Wachira & 12 others v Republic & 2 others (Petition 97, 88, 90 & 57 of 2021 (Consolidated)) [2022] KEHC 12795 (KLR) (31 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12795 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION 97, 88, 90 & 57 OF 2021 (CONSOLIDATED)

SM GITHINJI, J

AUGUST 31, 2022

BETWEEN

EDWIN WACHIRA .... 1ST PETITIONER

ROBERT MAGANGA .... 2ND PETITIONER

NELSON AMAYO ODHIAMBO .... 3RD PETITIONER

SAMUEL MWACHALA MWAGHANIA .... 4TH PETITIONER

CHARLES OTIENO .... 5TH PETITIONER

FREDRICK GILBERT BANDA .... 6TH PETITIONER

BENJAMIN FURAHA DICKSON .... 7TH PETITIONER

KAFUNDI MASHA .... 8TH PETITIONER

JAMES MUKOBO .... 9TH PETITIONER

MOSES MULI KINGOO .... 10TH PETITIONER

AND

REPUBLIC .... RESPONDENT

AS CONSOLIDATED WITH

PETITION 88 OF 2021

BETWEEN

ADAN MAKA THULU .... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... RESPONDENT

AS CONSOLIDATED WITH

PETITION 90 OF 2021

BETWEEN

ROBERT MWANGI .... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTION .... RESPONDENT

AS CONSOLIDATED WITH

PETITION 57 OF 2021

BETWEEN

KAZUNGU KALAMA JOJWA .... PETITIONER

AND

DIRECTOR OF PUBLIC PROSECUTIONS .... RESPONDENT

Effects of Mandatory (maximum & minimum) sentences on accused persons

Reported by John Ribia

Criminal Procedure *- sentencing – principles applicable during sentencing - what principles should courts take into account in exercising their discretion in sentencing - what principles should courts take into account when considering the legality of provisions prescribing mandatory maximum/minimum sentences.*

Constitutional Law *– fundamental rights and freedoms – right to a fair trial – where provisions of the law prescribed a mandatory maximum or minimum sentence – where a provision of the law did not accord an accused a chance to mitigate – whether the impugned provisions violated an accused person's right to fair trial to the extent that the provisions deprived the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case - whether the impugned provisions violated an accused person's right to fair trial to the extent that they imposed mandatory maximum and/or minimum sentences without giving the accused the chance to mitigate - whether the impugned provisions were prejudicial to accused persons to the extent that the provisions took away the court's discretion in sentencing – Constitution of Kenya, article 50(1); Sexual Offences Act (Cap 63A), sections 3(3), 8(2), (3), (4), 11 (1) and 20(1).*

Constitutional Law *– fundamental rights and freedoms – right to equality and freedom from discrimination – where a provision of the law imposed maximum mandatory/minimum sentences and accorded differential treatment to convicts distinct from the kind of treatment accorded to convicts under other offences which did not impose mandatory sentences - whether sections 3(3), 8(2), (3), (4), 11 (1) and 20(1) of the Sexual Offences Act were discriminatory - Constitution of Kenya, article 27; Sexual Offences Act, (Cap 63A), sections 3(3), 8(2), (3), (4), 11 (1) and 20 (1).*

Brief facts

The petitioners were individually charged, tried and convicted of the offences under the sections 3(3), 8(2), (3), (4), 11(1) and 20(1) of the Sexual Offences Act (the Act) (the impugned provisions) and sentenced to life imprisonment and/or the mandatory minimum sentences prescribed by the said provisions. Aggrieved,

the petitioners challenged the constitutional validity of the mandatory sentences prescribed by the impugned provisions.

The petitioners contended that the mandatory nature of the sentences in the impugned provisions took away the court's discretion in sentencing and took away an accused person's right to mitigate. As such, they contended that the provisions were a breach of their right to a fair trial and were discriminatory.

Issues

i. Whether mandatory minimum and/or maximum sentences were constitutional.

ii. What principles should courts take into account in considering the constitutionality of provisions prescribing mandatory maximum/minimum sentences?

iii. What principles should courts take into account in exercising their discretion in sentencing?

iv. Whether sections 3(3), 8(2), (3), (4), 11(1) and 20(1) of the Sexual Offences Act violated an accused person's right to fair trial to the extent that the provisions deprived the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case.

v. Whether sections 3(3), 8(2), (3), (4), 11(1) and 20(1) of the Sexual Offences Act violated an accused person's right to fair trial to the extent that they imposed mandatory maximum and/or minimum sentences without giving the accused the chance to mitigate.

vi. Whether sections 3(3), 8(2), (3), (4), 11(1) and 20(1) of the Sexual Offences Act was prejudicial to accused persons to the extent that the provisions took away the court's discretion in sentencing.

vii. Whether sections 3(3), 8(2), (3), (4), 11(1) and 20(1) of the Sexual Offences Act were discriminatory to the extent that the provisions gave differential treatment to a convict under the impugned provisions distinct from the kind of treatment accorded to convicts under other offences which did not impose mandatory sentences.

Relevant provisions of the Law

Sexual Offences Act (Cap 63A)

Section 3 - Rape

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

Section 8 - Defilement

(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

Section 11 - Indecent act with child or adult

(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

Section 20 - Incest by male persons

(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

Held

1. The Judiciary had the province and duty of the judicial department to say what the law was. In deciding whether any provisions of a law passed by the Parliament as an ordinary law were inconsistent with the Constitution, the courts were concerned with the propriety or expediency of the law impugned. They were concerned solely with whether those provisions, however reasonable and expedient, were of such a character that they conflicted with an entrenched provision of the Constitution of Kenya (the Constitution).
2. The interpretive authority of the courts was rooted in a duality. On one hand, the Judiciary, by virtue of life tenure enjoyed independence from the political branches and public passions of the moment. Insulated from partisan pressure, the Judiciary bore a responsibility to render decisions without fear or favor toward the political majority. Independent courts served as an excellent barrier to the encroachments and oppressions of the representative body, and they played a peculiarly essential role in safeguarding individual rights and liberties. On the other hand, the Judiciary had no influence over either the sword or the purse; it had neither force nor would, but merely judgment. The voice of the Judiciary on constitutional questions had to ultimately draw its authority from the public's acceptance of its institutional role, even when its specific decisions were controversial.
3. In interpreting and applying the Constitution, the Judiciary had to exercise independence from politics and reflect the common will in order to secure the democratic legitimacy of its decisions. The overriding characteristics of the Constitution were: -
    1. that the Constitution was the supreme source of law;
    2. that human rights and fundamental freedoms were protected as inherent and inalienable rights of the people;
    3. that the Constitution was based on the rule of law;
    4. that the principle of separation of powers was entrenched in the Constitution;
    5. that one branch of Government could not trespass on the province of any other under the principle of separation of powers.
4. The Supreme Court in *Francis Karioko Muruatetu & another v Republic,* [2017] eKLR (*Muratetu* case), albeit, in the context of the mandatory death penalty, addressed the nature of mandatory sentences and found such sentences to be constitutionally infirm for *inter alia* offending the right to a fair trial guaranteed under article 50(1) of the Constitution. The principles flowing from the *Muruatetu* case were binding to all courts in Kenya. The disposition of constitutional questions had to be formidable in terms of some constitutional principles that transcended the case at hand and applied to all comparable cases. Court decisions could not be *ad hoc*. They had to be justified and perceived as justifiable on more general grounds. A mandatory minimum sentence carried the same characteristics and effect regardless of the offence created by the provision.
5. The applicable principles to mandatory minimums, irrespective of offence were:
    1. A law that took away judicial discretion could only be regarded as harsh and unjust.
    2. The rights of an accused person to a fair trial under article 50 of the Constitution were absolute as it was one of the rights which could not be limited pursuant to article 25(c) of the Constitution.
    3. The trial process did not stop at convicting the accused. Sentencing was a crucial component of a trial. It was during sentencing that the court heard submissions that impacted on sentencing. That meant that the principle of fair trial had to be accorded to the sentencing stage too.
    4. Mitigation was an important congruent element of fair trial. The fact that mitigation was not expressly mentioned as a right in the Constitution did not deprive it of its necessity and essence

in the fair trial process. The rights pertaining to fair trial of an accused pursuant to article 50(2) of the Constitution were not exhaustive.

5. The right to fair trial was one of the cornerstones of a just and democratic society, without which the rule of law and public faith in the justice system would inevitably collapse.
6. If a court did not have discretion to take into account mitigating circumstances it was possible to overlook some personal history and the circumstances of the offender which could make the sentence wholly disproportionate to the accused's criminal culpability. Failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict.
7. A fair trial had many facets and included mitigation.
8. Another aspect of the mandatory sentence was its discriminate nature; discriminate in the sense that the mandatory sentence gave differential treatment to a convict under that section, distinct from the kind of treatment accorded to a convict under a section that did not impose a mandatory sentence. Article 27 of the Constitution set out non-discrimination provisions.

6. A court faced with a case where the minimum sentencing provisions applied would have no choice but to impose the prescribed sentence. That would happen regardless of what the court might regard as the appropriate sentence in the circumstances, and accordingly, the court's discretion in the circumstances was fettered. The enactment of the legislation meant that it was no longer business as usual, when sentencing for the specified offences. Sentence discretion was a vital element of Kenya's law of sentencing, and at the heart of that discretion was the principle that each case should be treated on its own facts or merits, and it was for that reason that the sentencing discretion lay with the trial court.
7. Infliction of punishment was pre-eminently a matter for the discretion of the trial court. The fact that courts should, as far as possible, have an unfettered discretion in relation to sentence was a cherished principle which called for constant recognition. Such discretion permitted of balanced and fair sentencing, which was a hallmark of enlightened criminal justice.
8. The principle of individualization of punishment required proper consideration of the individual circumstances of each accused person. Sentencing was a discretionary power exercisable by the court and it involved the deliberation of the appropriate sentence. Finding an appropriate sentence or a just punishment fell somewhere between striking a balance on key procedural ideals namely – rule making which ensured consistency and predictability. Secondly, sentencing required the judge to exercise discretion, which promoted flexibility and efficiency in the administration of justice. A balance of the two ends promoted consistency in sentencing at the same time as ensuring that courts were flexible to adjust sentences when there was a need.
9. While the law exists on mandatory sentencing, introducing flexibility enabled the court to strike the right balance. A review of sentences imposed by the courts since the enactment of the Sexual Offences Act disclosed massive and worrying inconsistencies which bordered on injustice because the peculiar circumstances of the case were ignored.
10. The core value was to ensure that courts imposed a just and appropriate sentence. That required a judge sentencing an offender to ensure that the aggregation of the sentences appropriate for each offence was a just and appropriate measure of the total criminality involved. The just and appropriate sentence arrived at considering the peculiar circumstances of the case could only be arrived at if the sentence was fixed and pre-determined regardless of the peculiar circumstances.
11. Some defilement cases were preceded or accompanied by extreme violence and sometimes leave life threatening impairments or even death. Offenders in such cases deserved no mercy. Stiffer or even maximum sentences had to be deployed in such cases. Other cases involved very young and innocent girls or boys, mentally or physically challenged victims or extremely aged and helpless persons. Offenders in such cases deserved no mercy. Others cases involved persons who had been entrusted with young children, and they abused the trust. Such persons deserved no mercy. Other cases involved

teenagers and boys of same age or age group both discovering their bodies. In such cases the boy child ended up in jail once convicted and a mandatory sentence was imposed regardless of the peculiar circumstances. Other cases involved girls who though under 18 years had a series of relationships. Others offences could be attributed to poor parenting. In that category one found irresponsible absentee fathers or mothers. Such boys or girls needed guidance and counseling rather than mandatory life imprisonments. A visit to any prison in Kenya would confirm all those categories.

12. Court's advantage centered on the fact that they tried individual cases and they could thus make sentencing decisions based on the particular facts of each case as they possessed information pertaining to a particular accused. Courts should be granted an unfettered discretion to impose sentences in cases presented to them. That was because the sentencing discretion could only be properly exercised on the basis of all the facts relevant to the matter. While the Legislature was concerned in a general way with the penalty that should attach to an offence, the court was concerned in a case-to-case basis the actual sentence that should be meted out to the particular offender. There was a difference between the preoccupations of the Legislature in legislating a penalty provision and the pre-occupations of the court in sentencing a particular offender.
13. Sentencing an offender was not the mechanical application of letters and number in a formulaic table. It was the human deliberation of what was the just punishment which could be given to a particular offender seen to have strayed from the set of norms at the time laid down by society. In that sense, convicting or discharging someone was easier. The formidable task, constitutional in character, came at the moment of sentencing. Sentencing involved a judicial duty to individualize the sentence tuned to the circumstances of the offender as a just sentence. It could not be likened to the mere administration of a common formula or standard or remedy.
14. Not every mandatory minimum penalty prescribed by legislation breached the constitutional principle of the separation of powers as an encroachment by the Legislature on judicial power.
15. The citizen in a given case of mandatory/minimum sentence had a right to put in a plea in mitigation to show that the imposition of the mandatory minimum sentence was not warranted in his case. If the court in considering all the facts and circumstances of the case came to the conclusion that that indeed was the case, the court would be perfectly entitled to read down the mandatory minimum without feeling bound by it. The court was empowered to interpret that the imposition of any grossly disproportionate penalty as unconstitutional. The court was also empowered to interpret that the legislative removal of the intrinsic discretion of the court to sentence a particular accused in the special circumstances of his case who in the court's judicial view deserved much less, was unconstitutional.
16. What an offender deserved in the real sense of the word was meant by fair hearing which included a fair sentence in the evolving concept of constitutionality and constitutionalism. In the adherence to the rule of law and application of democratic principles to given situations, constitutionalism was not limited to mere interpretations of the various articles but in the actual application of the articles with the evolving concepts behind them to the different and actual scenarios coming to court for the actual sentencing process. In the evolving concept of justice, sentencing should no longer be considered as an orphan of the law.
17. The *Muruatetu* case one was categorical that mitigation formed an integral part of a fair trial. An accused person that was deprived the right to mitigate was curtailed of their rights under article 50(1) of the Constitution. Taking away judicial discretion and the fact that the mandatory minimum sentences deprived the court the discretion to prescribe a sentence taking into account the individual circumstances of the accused was unfair to the accused and it impinged on the right to a fair trial.
18. Sentencing was an integral part of a judicial function and an important element of a fair trial process. The impugned provisions deprived the accused person the benefit of a lesser sentence informed by the circumstances of each offence. Unlike in other offences, the mandatory minimum sentences were

discriminatory because they deprived the accused person the full benefit of the law contrary to article 27 of the Constitution.

19. A mandatory minimum sentence was not *per se* unconstitutional. The Legislature in the exercise of its legislative powers was perfectly entitled to indicate the type of the sentence which would fit the offence it created. It had never been suggested that the sphere of judicial power was invaded when Parliament provided for a maximum or minimum penalty for offences which were duly proved in courts of law. What was decried was absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence.

20. he court was empowered by article 23(3) of the Constitution to grant appropriate reliefs. Appropriate reliefs would in essence be relief that was required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief could be a declaration of rights, an interdict, a *mandamus*, or such other relief as may be required to ensure that the rights enshrined in the Constitution were protected and enforced. If it was necessary to do so, the court could even have to fashion new remedies to secure the protection and enforcement of those all-important rights. The courts had a particular responsibility in that regard and were obliged to forge new tools and shape innovative remedies, if need be to achieve that goal.

Petitions allowed.

Orders

i. *Declaration issued that sentencing remained a discretionary power, exercisable by the court and involved the deliberation of the appropriate sentence. To the extent that the provisions of sections 8(2), (3), (4), 11(1), 20(1) and 3(3) of the Sexual Offences Act deprived the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case, then the said provisions offended the notion of a fair trial contemplated under article 50(1) of the Constitution.*

ii. *Declaration issued that to the extent that the citizen in a given case of mandatory/minimum sentence had a right to put in a plea in mitigation to show that the imposition of the mandatory minimum sentence was not warranted in his case, then sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the Sexual Offences Act deprived an accused person the right to mitigate which was a core component of a fair trial contemplated under article 50(1) of the Constitution.*

iii. *Declaration issued that sentence discretion was a vital element of the Kenyan law of sentencing and at the heart of that discretion was the principle that each case should be treated on its own facts or merits. The sentencing discretion lay with the trial court.*

iv. *Declaration issued that the infliction of punishment was pre-eminently a matter for the discretion of the trial court, and to the extent that the provisions of sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the Sexual Offences Act took away the courts discretion, ignoring the fact that the individualization of punishment required proper consideration of the individual circumstances of each accused person, then the said provisions deprived an accused person the benefit of judicial distention which was prejudicial to the accused.*

v. *Declaration issued that courts were to, as far as possible, have an unfettered discretion in relation to sentencing.*

vi. *Declaration issued that sentencing discretion permitted balanced and fair sentencing. The absence discretion was potentially prejudicial to an accused person.*

vii. *To the extent that the impugned provisions prescribed minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose taking into account an accused persons individual circumstances and mitigation, such sentences fell foul of the right a fair trial guaranteed under article 50 of the Constitution because mitigation and sentencing were part and parcel of a fair trial process.*

viii. *Declaration issued that the impugned mandatory minimum sentences were discriminatory in nature because they gave differential treatment to a convict under the impugned provisions distinct from the*

kind of treatment accorded to convicts under other offences which did not impose mandatory sentences, so, mandatory minimum sentences violate an accused rights under article 27 of the Constitution.

ix. *Order that persons convicted and imprisoned under the said offences were at liberty to the petition the High Court for mitigation and re-sentencing.*

x. *No order as to the costs.*

Citations

Cases

Kenya

1. *Anarita Karimi Njeru v Republic* Criminal Appeal 4 of 1979; [1979] KECA 12 (KLR) - (Explained)
2. *CKW v Attorney General & another* Petition 6 of 2013; [2014] KEHC 3657 (KLR) - (Explained)
3. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR) - (Explained)
4. *Jillo, Sammy Abiyo v Republic* Criminal Appeal 24 of 2019;[2021] KEHC 2812 (KLR) - (Explained)
5. *Kimingi, David Mathu v SMEC International PTY Limited* Petition E034 of 2020; [2021] KEELRC 2122 (KLR) - (Explained)
6. *Law Society of Kenya v Attorney General & another* Constitutional Petition E314 of 2021; [2021] KEHC 97 (KLR) - (Explained)
7. *Maingi, Philip Mueke & 5 others v Director of Public Prosecutions & the Attorney General* Petition E017 of 2021; [2022] KEHC 13118 (KLR) - (Explained)
8. *MK v Republic* Criminal Appeal 15 of 2015 - (Explained)
9. *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* Petition 15 & 16 of 2015; [2021] KESC 31 (KLR) - (Explained)
10. *Muruatetu, Francis Karioko & another v Republic & 6 others* Petition 15 & 16 of 2015; [2017] KESC 2 (KLR) - (Explained)
11. *Nyale, Yawa v Republic* Criminal Appeal 82 of 2015; [2018] KEHC 4441 (KLR) - (Explained)
12. *Shiunzi, Yusuf v Director of Public Prosecution* Petition 24 of 2019; [2020] KEHC 6014 (KLR) - (Explained)
13. *Shiunzi, Yusuf v Director of Public Prosecution* Petition 24 of 2019; [2020] KEHC 6014 (KLR) - (Applied)
14. *Wafula, Kilwake Dismas v Republic* Criminal Appeal 129 of 2014; [2019] KECA 5 (KLR) - (Explained)
15. *Wambui, Eliud Waweru v Republic* Criminal Appeal 102 of 2016; [2019] KECA 906 (KLR) - (Explained)
16. *Waweru, Peter K v Republic* Miscellaneous Civil Application 118 of 2004; [2006] KEHC 3202 (KLR) - (Explained)

South Africa

1. *Minister of Health & others v Treatment Action Campaign & others (No 2)* (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (5 July 2002) - (Explained)
2. *S v Dodo* (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC);; 201 (5) BCLR 432 (CC) - (Explained)
3. *S v Jansen* (480/87) [1988] ZASCA 68; [1989] 3 All SA 439 (AD) - (Explained)
4. *S v Malgas* (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) - (Explained)
5. *S v Mofokeng* (48/84) [1984] ZASCA 49; 1999 (1) SACR 502 (W) at 506 (D). - (Explained)
6. *S v Rabie* [1975] (4) SA 855 (A) at 861D - (Explained)
7. *S v Toms* (139/89, 289/89) [1990] ZASCA 38; 1990 (2) SA 802 (AD); [1990] 2 All SA 248 (A) - (Explained)

Namibia

S v Scheepers [2019] NAHCMD 1 - (Explained)

United Kingdom

Gillick v West Norfolk and Wisbech Area Health Authority [1986] AC 112 - (Explained)

India

1. *Bachan Singh v The State of Punjab (Bachan Singh)* (1982) 3 SCC 24; (1983) 1 SCR 145 - (Explained)
2. *Mithu v State of Punjab* 1983 AIR 473; 1983 SCR (2) 690 - (Explained)

United States

1. *Harmelin v Michigan* 501 US 957 (1991) - (Explained)
2. *Marbury v Madison* 5 US (1 Cranch) 137 (1803) - (Explained)

Canada

1. *R v M* [1961] 1 SCR 500 - (Explained)
2. *R v Sarson* [1996] 2 SCR 51 - (Explained)
3. *R v Scott* [1990] 3 SCR 979 - (Explained)

Australia

1. *Fraser Hemleins Pty Ltd v Cody* (1945) 70 CLR 100 - (Explained)
2. *Magaming v Queen* (2013) 232 CLR 381 - (Explained)

Regional Court

Edwards v Bahamas (Report No 48/01, April 4, 2001 - (Applied)

Ireland

Deaton v Attorney General & Revenue Commissioners [1963] IR 170 - (Explained)

Seychelles

Poonoo v Attorney-general [2011] SCCA 30 - (Explained)

Texts

1. Garner, BA., (Ed) (2019), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 11th Edn
2. O'Malley, T., (Ed) (2006), *Sentencing Law and Practice* Dublin: Thomson Round Hall Ltd 1st Edn
3. Terblanche, SS,. (Ed) (1999), *A Guide to Sentencing in South Africa* New York: Lexis Nexis
4. Wechsler, H., (Ed) (1959), *Towards Neutral Principles of Constitutional Law* Harvard Law Review Vol 73 No 1 pp 1-3

Statutes

Kenya

1. Constitution of Kenya articles 2(6);19(3)(a); 23(3); 25(c); 27; 28; 48; 50(1),(2)(q); 160(1); 165(3)(d) - (Interpreted)
2. Criminal Procedure Code (cap 75) sections 216, 329 - (Interpreted)
3. Penal Code (cap 63) section 204 - (Interpreted)
4. Probation of Offenders Act (cap 64) section 4(1)(2) - (Interpreted)
5. Sexual Offences Act (cap 63A) sections 3(3); 8(2)(3)(4); 11(1); 20(1) - (Interpreted)

Instruments

1. International Covenant on Civil and Political Rights (ICCPR), 1966 articles 10(3); 14
2. Universal Declaration of Human Rights (UDHR), 1948 article 10

Advocates

None mentioned

JUDGMENT

1. This judgment determines 4 consolidated petitions, namely, Petition Nos 97 of 2021, 88 of 2021, 90 of 2021 and 57 of 2021. The common thread between the 4 Petitions is that they all challenge the constitutional validity of the mandatory sentences prescribed by sections 8(2), (3), (4), 11 (1), 20 (1) and 3(3) of the *Sexual Offences Act*[1](the Act). Another common denominator is that all the petitioners were individually charged, tried and convicted of the offences under the above provisions and sentenced to life imprisonment and/or the mandatory minimum sentences prescribed by the said provisions. The said provisions are reproduced below: -

> 8. Defilement
>
> 1. A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
> 2. A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.
> 3. A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
> 4. A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.
>
> 11. Indecent act with child or adult
>
> 1. Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.
>
> 20. Incest by male persons
>
> 1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:
>
> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

[1] Ac No 3 of 2006.

Section 3(3) provides

> (3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

2. The grounds in support of the plea for the declaration of constitutional invalidity of the mandatory sentences as I glean them from the 4 petitions are: - (a) that the mandatory sentences impinge on a fair trial guaranteed under article 50 of the *Constitution*; (b) the petitioners are prejudiced by being deprived the right to mitigation and the right to a lesser severe sentence (unlike other offenders) which amounts to discrimination contrary to article 27 of the *Constitution*; (c) that the mandatory nature of the sentences under the said provisions jettison the discretion of the trial court forcing it to impose sentences which are pre-determined by the legislature contrary to the doctrine of separation of powers under article 160(1) of the *Constitution* thus depriving Magistrates sentencing discretion; (e) that the provisions ignore the offenders' personal circumstances; and, (f) that sentencing is a legal issue which forms part of the principles of a fair trial.

3. The petitioners pray for an order for re-hearing their mitigation and sentencing depending on each Petitioner's circumstances. The prayer to be provided with a *pro-bono* advocate during the hearing of this petition was not argued either after filing the petition or at any stage during the many court attendances for directions or during the hearing, so it has been rendered otiose. In any event, the petitioners filed submissions and argued their case.

4. The DPP filed a response dated February 4, 2022 stating:- (a) the petitions lack specificity; (b) the petitioner's rights cannot override the victims' rights; (c) mandatory sentences reflect the will of the people; (d) the sentences deter similar offenders; (e) judicial discretion should be bridled; (f) the Constitution recognizes children as vulnerable and children's rights are guaranteed under international conventions; (g) the decisions relied upon by the petitioners did not invalidate mandatory sentences; (h) this court would be exceeding its jurisdiction were it to declare mandatory sentences as unconstitutional; (i) the court has discretion to impose shorter or longer sentences; and, (j) the petitioners have not demonstrated that the challenged provisions offend article 27 of the *Constitution*.

5. The Hon Attorney General filed two identical responses to the petition both dated November 6, 2021 but court stamped on March 23, 2022 and January 17, 2022 respectively stating that :- (a) the rationale for *the Act* was to protect all persons from unlawful sexual acts and to preserve the integrity, security and dignity of the individual; (b) the impugned sections were intended to protect the best interests of the child, incapacitate the offender as a measure of protecting the victim and to deter would be offenders; (c) that the Supreme Court in *Francis Kariako Muruatetu & another v Republic*[2] *(the Muruatetu two)* clarified that the declaration of the unconstitutionality of mandatory death sentences does not apply to sexual offences; and, (d) that allowing these petitions will create havoc in the criminal justice system.

6. The petitioners filed a reply to the respondent's responses on January 28, 2022 which are essentially legal submissions as opposed to factual depositions. I will consider their arguments in my determination.

7. In their written submissions, the petitioners elucidated that they are not challenging their convictions, but they are questioning the constitutionality of the mandatory/minimum sentences which they argued denied them the right to a fair trial under article 50 of the *Constitution* which is non-derogable

2 *[2021] eKLR.*

under article 25(c). They argued that the sentences offend article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) and that the words "shall" and "not less than" in the said provisions confine the magistrates to sentences pre-determined by the legislature which offends the doctrine of separation of powers.

8. They submitted that mandatory sentences deprive the magistrate's judicial discretion. They argued that courts frown mandatory sentences and relied on *S v Toms*[3] which held that mandatory sentences are repugnant because they reduce the courts normal sentencing function to the level of a rubberstamp. Also, they cited *S v Mofokeng*[4] which held that curtailing the discretion of the court offends the constitutional principal of separation of powers. They also cited *S v Jansen*[5] which held that mandatory sentences disregard the individual characteristics of each case. They also cited *WM v Republic* which held that the phrase "shall be liable to life imprisonment" means the life sentence is the maximum sentence for the offence. They relied on *Francis Karioko Muruatetu and another v Republic*[6] (the *Muruatetu* case) which underscored the need to individualize sentencing in criminal justice. Further, they relied on *Yusuf Shiunzu Kunani v Republic* 7 which followed the Supreme Court decision in the above case and quashed mandatory death sentences in sexual offences. Lastly, they submitted that the impugned provisions offend their right to equal treatment and protection of the law under article 27 of the Constitution.

9. Counsel for the DPP cited *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*,[8] *David Mathu Kimingi v SMEC International PTY Limited*,[9] *Anarita Karimi Njeru v Republic*[10] all of which underscored the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened and the manifestation of the contravention.

10. On the alleged discrimination, she cited the definition of discrimination in the *Black's Law Dictionary*[11] as cited in *Peter K Waweru v Republic*[12] to support her argument that minimum sentences are not discriminatory but they serve a key role of denouncing sexual violence, hence they are compatible with sentencing principles which the legislature intended to achieve which is to communicate the society's condemnation of the particular conduct. (citing *R v M*[13]). She submitted that the position of person charged under the Act is distinguishable from persons charged with other offences.

[3] 1990 (2) SA 802(A) at page 806 (h)-807 (b).

[4] 1999 (1) SACR 502 (W) at 506 (D).

[5] 1999(2) SACR 368 (c) at 373 (G)-(H).

[6] Petition No 15 and 16 of 2015.

[7] Petition No 24 of 2018.

[8] [2014} eKLR.

[9] [2021] eKLR.

[10] [1979] KLR 254.

[11] 11th Edition.

[12] [2006] eKLR.

[13] [1961] 1 SCR 500.

11. Additionally, counsel for the DPP argued that the conviction cannot and does not offend article 50 of the *Constitution* or article 14 of the *ICCPR*. To buttress her argument, she cited *S v Dodo*[14]which held that there is no warrant for reading of article 14 of *ICCPR* in such a way that would render the trial envisaged by the article unfair or subvert the independent nature of the tribunal. She submitted that the court in *Yusuf Shiunzi v Republic*[15] relied on Francis Kariako Muruatetu & another v Republic[16]which has since been clarified by the Supreme Court so the said decision. is bad law.

12. To buttress her argument, she relied on *Fraser Hemleins Pty Ltd v Cody*[17]which dismissed the argument that a minimum mandatory sentence is unconstitutional holding that if the legislature could prescribe a minimum, it could also prescribe a maximum. She also cited *MK v Republic*[18] which held that section 20(1) of *the Act* means that the trial court has the discretion to mete out a maximum term. She underscored the need for the court to weigh the gravity and the circumstances of the offence and cited *R v Sarson*[19] in support of the proposition that where the courts are unable to provide an appropriate remedy, the executive is permitted to exercise the prerogative of mercy and order the offender's release. She cited *Harmelin v Michigan*[20] and *Magaming v The Queen*[21]both of which held that mandatory sentences are not unconstitutional. She submitted a courts discretion is not absolute because the court must consider legislative policies in preferring stiffer penalties.

13. The Hon Attorney General submitted that the petitioners have misconstrued the *Muruatetu* case and argued that the Supreme Court was clear that it did not outlaw the mandatory minimum sentences. As for the alleged violation of article 50 rights, the AG submitted that the issue was settled in *Sammy Abiyo Jillo v Republic*[22]which held that mandatory minimum sentences are not unconstitutional. The AG submitted that the petitioners have not demonstrated how the trial process violated their rights. (Citing *David Mathu v SMC International PTY Ltd*[23]). He also submitted that the issue of constitutionality of the impugned provisions was determined in *CKW v Attorney General*,[24] *Sammy Abiyo Jillo v Republic* and *MK v Republic*[25]and urged the court in deference to the doctrine of *stare decisis* to up hold the said provisions, a position he argued was up held in *Law Society of Kenya v Attorney General & another*.[26] Lastly, he submitted that the alleged limitation (if any) meets the tests in article 24 because they serve a legitimate purpose.

14 (CCT 1/01) [2001] ZACC 16; 2001 (3) SA 382 (CC);; 201 (5) BCLR 432 (CC).

15 Petition No 24 of 2019.

16 Petition No 15 & 16 of 2015.

17 (1945) 70 CLR 100.

18 [2015] eKLR.

19 [1996] 2 SCR at p 51.

20 501 US 957 (1991).

21 (2013) 232 CLR 381.

22 [2012] eKLR.

23 [2021] eKLR.

24 [2014] eKLR.

25 [2015] eKLR.

26 [2021] eKLR.

14. I find it convenient to commence the analysis by stressing that the judiciary has a special role in our system with respect to constitutional interpretation. The reason is not simply that "it is emphatically the province and duty of the judicial department to say what the law is." That famous line from *Marbury v Madison*,[27] in the context of 1803, was not an assertion of interpretive supremacy but a claim of interpretive parity: the courts "as well as other departments" are bound by the Constitution and must interpret it when a dispute so requires. That is the language of article 165(3)(d) of the *Constitution*. This judiciary's unique competence and authority to interpret the Constitution is widely accepted "as a permanent and indispensable feature of our constitutional system."[28] In deciding whether any provisions of a law passed by the Parliament as an ordinary law are inconsistent with the Constitution, neither the courts nor their judges are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution.

15. The interpretive authority of the courts is rooted in a familiar duality. On one hand, the judiciary by virtue of life tenure enjoys independence from the political branches and public passions of the moment. Insulated from partisan pressures, the judiciary bears a responsibility to render decisions without fear or favor toward the political majority. As Alexander Hamilton said, independent courts serve as an "excellent barrier to the encroachments and oppressions of the representative body," and they play a "peculiarly essential" role in safeguarding individual rights and liberties. On the other hand, the judiciary "has no influence over either the sword or the purse;" it has "neither force nor will, but merely judgment." As a practical matter, the voice of the judiciary on constitutional questions must ultimately draw its authority from the public's acceptance of its institutional role, even when its specific decisions are controversial.

16. A court's judgment must reflect the nation's best understanding of its fundamental values. In interpreting and applying the Constitution, the judiciary must exercise independence from politics and reflect the common will in order to secure the democratic legitimacy of its decisions. Undeniably, the overriding characteristics of our Constitution can be summarized as follows: -

    a. that the Constitution is the supreme source of law;

    b. that human rights and fundamental freedoms are protected as inherent and inalienable rights of the people;

    c. that the Constitution is based on the rule of law;

    d. that the principle of separation of powers is entrenched in the Constitution;

    e. that one branch of government may not trespass on the province of any other under the principle of separation of powers.

17. With the above parameters laid down, I proceed to address the core issue presented in this case, which the constitutional validity or otherwise of mandatory/minimum sentences. Fortunately for me, this issue has been the subject of judicial pronouncements in this country. In *Philip Mueke Maingi & 5*

27 5 US (1 Cranch) 137 (1803),

28 Ibid.

others v Director of Public Prosecutions & Attorney General,[29] Odunga J after a comprehensive review of the law, authorities both local and foreign, Odunga J had said: -

> 88. A study of the offences under the said Act reveals that *the Act* prescribes minimum mandatory sentences in several sections.
>
> 89. In determining the relevance and constitutionality or otherwise of such sentences, and statutes in general, it is my view that the current constitutional dispensation particularly article 27 of the *Constitution* ought to be taken into account. Clause 7 of the Transitional and Consequential Provisions thereof provide as follows:
>
> > All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with conformity with this Constitution.
>
> 90. It is clear that minimum mandatory sentences, *prima facie*, do not permit the court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the court is deprived of the discretion to consider whether a lesser punishment than the minimum prescribed, would be more appropriate in the circumstances. I am however, alive to the provisions of section 4(1) and (2) of the *Probation of Offenders Act*, cap 64 Laws of Kenya which provides as follows:
>
> > (1) Where a person is charged with an offence which is triable by a subordinate court and the court thinks that the charge is proved but is of the opinion that, having regard to youth, character, antecedents, home surroundings, health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which the offence was committed, it is expedient to release the offender on probation, the court may —
> >
> > > (a) convict the offender and make a probation order; or
> > >
> > > (b) without proceeding to conviction, make a probation order, and in either case may require the offender to enter into a recognizance, with or without sureties, in such sum as the court may deem fit.
> >
> > (2) Where any person is convicted of an offence by the High Court and the court is of the opinion that, having regard to the youth, character, antecedents, home surroundings. health or mental condition of the offender, or to the nature of the offence, or to any extenuating circumstances in which, the offence was committed, it is expedient to release the offender on probation, the court may, in lieu of sentencing him to any punishment, make a probation order, and may require the offender to enter into a

29 Petition No E017 of 2021.

recognizance, with or without sureties, in such sum as the court may deem fit.

91. It is arguable whether in light of the foregoing, sexual offenders qualify to be considered for probation. If they do, then the proponents of minimum mandatory sentences may find it difficult to justify such sentences on the ground that sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences. It is however my view that such reasoning may be taken to mean that there is lack of faith in the judicial system to mete appropriate sentences, a proposition that is dangerous in a system that believes in the rule of law. The fact that a trial court may err in imposition of sentences ought not to be a reason for taking away judicial discretion and handing it over to the legislature. The judicial system provides for appellate process where parties are dissatisfied with decisions of the lower court. To remove from the courts, the power to mete appropriate sentences merely because the lower courts or any other court for that matter are not imposing "sensible sentences" in my view amounts to judicial coup. All the tiers of the judiciary cannot be said to be wrong and if they arrive at the same decision then everyone must live with that decision however unpalatable it might appear since according to the law, that is the right decision.

96. In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:

> Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.

18. The learned law lord in his characteristic eloquence proceeded to say: -

106. It may be argued that these decisions of the Court of Appeal ought not to be followed on the ground that they are per incurium in light of the clarification in *Muruatetu 2*. However, it is my view that the Supreme Court in *Muruatetu 2* did not address itself to the constitutionality of mandatory minimum sentences. It simply clarified that *Muruatetu 1* only dealt with murder. I agree with that clarification. However, the Supreme Court left it open to the High Court to hear any petition that may be brought challenging *inter alia* mandatory minimum sentences and make a determination one way or another. The Supreme Court did not hold that the High Court ought not to apply the reasoning in *Muruatetu 1*.

107. In my view, even without the application of the ratio in Muruatetu 1, based on what I have stated hereinabove, I find that whereas the sentences prescribed under the *Sexual Offences Act* are not unconstitutional by the mere fact of such prescription and the trial courts are at liberty to impose them, the imposition of the same as the minimum mandatory sentences does not meet the constitutional threshold particularly section 28 of the *Constitution*.

108. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in *S v Malgas* 2001 (2) SA 1222 SCA 1235 paragraph 25 as follows:

> "What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

109. This court does not doubt the good intentions of the drafters of the *Sexual Offences Act* in taking steps to curb the menace of sexual offences and the trauma it causes to the victims of the said offence. The perpetrators of the said offences must be condemned by all means. However, the sentences to be imposed must meet the constitutional dictates.

110. It is also debatable whether minimum mandatory sentences which only prescribe imprisonment as the mode of sentencing are in tandem with the *International Covenant on Civil and Political Rights* of 1966, which Kenya ratified in 1972 and for that reason, Covenant forms part of Kenyan law pursuant to article 2(6) of the *Constitution*. Article 10(3) of the Covenant stipulates that— "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." A sentence that does not provide for other options save for custodial sentence may well be frowned upon the ground that it may not achieve the essential aim of sentencing.

111. My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under article 28 of the *Constitution*. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than the Constitution, the *prima facie* mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under article 28 of the *Constitution* as appreciated in the *Muruatetu 1* case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional.

112. At the risk of being repetitive, I must make it clear that my finding herein does not mean that the court ought not to mete out what appears as *prima facie* mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentences as are appropriate to the offence committed. I gather support from the opinion held by the Court of Appeal in *Dismas Wafula Kilwake v Republic* [2019] eKLR that:

> "In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter

commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

113. I however associate myself with the sentiments of the Court of Appeal in It was noted that the Court of Appeal in *Eliud Waweru Wambui v Republic* [2019] eKLR has also rallied the above call for legislative amendments to the *Sexual Offences Act* by opining that; -

> "We need to add as we dispose of this appeal that *the Act* does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years. We think it is rather unrealistic to assume that teenagers and maturing adults in the sense employed by the English House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402, do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process, and not a series of disjointed leaps. As Lord Scarman put it in that case (at p421);
>
> "If the law should impose on the process of "growing up" fixed limits where nature knows only a continuous process, the price would be artificially and a lack of realism in an area where the law must be sensitive to human development and social change." At p 422.
>
> In England, for instance, only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. See Archbold *Criminal Pleading, Evidence and Practice*, [2002] p 1720. The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation.
>
> For the reasons we have set out herein, we find that the appellant's conviction was not safe, given the full circumstances of the case and the sentence, clearly imposed on the basis of a mandatory minimum was clearly harsh and excessive."

19. The learned judge observed: -

115. This court also had occasion to weigh in on the same matter in *Yawa Nyale v Republic* [2018] eKLR where it expressed itself as hereunder:

> "It is now clear that certain provisions of the Sexual Offences Act, are a cause of concern in this country. The effect of the harsh minimum sentences imposed under the said Act on young people in this country is a serious cause of concern. Our jails are overflowing with young people convicted courtesy of the provisions of the said Act. While I appreciate that sexual offences do demean the victims of such crimes and ought not to be taken lightly, the general society in which we operate ought

to be taken into account in order to achieve the objectives of punishment. Penal provisions ought to take into account the objectives intended to be achieved and should not just be an end in themselves otherwise they may end up being unjust especially where the penalties imposed do not deter the commission of crimes where both the victim and the offender do not appreciate the wrongdoing in question."

116. Having said that the ultimate decision as to what ought to be done must remain that of the legislature. Ours is simply to align the legislation that were in existence before the promulgation of the *Constitution of Kenya, 2010* with the letter and spirit of the Constitution.

117. In the case *R v Scott* (2005) NSWCCA 152 Howie J Grove and Barr JJ stated:

> "There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed..."

118. Having considered the issues raised in this petition, the orders that commend themselves to me and which I hereby grant are as follows:

1) To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the *Constitution*. However, the court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

2) Taking cue from the decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR(*Muruatetu 1*) those who were convicted of sexual offences and whose sentenceswere passed on the basis that thetrial courts had no discretion but to impose thesaid mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases.

3) Save for the foregoing, the other reliefs are declined since this court cannot grant a blanket order for resentencing in the manner sought.

4) There will be no order as to the costs of this petition.

20. In determining the issues at hand, I am inspired by the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic*[30] (the Muruatetu case) and the lucid exposition of the law by Odunga J in the above cited case. Odinga J articulately distilled the principles of law flowing from the *Muruatetu* case and addressed their applicability to other cases which raise similar issues. The Supreme Court, albeit, in the context of the mandatory death penalty addressed the nature of mandatory sentences and found such sentences to be constitutionally infirm for *inter alia* offending the right to a fair trial guaranteed under article 50(1) of the *Constitution* as demonstrated by the following excerpts: -

(32) Two Indian decisions also merit mention. In *Mithu v State of Punjab*, Criminal Appeal No 745 of 1980, the Indian Supreme Court held that "a law that disallowed mitigation and denied a judicial officer discretion in sentencing was harsh, unfair and just" while in *Bachan Singh v The State of Punjab (Bachan Singh)* Criminal Appeal No 273 of 1979 AIR (1980) SC 898, it was held that "It is only if the offense is of an exceptionally depraved and heinous character,

[30] [2017] eKLR.

and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the court may impose the death sentence.”

(33) The UN United Human Rights Committee has also had occasion to consider the mandatory death penalty. In case of *Eversley Thomson v St Vincent*, Communication No 806/ 1998 UN Doc CCPR/70/806/1998 (2000), it stated that such sentence constituted a violation of article 26 of the Covenant, since the mandatory nature of the death sentence did not allow the judge to impose a lesser sentence taking into account any mitigating circumstances and denied the offender the most fundamental of right, the right to life, without considering whether this exceptional form of punishment was appropriate in the circumstances of his or her case.

Interrogating section 204 of the *Penal Code*

(37) The rights of an accused person to a fair trial is provided for under article 50(2) of the *Constitution*. That right is absolute as it is one of the rights which cannot be limited pursuant to article 25(c) of the Constitution. Article 50(1) and (2) of the *Constitution* provides:

> (1) “Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.
>
> (2) Every accused person has the right to a fair trial, which includes the right:
>
> ....
>
> (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by Law."

(38) Kenya is a signatory to the *International Covenant on Civil and Political Rights* (ICCPR) since May 1972. The *ICCPR* makes the following provisions under article 14:

> 1. “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...”

(40) These constitutional provisions and those of the *ICCPR* bring to the fore a number of principles. Firstly, the rights and fundamental freedoms belong to each individual. Secondly, the bill of rights applies to all law and binds all persons. Thirdly, all persons have inherent dignity which must be respected and protected. Fourthly, the State must ensure access to justice to all. Fifthly, every person is entitled to a fair hearing and lastly, the right to a fair trial is non-derogable. For section 204 of the *Penal Code* to stand, it must be in accord with these provisions.

(41) 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 the sentencing stage too.

(42) Pursuant to sections 216 and 329 of the *Criminal Procedure Code*, chapter 75, Laws of Kenya, mitigation is a part of the trial process. Section 216 provides:

> The Court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to the sentence or order to be passed or made.
>
> Section 329 of the *Criminal Procedure Code* provides:
>
> The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

(43) Therefore, from a reading of these Sections, it is without doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency.

(46) We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to article 50(2) of the *Constitution* are not exhaustive.

(47) Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in article 10 of the *Universal Declaration of Human Rights*, and in the same vein article 25(c) of the *Constitution* elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

(48) Section 204 of the *Penal Code* deprives the court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under articles 25 of the *Constitution*; an absolute right.

(53) If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.

(54) 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. Counsel for the petitioners and *amici curiae* both urged that the mandatory death sentence denied the petitioners enjoyment of their rights under article 50(2)(q) of the *Constitution*. On this issue, we are persuaded by the decision in *Edwards v The Bahamas* (Report No 48/01, April 4, 2001) which was decided by the Inter-American

Commission on Human Rights. In that matter, Michael Edwards was convicted of murder and a mandatory death sentence imposed on him.

(60) Another aspect of the mandatory sentence in section 204 that we have grappled with is its discriminate nature; 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 sentence.

(61) Article 27 of the *Constitution* sets out non-discrimination provisions in the following terms:

27.

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

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(63) Article 27 of the *Constitution* provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to section 204 are not accorded equal treatment to convicts who are sentenced under other sections of the *Penal Code* that do not mandate a 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. This is repugnant to the principle of equality before the law. Accordingly, section 204 of the *Penal Code* violates article 27 of the *Constitution* as well.

(64) Having laid bare the brutal reality of the mandatory nature of the sentence under section 204 of the *Penal Code*, it becomes crystal clear that that section is out of sync with the progressive Bill of Rights enshrined in our *Constitution* specifically; articles 25(c), 27, 28, 48 and 50(1) and (2)(q). That section therefore cannot stand, particularly, in light of article 19(3)(a) of the *Constitution* which provides that the rights and fundamental freedoms in the Bill of Rights belong to each and every individual and are not granted by the State, and in light of article 20(1) and (2) which provide that: (1) The Bill of Rights applies to all law and binds all state organs and all persons and (2) Every person shall enjoy this rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom. In light of these provisions therefore, the timing of the constitutional challenge to section 204 of the *Penal Code* is propitious and will succeed.

(65) A generous and purposive interpretation is to be given to constitutional provisions that protect human rights. This court must give life and meaning to the Bill of Rights enshrined in the Constitution. It is trite that the Constitution is the Supreme law, and all legislation must conform with it.

21. I am aware that the Supreme Court in *Muruatetu two* clarified that the Muruatetu one was limited to the death penalty in murder cases. However, I entirely agree with the reasoning of Odinga J in the above cited case particularly on the precedential value of the *Muruatetu one*. The principles flowing from the *Muruatetu one* are binding to all courts in Kenya as dictated by article 163(7) of the *Constitution*. The disposition of constitutional questions must be formidable in terms of some constitutional principles that transcend the case at hand and are applicable to all comparable cases. Court decisions cannot be ad hoc. They must be justified and perceived as justifiable on more general grounds reflected in previous

case law and other authorities that apply to the case at hand.[31] After all, a mandatory minimum sentence carries the same characteristics and effect regardless of the offence created by the provision.

22. The following principles are discernible from the Supreme Court decision in Muruatetu one. These principles are true to all mandatory minimum sentences irrespective of the offence: -

   i. A law that takes away judicial discretion can only be regarded as harsh and unjust.

   ii. The rights of an accused person to a fair trial under article 50 of the *Constitution* is absolute as it is one of the rights which cannot be limited pursuant to article 25(c) of the *Constitution*.

   iii. The trial process does not stop at convicting the accused. 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 the sentencing stage too.

   iv. Mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to article 50(2) of the *Constitution* are not exhaustive.

   v. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

   vi. If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict.

   vii. A fair trial has many facets, and includes mitigation.

   viii. Another aspect of the mandatory sentence is its discriminate nature; 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 sentence. Article 27 of the *Constitution* sets out non-discrimination provisions.

23. A court faced with a case where the minimum sentencing provisions apply, will have no choice, but to impose the prescribed sentence. This will happen regardless of what the court might regard as the appropriate sentence in the circumstances and accordingly, the court's discretion in the circumstances is fettered. This is largely because the enactment of the legislation meant that it was no longer business as usual, when sentencing for the specified offences. Sentence discretion is a vital element of our law of sentencing and at the heart of that discretion is the principle that each case should be treated on its own facts or merits and it is precisely for this reason that the sentencing discretion lies with the trial court.[32]

24. In the minimum, five key principles are discernible from paragraph 23 above. The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court. The fact that courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is

[31] See Wechsler, {1959}. *Towards Neutral Principles of Constitutional Law*, Vol 73, Havard Law Review P 1.

[32] SS Terblanche *A Guide to Sentencing in South Africa* 1st Ed (1999) 122.

that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person.[33]

25. The third principle, though closely related to the first two is that sentencing remains a discretionary power, exercisable by the court and it involves the deliberation of the appropriate sentence. Finding an 'appropriate sentence' or a 'just punishment' falls somewhere between striking a balance on key procedural ideals namely – rule making which ensures consistency and predictability. Secondly, sentencing requires the judge to exercise discretion, which promotes flexibility and efficiency in the administration of justice. A balance of these two ends promotes consistency in sentencing at the same time as ensuring that judges are flexible to adjust sentences when there is a need. Therefore, while the law exists on mandatory sentencing, introducing flexibility enables the court to strike the right balance. Sadly, a review of sentences imposed by the courts since the enactment of the Sexual Offences Act discloses massive and worrying inconsistencies which border on injustice because the peculiar circumstances of the case are ignored.

26. The core value is to ensure that courts impose a 'just and appropriate' sentence. This requires a judge sentencing an offender to ensure that the 'aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved.' The "just and appropriate sentence" arrived at considering the peculiar circumstances of the case can only be arrived if the sentence is fixed and pre-determined regardless of the peculiar circumstances. Some defilement cases are preceded or accompanied by extreme violence and sometimes leave life threatening impairments or even death. Offenders in such cases deserve no mercy. Stiffer or even maximum sentences must be deployed in such cases. Other cases involve very young and innocent girls or boys, mentally or physically challenged victims or extremely aged and helpless persons. Offenders in such cases deserve no mercy. Others cases involve persons who have been entrusted with young children, and they abuse the trust. Such persons deserve no mercy. Other cases involve teenagers and boys of same age or age group both discovering their bodies. In such cases the boy child ends up in jail once convicted and a mandatory sentence is imposed regardless of the peculiar circumstances. Other cases involve girls who though under 18 have had a series of relationships. Others offences can be attributed to poor parenting. In this category one finds irresponsible absentee fathers or mothers. Such boys or girls need guidance and counselling rather than mandatory life imprisonments. A visit to any prison in Kenya will confirm all these categories.

27. The fourth principle equally related to the above three is that court's advantage centres on the fact that they try individual cases and they can thus make sentencing decisions based on the particular facts of each case as they possess information pertaining to a particular accused. Judges and Magistrates should be granted an unfettered discretion to impose sentences in cases presented to them. This is because the sentencing discretion can only be properly exercised on the basis of all the facts relevant to the matter. While the legislature is concerned in a general way with the penalty that should attach to an offence, the court is concerned in a case-to-case basis the actual sentence that should be meted out to the particular offender. There is a difference between the preoccupations of the legislature in legislating a penalty provision and the pre-occupations of the court in sentencing a particular offender. (See *Poonoo v Attorney-general*[34]).

28. As was held in *Poonoo v Attorney-general* (*supra*), sentencing an offender is not the mechanical application of letters and number in a formulaic table. It is the human deliberation of what is the just punishment which can be given to a particular offender seen to have strayed from the set of norms at the time laid down by society. In this sense, convicting or discharging someone is easier. The formidable

[33] (**S v Rabie* 1975 (4) SA 855 (A) at 861D; *S v Scheepers* 1977 (2) SA 154 (A) at 158F-G)

[34] (SCA 38 of 2010) [2011] SCCA 30 (09 December 2011); Media neutral citation [2011] SCCA 30.

task, constitutional in character, comes at the moment of sentencing. The Seychells Court of Appeal in *Poonoo v Attorney-general* (*supra*), addressing mandatory sentences made reference to the textbook, *Sentencing Law and Practice*[35] in which the author aptly stated: -

> "It has been said that while legislatures understand offences, courts understand offenders. No statute or guideline system, no matter how finely tuned, can cater in advance for the unique circumstances of every offender who will come before the courts for sentence."

29. The court in the above cited case proceeded to state that "sentencing involves a judicial duty to individualize the sentence tuned to the circumstances of the offender as a just sentence. It cannot be likened to the mere administration of a common formula or standard or remedy." It again quoted from Thomas O'Malley thus: -

> "The proper exercise of discretion required attention to established guiding principles. In a sentencing context, the objective must be to achieve a viable mix of consistency and individualization."

30. Admittedly, not every mandatory or mandatory minimum penalty prescribed by legislation breaches the constitutional principle of the separation of powers as an encroachment by the legislature on judicial power. The court in the above case cited The Judicial Committee of the Privy Council which endorsed the above constitutional principle when it stated at 27:

> "In other words, Parliament had the constitutional right to impose a mandatory minimum as a general principle for reasons that it is best able to decide and for which legal fiction has given Parliament unlimited wisdom. However, Parliament could never envisage that a court of law would feel bound to say: "If this court convicts you, your sentence will be the one which Parliament has written down for you in advance as a general principle; it matters little what the facts are and your personal circumstances are!" The appellant has his constitutional rights. The power of Parliament as well as the power of the courts stop where the constitutional rights of the citizen begin. That is the whole concept of constitutionalism."

31. O'Dalaigh CJ in *Deaton v Attorney General and the Revenue Commissioners* [36] on the same issue arising under the Irish Constitution stated: -

> "The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule and the application of the rule is for the courts .... The selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive ..."

32. The fifth principle is that the citizen in a given case of mandatory/minimum sentence has a right to put in a plea in mitigation to show that the imposition of the mandatory minimum sentence is not warranted in his case. If the court in considering all the facts and circumstances of the case comes to the conclusion that that indeed is the case, the court would be perfectly entitled to read down the mandatory minimum without feeling bound by it. The court is empowered to interpret that the imposition of any grossly disproportionate penalty as unconstitutional. The court is also empowered to interpret that the legislative removal of the intrinsic discretion of the court to sentence a particular

35 Thomas O'Malley, p ix, (1 Edition, Thomson Round Hall, Dublin 2, 2006).

36 (1963) IR 170 at 182-183.

accused in the special circumstances of his case who in the court's judicial view deserves much less, is unconstitutional.

33. At the end of the day, "what the offender deserves" in the real sense of the word is what we mean by fair hearing which includes a fair sentence in the evolving concept of constitutionality and constitutionalism. In the adherence to the rule of law and application of democratic principles to given situations, constitutionalism is not limited to mere interpretations of the various articles but in the actual application of the articles with the evolving concepts behind them to the different and actual scenarios coming to court for the actual sentencing process. In the evolving concept of justice, sentencing should no longer be considered as an orphan of the law.[37]

34. At the heart of the principles discussed above and equally central to the core issue raised in this case are fundamental questions relating to the constitutional validity or otherwise of the mandatory/minimum sentences. One, does the fact that an accused person is deprived the right to mitigate impinge of his/her right to a fair trial under article 50 of the *Constitution*. Two, does the fact that the impugned provisions take away a court's discretion to consider an accused person's individual circumstances and determine an appropriate sentence breach an accused person's right to a fair trial. Three, does the fact that an accused person is deprived the opportunity to be accorded a lesser severe sentence offend his/her rights?

35. Lucky for me the Supreme Court in *Muruatetu one* was categorical that mitigation forms an integral part of a fair trial, so, the fact that an accused person is deprived the right to mitigate curtails his rights under article 50(1). Similarly, taking away judicial discretion and the fact that the mandatory minimum sentences deprive the court the discretion to prescribe a sentence taking into account the individual circumstances of the accused unfair to the accused and it impinges on the right to a fair trial. Sentencing is an integral part of a judicial function and an important element of a fair trial process. Similarly, the provisions under challenge deprive the accused person the benefit of a lesser sentence informed by the circumstances of each offence. Lastly, unlike in other offences, the mandatory minimum sentences are discriminatory because they deprive the accused person the full benefit of the law contrary to article 27 as earlier discussed.

36. For avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence.

37. Flowing from my analysis of the facts, the law and the conclusions arrived at herein above, I find and hold that these consolidated petitions are merited. I also find that this is a proper case for this court to fashion an appropriate relief(s). Indeed, this court is empowered by article 23(3) of the *Constitution* to grant appropriate reliefs. The most precise definition of "appropriate relief" is the one given by the South African Constitutional Court in *Minister of Health & Others v Treatment Action Campaign & Others*[38] thus: -

> "...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be

[37] *Poonoo v Attorney-general* (*supra*).

[38] {2002} 5 LRC 216 at p 249.

a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

38. I fully adopt the above definition of "appropriate reliefs" and shall deploy it in disposing these consolidated petitions. Arising from the findings herein above, I find that the following orders are appropriate in the circumstances of these consolidated petitions: -

a. A declaration be and is hereby issued that sentencing remains a discretionary power, exercisable by the court and involves the deliberation of the appropriate sentence. To the extent that the provisions of sections 8(2), (3), (4), 11(1), 20(1) and 3(3) of the *Sexual Offences Act* deprive the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case, then the said provisions offend the notion of a fair trial contemplated under article 50(1) of the *Constitution*.

b. A declaration be and is hereby issued that to the extent that the citizen in a given case of mandatory/minimum sentence has a right to put in a plea in mitigation to show that the imposition of the mandatory minimum sentence is not warranted in his case, then sections 8(2), (3), (4), 11(1), 20(1) and 3(3) of the *Sexual Offences Act* deprive an accused person the right to mitigate which is a core component of a fair trial contemplated under article 50(1) of the *Constitution*.

c. A declaration be and is hereby issued that sentence discretion is a vital element of our law of sentencing and at the heart of that discretion is the principle that each case should be treated on its own facts or merits and it is precisely for this reason that the sentencing discretion lies with the trial court.

d. A declaration be and is hereby issued that the infliction of punishment is pre-eminently a matter for the discretion of the trial court, and to the extent that the provisions of sections 8(2), (3), (4), 11(1), 20(1) and 3(3) of the *Sexual Offences Act* take away the courts discretion, ignoring the fact that the individualization of punishment requires proper consideration of the individual circumstances of each accused person, then the said provisions deprive an accused person the benefit of judicial distention which is prejudicial to the accused.

e. A declaration be and is hereby issued that courts should, as far as possible, have an unfettered discretion in relation to sentencing.

f. A declaration be and is hereby issued that sentencing discretion permits balanced and fair sentencing, which is a hallmark of enlightened criminal justice and the absence of this crucial discretion is potentially prejudicial to an accused person.

g. To the extent that the impugned provisions prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose taking into account an accused persons individual circumstances and mitigation, such sentences fall foul of the right a fair trial guaranteed under article 50 of the Constitution because mitigation and sentencing are part and parcel of a fair trial process.

h. A declaration be and is hereby issued that the impugned mandatory minimum sentences are discriminatory in nature because they give differential treatment to a convict under the

impugned provisions distinct from the kind of treatment accorded to convicts under other offences which do not impose mandatory sentences, so, mandatory minimum sentences violate an accused rights under article 27 of the Constitution.

i. An order that persons convicted and imprisoned under the said offences are at liberty to the petition the High Court for mitigation and re-sentencing.

j. No order as to the costs.

Orders accordingly

SIGNED AND DATED AT MOMBASA THIS 29TH DAY OF AUGUST 2022.

JOHN M. MATIVO

JUDGE

SIGNED, DATED AND DELIVERED VIRTUALLY THIS 31ST DAY OF AUGUST 2022.

STEPHEN GITHINJI

JUDGE