REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CONSTITUTIONAL PETITION NO. 8 OF 2020

IN THE MATTER OF: THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: ARTICLES 2, 10, 19, 20, 21, 22, 23, 25, 28, 48, 50,165(3) (b),258(1), 50(6), 50(9), 56(1), 50(2)(b) FAIR TRIAL GENERALLY

AND

IN THE MATTER OF: APPLICATION OF THE BILL OF RIGHTS BY THE COURTS

AND

IN THE MATTER OF: VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNER THE COSTITUTION

AND

IN THE MATTER OF: CRIMINAL CASE NO. 506 OF 2010 R VS NTHIWA CRIMINAL APPEAL NO. 65 &66 OF 2012 AND CRIMINAL APPEAL NO. 193 OF 2016

AND

IN THE MATTER OF: THE DOCTRINE OF RECENT POSSESSION IN SUSTAINING A CONVICTION

AND

IN THE MATTER OF: CONSTITUTION OF KENYA ON LEAST SEVERE PUNISHMENT AS IS JUST AND FAIR

BETWEEN

ANDREW NTHIWA MUTUKU.....PETITIONER

VERSUS

THE COURT OF APPEAL.....1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....2nd RESPONDENT

DIRECTOR OF CRIMINAL INVESTIFATIONS.....3RD RESPONDENT

INSPECTOR GENERAL OF POLICE.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

JUDGEMENT

Petitioner's Case

1. The Petitioner herein, **Andrew Nthiwa Mutuku**, together with **Musyoka Muli Kalyaka**, were charged with two counts of Robbery with Violence Contrary to Section 296(2) of the ***Penal Code***. They were further charged with Possession of a Firearm Contrary to Section 89(1) of the ***Penal Code*** while the Petitioner also faced the offence of possession of ammunition contrary to Section 4(1) of the ***Firearms Act***.

2. They both pleaded guilty but after full trial, were found guilty and convicted in all the counts facing them and sentenced to death in Counts 1 and 2 while the sentence in the other counts were held in abeyance. According to the petitioners, the trial court relied essentially on the doctrine of recent possession and the cell phone communication records in arriving at its decision.

3. Aggrieved by the said decision they appealed to this Court and after hearing their consolidated appeal, the Petitioner's Co-accused's appeal was allowed and his conviction set aside and the sentence quashed. The Petitioner's appeal was however upheld and his earlier sentences confirmed.

4. On appeal to the Court of Appeal, the Petitioner's conviction was similarly upheld but the death sentence was substituted with imprisonment for 25 years from the date of his conviction.

5. In this Petition, the Petitioner seeks the following reliefs:

> **a) A declaration that the Court of Appeal judgment dated 8th November 2019 in Criminal Appeal No. 193 of 2016 between Andrew Nthiwa Mutuku & Republic is nullity as the 1st Respondent Contravened Articles 20(2)(3)(4) of the Constitution of Kenya a far as Application of Fundamental rights and freedoms of the Petitioner is concerned.**
>
> **b) An order of *Certiorari* be issued quashing the Court of Appeal judgment dated 8th November 2019 and setting aside the sentence of 25 years in Criminal Appeal No. 193 of 2016 between Andrew Nthiwa Mutuku & Republic.**
>
> **c) A declaration that that the Petitioners rights to Fair Trial under Article 50 of the Constitution was infringed.**
>
> **d) A declaration that the Judgment dated 8th November 2019 in Criminal Appeal No. 193 of 2016 between Andrew Nthiwa Mutuku & Republic should be retried *de novo* by the Court of Appeal.**
>
> **e) A declaration be and is hereby issued that the sentences ought to run from the date of arrest and not from any other date.**
>
> **f) Any other relief that the Honourable Court may deem fit and just to grant in the interest of justice.**

6. At the hearing of this Petition, **Dr Khaminwa**, learned counsel for the Petitioner, informed the Court that since the challenge to the petition was only on jurisdiction, he would entirely rely on his oral submissions and that in the event that he did not refer to the written submissions, then the same ought to be considered as having been abandoned. According to learned counsel, at the time the Petitioner's submissions were filed they were seeking *inter alia*, the quashing of the conviction, the judgement and the setting aside of the sentence. However, in response, the Respondents only submitted on jurisdiction. Having considered that the Respondent's submissions narrowed down the issues, **Dr Khaminwa** decided to highlight only the parts of the submissions and expressly stated that he would not be seeking the quashing of the judgement.

7. It was submitted on behalf of the Petitioner that following the decision of the Supreme Court in Petition No. 15 of 2015 – **Francis Karioko Muruatetu vs. Republic**, in which the Supreme Court held that death sentence is unconstitutional and remitted the Court of Appeal judgement to the High Court to deal with the sentencing, it has been the practice that when death sentence is passed and there is an appeal against conviction and sentence to the Court of Appeal, the Court of Appeal in dismissing the appeal remits the matter to the High Court to comply with the Supreme Court decision.

8. In the instant case, it was submitted that the Court of Appeal instead proceeded to hand down a sentence of 25 years in its judgement delivered on 28th November, 2020. In so doing, the Petitioner complained that he was denied an opportunity to mitigate. Learned Counsel further submitted that it is a constitutional right which has been violated since even before the trial court, the Petitioner was convicted and sentenced without being accorded an opportunity to mitigate. Similarly, in upholding the conviction and the sentence, this Court did so without any mitigation.

9. It was submitted that the issue before the Court is a pure point of law as the Petitioner is seeking this Court's intervention as the Constitutional Court based on Article 50 of the Constitution that guarantees the right to fair hearing of which sentencing is part. It was submitted that under Article 50(2)(b) of the Constitution, the Petitioner was entitled to the benefit of the least severe sentence. At the time the offence as committed the prescribed sentence was death but at the time of the hearing of the appeal it was imprisonment. Accordingly, in imposing the sentence, it was submitted that the Petitioner ought to have been heard on the same before the sentence was imposed.

10. According to **Dr Khaminwa**, the right to fair hearing is part of the Bill of Rights and if it has been violated or breached, the Constitution has been violated. Learned Counsel referred to Article 1 of the Constitution and submitted that sovereign power belongs to the people but is delegated to state organs including the judiciary. Under Article 20 of the Constitution, the Bill of Rights applies to all State Organs while under Article 20(3) the Court is enjoined to develop the law and adopt an interpretation that favours the rights and freedoms. In support of his submissions, Learned Counsel relied on Articles 20(4), 22, 23, 50, 163, 165(3) and 260 of the Constitution and submitted that this Court is enjoined to uphold the Bill of Rights which includes the right to fair hearing which State Organs, including Judges and enjoined to uphold.

11. It was submitted that this Court has the original jurisdiction to decide whether a right or fundamental freedom has been infringed or violated and that where any Court including the Court of Appeal and the Supreme Court has violated a provision of the Constitution, a party can approach this Court for remedy immediately. It was submitted that the Petitioner could not approach the Supreme Court since the

jurisdiction of the Supreme Court is set out in Article 63 of the Constitution and it would not be expeditious to do so.

12. It was submitted that under Section 354 of the ***Criminal Procedure Code***, if it is contemplated that the sentence imposed on the convict is to be enhanced, to his prejudice, the convict must be heard and reference was made to the case of **Amritlal vs. Uganda [1970] EA 401;** ***The Code of Criminal Procedure*** 15th Edn. by **Y. V Chandrachud** at pages 624, 625 and 662; ***Procedure in Criminal Law in Kenya*** by **Momanyi Bwonwonga** at page 274; ***Criminal Procedure Bench Book*** at paragraphs 22, 24, 53 and 54; ***Sentencing and Punishment*** 3rd Edn by **Susan Easton**, Chapter 7. It was submitted that the Court, in exercising its discretion on the sentence to impose is enjoined to consider such factors as the age and conduct of the accused. However, in this case it is not clear what factors the Court of Appeal considered since it never gave the Petitioner an opportunity to give its side of the story before arriving at its decision on the appropriate sentence to be served. According to learned counsel, the value of the items as per charge sheet was Kshs 212,130/- which ought to have been considered in sentencing as well as the role of the Petitioner.

13. It was urged that the matter ought to be referred to the trial court for resentencing.

2nd, 3rd and 4th Respondents' Case

14. The Petition was opposed by the 2nd, 3rd and 4th Respondents based on the following grounds of opposition:

> **1) THAT this Honorable Court lacks the jurisdiction to entertain the Petition as the High Court cannot direct the Court of Appeal to retry a matter *de novo*.**
>
> **2) THAT this Honorable Court lacks the jurisdiction to quash the decision of the Court of Appeal as that would amount to the High Court supervising the Court of Appeal contrary to Article 165 (6) and (7) of the Constitution.**
>
> **3) THAT the jurisdiction of this Honorable Court under Article 50(6) of the Constitution has been incorrectly invoked as there are neither new nor compelling evidence.**
>
> **4) THAT the Petitioner has neither alleged the existence nor proved the existence of any new and compelling evidence for the invocation of this Honorable Court's jurisdiction under Article 50(6) of the Constitution.**
>
> **5) THAT the issues raised by the Petitioner are questions of trial that have been directly and substantially addressed and determined by the Trial Court, the High Court and the Court of Appeal and therefore are moot.**
>
> **6) THAT there is no basis for this court's interference with the trial court's sentence as sentence is a matter of discretion of the trial court and the Petitioner has neither alleged nor proved that the same was not exercised judiciously; and further that the question of sentence was already litigated by the Court of Appeal.**
>
> **7) THAT the Petition is vexatious, frivolous and therefore an abuse of the legal process.**
>
> **8) THAT it is in the interest of justice and public interest that the orders sought in the instant Petition be declined.**

15. On behalf of the said Respondent written submissions were filed in which, while dealing with the issue whether the high court has jurisdiction to entertain this petition under article 50(6), it was noted that the Petitioner filed an appeal at the **High Court Cr. Appeal No. 193/2016** which was subsequently dismissed and upheld the conviction. Reliance was placed on **Aloise Onyango Odhiambo vs. Republic (2016) eKLR** and **Simon Karanja Wainaina vs. Republic (2017) eKLR** as regards the circumstances under which a new trial based on the availability of new and compelling evidence may be ordered. It was submitted that the Petitioner has failed to demonstrate and convince this court that he has met the threshold to invoke this court's jurisdiction under Article 50(6) to hear this petition.

16. On the issue whether the Petitioners' fundamental rights under the Constitution have been violated, the Respondents' position was that the question which ought to be answered by the Petitioners herein strictly is how their fundamental rights enshrined in the Constitution been violated by the Respondents. It was contended that it is an established principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and how the same have been or will be infringed in respect to him based on **Anarita Karimi Njeru vs. Republic (1976-1980) KLR 1272** and **Matiba vs. AG (1990) KLR 666.**

17. It was submitted that it is trite law that he who alleges must prove their claim and that the claim must be propounded on an evidentiary foundation. This contention was founded on the decision of **Mativo, J** in **Leonard Otieno vs. Airtel Kenya Limited [2018] eKLR** where it was held that:

> **"It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses."**

18. According to the said Respondents, the independence of the judiciary is a key tenet in the administration of justice and that under Article 160 of the Constitution the Court is independent and impartial and is not subject to the control or direction of any person or authority.

19. As regards the question whether the Petitioner is entitled to an order of *Certiorari* to quash the judgment of the Court of Appeal, reliance was placed on **William and Others vs. Spautz [1993] 2 LRC 659** at 667 and **Kenya National Examination Council and the Republic, Nairobi, Court of Appeal Civil Appeal number 266 of 1996** and it was submitted that an order of certiorari is an order of the High Court quashing a decision made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the said Respondents' view, an order of certiorari in the circumstance is also not applicable because the decision was made intra vires with the Constitution and that there was no breach of rules of natural justice or any error of law apparent on the face of the record and therefore, this Court lacks the jurisdiction to quash the decision of the Court of Appeal as that would amount to the High Court supervising the Court of Appeal contrary to Article 165 (6) of the Constitution.

20. As to whether the High Court can declare that the Court of Appeal judgement is a nullity, it was submitted that this Court lacks the jurisdiction to entertain the Petition as the High Court cannot nullify the decision of the Court of Appeal and that were this Court to entertain this petition and declare that the Court of Appeal judgement is a nullity it would be perpetuating an illegality. This was submission was based on **Kenya Hotel Properties Limited vs. Attorney General & 5 Others (2020) eKLR** where the Court of Appeal expressed itself as hereunder:

> **"Despite several declarations of finality made by various Judges of the High Court and benches of this Court, the matter appears to have an uncanny capacity for reincarnation. Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. The Constitution itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts. Moreover, under Article 164(3) of the Constitution, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue *pits supremacy of the courts against citizens' enjoyment of fundamental rights* is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong: without jurisdiction it would be embarking on a hopeless adventure to nowhere. We think the Supreme Court in the *S.K MACHARIA* case captured the essence of the need for courts to respect and stay within jurisdictional tethers and constraints…"**

21. According to the said Respondents, this petition is an abuse of Court process in itself and should therefore be dismissed with costs to the Respondents.

22. In her oral highlight of the said submissions, **Ms. Felister Njeru**, Senior Assistant Director of Public Prosecutions Learned, submitted that the procedure was followed in the conduct of the defence case and that the legal provisions were explained on how the accused were to defend themselves which they understood. When it came to sentencing, they were afforced an opportunity to mitigate as required but they said nothing. Accordingly, it was submitted that there was no violation of the rights of the accused as regards mitigation.

23. As for the appellate court, it was submitted that the Petitioner's appeals were dismissed with the High Court upholding his sentence. It was submitted mitigation is only required before the trial court and not at the appellate court since in the event that the appeal fails, the sentence remains. According to Learned Counsel, there was no violation of the Petitioner's rights.

24. It was submitted that before the Court of Appeal, the Petitioner took issue with the constitutionality of his sentence and all his grounds were considered and in its decision the Court of Appeal upheld the Petitioner's conviction and only substituted his death sentence with 25 years imprisonment based on the Supreme Court decision in ***Muruatetu Case*** (supra). It was submitted that since sentencing is discretionary, the Petitioner's rights were not violated in passing the sentence since, like the High Court, there is no requirement for mitigation on resentencing. It was submitted that the right to fair hearing only relates to the proceedings before the trial court where the accused is accorded an opportunity to address the court hence there was no violation. It was therefore urged that the Petition has no merit and ought to be dismissed.

25. **Mr Muteti**, Learned Counsel for the Respondent associated himself with the submissions made by **Ms Njeru** and added that having exhausted his rights of appeal, for the Petitioner to benefit from Article 50 of the Constitution, he has to demonstrate that there are new and compelling evidence that would warrant a new trial. It was noted that the Supreme Court in the ***Muruatetu Case*** (supra) did not declare death sentence unconstitutional but only looked at the mandatory death sentence. Learned Counsel wondered the basis upon which this Court can order for resentencing since there is no justification for that course since it is not contended that the Court of Appeal did not consider the sentence and that the Petitioner had sought for the reversal of his sentence.

26. As regards the jurisdiction of this Court, it was submitted that the Constitution has vested the powers to interpret the Constitution in the High Court and the Supreme Court. However, since the High Court has exercised its jurisdiction, this is an appeal camouflaged as a Petition. Learned Counsel urged this to pronounce itself on the precision of the Constitution and whether there is manifest evidence as opposed to trivialisation of the Constitution by inviting the Court to make a declaration that the sentence was improper without evidence. It was submitted that in a case for proper consideration of Constitutional issues, the Court ought to be given evidence on constitutional issues and that hypothetically sentence cannot be a constitutional issue as opposed to the nature of sentencing which is not the petitioner's case.

27. While conceding that Article 25 of the Constitution binds all State Organs, it was submitted that for the Court to adopt a liberal approach, the Court must have a constitutional issue which it does not have in this case. It was argued that to entertain this petition would amount to opening a Pandora's box since every convict will simply walk into the High Court challenging the impropriety of the sentence, a dangerous and retrogressive action. It was argued that the Petitioner could have gone to the Supreme Court since it would be improper for the High Court to sit on appeal on a judgement of the Court of Appeal since the hierarchy of courts must be appreciated. It was submitted that the

Petitioner ought to have adduced evidence if he believed that his rights were violated. In this case, it was submitted that what has been addressed before this Court is the severity of the sentence.

Determination

28. I have considered the issues raised hereinabove.

29. It is clearl that this petition revolves around the interpretation and application of Articles 20, 23, 25 and 50 of the Constitution.

30. Article 23(1) of the Constitution provides that*:*

> ***The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.***

31. In this Petition, the Petitioner contends that his rights to fair hearing under Article 50 of the Constitution were infringed or violated by the 1st Respondent, a Superior Court, which passed the sentence against him without affording him an opportunity of being heard thereon. It is however argued that this Court has no jurisdiction to interrogate the said issue since the subject of this petition is a court superior to the High Court in terms of hierarchy. However, Article 20(1) of the Constitution provides that:

The Bill of Rights applies to all law and binds all State organs and all persons.

32. From a textual reading of the above provision, it comes out clearly that all State Organs and persons are constitutionally bound by the Bill of Rights, which under Article 19(1) and (2) of the Constitution, is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies and that the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. According to Article 260 of the Constitution, "State organ" means a commission, office, agency or other body established under the Constitution while "State officer" means a person holding a State office and "State office" means *inter alia* Judges. It follows that Judges are bound under Article 21(1) of the Constitution, to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights notwithstanding their hierarchy in the judicial chain. Where therefore it is alleged that a Judge has violated the rights or fundamental freedoms of an individual that individual is properly entitled to approach the High Court for redress and this Court is under an obligation to interrogate such allegations.

33. In arriving at my decision I associate myself with the views expressed in **Protus Buliba Shikuku vs. Attorney General [2012] eKLR** where the High Court, while addressing the question of jurisdiction to hear a matter which the Court of Appeal had determined where there was an allegation that of violation of fundamental rights held that:-

> **"(9) In a unique way the superior court is being asked to interfere with a decision of the court of appeal. We are in agreement that Article 23 of the current 2010 Constitution as read with Article 165(1) 3(a) (b) (d) (i) (ii) have donated the same mandate without exception to this superior court and for this reason of donation of jurisdiction without exception we feel confident that we are properly seized of the petitioner's complaints which arise from an alleged act of omission or commission by the courts of this jurisdiction as laid out in the petition.**
>
> **(10) That the petitioner's complaints in the petition having been anchored on an alleged breach of a fundamental right, the legal prescriptions assessed under the Article 2(5) of the 2010 Constitution as emanating from International Law Best Practices are in agreement with the current Municipal prescriptions as assessed that there are key principles which should be taken into consideration when dealing with complaints such as those laid by the petitioner namely:-**
>
> > **(a) Equality before the law courts, tribunals and equal protection of the law is a fundamental right.**
> >
> > **(b) A right to have one's cause heard irrespective of its ultimate success is of paramount importance.**
> >
> > **(c) There is entitlement to a right to an effective remedy meaning one which is capable of enforcement with a leaning towards conferring of a right.**
> >
> > **(d) The sole purpose of enforcement of human rights is for purposes of preservation of the human dignity and enable the offending human being realize the full potential of himself/herself as a human being.**
> >
> > **(e) Adjudication of the rights are between the individual as the governed and the state as the governor and are not adjudicatable as between individuals under private law.**
> >
> > **(f) As found by judges in the persuasive authority of *Reyes Versus the Queen (supra)* the call both at the international level as well as the Municipal level is for the courts to interpret the said bill of Rights broadly and liberally in order to give effect to the enforcement of the right with an interpretation which favours the enjoyment of that is alleged to have been breached or has been threatened to be breached.**
> >
> > **(g) The interpretation should also bear in mind the need to observe respect and protect the dignity of the individual.**
> >
> > **(h) There is no prescribed period of limitation inbuilt either under the defunct section 84(1) Provisions or current**

Article 23 of the 2010 Constitution as to when one loses the right to pursue infringement to a fundamental right.

(i) Even where no specific remedies were prescribed as being inbuilt in the defunct Section 84(1) Provisions, the courts had jurisdiction to grant appropriate remedies known in law. Some of which have now been entrenched in Article 23 with a rider that they are not exhaustive."

34. That position was approved by the Supreme Court (**Mutunga, CJ**) in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai Estate & 4 Others [2013] eKLR** where he expressed himself as hereunder*;*

"[111]…The Kenyan Constitution has given the High Court the exclusive jurisdiction to deal with matters of violations of fundamental rights (Article 23 as read with Article 165 of the Constitution). The High Court, on this point, has correctly pronounced itself in a judgment by Justices Nambuye and Aroni, in Protus Buliba Shikuku v R, Constitutional Reference No. 3 of 2011, [2012] eKLR.

[112] The Shikuku Case fell within the criminal justice system; it involved a claim of violation of the petitioner's fundamental rights by the Court of Appeal, in a final appeal. The trial Court failed to impose against the petitioner the least sentence available in law, at the time of sentencing. On the issue of jurisdiction, the learned judges, relying on Articles 20, 22, 23 and 165 of the Constitution, rightly held that the High Court had jurisdiction to redress a violation that arose from the operation of law through the system of courts, even if the case had gone through the appellate level. In so holding, the High Court stated with approval the dicta of Shield J, interpreting the provisions of the 1963 Constitution in Marete v. Attorney General [1987] KLR 690:

"The contravention by the State of any of the protective provisions of the Constitution is prohibited and the High Court is empowered to award redress to any person who has suffered such a contravention."

[113] Thus, in answer to Mr. Nowrojee's first two questions posed to the Supreme Court, my answer is this: There is no injustice that the Constitution of Kenya is powerless to redress."

35. In this case it is alleged that the right that was violated was the right to fair trial under Article 50(2) of the Constitution. The said Article 50(2)(k) and (p) provides that every accused person has the right to a fair trial, which includes the right to adduce and challenge evidence; and to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing. That right according to Article 25(c) of the Constitution cannot be limited. That was the position adopted by the ***Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa*** which provides that:

"The right to a fair trial is a fundamental right, the non-observance of which undermines all other human rights. Therefore the right to a fair trial is a non-derogable right, especially as the African Charter does not expressly allow for any derogations from the rights it enshrines."

36. On the issue of the right to fair trial, the Supreme Court of India in the case of Natasha Singh vs. CBI {2013} 5 SCC 741 expressed itself as follows:-

"Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized.

37. The same Court in ***Rattiram vs. State of M.P. {2012} 4 SCC 516***, ruled thus:-

"Fundamentally, a fair and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favoritism…Decidedly, there has to be a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused….."

38. A miscarriage of justice was discussed by the same Court in the case of **Zahira Habibullah Sheikh & Another vs. State of Gujarat & Others AIR 2006 SC 1367** where it opined that:-

"It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted…Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretence….The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice."

39. In **Muruatetu & Another vs. Republic [2017] eKLR, Petition No. 15 of 2015, the Supreme Court** expressed itself as follows:

> **"It is generally accepted that both the accused and the State have a right to address the court regarding the appropriate sentence. Although s 274 of the Criminal Procedure Act uses the word 'may' which may suggest that a sentencing court has a discretion whether to afford the parties the opportunity to address it on an appropriate sentence, a salutary judicial practice has developed over many years in terms whereof courts have accepted this to be a right which an accused can insist on and must be allowed to exercise. This is in keeping with the hallowed principle that in order to arrive at a fair and balanced sentence, it is essential that all facts relevant to the sentence be put before the sentencing court. The duty extends to a point where a sentencing court may be obliged, in the interests of justice, to enquire into circumstances, whether aggravating or mitigating which may influence the sentence which the court may impose. This is in line with the principle of a fair trial. It is therefore irregular for a sentencing officer to continue to sentence an accused person, without having offered the accused an opportunity to address the court or as in this case to vary conditions attached to the sentence without having invited the accused to address him on the critical question of whether such conditions ought to be varied or not. See *Commentary on the Criminal Procedure Act at 28-6D*."**

40. It is therefore my view that sentencing being part of the trial, the right to fair trial enjoins the Court to ensure that an accused is accorded an opportunity to adduce and challenge evidence that may either aggravate or reduce his sentence before the sentence is imposed. For the Court to arbitrarily impose a sentence without considering the mitigating circumstances disclosed by an accused person amounts to a violation of the right to fair hearing and trial. However, at an appellate stage where the appellant was accorded an opportunity to mitigate by the trial court, the appellate tribunal may take into account such mitigating circumstances on record without necessarily reopening the mitigation. In the event however, that no opportunity was afforded by the trial court, it behoves the appellate court to afford the appellant such an opportunity before a fresh sentence is imposed. In those circumstances, it is my view that it may be prudent to refer the matter back to the trial court to reconsider the sentence based on the mitigating circumstances in order not to deny the appellant his constitutional right to appeal against the sentence which may be the case where the appellate tribunal takes mitigating evidence and then proceeds itself impose the sentence.

41. In this Petition, it is alleged that the 1st Respondent in imposing the sentence of 25 years did not afford the Petitioner an opportunity of addressing it before doing so. The Respondents however contend that the Petitioner ought to have appealed to the Supreme Court instead. I have already found that where it is alleged that a person's rights have been violated even by the Highest Court in the land, his remedy under Article 50 cannot be limited and this Court would be shirking its constitutional duty if it were to fail to undertake its constitutional mandate.

42. It has also been argued that the Petitioner herein was in fact accorded an opportunity to mitigate by the trial court. From the proceedings, it is clear that the Petitioner was afforded an opportunity to mitigate and he stated that he had nothing to say. Though the prosecutor informed the Court that the Petitioner was a first offender, the Court while considering that the offence was serious and it led to a person's death, imposed on him the death sentence which has however been reduced to 25 years. In those circumstances, this is not a case where the Petitioner was not afforded an opportunity to mitigate, but where he simply failed to seize that opportunity. In those circumstances, it cannot be claimed that his rights to mitigate were violated. In **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** the Court of Appeal held that:

> **"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."**

43. In this case since the sentence was reduced from death sentence to 25 years imprisonment, the requirement that the appellant be heard before the sentence is enhanced does not apply.

44. In reducing the sentence, the Court of Appeal took into account the fact that the Petitioner pleaded for leniency and was a first offender but also considered the gravity of the offence. While an appellate court could well have found the sentence excessive, this Court in exercise of its jurisdiction as a Constitutional Court cannot interfere with the gravity of the sentence unless the same is unconstitutional or violates the Petitioner's right to fair hearing. While this Court may well have taken a different view had the courts not afforded the Petitioner an opportunity to mitigate, in this case where that right was afforded but not utilised, to interfere with the sentence would amount to unjustifiably interfering with the Court of Appeal's discretion in sentencing based on the material placed before it.

45. In the circumstances while I find that this Court has the power and is enjoined to interrogate the constitutionality of actions by state organs and all persons including superior courts, I have considered the circumstances in this case and I am unable to find that the Petitioner's rights were violated since he was called upon to mitigate but failed to do so. In the premises, I find no merit in this petition which I hereby dismiss.

46. Judgement accordingly.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 25TH DAY OF MARCH, 2021.

G.V. ODUNGA

JUDGE

In the presence of:

Miss Wekesa for Dr Khaminwa for the Petitioner.

Ms Njeru for the 2nd and 3rd Respondents

CA Geoffrey