to actualize Article 50(2) (h) of the Constitution of Kenya 2010.
4. That the existing criminal law and procedure constrains judicial officers in the exercise of discretion at sentencing which violates Article 160 of the Constitution on the independence of the judiciary when making judicial decisions.
5. That section 40 (3), 60, 204, 296 (2) and 297 (2) of the Penal Code provide for death mandatory sentence denying Judicial Officers (judges and magistrates) an opportunity to entertain the following before determining a sentence:-
  - Submissions in mitigation by a convicted person.
  - Record of accused e.g. First Offenders and post- conviction.
  - Circumstances of the offence.
  - Nature and seriousness of the offence.

RECEIVED  
DIRECTORATE OF LEGAL SERVICES  
NATIONAL ASSEMBLY  
DATE RECEIVED 24/2/2015  
NAME.....  
TIME RECEIVED.....  
SIGNATURE.....

NATIONAL ASSEMBLY  
RECEIVED  
23 FEB 2015  
CLERK'S OFFICE  
P. O. Box 41842, NAIROBI

- Probation Officer's report

The death sentence is mandatory notwithstanding that a Taskforce on Sentencing is in place. It has no legal mandate to amend the relevant sections of the Penal Code and the Criminal Procedure Code. The mandate resides in Parliament.

6. There is also need to amend section 361 of the Criminal Procedure Code and observe that sentence is a matter of law.

I HEREBY CONFIRM THAT THE ISSUES IN RESPECT OF WHICH THE PETITION IS MADE ARE NOT PENDING BEFORE ANY COURT OF LAW, OR CONSTITUTIONAL OR LEGAL BODY.

HEREFORE your humble petitioner prays that parliament:-

1. In respecting provisions of Article 50 (2)(h) and observing the gravity of the death sentence enact legislation for the provision of an advocate by the government during the trial of all capital offences rather than at later stage during second appeals when mistakes were already occasioned yet the sentences are the same with the offence of murder.
2. To amend section 24 (a) of the Penal Code and provide that in appropriate circumstances the court may sentence a convict to death.
3. To delete the whole of section 25 of the Penal Code which states:-
  - (1) Where any person is sentenced to death, the form of the sentence shall be to the effect only that he is to suffer death in manner authorized by law.
  - (2)\* sentence of death shall not be pronounced on or recorded against any person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in lieu thereof the court shall sentence such person to be detained during the President's pleasure, and if so sentenced he shall be liable to be detained in such place and under such conditions as the President may direct, and whilst so detained shall be deemed to be in legal custody.
  - (3) When a person has been sentenced to be detained during the President's pleasure under subsection (2), the presiding judge shall forward to the President a copy of the notes of evidence taken on the trial, with a report in writing signed by him containing any recommendation or observations on the case he may think fit to make."
4. To substitute the word "shall" with "may" in section 40 (3) of the penal code which states:-
  - (4) Any person who is guilty of the offence of treason shall be sentenced to death."



PETITION TO THE NATIONAL ASSEMBLY ON REVIEW OF CRIMINAL LAWS (PENAL CODE AND CRIMINAL PROCEDURE CODE) TO ALIGN AND CONFORM WITH THE CONSTITUTION OF KENYA 2010

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5. To substitute the word 'shall' with 'may' in section 60 of the penal code which states:-  
"Any person who administers an oath, or engagement in the nature of an oath, purporting to bind the person who takes it to commit any offence, punishable with death, is guilty of a felony and shall be sentenced to death."
6. To substitute the word 'shall' with 'may' in section 204 of the Penal Code which states:-  
"Any person convicted of murder shall be sentenced to death."
7. To substitute the word 'shall' with 'may' in section 296 (2) of Penal Code which states:-  
(2) if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."
8. To substitute the word 'shall' with 'may' in section 297 (2) of Penal Code which states:-  
(2) if the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."
9. To amend section 361 of the Criminal Procedure Code and observe that sentence is a matter of law. No punishment can be inflicted on any offender if the same is not prescribed by law or specific guidelines are in place.

AND YOUR PETITIONER WILL EVER PRAY:-

That the parliamentary committee may visit the petitioner and give him a chance for more details at Kamiti Maximum Security Prison

JOSEPH MWATHI NYANJUI

C/O KAMITI MAXIMUM SECURITY PRISON

P. O. BOX 65501-00607,

NAIROBI.

PRISON NO. KAM/384/013/CON

NATIONAL ID NO: 27531791

JOSEPH MWATHI NYANJUI .....PETITIONER



L.T.P



