

**IN THE FEDERAL HIGH COURT OF NIGERIA**  
**IN THE ENUGU JUDICIAL DIVISION**  
**HOLDEN AT ENUGU**  
**ON THURSDAY THE 30<sup>TH</sup> DAY OF APRIL, 2026**  
**BEFORE HIS LORDSHIP, HON. JUSTICE M.T. SEGUN-BELLO**

*SUIT NO: FHC/EN/CS/ 212/2024*

*BETWEEN*

1. IKEAZOR AKARIWE, SAN ..... APPLICANTS  
 2. BASSEY SAMUEL

A N D

1. THE FEDERAL REPUBLIC OF NIGERIA  
 2. ATTORNEY GENERAL OF THE FEDERATION  
 3. PRESIDENT OF THE SENATE  
 4. THE SPEAKER OF THE NATIONAL ASSEMBLY  
 5. CLERK OF THE NATIONAL ASSEMBLY

} RESPONDENTS

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**FEDERAL HIGH COURT**  
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**FEDERAL HIGH COURT**  
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 NAME *Awardu Ado*  
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RESPONDENTS

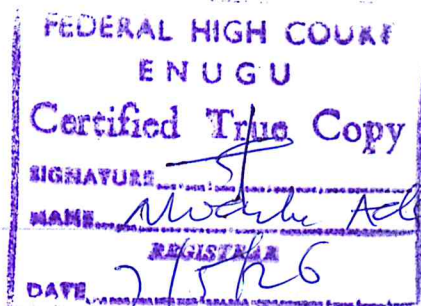
**1. Introduction:**

This action was commenced via an Originating Summons seeking for the interpretation as well as a review of provisions in Nigerian Law, which provide for the mandatory Death Penalty in Nigeria. In the said Originating Summons, dated 10<sup>th</sup> April 2024, the applicants specifically sought for the determination of just one issue, namely:

*Whether the mandatory death penalty provisions in Nigerian laws do not rob the judges of judicial discretion in sentencing.*

**1.1 Reliefs Sought:**

Based on this court's resolution of the above issue, the applicants have also sought for three reliefs, namely:-



- 1) A declaration that the mandatory death penalty provisions in Nigerian laws rob the judges of judicial discretion in sentencing.
- 2) An order directing the Respondents to take immediate steps towards the amendment of the provision of the laws in Nigeria providing the mandatory death penalty towards giving discretion to judges in such cases.
- 3) An order directing the Respondents to take immediate steps to amend all laws in Nigeria with provisions for the mandatory death penalty in capital offences in Nigeria or in the alternative give the judges the discretion to sentence in capital offences.

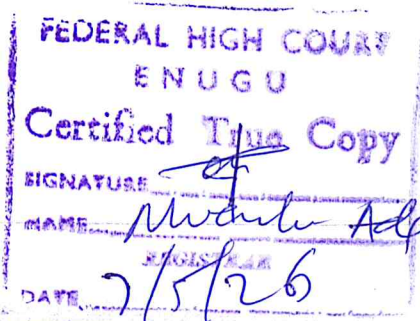
Any further order(s) that this Honourable Court may deem fit to make in the circumstances.

## 2. Précis of the Facts Relied upon by Each Party:

### 2.1 The Applicants' Case:

In a 10-paragraph supporting affidavit the (deposed to by one Ezinne Nwachukwu – the practice manager in the law firm of the first Applicant) the applicants made the following salient averments in support of this application –

1. That the first applicant is a Legal Practitioner and a Senior Advocate of Nigeria.

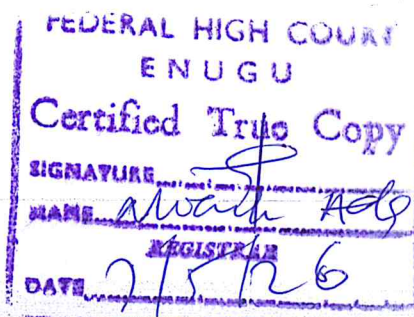


2. That as a Senior Advocate of Nigeria, he took an oath to uphold the rule of law and enhance the administration of justice in Nigeria.
3. That the 2<sup>nd</sup> Applicant is a Nigerian citizen on death row in Nigeria at Okere Correctional Centre, Delta State, Nigeria.
4. That the 2<sup>nd</sup> Applicant was charged with Armed Robbery, an offence he vehemently denied committing but, after his trial, he was sentenced to death and is currently on death row.
5. That the sentence of the 2<sup>nd</sup> Applicant by the learned trial judge has now prompted him to institute this public interest action seeking an interpretation from this honourable court on the position of our laws with regard to capital punishments and the discretion of judges; and
6. That the respondents were served with pre-action notice for this application.

## 2.2 The Case of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents:

In a terse counter affidavit, deposed to by one Barnabas Onoja, (Litigation clerk of the Civil Litigation Department, office of the Honourable Attorney-General of the Federation and Minister of Justice); the 1<sup>st</sup> and 2<sup>nd</sup> respondents made the following salient averments:

- (i) That an offender who is sentenced by a Court of competent Jurisdiction in Nigeria is kept in a correctional center/prison where he/she will serve the punishment for the crime/offence committed.

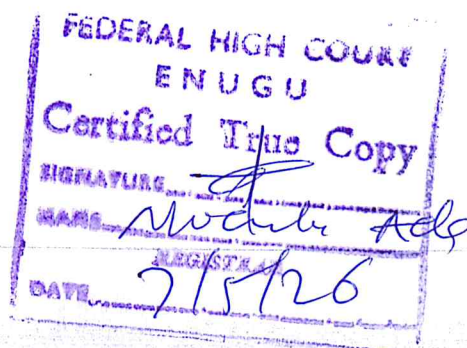


- (ii) That if the offence is a capital crime the person will be sentenced with capital punishment in line with the Laws of the Federal Republic of Nigeria.
- (iii) That the 2nd Applicant who was sentenced to death and currently at the Okere Correctional Centre Delta State Nigeria awaiting the capital punishment is doing so in compliance with the judgment of the Court and also in compliance with the Law of the Federal Republic of Nigeria.
- (iv) That the discretion of the Judges is subject to the Laws of the Federal Republic of Nigeria which is to give capital punishments for capital crimes committed by any person.
- (v) That Capital punishment is the punishment by death for capital crimes as prescribed by the laws of the Federal Republic of Nigeria.
- (vi) That the review of legislation or amendment thereof, cannot be compelled by the courts.

### 2.3 The Case of the 3<sup>rd</sup> Respondent:

In a 14-paragraph counter affidavit, deposed to by one Kingsley Essell Esq (one of the lawyers in the office of Peter Uche Udoku & Co the chambers Representing the, President of the Senate office) the following relevant averments were made, viz:

- (i) That the 3rd Respondent states that the discretion of the Judge is subject to the Laws of the Federal Republic of Nigeria which is to give capital punishments for capital crime committed by any person.



- (ii) That capital punishment is the punishment by death for capital offences as prescribed by the Laws of the Federal Republic of Nigeria.
- (iii) That the 3rd Respondent as a legislator solely cause for the renewal or review of an act of the National Assembly of the Federal Republic of Nigeria.
- (iv) That the amendment is general cause or issues of National interest and goes strictly to the rule of Law, as such that issues like death penalty is of the public interest and should be handled as one.

### 3. Summary of Counsel's Submission:

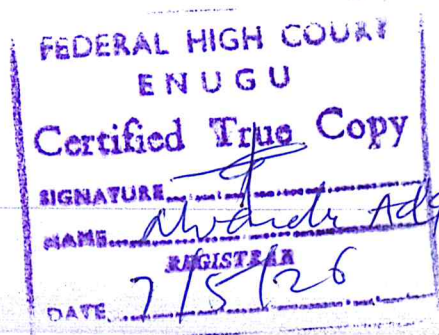
Summarized hereunder, are the various submissions of each counsel on each of the issues as formulated by them.

#### 3.1 Applicant Counsel's Arguments:

Arguing the sole issue for determination in her supporting address J.O. Nnani of counsel, submitted that the specific genre of laws as envisaged by this very application include provisions such as the extant **section 319(1) of the Criminal Code Act** which provides that:

Subject to the provisions of this section any person who commits the offence of murder shall be sentenced to death.

It was learned counsel's submission that it is not in doubt that the Nigerian legal system recognizes the death penalty as a form of punishment for capital offences without any alternative to other forms of punishment. These offences, according to learned counsel; include but



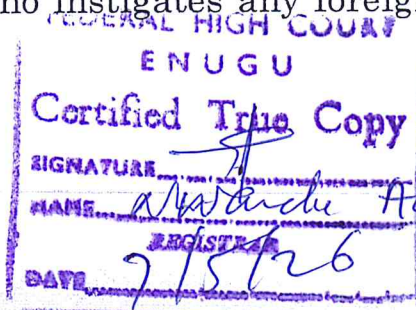
are not limited to offences such as Treason, Murder, Armed robbery, Kidnapping, and Terrorism. He referred to instruments such as –

1. **The Nigerian Criminal Code Act, 1990**; which he said outlines offences carrying the death penalty and the procedures for imposing such sentences.
2. **The Terrorism (Prevention) Act, 2011**; which he said contains provisions for dealing with acts of terrorism, including the death penalty for certain offences.
3. **The Criminal Code Act (Section 319)**: which he said provides that subject to the provisions of this section, any person who commits the offence of murder shall be sentenced to death.

Counsel then went on further to submit that similar provisions are also contained in **section 221 of the Penal Code; the Robbery and Firearms (Special Provisions) Act (Section 1(2))** which specifies that any person who, in the course of committing a robbery, uses or threatens to use any deadly weapon, shall be guilty of an offence punishable by death; and **Section 2(3)**, which stipulates that any person who aids, abets, counsels, or procures the commission of the offence of robbery with firearms shall be liable to the same punishment as if he had committed the offence himself.

Learned applicant counsel additionally made reference to the **Armed Forces Act**, which he said also stipulates capital punishment for murder offenders in **section 106 of the Armed Forces Act**.

Likewise, he cited **section 4(2) of the Terrorism (Prevention) Act (2011)** which has a provision similar to **section 38 of the Criminal Code** which provides that any person who instigates any foreigner to invade



Nigeria with an armed force is guilty of treason, and is liable to the punishment of death.

Equally citing the extant **Administration Criminal Justice Act, 2015**(and corresponding laws of the various states), learned counsel submitted that these legislation all outline offences carrying the death penalty and the procedures for imposing such sentences.

He then cited the Jowitts Dictionary of English Law; where it defined the word “discretion” to mean:

...a man’s own judgment as to what is best in a given case, as opposed to a rule governing all cases of a certain kind.

With specific reference the term “judicial discretion” applicant counsel made reference to the Oxford Dictionary of Law, which defines the said phrase to mean:

The power of the court to take some steps, grant a remedy, or admit evidence or not as it thinks fit.

Citing the decision in the case of *UBN Plc v. Astra Builders* (2010) 41 NSCOR 1016 at 1038-1039, counsel went further argued that the Supreme Court per Adekeye JSC has held that an exercise of discretion is an act or deed based on one's personal judgment in accordance with one's conscience, free and unfettered by any external influence or suggestions. Thus, he submitted that the provision of our laws on the mandatory nature of the death sentence has kept the hands of our judges fettered for too long, as they have no power to choose among two or more alternatives. This is the reason the judges’ response to counsel, after allocutus on such cases, is always “my hands are tied”.



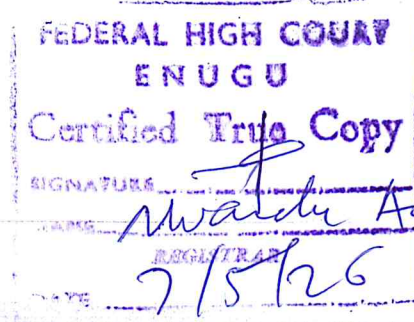
As Mrs. Nnani further submitted, the Respondents do not possess the powers to “tie the hands” of the judiciary or the judges by making laws with mandatory effects because, “Judicial Discretion” is the power of the judges to make legal decisions according to their discretion, under the doctrine of separation of powers. In other words, laws containing mandatory capital sentencing, rob judges of their judicial discretion, notwithstanding that they are the persons who have had the privilege of observing the trial and the circumstances of the case; and who will ultimately pronounce the sentence.

According to counsel, the pertinent question here is – *“How can a judge give a decision which is fair when the decision or the sentence of certain offences has been predetermined by the law made by another arm of government who will not pronounce the sentence and who did not observe the trial and the circumstances of the case?”*

He thus, cited the decision of the Supreme Court in *UBN Plc v. Astra Builders* (supra) where the apex Court held that:

An exercise of discretion is an act or deed based on one's personal judgment in accordance with one's conscience, free and unfettered by any external influence or suggestions. A judicial discretion means the power exercised in an official capacity in a manner which appears to be just and proper under a given situation.

As Mrs. Nnani, further argued; in view of the doctrine of separation of powers, the judiciary should be allowed to exercise their judicial discretion in capital offences, having had the opportunity to hear the cases and the *allocutus* after conviction and before sentence.



Some judges he argued; may, in a bid to avoid handing down the death sentence, even decide to use the “slightest doubt” in the case of the prosecution as a subterfuge to discharge and acquit the accused person. This he submitted; will still not serve the purpose of justice.

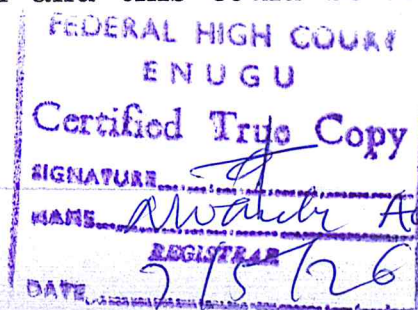
According to him, if judges were to be allowed to exercise discretion in capital offences, they can impose an alternative punishment in lieu of outright discharge and acquittal of an accused person; all in a bid to avoid making the pronouncement of a death sentence on the accused.

In his additional submission, learned counsel went on further to urge this court to hold that giving judges the *carte blanche* (or discretion, if you will) to choose between two or more options during the capital sentencing, does not mean condoning heinous crimes or letting criminals go unpunished. Rather it would mean adopting a more humane and effective approach to justice, where the judge who observed the trial is given the choice to decide what is judicially and judiciously fair, considering the circumstances of the case.

Finally, it was applicant counsel’s proposition that giving judges the discretion in capital offences in Nigeria is a step towards a more just and equitable society where separation of powers of the arms of government is adhered to.

### 3.2 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ Counsel’s Arguments:

Arguing the sole issue for determination, Mrs. Chime of counsel basically submitted that death sentence she argued; is fully recognized and approved by the Constitution and this could be found in the



Provisions such as **section 33(1) of 1999 constitution**. It is therefore, not the function of Courts to abolish the death sentence; nor is it their responsibility to pronounce that judges should be given discretion in sentencing, as that responsibility squarely rests on the legislature. He urged this court to resolve the issue for determination in the negative for the following reasons, based on the following reasons.

First of all, as he submitted; historically speaking, capital punishment is as old as mankind. Its origin is traceable to the Holy Bible where the rule was an eye for an eye, a tooth for a tooth and a life for a life. In Genesis 9 : 5 - 6 of the Holy Bible it was specifically stated as follows:

And I will require the blood of anyone who takes another person's life. If a wild animal kills a person, it must die. And anyone who murders a fellow human must die. If anyone takes a human life, that person's life will also be taken by human hands. For God made human beings in his own image.

Then in Islam, it is also provided in the Holy Quran, in The Table (Al- Maida) 5 : 32- 33 and Light(Al-Nur) 24 : 2-5 of the Holy Quran that:

Penalty for the offences of treason, apostasy and blasphemy (Hadd), fornication (Zina), brigandage or high way robbery (Khirabah) and homicide (jinayah) is death."

According to counsel, these ancient laws until set aside, remains the law. Thus, it can be seen that the execution of criminals was used by nearly all societies to punish certain grievous crimes.

Learned counsel further submitted that in many retentionist countries, drug trafficking is also a capital offence. He cited China as an



example of a country where human trafficking and serious cases of corruption are also punished by the death penalty.

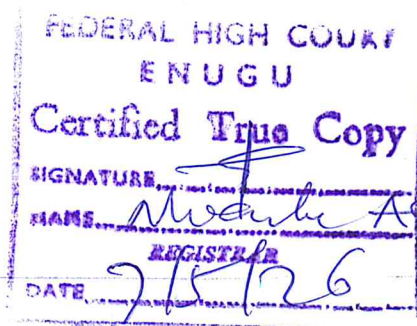
As counsel further submitted, in most militaries around the world, Courts-Martials are known to have imposed death sentences for offences such as cowardice, desertion, insubordination, and mutiny.

According to learned counsel, these laws remain so until either amended or abrogated. Their amendment or abrogation she said; cannot be compelled by courts for the singular reason that the statutes creating those punishments fetter the discretion of judges.

She then went further to submit that under the Nigerian Constitution, the death penalty/capital punishments neither violate the right to life nor the right to human dignity. Thus, the Courts lack discretion to alter sentences when the penalty is mandatory and this position does not also fetter the discretion of judges. For this submission, counsel placed reliance on the decision in *Onuoha Kalu vs. The State* (2018) 18 African Human Rights Law Journal 551-578, where it was held that -

Death Penalty is firmly entrenched in Nigerian Law and Courts routinely impose death penalty because they are without a discretion to alter sentences when the penalty is mandatory.

Regarding the definition of the word “discretion” learned counsel cited the **Chambers Dictionary**; which according to her defines discretion to mean - ‘to be completely under someone’s power or control’.



As for the term “Judicial Discretion” he cited the Black's Law Dictionary,<sup>1</sup> which defined the term to mean—

The exercise of judgment by a Judge or Court based on what is fair under the circumstances and guided by the rules and principles of law, a courts power to act or not to act when a litigant is not entitled to demand the act as a matter of right".

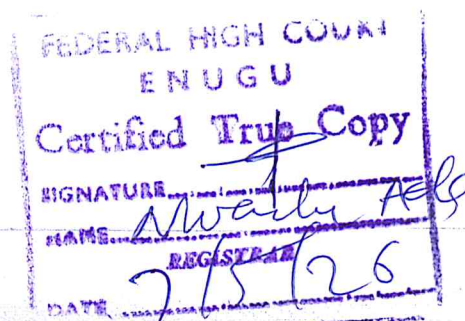
He also referred to The New International Comprehensive Dictionary of the English Language - Encyclopedia Edition at page 365, where the word “discretion” was defined as – “the act or the liberty of deciding according to justice and propriety, and one's idea of what is right and proper under the circumstances without willfulness or favour.”

Additionally, learned counsel submitted that currently, judicial discretion is not allowed in death sentencing as judges are required to follow strictly the provisions of the Law, which does not give judges discretion in capital sentencing. So, in order to change the current state of affairs, the state policy has to be changed, the Constitution has to be amended to ban death sentences and then the different laws providing for death sentences amended to reflect state policy and Constitutional provision.

Counsel then went on further to define the word “sentencing” which he said means the judicial determination of a legal sanction to be imposed on a person found guilty of an offence. As he posited, sentencing generally aims at the protection of the society through

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<sup>1</sup> 8th Edition, edited by Bryan Garner at page 409,

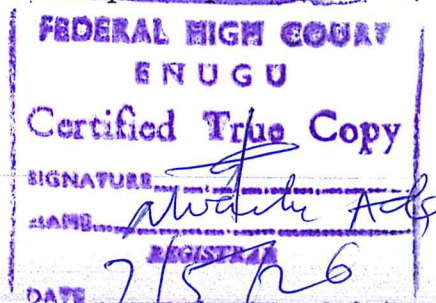


prevention of crime or reform of the offender which may be achieved by the means of deterrence, elimination or reformation/rehabilitation of the offender. Thus, the essence of sentencing and punishment he submitted is to meet the legitimate expectation of society for retribution, where the society strikes back at the offenders to deter potential offenders and make the commission of crime unattractive, protect the public and society by ensuring that dare devil criminals and recalcitrant offenders are taken out of circulation to provide interregnum for dangerous criminals to reflect pending their rehabilitation to normalcy.

Learned counsel further made reference to the fact that Nigeria is a State party to the **United Nations Convention against Transnational Organized Crimes**, (i.e. the Palermo Convention), which came into force on the 29th day of September, 2003; and submitted that the essence of punishment of hardened criminals is to restore confidence and enhance the credibility of government and governance, failure to send signal by imposing such severe punishment may engender disunity and promote private retribution by the aggrieved.

Further citing the decisions in *Ali v. FRN* (2016) LPELR-40472(CA) per Tijjani Abubakar, J.C.A (at Pp. 26-29, paras. F-A ) and *Michael Alor vs. The State* (1997) 4 NWLR (Pt. 501) 511, he additionally submitted that mandatory sentences, being safeguards against leniency, are assumed to maximize the deterrent effect of penalties, and are seldom advocated for corrective reasons.

He argued that in the instant case, the offence for which the Applicant was convicted attracts capital punishment, which the trial



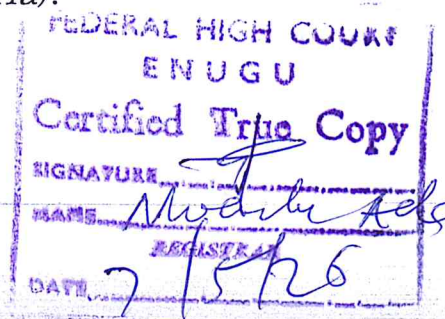
court rightly imposed; after analytical reasoning. For this submission, he placed reliance on the Supreme Court's decision in *Ndidi vs. The State* (2007) ALL FWLR (Pt. 381) 1617 at 1650 – 1651, where the apex Court held that:

A judgment which sends a man to the gallows and await the hangman to execute him at any minute must be punctuated by logical thinking and based on cogent and admissible evidence in which the facts leading to his conviction are clearly found and legal inference carefully drawn.

He made reference to the decision in *Amoshima v. State* (2008) LPELR-4369 (CA), where his lordship, Lokulo-Sodipe, J.C.A ( Pp. 33-36, paras. C-E) expounded the position of the law in these memorable words:

“Death sentence” or “sentence of death” therefore in my view is a separate and indeed a distinct type or form of punishment vis-a-vis sentence of imprisonment... “Sentence of death” as it appears in Section 1(2) of Decree No.5 of 1984/cap. 398 is a punishment on its own and it does not admit of the dichotomy of “minimum” and “maximum” which allows for exercise of discretion...The point is, if the Court is duty bound to impose the mandatory sentence of life imprisonment in respect of attempted robbery, where then is the discretion to impose anything less than the mandatory sentence of death upon conviction for the actual offence of armed robbery? Suffice it to say that I do not see where a court can be said to derive such discretion. From all that has been said, I hold that the trial Court having found the Appellant guilty of the offence of armed robbery had no discretion in the sentence to be passed on him; the trial Court was duty bound to pass the sentence of death on the Appellant and this the said Court did. (Emphasis supplied).

At this point, learned counsel digressed to the other issue, which he had raised (i.e. *whether death penalty is a constitutionally valid and recognized form of punishment in Nigeria*).

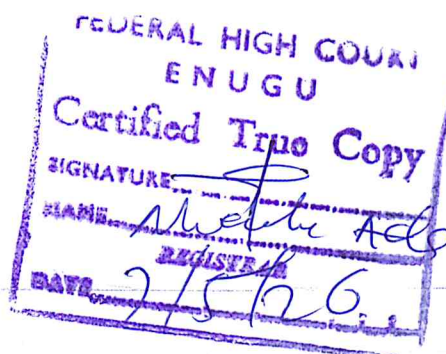


Arguing this issue, counsel cited the Supreme Court's decision in *Nafiu Rabi* vs *The State* (1980) NSCC 291; (1981) 2 NCLR 293 to argue that the Constitution does not approbate and reprobate. The role of the courts, he argued; is as stated in **section 6 (1) of the 1999 Constitution** and this includes imposition of the death penalty where the law so stipulates; because of judges' role is basically, to interpret the Constitution in such a manner that its objects and purposes should not be defeated. Counsel further cited Iguh J.S.C. in *Onuoha Kalu vs. The State* (supra) at page 597; where the learned jurist posited that although the arguments against capital punishment may be proper basis for legislative abolition of death penalty, the authority for any action abolishing the death penalty is clearly not a matter for the law Courts. Such repeal or revocation is within the exclusive jurisdiction of the legislature except, such laws are attacked by due process of law on grounds such as unconstitutionality, illegality or the like. Thus, counsel asserted that it is not within the purview of this Honourable Court to grant the reliefs sought by the Applicants.

Finally, it was counsel's proposition that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents belong to the school of thought that believe that Nigeria is not yet ripe for the total abolition of death sentence.

### 3.3 3<sup>rd</sup> Respondent's Counsel's Arguments:

In his written address Mr. Peter Uche Udoku of counsel adopted the sole issue as nominated by the applicants; but however, went on to distil an additional issue, namely:



*Whether death penalty is a constitutionality valid and recognized form of punishment Nigeria.*

Arguing this issue, Mr. Udoku made virtually the -same submissions as were made by learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, *mutatis mutandis*; hence, I will not repeat them here.

Similarly, he also concluded by submitting that Nigeria is not yet ripe for the abolition of the death penalty.

As for the 4<sup>th</sup> and 5<sup>th</sup> respondents, they did not file any counter affidavit in this suit.

#### **4. Issue for Determination and Resolution of the issue:**

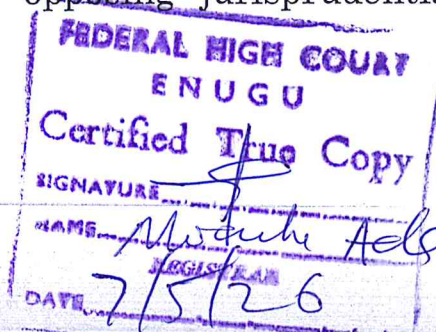
As earlier noted, there is only one issue proposed for determination by this court by the applicants; namely -

*Whether the mandatory death penalty provisions in Nigerian laws do not rob the judges of judicial discretion in sentencing*

First of all, let me start by saying that the relief sought by the applicants in this suit is not for the abolition of the death penalty; hence it would amount to an exercise in futility to expend precious judicial ink considering submissions of respondents' counsel on that point.

Secondly, as the learned applicants' counsel has submitted, the present suit is a public interest action, wherein the applicants are seeking for this court's pronouncement on the mandatory nature of the death penalty and the judicial discretion of judges to commute same in deserving cases.

Thirdly, it can easily inferred from the submissions of counsel on both sides, in the instant two opposing jurisprudential schools of



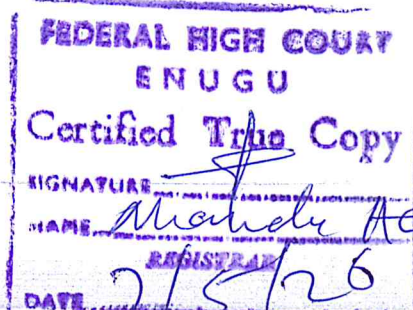
thought have been put forward by both sides, for this court's consideration in its appraisal of the issue for determination. On the part of the applicants they are basically proposing that this court employs "judicial activism" plus sociological jurisprudence, to strike down any statute in Nigeria, which imposes mandatory death penalty as punishment for a crime and thereby, robs the trial court of the power to exercise its judicial discretion to either mitigate or commute a death sentence. Then on the part of the respondents, they are essentially proposing that this court applies jurisprudential theory of Legal Positivism. That is, the theory which postulates that judges should interpret the law primarily by reference to rules that have been formally enacted or recognized within a legal system.

So, the applicability of either of these two divergent jurisprudential theories is what I shall therefore, be evaluating in this judgment, going forward.

4.1 *On whether the mandatory death penalty provisions in Nigerian laws do not rob the judges of judicial discretion in sentencing:*

Unarguably, sociological jurisprudence is a theory that basically postulates that judges should interpret legal rules in the light of social needs, public policy, and practical consequences. This is because a leading proponent of this school of thought – Roscoe Pound, believed that law should function as an instrument of "social engineering."

Sociological jurisprudence therefore, often portrays judges not just as "interpreters" of legal texts, but also, as "participants" in shaping social policy. The theory is thus, famous for three propositions, namely:



- (i) That courts must consider the social effects of their decisions;
- (ii) That legal rules should adapt to changing societal conditions; and
- (iii) That judicial reasoning should balance competing social interests.

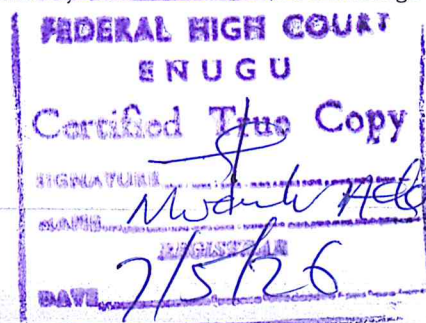
However, on the other hand, according to Hart (a prominent proponent of the Legal Positivism theory), whose seminal work – *The Concept of Law*<sup>2</sup> introduced the idea of a “rule of recognition;” judges only possess discretion in “hard cases,” where existing rules do not clearly resolve a dispute. In such situations, judges may effectively create new law. As another earlier positivist– John Austin opined, judges should interpret law simply by identifying the sovereign’s commands expressed through legislation and precedent.<sup>3</sup>

The foregoing divergent schools of thought as put forward by counsel for the parties expose four salient matters, which I shall discuss (albeit marginally) in the course of this judgment. These matters include –

- (i) The constitutional basis for the jurisprudence of the death penalty in Nigeria;
- (ii) The mandatory nature of death sentences;
- (iii) The doctrine of stare decisis *vis-à-vis* judicial discretion to commute a death sentence; and
- (iv) Separation of Powers, Executive commutation and prerogative of Mercy:

<sup>2</sup>Hart, H.L.A (1961) *The Concept of Law*. 2<sup>nd</sup> Edn, Oxford University Press, London.

<sup>3</sup>Austin, John, 1832, *The Province of Jurisprudence Determined*, W. Rumble (ed.) Cambridge: Cambridge University Press, 1995.



(i) *The Constitutional Basis for the Jurisprudence on Death Penalty in Nigeria:*

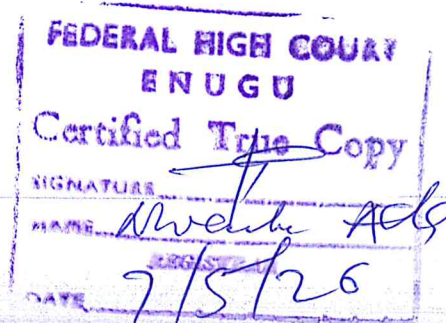
**Section 33(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended)** recognizes the right to life; but however, provides an exception where a person is deprived of life in execution of a sentence of a court of law for an offence of which he has been found guilty.

It has long been settled by the Supreme Court of Nigeria that the death penalty is constitutionally permissible in Nigeria. The constitutionality of capital punishment was affirmed in *Kalu v State* (1998) 13 NWLR (Pt.583) 531, where the Supreme Court held that the death penalty does not violate the constitutional rights to life and human dignity. Nigerian courts have consistently upheld this position, reinforcing the legality of capital punishment within the constitutional framework.<sup>4</sup>

(ii) *Mandatory Nature of Death Sentences:*

One distinctive feature of Nigerian death penalty jurisprudence is the mandatory nature of sentencing for certain crimes. What this simply means is that so long as the statute creating the offence prescribes death as punishment and uses the word “shall”, then courts are required to impose the sentence once guilt is established. In such situations Nigerian courts lack discretion to impose a lesser punishment. This position has also been reaffirmed in numerous

<sup>4</sup>See for instance, *Amoshima v State* (2011) 14 NWLR (Pt.1268) 530; and *Tanko v State* (2009) 4 NWLR (Pt.1131) 430.



decisions such as - *Amoshima v State* (2011) 14 NWLR (Pt.1268) 530; and *Tanko v State* (2009) 4 NWLR (Pt.1131) 430.

The implication of this reaffirmation is that, as of today; Nigerian trial courts in this country still remain statutorily constrained from considering mitigating factors during sentencing in capital punishment.

(iii) *The Doctrine of Stare Decisis:*

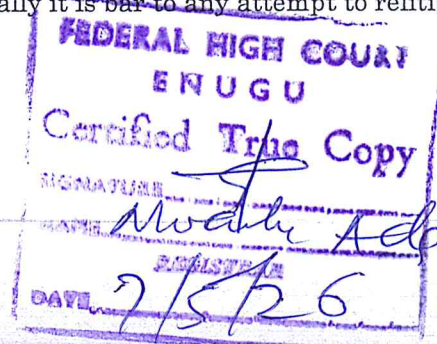
*Stare decisis*, is a Latin word for “let the decision stand.” In common law, it is the doctrine under which courts adhere to precedent on questions of law in order to ensure certainty, consistency and stability in the administration of justice. The doctrine thus, enjoins adherence by lower courts to doctrinal rules established by superior courts.<sup>5</sup>It is therefore, a policy of the courts upon which rests the authority of judicial decisions as precedents in subsequent litigations, embodied in the maxim, *stare decisis et non quietamovere*.

What it simply means is that when a point of law has been once solemnly and necessarily settled by the decision of a competent court, it will no longer be considered open to examination or to a new ruling, by the same tribunal or those which are bound to follow its adjudication.

In Nigeria, the doctrine of *stare decisis* makes it obligatory on all lower courts, however strongly they may be opposed to a judgment of a higher court which comes before them for consideration; to accept the binding effect of that judgment upon their courts. A lower court is free to express its own views on the issue of law concerned but must as a

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<sup>5</sup>It is based on the principle that once a question of law has been examined and decided, it should be deemed settled and closed to further argument. Basically it is bar to any attempt to relitigate the same issues.



necessity give its decision in accordance with the binding decision of the court superior in authority and jurisdiction to it. The lower court is not entitled to jettison the decision of the court with superior jurisdiction on the slightest pretext or substitute that decision with its own.

The doctrine has horizontal and vertical aspects. A court adhering to the principle of horizontal *stare decisis* will follow its own prior decisions absent exceptional circumstances (e.g., the Supreme Court follows a precedent unless it has become too difficult for lower courts to apply). Horizontal *stare decisis* thus, refers to the rule that a court must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself.<sup>6</sup> By contrast, vertical *stare decisis* binds lower courts to follow strictly the decisions of higher courts within the same jurisdiction (e.g., the Court of Appeal must follow the decisions of the Supreme Court, the court of last resort).

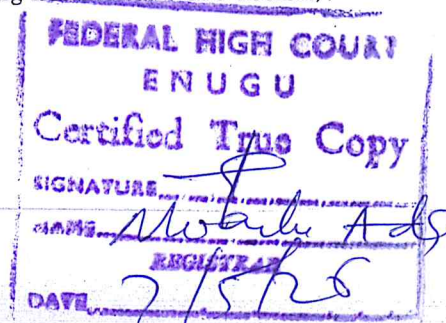
This principle of bindingness of decisions of higher courts on lower courts was also eloquently articulated by Tobi, J.C.A. (as he then was) in *Onyemizue v. Ojiako*<sup>7</sup> where the erudite jurist opined that courts in Nigeria (in operating the common law):

...religiously follow the doctrine of precedent in the enforcement of the judicial process. Thus, as a matter of law and tradition, they adore the doctrine of stare decisis.

Further stressing on the importance of adherence to the principle of *stare decisis*, the Supreme Court in the case of *Okonji v. Mudiaga Odje & Ors* (1985) 10 SC 267, held that:

<sup>6</sup> Black's Law Dictionary 10th edn 2014, 1537 (defining horizontal *stare decisis*).

<sup>7</sup>(2000) 6 N.W.L.R. (pt. 659) 25 at p. 46



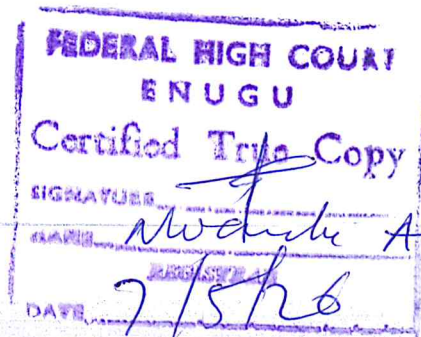
In the hierarchy of courts in this country, as in all other free common law countries, one thing is clear, however, learned a lower court considers itself to be and however, contemptuous of the higher court, that lower court is still bound by the decision of the higher court...I hope it will never happen again whereby the Court of Appeal in this country or any lower court for that matter would deliberately go against the decision of this court and in this case, even to the extent of not considering the decision when those of this court were brought to the notice of that court. This is the discipline of law. This is what makes the law certain and prevents it from being an ass. (Underlining mine).

(iv) *Judicial Discretion to Commute a Death Sentence:*

A central issue in modern death-penalty jurisprudence is that of “judicial discretion” (i.e. the ability of courts to impose a lesser punishment such as life imprisonment instead of death based on mitigating circumstances). As earlier noted, being a “retentionist state;” judicial discretion has been mostly fettered by the fact that the Nigerian law and jurisprudence recognize the mandatory nature of death sentence. Howbeit there are still certain provisions that have been put in place in our laws under the principle of “Separation of Powers;” for the mitigation of the death sentence in deserving cases. This has been done via procedures now commonly referred to as “Executive Commutation and Prerogative of Mercy.”

(v) *Separation of Powers, Executive Commutation and Prerogative of Mercy:*

Although courts often lack the discretion to commute death sentences, however, under the principle of “Separation of Powers,” the



Constitution has imbued the executive branch of the government with discretion to commute death sentences.

For instance, by the provisions of **section 175** of the extant 1999 Constitution (as amended), there is the “Presidential prerogative of mercy.” Similarly, **section 212** of the same **Constitution** also makes provision for the “Governor’s prerogative of mercy.”

These executive powers are exercised through advisory councils on prerogative of mercy. So, under these constitutional provisions, the President or State Governors(as the case may be) may do either of the following:-

- i. Grant a pardon to the convict;
- ii. Substitute a lesser punishment; or
- iii. Commute a death sentence to life imprisonment.

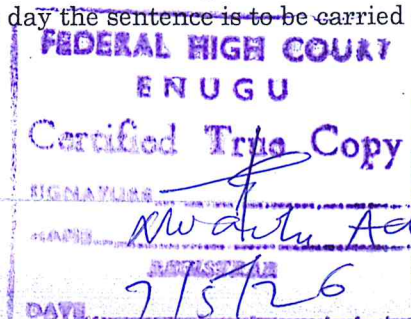
Furthermore, there is also the provision in **section 12(2)(c) of the Nigerian Correction Service Act**, which equally confers on a Chief Judge of a State, the discretion to commute a death sentence to life imprisonment. That is, in cases where a convict has spent 10 years on death row without execution; and has exhausted all legal procedures for appeal.<sup>8</sup>

– *Judicial Discretion in Capital Sentencing in other Jurisdictions:*

The death penalty remains one of the most controversial sanctions in criminal jurisprudence globally. As earlier noted, while some jurisdictions retain it as the ultimate punishment for grave offences,

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<sup>8</sup> Note however, that this power of the Chief Judge to commute death sentence to life imprisonment is only exercisable, if the length of detention of the inmate is brought to the notice of Chief Judge’s by Superintendent of the Correctional Center on the day the sentence is to be carried out.



many legal systems have evolved towards limiting its application or abolishing it entirely. Notwithstanding the fact that Nigeria has retained the death penalty for certain offences; in contrast, many jurisdictions in Africa, America, Asia and Europe have moved towards systems where courts can reduce, commute, or avoid the death sentence depending on the facts of each case.

### 1) **South Africa:**

South Africa for instance represents a contrasting approach to capital punishment. In *S v Makwanyane*<sup>9</sup> the South African Constitutional Court held that the death penalty violates constitutional rights to dignity and life, thereby abolishing capital punishment. The court reasoned that capital punishment is inconsistent with human rights and that the irreversibility of the punishment poses a great risk of miscarriage of justice.

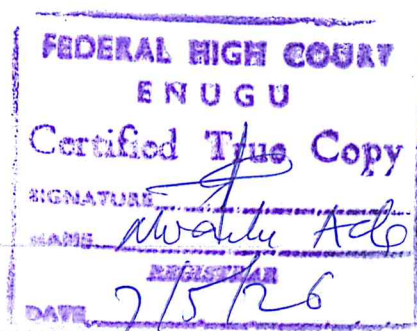
Subsequently, legislation such as the **Criminal Law Amendment Act 1997** were enacted to replace death sentences with alternative punishments.

### 2) **Lesotho:**

Lesotho for instance, has continued to retain the capital punishment; but yet it allows judicial discretion through mitigating factors. In Lesotho, courts rarely impose death sentences. In fact, it can only be imposed where there are no extenuating circumstances. These circumstances vary from age, peer pressure, *dolusevenualis* (the

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<sup>9</sup> CCT3/94 [1995] ZACC 3



reckless causing of death, foreseeing that death might occur but carrying on regardless whether it occurs or not), to intoxication, provocation etc.<sup>10</sup>This also demonstrates a shift away from mandatory sentencing toward a discretionary sentencing regime.

### 3) United States:

In the United States, in 1972 the US Supreme Court ruled in the case of *Furman v Georgia*<sup>11</sup> that mandatory death penalty constituted cruel and unusual punishment. However, four years later in 1976, in *Gregg v Georgia*<sup>12</sup> the same Supreme Court ruled that the death penalty statutes in Florida, Georgia, and Texas were constitutional; meaning that the penalty is not a “cruel and unusual punishment” in violation of the Eighth and Fourteenth Amendments. However, the Court approved the use of sentencing guidelines for juries, while sentencing.

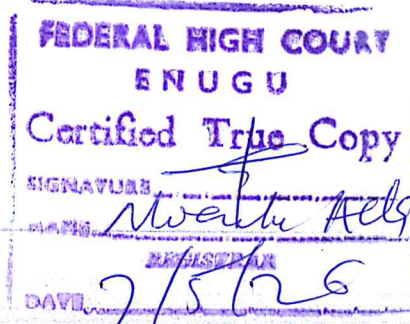
So, currently, in the US capital punishment is only a legal penalty in 27 states. And in those states, courts must consider aggravating and mitigating factors, before deciding on the death penalty; thus, allowing for individualized sentencing.

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<sup>10</sup>See for instance, World Coalition against Death Penalty, Lesotho’s Compliance with the International Covenant on Civil and Political Rights: The Death Penalty (Submitted by The Advocates for Human Rights a non-governmental organization in special consultative status with ECOSOC since 1996 and The World Coalition Against the Death Penalty for the 138th Session of the UN Human Rights Committee 26 June–28 July 2023 Submitted on 29 May 2023

<sup>11</sup>408 US 238 (1972)

<sup>12</sup>428 US 153 (1976)



#### 4) India:

India has also retained capital punishment; however, in India the courts apply what is called the “rarest of rare” doctrine. This principle emerged in *Bachan Singh v State of Punjab*<sup>13</sup> where the Indian Supreme Court held that the death penalty should only be imposed when life imprisonment is unquestionably inadequate. Thus, before sentencing, judges must weigh aggravating and mitigating factors; which allows Indian courts the latitude to commute death sentences to life imprisonment.

#### 5) China:

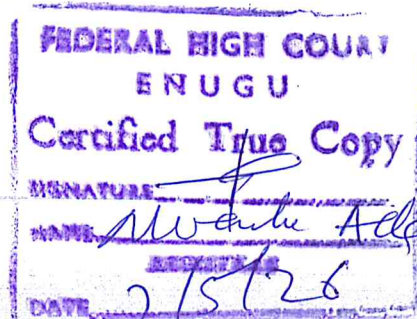
A specially fascinating feature of China’s domestic criminal law is the suspended death sentence - *sihuanzhidu*.” Under this system a two-year reprieve is pronounced simultaneously with the death sentence; and if within those two years, the offender demonstrates good conduct, the sentence is automatically reduced to life imprisonment. This mechanism thus, allows courts to impose a severe penalty while retaining the possibility of commutation.<sup>14</sup>

#### 6) Europe:

Most European countries have abolished the death penalty entirely. Regional instruments such as Protocol No. 6 to the European Convention on Human Rights, and Protocol No. 13; prohibit capital

<sup>13</sup>(1980) 2 SCC 684

<sup>14</sup>See for instance, Seet, Matthew, “China’s Suspended Death Sentence with a Two-Year Reprieve: Humanitarian Reprieve or Cruel, Inhuman and Degrading Punishment?” NUS Working Paper 2017/006 April 2017.



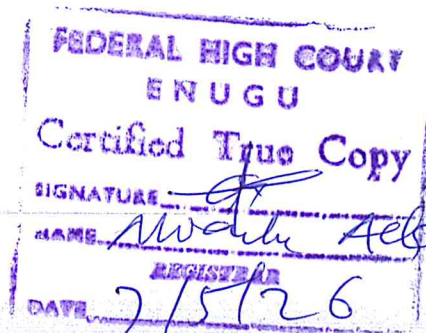
punishment in peacetime and all circumstances. As a result, European courts do not impose death sentences, and life imprisonment serves as the maximum penalty.

## 5. Conclusion:

As can be gleaned from all the foregoing analysis, inasmuch as there is now a significant global shift towards the mitigation of the death penalty; the position of the law in Nigeria as of today still remains that, not only is judicial discretion still fettered by statute, it is also largely impeded by the doctrine of *stare decisis*.

Just two years ago, the Supreme Court in *Ayuba v. State* (2024) LPELR-62527 (SC) had cause to make some pronouncements on a similar issue, (i.e. whether a court has discretion or power to alter a mandatory sentence imposed by law). As the apex Court stated once a law prescribes a mandatory sentence in clear terms, courts are bereft of jurisdiction to impose anything less than the mandatory sentence, as no discretion exists to be exercised. (See also *Mohammed v. A.G Federation* (2020) LPELR-52526 (SC).

To crown it all, the same apex Court (per Adekeye JSC) had in *UBN Plc v. Astra Builders* (2010) 41 NSCOR 1016 at 1038-1039, enunciated the canon that judicial discretion is the “antithesis of *stare decisis*.” The implication of all these foregoing pronouncements by the Supreme Court is that, so long as the doctrine of *stare decisis* remains part of our jurisprudence; and so long as the apex Court has yet to overrule itself in its earlier decisions in cases such as *Tanko v State* (supra) and *Amoshima v State* (supra); on this recurring subject of



using judicial discretion to mitigate the death penalty; any form of judicial activism attempted by a lower court (albeit by way of employing sociological jurisprudence) to commute a death sentence to a lower punishment; will ultimately amount to an exercise in futility.

In summary therefore, this court totally agrees with the submissions of learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents to the effect that review or amendments of instruments which prescribe the mandatory imposition of the death penalty, cannot be compelled by the courts. The legislature is not accountable to the courts in respect of their legislative functions. It therefore, behoves the Executive and Legislative arms of Government to do the needful to unfetter the hands of the Courts, in order to allow the courts the carte Blanche (complete, unconditional authority or freedom to act) to exercise their judicial discretion to commute death sentences. Until that is done, the hands of the courts in Nigeria will remain tied. And that invariably means that as far as this suit is concerned; Reliefs 2 and 3 are bound to fail.

(i) Consequently, in the final analysis, the sole issue for determination is hereby resolved in the negative.

And Relief 1 remain as stated.



**HON. JUSTICE MABEL T. SEGUN-BELLO**  
(Judge)

30<sup>TH</sup> APRIL, 2026.

