



**Ashiudu v Republic (Constitutional Petition E001 of 2023)
[2024] KEHC 10563 (KLR) (26 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10563 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E001 OF 2023
SC CHIRCHIR, J
AUGUST 26, 2024**

**IN THE MATTER OF THE ALLEDGED CONTRAVENTION OF RIGHTS
OR FUNAMENTAL FREEDOMS UNER ARTICLE 22(1) 23, (1) 25 (C) 27,28 ,
50 (2) (P) (Q) , 159 (2) (160(1) AND 165 OF THE CONSTITUION OF KENYA**

**IN THE MATTER OF CLAUSE 7(1) OF THE
TRNSTIONAL AND CONSEQUENTIAL PROVISIONS**

**IN THE MATTER OF SECTION 216 329, AN 333(2) OF THE
CRIMINAL PROCEDURE CODE CAP 75 LAWS OF KENYA**

BETWEEN

JOSPHAT ASHIUDU PETITIONER

AND

REPUBLIC RESPONDENT

Constitutionality of the mandatory death sentence for robbery with violence and attempted robbery with violence

The petitioner had been convicted of robbery with violence and attempted robbery with violence under sections 296(2) and 297(2) of the Penal Code. He had initially been sentenced to death but it was later commuted to life imprisonment. In the instant petition he challenged the constitutionality of the mandatory death sentence. The High Court held that sections 296(2) and 297(2) violated article 27 of the Constitution on equality and freedom from discrimination, article 28 of the Constitution on the right to human dignity, article 29(f) of the Constitution on freedom from cruel, inhuman or degrading punishment, and article 50(2)(q) of the Constitution on the right to fair trial. The court set aside the life sentence, and resented the petitioner to 50 years' imprisonment from the date of conviction.

Reported by Kakai Toili

Constitutional Law - fundamental rights and freedoms – right to fair trial and right to inherent dignity – enforcement of the right to fair trial - whether the mandatory death sentence for the offences of robbery with violence and attempted robbery with violence violated the accused's right to a fair trial by denying him a meaningful



opportunity for mitigation and sentence review – whether the mandatory death sentence and a sentence of life imprisonment was inhumane and violated the right to dignity - Constitution of Kenya, articles 25(2), 28 and 50(2)(q); Penal Code (cap 63), section 296.

Constitutional Law - *fundamental rights and freedoms – right to equality and freedom from discrimination – claim that capital offenders were denied the right to have their mitigation considered while the non-capital offenders enjoyed that right - whether it was discriminatory to deny capital offenders the right to have their mitigation considered while the non-capital offenders enjoyed that right - Constitution of Kenya, article 27.*

Brief facts

The petitioner sought review of sentence on the basis that his rights under article 50(2)(p), (q), 27, 28 and 29 of the Constitution were violated during sentencing. The petitioner was charged, tried and convicted with others, for the offence of attempted robbery with violence contrary to section 297(2) of the Penal Code and robbery with violence contrary to section 296(2) of the Penal Code at the trial court and sentenced to suffer death.

Aggrieved with the conviction and the sentence, the petitioner appealed to the High court which dismissed the appeal in its entirety. The petitioner lodged a second appeal at the Court of Appeal and the same was equally dismissed. The petitioner thus moved the instant court to challenge the constitutionality of his sentence.

It was the petitioner's case that he was sentenced as per the prescribed sentence under section 296(2) of the Penal Code without the court considering his mitigation or the unique facts and circumstances of his case. The petitioner sought a declaration that the mandatory death sentence imposed on him offended articles 27, 28 and 50(2)(p) and (q) of the Constitution.

Issues

- i. Whether the mandatory death sentence for the offences of robbery with violence and attempted robbery with violence violated the accused's right to a fair trial by denying him a meaningful opportunity for mitigation and sentence review.
- ii. Whether the mandatory death sentence and a sentence of life imprisonment was inhumane and violated the right to dignity.
- iii. Whether it was discriminatory to deny capital offenders the right to have their mitigation considered while the non-capital offenders enjoyed that right.

Relevant provisions of the Law

Constitution of Kenya

Article 27 – Equality and freedom from discrimination

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

Held

1. Article 165(3)(b) of the Constitution bestowed upon the court the jurisdiction to *inter alia* determine the question whether a right or fundamental freedom in the Bill of Rights had been denied, violated, infringed or threatened.
2. In *Muruatetu & another v Republic & 5 others* [2021] KESC 31 (KLR) (*Muruatetu 2*) to clear the confusion that existed with regard to the mandatory death sentence in offences other than murder, the Supreme Court directed that in respect of other capital offences such as treason under section 40(3), robbery with violence under section 296(2), and attempted robbery with violence under section 297(2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in the case may be reached.
3. Pursuant to the provisions of article 165(3)(b) of the Constitution and the Supreme Court's directions in *Muruatetu 2*, the instant court was bestowed with the jurisdiction to hear and determine the petition. Whereas the Supreme Court made it clear in *Muruatetu 2* that their reasoning applied to section 204 of the Penal Code only, their reasoning on the right to fair trial *vis-a-vis* the mandatory sentence could be applied across the board on any mandatory minimum sentence.



4. The sentence in the instant case had been predetermined. Mitigation was a matter of going through the motions. It was purely academic. Mitigation in the face of a mandatory sentence was a mockery of the concept, and import, of a fair trial.
5. The right to fair trial was an unlimited right pursuant to article 25(2) of the Constitution. It was a right that the courts must be alive to, and protect, at all times as they sought to render justice. Fair trial was the theme that ran through every stage of trial. In criminal cases, it ran from the stage of plea-taking all the way to mitigation. Denying that right at the point of mitigation must be treated in the same way as if it affected any stage of trial preceding mitigation or sentencing hearing. Section 296 of the Penal Code violated article 50(2)(q) of the Constitution.
6. The constitutionality of the life sentence had been determined by the Court of Appeal in *Mwavughanga v R* [2023] KECA 1489(KLR) where the court held that indeterminate sentences were unconstitutional. Life sentence was inhumane, violated the right to dignity and had already been declared unconstitutional by the Court of Appeal.
7. Murder convicts no longer needed to be sentenced to death, there was no reason why the convicts in the offence of robbery with violence under section 296(2) and 297(2) of the Penal Code must suffer death. Both offences were capital in nature, and the subsisting discrimination offended article 27 of the Constitution.
8. It was discriminatory to deny capital offenders the right to have their mitigation considered while the non-capital offenders enjoyed that right. In the words of article 27(1) of the Constitution, capital offenders were also equal before the law, they had a right to be protected before the law and must derive equal benefit from the law as the non-capital offenders.
9. The effect of section 296(2) and 297(2) of the Penal Code was to discriminate against persons convicted for the offence of robbery with violence as it made their mitigation immaterial, while those convicted of a lesser offence enjoyed the benefit of mitigation. To that extent, section 296(2) and 297(2) violated article 27 of the Constitution.
10. The petitioner had submitted that he was not given a chance to mitigate at the trial court. However, the record showed that he was given a chance. The petitioner was offered an opportunity to mitigate, it was only that he never made use of that opportunity and instead sounded as though he was still challenging the conviction. The prosecutor however informed the court that the petitioner was a first offender. That was a mitigating factor.
11. The petitioner was convicted of counts 5 and 6. Count 5 was on actual robbery while count 6 was attempted robbery in which they and his co-accused used, and threatened to use violence respectively, on their victims. That was an act of intimidation. From the evidence, the petitioner and his fellow accused persons were on a robbing spree that night. The fact that they moved from one home to another without the fear of being caught demonstrated unusual defiance to law and order.

Appeal partly allowed.

Orders

- i. *A declaration was issued that section 296(2) and 297(2) of the Penal Code violated articles 27, 28, 29 and 50(2)(q) of the Constitution.*
- ii. *The life sentence imposed on the petitioner was set aside.*
- iii. *The petitioner was sentenced to 50 years in prison, and the sentence was to take effect from the date of conviction at the trial court.*

Citations

Cases

Kenya

1. *Jona, Vincent Sila & 87 others v Kenya Prison Service & 2 others* Petition 15 of 2020; [2021] KEHC 13027 (KLR) - (Mentioned)



2. *Manyeso v Republic* Criminal Appeal 12 of 2021; [2023] KECA 827 (KLR) - (Explained)
3. *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* Petition 15 & 16 of 2015; [2021] KESC 31 (KLR) - (Explained)
4. *Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* Petition 15 & 16 of 2015 (Consolidated); [2017] KESC 2 (KLR) - (Followed)
5. *Mutiso v Republic* Criminal Appeal 17 of 2008; [2010] eKLR; [2010] 2 KLR 95 - (Explained)
6. *Mwavughanga v Republic* Criminal Appeal 111 of 2022; [2023] KECA 1489 (KLR) - (Explained)

Regional Court

Vinter and others v The United Kingdom Application nos. 66069/09, 130/10 and 3896/10 [2016] III ECHR 317 - (Explained)

Statutes

Kenya

1. Constitution of Kenya sections 25(2); 27; 28; 29; 50(2); 165 - (Interpreted)
2. Criminal Procedure Code (cap 75) section 333(2) - (Interpreted)
3. Penal Code (cap 63) section 40(3); 204; 296(2); 297(2) - (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The petitioner's petition herein seeks for review of sentence on the basis that his rights under article 50(2)(p)(q), 27, 28 and 29 of the [Constitution](#) were violated during sentencing.
2. He was charged, tried and convicted with others, for the offence of attempted robbery with violence contrary to section 297(2) of the [Penal Code](#) and robbery with violence contrary to section 296(2) of the [Penal Code](#) in Criminal case No 2972 of 2011 at Kakamega chief Magistrate's court and sentenced to suffer death.
3. Being dissatisfied with the conviction and the sentence, he appealed to the High court at Kakamega under HCCRA No 115 of 2006. The high court dismissed the appeal in its entirety. The petitioner lodged a second appeal at the court of appeal at Kisumu, *vide* COA No 170 of 2014 which appeal was equally dismissed.
4. The petitioner has come back to this court to challenge the constitutionality of his sentence.

The Petitioner's Case

5. It is the petitioner's case that he was sentenced as per the prescribed sentence under section 296(2) of the [Penal Code](#), without the court considering his mitigation or the unique facts and circumstances of his case.
6. He seeks a declaration that the mandatory death sentence imposed on him offends articles 27, 28 and 50(2)(p) and (q) of the [Constitution](#).
7. He states that the directions given by the supreme court in [Francis Karioko Muruatetu & another v Republic](#) (2017) eKLR, (commonly referred to as [Muruatetu 1](#)), left it open for the high court to hear and determine any petition on any minimum mandatory sentences and makes a determination. He therefore prays that the court do interpret the mandatory application of the death penalty in the light of the direction given by the supreme court decision in the [Muruatetu case](#) (*supra*)



8. He further prays that the court considers the period that he spent while in custody and that this period be taken into account on resentencing, in compliance with the provisions section 333(2) of the Criminal Procedure Code. In this regard he has relied in the case of Vincent Sila Jona & 87 others v Attorney General.

Petitioner's Submissions

9. It is the petitioner's submission that this court has jurisdiction to determine this application pursuant to the provisions of article 165(3), (6) and (7) of the Constitution.
10. He further submits that he never got a chance to mitigate and perhaps his mitigating circumstances could have altered or arrested the pronouncement of death sentence; that failure by the trial court to address his mitigation ran afoul articles 25(2), 27 and 50(2)(p) of the Constitution.
11. He further submits that though his sentence was commuted to life sentence, it has the same effect as the death sentence. He argues that incarceration without a chance for release amount to cruel punishment contrary to article 28 and 29(f) of the Constitution.
12. It is further submitted that failure to accord him the benefit of mitigation while others who are charged with other capital offences amount to discrimination contrary to article 27 and 28 of the Constitution.
13. The respondent did not file any response or submissions to the petition.

Determination

14. I have considered the petitioner, the affidavit and submissions. I have identified the following issues for determination:
- a). whether this court has jurisdiction to determine this petition
 - b). whether the sentence imposed on the petitioner violated his constitutional Rights.
15. The petitioner is challenging the constitutionality of the mandatory nature of the death sentence under section 296(2) and section 297(2) of the Penal Code against his rights protected under articles 25(2), and 27, 28, 29(f) and 50(2)(q) of the Constitution.
16. Article 165(3)(b) of the Constitution bestows upon this court the jurisdiction to inter alia determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened.
17. Further in Muruatetu & another v Republic & 5 others (2021) KESC 31 (KLR) (otherwise referred to as Muruatetu 2) the supreme court directed as follows: "To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40(3), robbery with violence under section 296(2), and attempted robbery with violence under section 297(2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached....."
18. I therefore agree with the petitioner's submission that pursuant to the provisions of article 165(3) (b) of the Constitution, and the supreme court's directions in Muruatetu 2, this court is bestowed with the jurisdiction to hear and determine this petition



The right to fair trial(article 50(2)(q) of the Constitution.

19. The petitioner has pleaded that he was denied the right to fair trial . He however premised it under article 50(2)(p) instead of 50(2)(q). I note that he is not represented and I will ignore the error. In any event when it comes to enforcement of rights, courts are exhorted not to pay undue regard to technicalities.
20. It is his submissions that due to the mandatory nature of the sentence under section 296(2) and 297(2) of the Penal Code, he had no chance to present his mitigation, which mitigation, might have ended up altering or varying the sentence meted to him.
21. In Muruatetu 1 (*supra*) the supreme court had this to say about the significance of sentencing hearing : “ It is evident that the trial process does not stop at convicting the accused . There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing . This necessarily means that the principle of fair trial must be accorded to sentencing stage too.” The court went further on to state : “ A fair trial has many facets and includes mitigation and the right to appeal or apply for review by a higher court as prescribed by law” .
22. The supreme court went on hold that section 204 of the Penal Code which section was under interpretation then , and which prescribes a minimum mandatory sentence of death for the offence of murder, violates article 50(2)(q) of the Constitution, as the convict stands no chance of having their sentence reviewed by a higher court , considering that their appeal is limited to conviction only.
23. Whereas the supreme court made it clear in Muruatetu 2 that their reasoning applied to section 204 of the Penal Code only, in my view , their reasoning on the right to fair trial *visa- vis* the mandatory sentence can be applied across the board on any mandatory minimum sentence.
24. In this regard , I find support in the case of Geoffrey Mutiso v Republic (2010) eKLR the court of appeal held: We declare that section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution, which as we have said, makes no such mandatory provision. We have confined this judgment to sentences in respect of murder cases, because that was what was before us and what the Attorney General conceded to. But we doubt if different arguments could be raised in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296(2) and attempted robbery with violence under section 297(2) of the Penal Code. Without making conclusive determination on those other sections, the arguments we have set out in respect of section 203 as read with section 204 of the Penal Code might well apply to them.”
25. In Manyeso v Republic (2023) KECA 827(KLR) the Court of Appeal , while considering the issue of indeterminate sentences, particularly life imprisonment held:

“ We note that the decisions of this Court relied on by the appellant, namely *Evans Wanjala Wanyonyi v Rep* [2019] eKLR and *Jared Koita Injiri v Republic Kisumu Crim App No 93 of 2014* were decided before the Supreme Court clarified the application of its decision in *Francis Karioko Muruatetu & another v Republic* [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the Penal Code. This fact notwithstanding, we are of the view that the reasoning in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation, which



is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the Constitution.” (Emphasis added)

26. In this case , the sentence in effect had been predetermined. Mitigation was a matter of going through the motions. It was purely academic. Mitigation in the face of a mandatory sentence is a mockery of the concept , and import, of a fair trial. what use is a mitigation that would not influence the outcome?
27. Further , it must be remembered that the right to fair trial is an unlimited right pursuant to article 25(2) of the Constitution. It is a right that the courts must be alive to, and protect , at all times as they seek to render justice. And as pointed out by the supreme court in Muruatetu one (*supra*), fair trial is the theme that runs through every stage of trial. In criminal cases, it runs from the stage of plea- taking , all the way to mitigation. Denying this right at the point of mitigation , must be treated in the same way as if it affected any stage of trial preceding mitigation or sentencing hearing.
28. I do therefore find that section 296 of the Penal Code violates article 50(2)(q) of the Constitution.

Article 28 and 29 of the Constitution.

29. It is the petitioner’s submission that even though his death sentence was commutated to life imprisonment by the president, his incarceration without the prospects of release amount to cruel punishment contrary to articles 28 and 29(f) of the Constitution.
30. The supreme court in the Muruatetu 1 (*supra*) had this to say about article 28: “ it is for this court to ensure that all persons enjoy the right to dignity . Failing to allow a judge discretion to take into consideration the convict’s mitigating circumstances , the diverse character of convicts and the circumstances of the crime but instead subject them to the same (mandatory) sentence treating them as undifferentiated mass, violates their right to dignity”
31. Further in Julius Kitsao (*supra*) the court addressed the life sentence as against article 28 as follows: “ In addition, an indeterminate life sentence in our view is also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.”
32. Finally , the constitutionality of the life sentence has been determined by the Court of Appeal in Mwavughanga v R (2023) KECA 1489(KLR) where the court held: “As we have stated, in line with the decision of this court in Julius Kitsao Manyeso v Republic, (*supra*), indeterminate sentences are unconstitutional.....”
33. Am duly guided and I need not say anymore. In brief, life sentence is inhumane, violates the right to dignity and has already been declared unconstitutional by the court of Appeal. in line with the aforesaid decisions I hereby set aside the life sentence imposed on the petitioner.

Article 27 of the Constitution

34. It is the petitioner’s submission that it is discriminatory to have some of the capital offenders have their sentences reviewed while others are denied. This , he argues is a violation of article 27 of the Constitution.
35. Article 27 provides as follows: “



- (1). Every person is equal before the law and has the right to equal protection of the law and equal benefit before the law.
 - (2). Equality includes the full and equal enjoyment of all rights and fundamental freedoms.
36. Though the supreme court, in *Muruatetu 1* (*supra*) was addressing the discrimination that was evident in the treatment of capital offenders and non- capital offenders, and not the between the capital offenders , the petitioner’s submission in this regard is still valid. To the extent that it is now settled that murder convicts no longer need to be sentenced to death, there is no reason why the convicts in the offence of robbery with violence under section 296(2) and 297(2) of the *Penal Code* must suffer death. Both offences are capital in nature, and the subsisting discrimination offends article 27 of the *Constitution*.
37. It is also discriminatory to have deny capital offenders the right to have their mitigation considered , while the non- capital offenders enjoy that right. In the words of article 27(1) of the *Constitution*, capital offenders are also equal before the law, they have a right to be protected before the law and must derive equal benefit from the law as the non- capital offenders.
38. In *Muruatetu 1* (*supra*) the supreme court when addressing the discriminate nature of the death sentence stated as follows: “ It is discriminate in the sense that the mandatory sentence gives differential treatment to a convict under that section , distinct from the kind of treatment accorded to a convict under a section that does not impose a mandatory death sentence..... refusing or denying a convict facing the death sentence to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair”
39. In a nutshell, the effect of section 296(2) and 297(2) is to discriminate against persons convicted for the offence of robbery with violence as it makes their mitigation immaterial, while those convicted of a lesser offences enjoy the benefit of mitigation.
40. To that extent, I find that section 296(2) and 297(2) of the *Penal Code* violate article 27 of the *Constitution* and I hereby declare it as such.

Mitigation

41. Concerning mitigation in the lower court, the petitioner has submitted that he was not given a chance to mitigate. However the record shows that he was given a chance . He was the 1st Accused in the lower court and on being given a chance to mitigate stated: “ I did not steal as alleged. I pray for proceedings” . Thus contrary to his submissions, the petitioner was offered an opportunity to mitigate .It is only that he never made use of that opportunity , and instead sounded as though he was still challenging the conviction. The prosecutor however informed the court that the petitioner was a first offender . This is a mitigating factor.
42. On the aggravating side , I have considered the circumstances surrounding the crime. The petitioner herein was convicted of counts 5 and 6 . Count 5 was on actual robbery while count 6 was attempted robbery in which they and his co- accused used, and threatened to use violence respectively, on their victims. This was an act of intimidation. It also emerged from the evidence that the petitioner and his fellow accused persons were on a robbing spree that night. The fact that they moved from one home to another without the fear of being caught , demonstrates unusual defiance to law and order.
43. Taking into consideration the mitigating and aggravating circumstances I hereby sentence the petitioner to 50 years in prison.



44. I have not found any evidence indicating that the petitioner was in custody during trial, and he has not indicated in his petition or the appeal if he was in custody during trial. In the circumstances the sentence will take effect from the date of conviction at the lower court.
45. Final orders:
- (a) A declaration is hereby issued that section 296(2) and 297(2) of the *Penal Code*, violates articles 27, 28, 29 and 50(2)(q) of the *Constitution*.
 - (b) The life sentence imposed on the petitioner is hereby set aside.
 - (c) The petitioner is hereby sentenced to 50 years in prison, and the sentence to take effect from the date of conviction at the trial court.

DATED, SIGNED AND DELIVERED AT NAIROBI, VIA MICROSOFT TEAMS , THIS 26TH DAY OF AUGUST 2024.

S. CHIRCHIR

JUDGE

In the presence of :

Godwin- Court Assistant

Joseph Ashiundu- The petitioner.

