REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL DIVISION

[CORAM: LESIIT, KIMARU & KIMONDO JJ.]

PETITION NO. 7 OF 2018

IN THE MATTER OF ARTICLES 1, 2, 3, 19, 20, 21, 22, 23, 25, 27, 28, 48, 50, 51, 59, 94, 95, 156, 157, 159, 165(3)(D) AND 4 AND 244(C) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 4 AND 5 OF THE CRIMINAL PROCEDURE CODE

AND

IN THE MATTER OF SECTION 211 AND 212 OF THE PENAL CODE

AND

IN THE MATTER OF SECTION 5 OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT, 2013

AND

IN THE MATTER OF SECTION 5 AND 6 OF THE OFFICE OF THE ATTORNEY GENERAL ACT, 2012

AND

IN THE MATTER OF SECTION 6 OF THE KENYA LAW REFORM COMMISSION ACT, 2013

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMNETAL

FREEDOMS UNDER ARTICLES 27 AND 28 OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

CHARLES HENRY NYAOKE.....PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF INTERIOR AND

CO-ORDINATION OF NATIONAL GOVERNMENT.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS.....3RD RESPONDENT

THE KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS.....4TH RESPONDENT

THE KENYA LAW REFORM COMMISSION.....5TH RESPONDENT

JUDGMENT

Introduction

1. At the commencement of the hearing, the Court was notified that a signal was received by the Registry on 13th October 2020 from Kodiaga Prison, reporting that the original petitioner, **Stephen Nyakwaka**, died at the prison on 26th July, 2020.

2. The issue that came to the fore was whether the court could proceed in the absence of the petitioner. After taking submissions from counsel for the parties, we ruled that the issues raised and the orders sought in the petition were *in rem*. We decided that the constitutional questions raised required this court's interpretation. We directed that since the original petition could not be prosecuted without a substantive petitioner, the deceased petitioner be substituted to breathe new life to the petition.

3. The Court gave directions, after the parties conceded that the petition should be saved, that counsel for the deceased petitioner moves the court to substitute the deceased within 14 days of the date of our order. Secondly, we directed that the 1st, 2nd, 4th & 5th respondents file their respective responses within 14 days of service to the substituted petition or substantive petition.

4. The 3rd respondent indicated that he would raise a preliminary objection to the new petition on the basis that it was *res judicata* in view of the decision in ***Peter Kariuki Muibau & 11 others v A. G & Another*** [2018] eKLR. In that regard, we directed that the intended issues that may be raised in the preliminary objection to form part of the 3rd respondent's reply to the petition as grounds of opposition. The 3rd respondent was directed to file and serve those grounds of opposition within 14 days of service of the substituted petition.

5. The court ruled that, since the respondents had indicated they had no objection to the motion by the petitioner to file a further petition substituting the deceased petitioner, the court would proceed to hear the substituted/substantive petition. That meant that the motion to substitute the deceased petitioner stood allowed unopposed. This, the court ruled, was guided by the overriding objective of the court; the dictates of **Article 159** of the **Constitution**; and to save on judicial time particularly considering that this is a three-Judge bench.

6. The Further Amended Petition dated 15th October, 2020 was filed on 21st October 2020 and substituted the deceased petitioner with one, **Charles Henry Nyaoke** (hereinafter referred to *as the petitioner*). All the parties had filed their respective written submissions which they wished to rely on. The 3rd respondent indicated that in addition to the submissions, it had also filed grounds of opposition to the petition.

7. The petitioner was represented by Mr. Onsongo. Ms. Orao appeared for the 4th respondent and also held brief for Ms. Lang'at for the 1st, 2nd and 5th respondents. Mr. Obiri, senior prosecution counsel, represented the 3rd respondent.

The Petitioner's case

8. The petitioner is one of the accused persons in ***Republic vs Stephen Walter Nyakwaka***, ***Richard Nunda Nyaoke*** *&* ***2 Others,*** Kisumu High Court Criminal Case No.13 of 2017; where they are charged for **murder** contrary to **Section 203** as read with **Section 204** of the **Penal Code**.

9. The petitioner's case is that he and other persons charged with **murder** suffered discrimination and unequal treatment before the law. He contends that he was denied equal protection and equal benefit of the law, as well as freedom from discrimination, therefore violating **Articles 25** and **27** of the **Constitution**. The petitioner further states that any person aggrieved or dissatisfied by the decision of a magistrate's court has a right of appeal to the High Court in the first instance, and to the Court of Appeal in the second instance, on matters

of law. Conversely, an accused person tried before the High Court has only one level of appeal to the Court of Appeal. It is the petitioner's case that the **Constitution** does not differentiate between cases tried before a high court and the magistrates court with regards to the rights of arrested and accused persons.

10. The petitioner contends that there is no jurisprudential basis for holding murder and treason trials in the High Court in the first instance, as opposed to commencing at the magistrates' courts. Further, that there is nothing unique, special or of such a technical nature that the magistrates' courts would be unable to try and determine those cases.

11. The petitioner further urged that the time taken to try cases before the High Court was longer compared to trials held before magistrates' courts. He urged that such delay amounted to denial of access to justice guaranteed under **Article 50** of the **Constitution.**

12. The petitioner contends that since magistrates' courts are many in number, are decentralized, and devolved throughout the counties, the costs of trial are much lower since witnesses do not have to travel far. This, he says will result further in enhancing access to justice as guaranteed under **Article 50** of the **Constitution.**

13. The petitioner states that all magistrates are well trained on the criminal law and procedure, and that the same procedure is applicable in both magistrates' courts and the High Court.

14. In terms of jurisdiction to impose sentences, it is the petitioner's case that the magistrates' courts have jurisdiction to impose minimum and maximum sentences provided for by the law, including the death sentence, similar to the High Court. He urges that the range of sentences that can be meted on a convicted person by a magistrates' court is similar to that by the High Court and that there was no justifiable reason for the murder and treason trials to be commenced in the High Court in exercise of its original criminal jurisdiction.

15. The petitioner states that trial of an accused person before the High Court as the court of first instance, denies an accused person the right to one further step of appeal; is discriminatory and a breach of **Article 27** of the **Constitution**, as well as **Article 7** of the **Universal Declaration of Human Rights**, and **Article 3** of the **African Charter on Human and Peoples' Rights**; that it gives preferential treatment to accused persons whose trials commence before the magistrates' court; that it elevates murder and treason to be more serious offences, yet they attract the same sentence of death as can be imposed by the magistrates' court; and, that it is not supported by any specific legal framework or policy.

16. The Petitioner states that pursuant to **Section 204** of the **Penal Code**, the sentence provided for persons convicted of murder is death, and that the trial court has no discretion in sentencing with regard to the said offence.

17. The petitioner further avers that **Sections 211** as read with **212** of the **Penal Code** provides that where a pregnant woman is convicted of an offence punishable by death, the sentence passed on her shall be life imprisonment.

18. The petitioner states that **Section 3(1)** of the **Criminal Procedure Code** provides that all offences under the Penal Code shall be inquired into, tried and otherwise dealt with according to the said Code. **Subsection 2** provides that all offences under any other law shall be inquired into, tried and otherwise dealt with according to the said Code, subject to any enactment for the time being in force regulating the manner or place of inquiring into, trying, or otherwise dealing with those offences.

19. The petitioner further states **Section 3(3)** of the **Criminal Procedure Code** provides that notwithstanding anything in the said Code, the High Court may, subject to provisions of any law for the time being in force, in exercise of its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by the said Code is inapplicable, exercise that jurisdiction according to the code of procedure and practice observed by and before the High Court of Justice of England at the date of coming into operation of the said Code.

20. The petitioner further contends that **Section 5** of the **Criminal Procedure Code** provides that:

> ***"An offence under any law other than the Penal Code shall, when a court is mentioned in that behalf in that law, be tried by that court.***
>
> ***When no court is mentioned, it may, subject to this Code, be tried by the High Court, or by a subordinate court by which the offence is shown in the fifth column of the First Schedule to this Code to be triable."***

21. The petitioner avers that the **First Schedule** to the **Criminal Procedure Code** does not provide the court with jurisdiction to try murder cases.

22. The petitioner states that **Article 2** of the **Constitution** establishes the **Constitution** as the supreme law of the Republic of Kenya which binds all persons and all State organs at both levels of government. He avers that the respondents have an obligation to respect, uphold and defend the **Constitution.**

23. The petitioner avers that the purpose of recognizing and protecting human rights and fundamental freedoms in **Article 19** of the **Constitution** is to preserve the dignity of individuals and communities, and to promote social justice and the realization of the potential of all human beings. He states that the rights and fundamental freedoms provided in the Bill of Rights belong to each individual and are not granted by the State, do not exclude other rights and fundamental freedoms not in the Bill of Rights but recognized by law, except to the extent that they are inconsistent with **Chapter 4** of the **Constitution**, and are subject only to limitations contemplated under the **Constitution**.

24. The petitioner states that by virtue of **Article 25** of the **Constitution**, the right to a fair trial cannot be limited. The petitioner further

states that **Article 27** of the **Constitution** provides for equality of all persons before the law and guarantees freedom from discrimination. This right is also enshrined under **Article 7** of the **Universal Declaration of Human Rights** as well as **Article 3** of the **African Charter on Human and Peoples Rights**.

25. The petitioner avers that every person has inherent dignity and right to have it respected and protected as enshrined under **Article 28** of the **Constitution**.

26. The petitioner contends that **Article 48** of the **Constitution** places the onus of ensuring access to justice for all persons on the State organs, which includes the respondents in the present petition.

27. The petitioner states that under **Articles 94** and **95** of the **Constitution**, Parliament is mandated to make laws that accord with the aspirations of the people of Kenya

28. The petitioner states that the respondents have a mandate jointly and severally to ensure that the laws of Kenya are aligned with the **Constitution,** and that any law that is inconsistent with the **Constitution** is amended or re-enacted so as to align it to the **Constitution**. The petitioner contends that the respondents also have a duty to participate in policy development which informs the enactment of legislation and formulation of rules which facilitate implementation of the **Constitution**.

29. The petitioner further states that the respondents, jointly and severally, have a duty and responsibility to ensure that all accused persons are treated equally before the law, which duty they have failed to uphold.

Petitioner's Submissions

30. Mr. Onsongo, counsel for the petitioner, filed written submission on 10th November, 2020 in support of the petition. He relied entirely on them without highlighting them. In those submissions, counsel asserted that by virtue of **Article 50(2)(q)** of the **Constitution**, every accused person has the right to a fair trial which includes, if convicted, the right to appeal to, or apply for review by, a higher court as prescribed by law. He submitted that an accused person, who was tried and convicted by a magistrate's court, if aggrieved by the trial court's decision, has the right of appeal to the High Court. If aggrieved by the decision of the high court in its appellate jurisdiction, he has a further right of appeal to the Court of Appeal, and finally to the Supreme Court, if the case meets the threshold for determination before that court.

31. Mr. Onsongo submitted that **Article 27(1)** of the **Constitution** provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. He argued that **Article 27(6)** of the **Constitution** directs the State to take legislative and other measures, including affirmative action, programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination, so as to give full effect to the realization of the rights guaranteed under the said Article.

32. In support of that proposition, the petitioner relied on the case of ***Peter K. Waweru vs Republic [2006] eKLR*** where the court defined discrimination as affording different treatment to different persons attributable wholly or mainly to their description. He also relied on the case of ***Nyarangi & 3 Others vs Attorney General [2008] eKLR*** where the court held that the law does not prohibit discrimination, but rather unfair discrimination. The court defined unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings; and stated that discrimination which is forbidden by the **Constitution** involves an element of unfavourable bias, and further that the discrimination by substantive law and procedural law is forbidden under the **Constitution**.

33. The court in the above case held that permissible classification for discrimination must satisfy two conditions; one, it must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group; and two, the differential must have a rational relation to the object sought to be achieved by the law in question.

34. The petitioner further submitted that the courts should not be saddled with provisions of a law or statute that existed before the promulgation of the new **Constitution**, that do not align themselves with the provisions of the said **Constitution**. He submitted that any law or statute that is inconsistent with the provisions of the **Constitution** is to the extent of the inconsistency, null and void. He urged that the rights and fundamental freedoms of an individual are two fold; those that flow from **Article 2(5)** of the **Constitution** and those that flow from other provisions of the **Constitution.** For that proposition, he relied on the case of ***Protus Buliba Shikuku vs Attorney General [2012] eKLR***.

35. The petitioner further submitted that the offence of murder is treated differently from other capital offences such as robbery with violence or attempted robbery with violence. He stated that a person accused of the offence of murder is denied one level of appeal since murder cases are tried before the High Court. He opined that there is nothing special about a murder trial that makes it necessary for the trial to be heard before the High Court, as opposed to a Magistrates' court.

36. Counsel urged the court to interpret the issues at hand in favour of enforcement of fundamental rights and freedoms. He urged the court to direct the respondents to undertake their responsibility to ensure that all laws are aligned to the the **Constitution**, so as to ensure equal treatment for all individuals, and equal access to justice. He asserted that accused persons whose trials commence at the High Court only enjoy a right of appeal to the Court of Appeal as opposed to their counterparts whose trials begin at the magistrates' courts, who have access to two levels of appeal. He was of the view that the said differentiation is discriminatory. In the premises, he urged this court to allow the petition as prayed.

The 1st, 2nd and 5th Respondents' Grounds of Opposition

37. The 1st, 2nd and 5th respondents through the Attorney General filed five grounds of opposition to the petition dated 3rd November 2020. These were:

a. The evidentiary burden required of the petitioner to demonstrate that he exhausted all his rights of appeal under the ***Constitution*** *or any written law has not been properly discharged.*

b. That the petitioner has misconstrued the role of Parliament in the enactment, amendment and or repeal of the ***Constitution****.*

c. That the matter is res judicata, the issues raised herein having been determined in ***Peter Kariuki Muibau & 11 Others vs The Hon. Attorney General and Director of Public Prosecutions*** *[2018] eKLR.*

d. That the petitioner purports to question the validity of ***Article 165(3)*** *of the* ***Constitution*** *on the unlimited jurisdiction of the High Court in criminal and civil matters, contrary to* ***Article 2(3)*** *of the* ***Constitution****.*

e. That the petition was unmeritorious and is otherwise a classical description of what constitutes an abuse of the due process of this court and should be dismissed with costs to the respondents.

1st, 2nd and 5th Respondents' submissions

38. The 1st, 2nd and 5th respondents through the Attorney General filed their written submission on 19th November 2020. They submitted that the commencement of murder trials before the High Court was not discriminatory. They urged that as regards the impugned **Sections 3** and **4** of the **Criminal Procedure Code,** which give a differentiation in the courts handling criminal cases, such differentiation is not unique to the Kenyan legal system. They argued that the Kenyan system borrowed heavily from the British system where courts are organized in order according to the seriousness and the nature of the matters they hear. For that proposition, the respondents relied on the case of ***Peter Kariuki Muibau & 11 others vs The Attorney General & Director of Public Prosecutions*** [2018] eKLR, where the learned judge found:

> "***[39]….This arrangement is necessitated by four main reasons; firstly, for purposes of specialization, courts are divided according to the matters they hear so that court personnel at each level become familiar with the types of cases heard, the relevant laws to those cases and the procedures to be followed. This is done so that courts can employ specialist personnel who may understand the specific needs of the parties coming before them. A very good example in our context is the establishment of the specialized courts under Article 162(2) of the Constitution to deal with employment and land cases as I have already observed in this judgment."***

39. The respondents urged that **Sections 3** and **4** of the **Criminal Procedure Code** do not offend the provisions of **Article 27** of the **Constitution** for providing for murder and treason to be tried before the High Court. They submitted that only unfair discrimination is disallowed by the law. For that proposition they relied the cases of ***Nyarangi & 3 others vs Attorney General*** [2008] eKLR where a definition is given of what constitutes discrimination. They also relied on the case of ***Lucy Nyaguthii Wachira vs Council for Legal Education & 3 others*** [2017] eKLR where the court discussed what constitutes unfair discrimination, and whether it is justifiable under limitations provided by the **Constitution**.

40. The respondents submitted that the petition was *res judicata* because the issues raised were determined and finally settled in ***Peter Kariuki Muibau & 11 others vs The Attorney General & another*****,** supra, where the court held that the organization of courts to hear different types of cases is necessary to ensure specialization of court personnel at each level, and to ensure each court understands the specific needs of the parties coming before it. The court held:

> ***"[41]….. In the instant case, I note that the Petitioners' complaint was not that they were denied an opportunity to appeal, but rather that they were not able to have a second chance on appeal as other suspects whose hearings commenced before the subordinate court. I am however, not persuaded by the Petitioners' argument that because they did not have a chance to a second appeal, this amounted to the denial to a right to fair hearing as Article 50(2)(q) of the Constitution on the right of appeal does not stipulate that such right must occur twice. The said Article stipulates as follows:***
>
> *'Every accused person has a right to a fair trial which includes the right, if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.'*
>
> ***[42]. Lastly, the setting of the hierarchy of courts is for administrative efficiency so that minor matters are heard locally or by lower courts and major matters by higher courts. This ensures that the administration of justice is streamlined thereby reducing court delays, backlogs and costs because court personnel under such a system have specialized knowledge and can process cases quickly. In the present case, petitioners argued that there was nothing peculiar about murder trials so as to necessitate their commencing before the High Court as opposed to other offences.***
>
> ***[43]. According to the petitioners, murder cases should be treated on equal basis as robbery with violence cases as both cases previously attracted the mandatory death sentence upon conviction. My take however, is that law makers had valid reasons for placing murder and treason in a different category from other criminal cases and this must have informed their decision to make provisions that their trials commence before the High Court. The seriousness of a murder charge cannot be gainsaid as it is an offence that may pose danger to the very existence of the human race if left unchecked…''***

41. To further buttress their argument, the respondents relied on several cases on what amounts to *res judicata* including the case of ***Okiya Omtatah Okoiti Vs CAK & 14 others*** [2015] eKLR and the case of ***John Florence Mautine Services Ltd & Another Vs. Cabinet Secretary for Transport and Infrastructure & 3 others*** [2015] eKLR.

42. The respondents submitted that the petitioner was challenging the unlimited original jurisdiction of the High Court in criminal and civil

matters provided under **Article 165(3)** of the **Constitution**. They urged that this power of the High Court to hear murder trials is prescribed and regulated by the **Constitution**, while the commencement of the other criminal trials before the magistrates' courts is regulated by statutes, and cannot be challenged. They urged that **Sections 3** and **4** of the **Criminal Procedure Code** which provide for murder and treason cases to be tried before the High Court are not unconstitutional. In the premises, they urged this court to dismiss the petition.

3rd respondent's response [Grounds of Opposition and Replying Affidavit]

43. The 3rd respondent filed grounds of opposition to the petition dated 12th October 2020. The 3rd respondent also filed a replying affidavit sworn by learned senior prosecution counsel, Mr. Obiri, on 13th October 2020. The 3rd respondent raised the following grounds of opposition:

> *1. "That the application and the petition separately and cumulatively purport to question the validity of the Constitution as far as unlimited jurisdiction of the High Court in criminal matters, and more particularly murder cases, is concerned contrary to the provision of Article 2 (3) of the Constitution which prohibits the challenging of the validity and or legality thereof by or before any court or other State organ.*
>
> *2. That it is in the interest of justice and public interest that the orders sought herein be declined."*

44. The 3rd respondent submitted that the petition purports to question the validity of the **Constitution** in as far as the unlimited jurisdiction of the High Court in criminal matters, and more particularly murder cases, is concerned. He urged that the challenge was contrary to the provision of **Article 2(3)** of the **Constitution** which prohibits challenge of the validity or legality of the **Constitution** by or before any court or other State organ.

45. The 3rd respondent disputed the petitioner's assertion that the trial court has no discretion in sentencing with regard to persons convicted of murder, and that the death sentence is the only sentence provided by the law. The 3rd respondent stated that pursuant to the decision of the Supreme Court in the case of ***Francis Karioko Muruatetu & Another vs Republic & 5 Others [2017] eKLR***, the mandatory nature of the death penalty was declared unconstitutional, thereby granting trial courts discretion on sentencing.

46. The 3rd respondent further deposed that the petitioner's interpretation of the **First Schedule** to the **Criminal Procedure Code** is incorrect. In his view, the correct interpretation of **Section 5(2)** of the Code was that where no court is mentioned with respect to the trial of an offence, subject to the said Code, the offence may be tried by the High Court. The 3rd respondent stated that by dint of **Section 5(2)**, murder cases are triable by the High Court.

47. The 3rd respondent averred that while he has a duty to uphold and defend the **Constitution**, the power to legislate is vested in Parliament, except where the authority is conferred to other entities by the **Constitution** or by legislation.

48. The 3rd respondent further contended that the right to equality before the law is not absolute and may be limited as long as the limitation is permissible and reasonable in an open and democratic society. Such limitation provides for the differentiation in applicability of the death sentence, for example, to the extent that the law exempts pregnant women from the death penalty under **Sections 211** and **212** of the **Penal Code**, as correctly noted by the petitioner.

49. The 3rd respondent averred that it is trite that not every differentiation in application of the law amounts to discrimination, and that it is important to identify the criteria that distinguishes legitimate differentiation from constitutionally impermissible differentiation. Accordingly, not all differentiation is prohibited by the **Constitution,** but only that which is unjustifiable and without any rational basis.

50. The 3rd respondent stated that the High Court has unlimited jurisdiction in criminal and civil matters including murder cases, which jurisdiction is provided under **Article 165(3)(a)** of the **Constitution**, whose validity is not subject to challenge by dint of **Article 2(3)** of the **Constitution**.

51. The 3rd respondent deposed that the proposal by the petitioner that all murder cases be tried by magistrates' courts so as to afford convicted persons dissatisfied by the decision of the trial court two levels of appeal, has the net effect of limiting the jurisdiction of the High Court in criminal matters, contrary to **Article 165(3)(a)** of the **Constitution**.

52. The 3rd respondent averred that the trial of murder and treason cases before the High Court, as opposed to the magistrates' courts, amounts to permissible and legitimate differentiation and the same is justifiable on the basis of the **Constitution**.

53. The 3rd respondent was of the view that the petitioner has failed to establish any breach or violation of any of his constitutional rights and fundamental freedoms, and has failed to lay any basis for grant of the reliefs sought in the petition. He therefore urged this court to dismiss the petition for lack of merit.

4th Respondent's Replying affidavit

54. The 4th respondent filed a replying affidavit to the petition sworn by Jacqueline Ingutiah on 19th November 2020. She averred that **Section 8** of the **Kenya National Commission on Human Rights Act, 2011** sets out the mandate of the 4th respondent. She deposed that **subsections (d)** and **(f)** of the said section prohibit the 4th respondent from receiving and investigating complaints on alleged violation of human rights relating to equality and discrimination.

55. She further stated that the petition is pegged on allegations of violation of the right to equality and non-discrimination provided under **Article 27** of the **Constitution**. She averred that the petition against the 4th respondent was bad in law for mis-joinder of parties. She therefore urged this court to dismiss the petition.

4th Respondent's submissions

56. The 4th respondent filed written submission on 20th November, 2020. It averred that it is established by virtue of **Article 59(1)** of the **Constitution**. **Article 59(4)** of the **Constitution** directs Parliament to enact legislation to give full effect to **Article 59** including restructuring the Commission into two or more separate commissions. Parliament created three independent commissions under three legislations namely: **The Kenya National Commission on Human Rights Act**; **The Commission on Administrative Justice Act**; and, **The National Gender and Equality Commission Act.** It urges that the three commissions have distinct but complimentary functions.

57. The 4th respondent further submitted that **Section 8** of the **Kenya National Commission on Human Rights Act** provides the mandate of the 4th respondent. **Subsections (d)** and **(f)** prohibit the 4th respondent from receiving and investigating complaints on alleged violation of human rights relating to equality and discrimination. The 4th respondent asserted that the petitioner appreciated this limitation with regards to the mandate of the 4th respondent in paragraph 5 of his petition.

58. The 4th respondent stated that the National Gender and Equality Commission has the mandate to promote gender, equality and to promote freedom from discrimination in accordance with **Article 27** of the **Constitution**; ensure integration of principles of equality and freedom from discrimination in all national and county policies, laws and regulations; act as the principal organ of the State in ensuring compliance with all treaties and conventions ratified by Kenya relating to issues of equality and freedom from discrimination; investigate complaints of violations of the principle of equality and freedom from discrimination and make recommendations for improvement of the functioning of the concerned institutions.

59. The 4th respondent averred that protection and promotion of the right to equality and freedom from discrimination is not the mandate of the 4th respondent, and therefore there is mis-joinder of parties. The 4th respondent relied on ***Skair Associates Architects vs Evangelical Lutheran Church of Kenya & 4 others*** [2015] eKLR for that proposition.

60. The 4th respondent asserted that **Rule 5(d)(i)** and **(ii)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** allows the court, at any stage of the proceedings to order that the name of any party improperly joined be struck out, and the name of any party who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle a matter, be added.

61. The 4th respondent submitted that it could not answer to the prayers sought in the petition because it lacked the requisite legal mandate.

Issues for determination

62. From the pleadings, submissions and the authorities we find that the broad issues for determination are as follows:

(a) Whether the petition is *res judicata*.

(b) Whether the initiation of murder trials at the High Court violates the **Constitution** or other statutes.

(c) Whether the petitioner or class of persons convicted of murder have been discriminated or denied their right of protection by or equality before the law.

(d) Whether the respondents have been properly impleaded. Paraphrased, whether there has been misjoinder of parties.

(e) Whether the petitioner is entitled to the reliefs sought.

(f) Who should bear the costs of the petition?

On the issue of *Res Judicata*

63. The 1st, 2nd and 5th respondents have challenged the petition and urged that the suit is res-judicata and is subject to judgment *in rem*. They urged that the petitioner was challenging the exclusive initiation of murder trials in the High Court, an issue they argued had already been litigated upon and determined in ***Peter Kariuki Muibau & 11 others vs The Attorney General & another,*** supra. They submitted that litigation must come to an end and re-litigating the same issue is an abuse of the court process and a waste of judicial time.

64. For that proposition, the respondents relied on the case of ***Okiya Omtatah Okoiti vs CAK & 14 others*** (2015) eKLR, where Lenaola, J, as he then was, stated:

> ***"The rationale behind the provisions of Section 7 above entrenching the doctrine of res-judicata is that if the controversy in issue is finally settled, determined or decided by a competent court, it cannot be re-opened.***

The doctrine is, therefore, based on two principles, that there must be an end to litigation and that a party should not be vexed twice over the same cause."

65. The respondents also relied on the case of ***E. T. vs Attorney General & Another*** [2012] eKLR, where the court held:

> ***"The courts must always be vigilant to guard against litigants evading the doctrine of res-judicata by introducing new causes of action so as to seek the same remedy before the court in another way and in the form of a new cause of action which has been resolved by a court of competent jurisdiction."***

66. They further cited the Court of Appeal decision in ***John Florence Mautine Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 others*** [2015] eKLR which held:

> ***"The rationale behind res-judicata is based on public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency of judgments of concurrent courts. It promotes confidence in courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res-judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably. In a nutshell, res-judicata being a fundamental principle of law may be raised as valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus, therefore, remains that res-judicata being a fundamental principle of law that relates to the jurisdiction of the court may be raised as a valid defence to a constitution claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013."***

67. The respondents urged this court to find that the petitioner is bound by the decision in ***Peter Kariuki Muibau & 11 others***, supra, which is a judgment in *rem*.

68. The respondents relied on the Tanzanian case where the Court of Appeal, in ***Kamunyu & others vs The Attorney General & others*** [2007] 1EA 116 at 122 held:

> ***"In a suit seeking judgment, in rem, that is a judgment applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgment which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit, obtain judgment which is effective against the whole world but does not confer benefits upon the whole world."***

69. The question then is whether this matter is *res judicata*. In ***Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others*** [2014] eKLR, the Court of Appeal considered what constitutes *res judicata* and held:

> ***"To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy."***

70. In ***Mwangi Njangu vs. Meshack Mbogo Wambugu & Another*** HCCC No. 2340 of 1991 (unreported) Kuloba J, stated that the doctrine of *res judicata* applies where:

> ***"there is an existing final judgment rendered upon the merits, without fraud or collusion, by a court, tribunal, or other judicial body, of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as regards the parties and their privies, in all other actions, proceedings or applications in the same or any other court or judicial tribunal or body of concurrent or exclusive jurisdiction. Once a decision has been given by a court of competent jurisdiction between two persons or their privies over the same subject-matter, neither of the parties would be allowed to re-litigate the issue again or to deny that the decision had in fact been given, subject of course to certain conditions."***

71. In ***Kibundi vs Mukobwa & Another*** [1993]eKLR Kuloba J, pronounced himself on the doctrine of *res judicata* thus:

> ***"… in order to sustain a plea of res judicata, it is necessary to show:***
>
> ***that everything that is directly and substantially in controversy in the subsequent suit as the foundation of the claim for relief was also directly and substantially in controversy or open to controversy in the early suit (i.e. that the subject matter in dispute is the same), either actually or constructively;***
>
> ***1). that the same subject matter in dispute now came in question before a Court of competent jurisdiction;***
>
> ***2). that the result in the former case was conclusive; and,***
>
> ***3). that the former suit was between the same parties or between parties under whom they or any of them claim,***

litigating under the same title.

That is to say, there I showed the conditions of applying the doctrine of res judicata to be:

a). Identity of the matter in issue;

b). Identity of the parties;

c). Sameness of title;

d). Concurrence of jurisdiction;

c). Finality of the previous decision."

72. In order to determine whether a matter is *res judicata*, one has to consider whether it is shown that everything that is directly and substantially in controversy in the subsequent suit as the foundation of the claim for relief, was also directly and substantially in controversy or open to controversy in the earlier suit, and further that the same subject matter in dispute now, came into question before a court of competent jurisdiction; that the result in the former case was conclusive; and, that the former suit was between the same parties or between parties under whom they or any of them claim, litigating under the same title.

73. The issue before the court in ***Peter Muibau & others***, supra, is set out in the petition itself. The learned Onkwany, J stated:

"*[1.]* ***The petitioners herein are convicts currently detained at Kamiti Maximum Prison having been charged, convicted and sentenced to death for the offence of murder. Their respective appeals to the Court of Appeal against both the conviction and sentence were unsuccessful thereby precipitating the instant petition in which they challenge the constitutionality of the provisions of*** *Rule 24* ***of the*** *Supreme Court Rules* ***and*** *Section 4* ***of the*** *Criminal Procedure Code****,* ***the*** *fifth column of the First Schedule* ***thereof.***

[2.] ***In the petition filed on 2nd March 2016 the petitioners state that the commencement of their trials before the High Court instead of the Chief Magistrate's Court as is the procedure applied in other criminal cases was discriminatory and contravened*** *Article 27(1) (4)* ***of the*** *Constitution.*

[3.] ***They claim that granting one unqualified and automatic right of appeal to murder convicts as opposed to the two chances of appeal available to convicts for other offences amounts to violation of*** *Article 27(1)* ***of the*** *Constitution.* ***They also challenge the provisions of*** *Rule 24* ***of the*** *Supreme Court Rules 2012* ***which gives the Court of Appeal the sole mandate to adjudicate on matters of application for certification for contradicting the objects of*** *Article 47(1), 48* ***and*** *259(1)* ***of the Constitution. Their prayers in the petition were as follows:***

1. A declaration that the 2nd respondent (DPP) commencement of the proceedings against the petitioners at the High Court instead of the Chief Magistrate Court contravenes Article 27(1) of the Constitution.

2. A declaration that in according the petitioners one right of appeal in contradiction to the offences amounts to violation of Article 27(1) (4) which guarantees equality and freedom from discrimination.

3. A declaration that in subjecting the petitioner to Rule 24 of the Supreme Court Rules contradict the objective of Article 47(1), 48, 259(1) of the Constitution.

4. A clear definition of what constitutes a matter of general public importance and death sentence be considered to constitute matter of great public importance.

5. The court orders that the petitioners be accorded unlimited access to Supreme Court or re-trial of the petitioners cases at the Magistrate Court or be released unless unlawfully held."

74. The petitioners' case in the ***Muibau case*** above was that they were denied one more right of appeal in violation of **Article 27(1) (4)** of the **Constitution** which guarantees equality and freedom from discrimination. They contended that ***Rule 24*** *of the* ***Supreme Court Rules*** contradicted the objective of ***Article 47(1), 48, 259(1)*** of the ***Constitution;*** and that there be a clear definition of what constitutes a matter of general public importance, and that the death sentence be considered to constitute a matter of great public importance. They also prayed for orders that the petitioners be accorded unlimited access to Supreme Court, or, re-trial of their cases before the Magistrates' Court, or be released unless otherwise lawfully held.

75. In the ***Muibau case***, the petitioners therein had already been convicted by the High Court on charges of murder and their respective appeals heard and dismissed. They filed the petition at the High Court after exhausting all their rights of appeal. This is unlike the instant case where the petitioner is yet to be tried.

76. This petition challenges various laws on the basis that persons charged with the offence of **murder** contrary to **section 203** of the **Penal Code** suffered discrimination and unequal treatment before the law, which violated their right to equal protection and equal benefit of the law, as well as freedom from discrimination, as guaranteed under **Articles 25** and **27** of the **Constitution**.

77. The petitioner contends that due to the delay occasioned by the time taken to try cases before the High Court compared to trials held before magistrates' courts, such delay amounted to denial of access to justice guaranteed under **Article 50** of the **Constitution.** The petitioner also contends that trial of an accused person before the High Court as the originating court, denies a convicted person one level of appeal, which amounts to discrimination and a breach of **Article 27** of the **Constitution.** And further that **Sections 3** and **5** and the **First Schedule** of the **Criminal Procedure Code**, **Sections 211** and **212** of the **Penal Code**, and any other statute to the extent that it provides for trial of offences set out in the **Penal Code** to commence before the High Court, are inconsistent with **Article 27** of the **Constitution.**

78. In terms of orders sought, the petitioner prays for various declarations, including a declaration that the respondents have jointly and severally failed in discharging their constitutional mandates of advising the government and its institutions on the right to equality under the law; a declaration that the respondents have jointly and severally failed to discharge their statutory and regulatory duties and responsibilities of ensuring that the laws, statutes, regulations and rules relating to the trial process of all accused persons apply equally as contemplated by the **Constitution** and **International Instruments** applicable in Kenya pursuant to **Article 2(6)** of the **Constitution**; a declaration that trials for the offences of murder and treason, and any other cases save for contempt in the face of the court, tried before the High Court are discriminatory and violate the provisions of **Article 27** of the **Constitution**; an order directing that all trials for offences provided for in the **Penal Code**, pending before the High Court, including those for the offences of murder and treason, be transferred to the magistrates' courts for trial and determination; a declaration that **Sections 3** and **5** and the **First Schedule** of the **Criminal Procedure Code**, **Sections 211** and **212** of the **Penal Code**, and any other statute to the extent that it provides for trial of offences set out in the **Penal Code** to commence before the High Court, are inconsistent with **Article 27** of the **Constitution** and therefore invalid.

79. It is therefore clear from the foregoing, that the instant petition is not *res judicata*. The issues that were determined in the ***Muibau Case***, supra, though *in rem*, were not similar to the issues that are now before us. As stated above, the petitioners in the former case had already been tried by the High Court, convicted and had exhausted their rights of appeal. This is unlike the instant petition where the petitioner has raised the question of jurisdiction of the High Court *in limine*. The prayers sought here are therefore germane to the real issues in controversy in the instant petition, unlike the former suit where the issue of jurisdiction of the High Court was an intellectual exercise.

80. That for the respondents to raise *res judicata* to defeat the petition, they needed to establish that the present petition fell on all fours to the ***Muibau's case***. Other than a general reference to some of the issues arising in the former case, they did not set out the specificity of the issues that they alleged are *res judicata* in the instant petition. For instance, there is a world of difference between the prayers sought in the former suit and this one. Whereas, the petitioners in the former suit were seeking for a declaration that their trials which had been concluded were unconstitutional and sought to be retried before a court of competent jurisdiction, the petitioners herein seek to be tried in the magistrates' court.

81. Another prayer in the present petition that is novel is a declaration that the respondents do take action to advise the Government to align the criminal laws relating to the trial process to be in conformity with the Bill of Rights and other rights and fundamental freedoms in **Chapter 4** of the **Constitution**. This is an issue that has not been judicially considered and a decision rendered.

Original Jurisdiction of the High Court in Criminal Matters

82. The petitioner has submitted that he ought, in the first instance, to be tried before the Magistrate's Court so that, if convicted, his right of appeal to the High Court and later Court of Appeal will not be circumscribed. The 3rd respondent on behalf of the State was not persuaded by this argument. He stated that if the court were to allow the prayer craved for by the petitioner, that his case be tried before the magistrate's Court, it would interfere with the jurisdiction of the High Court which is provided for by the **Constitution**.

83. **Article 165(3)** of the **Constitution** sets out the jurisdiction of the High Court. It provides thus:

> ***"Subject to Clause (5), the High Court shall have:-***
>
> ***(a) Unlimited original jurisdiction in criminal and civil matters;***
>
> ***(b) Jurisdiction to determine the question whether a right or fundamental freedom has been denied, violated, infringed or threatened;***
>
> ***(c) …***
>
> ***(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –***
>
> ***(i) the question of whether any law is inconsistent with or in contravention of the Constitution;***
>
> ***(ii) the question of whether anything said to be done under the authority of the Constitution or if any law is inconsistent with or in contravention of this Constitution;***
>
> ***(iii) …***
>
> ***(iv) …***
>
> ***(e) Any other jurisdiction, original or appellate conferred on it by legislation;"***

84. **Article 165 (6)** provides that:

> ***"The High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a Superior Court."***

In exercise of the above jurisdiction, the High Court may, under **Sub-Article 7;**

> ***" … call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."***

85. Korir W. J, while considering the centrality of jurisdiction in suits brought before the court, and particularly the High Court held thus in ***Okiya Omatatah & Another -Vs- Attorney General & 2 Others [2015] eKLR:***

> ***"[57.] Jurisdiction is what gives a court the authority to inquire into a matter before it. Where a court comes to the conclusion that it has no jurisdiction to deal with a matter, the only option to the court is the one prescribed by Nyarangi, JA. in OWNERS OF MOTOR VESSEL LILIAN 'S' -VS- CALTEX OIL (KENYA) LIMITED [1989] KLR 1.***
>
> *In that case the learned Judge stated that:*
>
> ***'Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law down tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction.'***
>
> ***[58.] The source of the court's jurisdiction was highlighted by the Supreme Court in the case of SAMUEL KAMAU MACHARIA & ANOTHER -VS- KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR, where it stated that:***
>
> > ***"A court's jurisdiction flows from either the Constitution or legislation or both. Thus; a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in In the matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application No. 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within the authority to prescribe the jurisdiction of such a court or tribunal by statute."***

86. In the present petition, it is not disputed that indeed the High Court has unlimited jurisdiction to hear and determine criminal matters. ***Article 165(3)(c)*** of the **Constitution** states so. This is in addition to other Statute, such as the **Criminal Procedure Code** that confer further jurisdiction to the High Court to hear and determine Appeals and Revisions. (See **sections 347, 348** and **sections 362** and **364** of the **Criminal Procedure Code**). The Appellate and Revisionary jurisdiction of the High Court is not in issue in this petition. Rather it is the extent to which the High Court can exercise the original criminal jurisdiction.

87. As decided by the Supreme Court in the above case **(*In the matter of Interim Independent Electoral Commission (Applicant) (supra)***, jurisdiction can be conferred by both the **Constitution** or Statute or both. As regards criminal cases, the **Criminal Procedure Code** sets out further jurisdiction of the High Court, in the exercise of its original jurisdiction, in criminal cases under **Part II** titled ***"Powers of Courts."*** It provides thus:

> ***"4. Subject to this Code, an offence under the Penal Code may be tried by the High Court or a subordinate court by which offence is shown in the fifth column of the first schedule to this Code to be triable.***
>
> ***5(1). An offence under any law other than the Penal Code shall where the court is not mentioned in that behalf in that law, be tried by that court.***
>
> ***(2). Where no court is so mentioned, it may; subject to this Code, be tried by the High Court, or by a subordinate court by which the offence is shown in the fifth column of the First Schedule to this code to be triable."***

88. Under the **fifth column** of the **First Schedule** of the **Criminal Procedure Code,** the court which may try a person charged with murder under **Section 203** of the **Penal Code** is not indicated. The Petitioner asserts that there is no legal reason why he should be charged before the High Court, because, murder, like any other criminal offence, can be tried before the magistrate's Court.

89. The 3rd Respondent on his part, has argued that **Section 5(2)** of the **Criminal Procedure Code** cures the anomaly in the **First Schedule** by providing a default court where such a trial may be held. That default court is the High Court. This also applies to a person charged with

the treason under **Section 40** of the **Penal Code**. In essence, the respondents are saying that the petitioner's case has no *locus standi*, since the statute has provided the High Court with the requisite jurisdiction to try the charge of murder that has been brought against him.

90. For added measure, the respondents have argued that this court cannot grant the prayer sought by the petitioner that he be tried before a magistrate's Court, because, to do so, it would amount to this court depriving jurisdiction which has been specifically conferred to the High Court by the **Constitution** and **Statute**.

91. We have carefully evaluated the rival submissions made by the parties to this petition in that regard. It was clear to us that the parties herein are asking the court to interpret **Article 165(3)(c)** of the **Constitution** to determine the delineation of the jurisdiction of the High Court in hearing and determining criminal matters in exercise of its original jurisdiction.

92. The principles that this court must bear in mind in interpreting the **Articles** of the **Constitution** was succinctly stated by the court (E. Mwita, J) in ***Jack Mukhongo & 12 Others -Vs- Attorney General & 2 Others*** **[2017] eKLR**, where it was held that:

> ***"[32.] This was reiterated in the case of Institute of Social Accountability & Another -vs- National Assembly & 4 Others, Petition No. 71 of 2014 [2015] eKLR, where the court stated:***
>
> ***'The court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purpose value and principles, advances the rule of law, human rights and contributes to good governance. In exercising its judicial authority, this court is obliged under Article 259(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.'***
>
> ***[33.] Where the constitutional validity of a statute or statutory provision is challenged on the grounds that it violates the Constitution, it becomes imperative to ascertain the true nature and character of the statute or statutory provision concerned. In that regard the court should ascertain the subject matter of the statute, the area it is to operate, as well as determine the purpose and intent of the statute or statutory provision.***
>
> ***[34.] To do so, it is legitimate for the court to take into account all factors such as the history of the legislation, the purpose thereof, the surrounding circumstances and the conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature intended to cure and the true reason for the remedy, (BENGAL IMMUNITY COMPANY LIMITED -VS- THE STATE OF BIHAR [1954] SCR 73)."***

93. In the present petition, it is apparent to this court that the assignment of jurisdiction to the High Court to hear murder and treason charges under the **Penal Code** under **Section 4** and **5(2)** of the **Criminal Procedure Code** may appear to be arbitrary if the history and context is not taken into consideration. For the proper understanding why murder and treason are currently the only charges that are tried by the High Court in exercise of its original jurisdiction, it is important for the historical context to be set out.

94. Prior to 2003, there was an elaborate procedure provided under the **Criminal Procedure Code** which was required to be fulfilled before a person charged for murder under **Section 203** of the **Penal Code** was presented for trial before the High Court. Under the now repealed **Section 230** of the **Criminal Procedure Code** [Repealed by **Criminal Law (Amendment Act) No. 5 of 2003]** the magistrate's Court was required to hold committal proceedings before such accused person was presented to the High Court for trial.

95. Committal proceedings were an elaborate process which required the prosecution to compile all the witnesses' statements and exhibits and present it to the magistrate to determine whether there was sufficient evidence to refer the accused to the High Court for trial. The procedure was provided under the now repealed **Sections 231** to **253** of the **Criminal Procedure Code**.

96. Where such accused person was committed to the High Court for trial, the trial that ensued from the committal proceedings was a special one. Under the now repealed **Sections 262** and **203** of the **Criminal Procedure Code**, the trial was to be held with the aid of three (3) assessors. The assessors were lay persons who fell under the category not exempted under the now repealed **Section 266** of the **Criminal Procedure Code**.

97. Although it was a mandatory requirement for the trial in the High Court to be held with the aid of assessors, under the now repealed **Section 322(2)** of the **Criminal Procedure Code**, the Judge was not bound by the opinion of the assessors as regards the guilt or otherwise of the person accused.

98. One may then ask why the law required the presence of assessors in trial in respect of those charged with murder under **Section 203** of the **Penal Code,** if at the end of the day, the opinion of the assessors was not required to be taken into account by the Judge who heard the case.

99. It was variously observed by several courts at the time that the committal process and mandatory trial with the aid of assessors caused unreasonable delay in the hearing and conclusion of murder trials before the High Court. For instance, the Court of Appeal in: ***Geoffrey Oketch Ouko -Vs- Republic*** **[2007] eKLR** made the following remarks:

> ***"The appeal before us once again brings to the fore the problems of conducting trials with the aid of assessors. This is a system which the law, as currently stands, makes assessors part of the court and provides in mandatory tone in section 262 of the Criminal Procedure Code that:-***
>
> *'All trials before the High Court shall be with the aid of assessors.'*

… we are aware however, that the system has lately come under considerable onslaught and indeed proposals for repeal of the relevant provisions relating to it are currently before Parliament."

100. The Court of Appeal in ***Charo Karissa Salimu -Vs- Republic*** [2016] eKLR**,** noted the challenges posed by trials with the aid of assessors which included undue delay in the conclusion of trials due to absence or non-attendance by one or more of the assessors. The Court deprecated the fact that it had taken over ten years for the trial to be concluded due to, among other reasons, the failure by the assessors to diligently attend court during the dates scheduled for trial. It was for this reason that the court invoked **Article 50(2)(e)** of the **Constitution** and allowed the appeal resulting in the appellant's acquittal.

101. The considerable delay caused by trials with the aid of assessors resulted in the enactment of the **Statute Law (Miscellaneous Amendments) Act** (Act No. 7 of 2007) which did away with assessors in murder trials before the High Court. Those charged with murder are now tried before the High Court, in a manner similar to criminal trials before the magistrate's Court. Other than the safeguards inherent in the **Criminal Procedure Code** that ensure that an accused person will face a fair trial, additional guarantees are provided by **Articles 49** and **50** of the **Constitution**. Sacrosanct in the guarantees is the right for the trial to be conducted and concluded without undue delay.

102. Legitimate questions have been posed why it is only murder cases under **Section 203** of the **Penal Code** (and treason under **Section 40** of the **Penal Code** - though such trials are rare) are tried before the High Court in exercise of its original criminal jurisdiction.

103. As stated above, it appears that such trials were conducted before the High Court due to the elaborate procedures that required committal bundles to be prepared and subsequently thereafter, trial to be conducted with the aid of assessors. With the removal of the procedural requirement of committal proceedings by **Criminal (Amendment) Act** (Act No. 5 of 2003) and the requirement of trials to be conducted with the aid of assessors by the **Statute Law (Miscellaneous Amendments) Act** (Act No. 7 of 2007), there is nothing special to justify or require a criminal case to be tried before the High Court in only two case types, whilst all other criminal charges are tried before the magistrate's Courts.

104. The frustration encountered by trial judges at the High Court when hearing murder trials with the aid of assessors led to a recommendation by the then Chief Justice, Evan Gicheru, to the Attorney General, to consider introducing before Parliament amendments to remove the requirement of assessors in murder trials. The result was **Statute Law (Miscellaneous Amendments) Act** (Act No. 7 of 2007).

105. Other than the statutory requirements under the **Criminal Procedure Code** (the majority of which have been repealed), it is apparent that the trial of murder charges before the High Court is a historical accident. According to ***Y. P. Ghai*** *and* ***J.P.W.B. McAuslan,*** in their treatise ***Public Law and Political charge in Kenya: A study of the legal framework of government from the colonial times to the present*** (Oxford University Press, 1970), prior to independence, there was a segregated criminal and civil justice systems that catered respectively for the Europeans, Indians and Africans (referred to as Natives). After independence, with the enactment of the **Magistrates' Courts Act** (now repealed) in 1967, the segregated systems became one.

106. Prior to 1963, according to ***Bwonwong'a M; Procedures in Criminal Law in Kenya*** (1994) in criminal cases European settlers were tried before the High Court with the aid of a jury. On the other hand, in murder charges, Africans were tried by the High Court with the aid of assessors. At the time, nearly all the Judges of the Superior Courts were of European descent. At page 232 of his book, Bwonwong'a stated:

"Unlike England, Kenya is not only heterogeneous (having many ethnic communities - Kikuyus, Kalenjin, Luo, Gusii, Luhya etc) but it also lacks a common national language or lingua franca consequently, the introduction of trial by jury proved unsuitable at the time of colonisation. This is exemplified in Andrea S/O Kalinga and Others -vs- Republic, where the trial Judge convicted the appellants of conspiracy to murder and soliciting the use of witchcraft ignoring the opinions of the assessors because of their intertribal prejudice which biased their mind. …

Besides the cultural diversity in Kenya another reason for not using trial by jury is the use of the English language as the language of the High Court[3], which is tied up with the cultural aspect just mentioned.

With regard to the above factors the use of assessors was introduced in Kenya through India, the latter being a former British Colony. During colonial time their role was that of expert witnesses in assisting a trial Judge in customary laws because the Judges, being of English origin, did not know the customs and ways of life of the Africans. The case of Benjamin Pande S/O Mawuku -vs- Republic, is the best illustration of this aspect. The Court of Appeal cited the case of Mutwiwa S/O Mangi with approval in which the court held that one of the objects in having assessors was to assist the court in questions which might arise as to the law or customs of any tribe, caste or community."

107. It is therefore clear that the necessity of trying murder charges before the High Court was imposed by colonial expediency which spilled over to post independence Kenya. Despite trials by jury being abolished in 1963, trial of those charged with murder continued to be at the High Court with the aid of assessors. We assert, with the benefit of history, that the fact that those charged with murder are still tried in the High Court is a historical accident without any legal justification or logic.

108. Furthermore, we are alive to the fact that there are 125 magistrates' courts stations which are decentralized, and devolved throughout the counties. At the time of this judgment there were 447 magistrates compared to only 82 judges of the High Court. Initiating murder trials at the magistrates' courts will significantly lower the costs of the trial, reduce the distance to court and expedite delivery of justice.

109. This will result in better realization of access to justice which is a fundamental right guaranteed by **Articles 48, 50** and **159(2)(a)** and **(b)** of the **Constitution**.

Denial of One Step of Appeal

110. A key plank of the petitioner's case is that the initiation of his murder trial at the High Court, instead of the magistrates' court, will deny him one level of appeal. He also contended that it discriminated him as against other suspects charged with equally serious offences, such as robbery with violence who are tried by the magistrates' court and who gain an additional right of appeal to the High Court.

111. **Article 2** of the **Constitution** decrees that the instrument is supreme; that any provision in it is not subject to challenge before any court; and, that any law inconsistent with it is void to the extent of that inconsistency.

112. **Article 50** of the **Constitution** enshrines the right to a fair trial which includes the right to an appeal. This right is sacrosanct and non-derogable. **Article 50 (2) (q)** provides that a convicted person has a right "*to appeal to, or, apply for review by, a higher court as prescribed by law*".

113. The petitioner thus feels strongly that he has been discriminated or deprived of his rights to equal protection of the law as enshrined under **Article 27**.

114. We also find that there are also other disadvantages: For instance, under **Article 50 (6),** persons convicted in the magistrates' court can approach the High Court for a re-trial. In ***Geoffey Mwangi Githinji v Republic***, [2015] eKLR, the petitioner was convicted for robbery with violence by the Chief Magistrates' Court and sentenced to life imprisonment. The High Court ordered for a retrial upon discovery of new evidence, an Occurrence Book Report from another police station, which contained some exculpatory material. That kind of remedy is obviously lost for murder suspects at the High Court.

115. We must emphasize that the mere origination of the murder trial at the High Court is not unlawful. As we have seen, under **Article 165**, the High Court has original and appellate jurisdiction in both civil and criminal matters. We are also alive to the fact that appeals can be limited by law. A good example is the limitation of number of appeals in some case types; or, limiting a second appeal to only points of law.

116. But the point to be made is that initiating a murder trial in the High Court compromises an essential element of the right to a fair trial. We thus readily find that under the hierarchy of courts provided by **Articles 162** and **169** of the **Constitution**, a murder convict is denied a vital step in the appellate chain.

117. **Article 27 (6)** of the **Constitution** obligates the State to give full effect to the realization of the rights for equal protection and equal benefit of the law guaranteed by the **Article**. Since **Article 25** provides that the right to a fair trial cannot be derogated from under any circumstances, we are minded to direct the State to take appropriate legislative and other measures including appropriate policy interventions to redress the disadvantage currently experienced by murder suspects.

<u>On Alleged Violations of Other Constitutional Provisions</u>

118. **Article 22** provides that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. The Bill of Rights does not exclude other rights and fundamental freedoms not in the Bill of Rights but recognized by law unless they are inconsistent with **Chapter 4** or subject to other limitations contemplated by the **Constitution**. We therefore find that this petition is properly before us.

119. **Article 259** of the **Constitution** enjoins the Court to interpret the **Constitution** in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and in a manner that contributes to good governance.

120. Again **Section 7 (1)** of the **Sixth Schedule** to the **Constitution** provides that-

> ***"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 this Constitution."***

121. **Article 19** of the **Constitution** is geared towards preservation of the dignity, promotion of social justice and the realization of the potential of all human beings. The rights and fundamental freedoms provided in the Bill of Rights belong to each individual and are not donated by the State. As we have seen, the right to a fair trial is guaranteed by **Article 25** of the **Constitution** cannot be limited.

122. **Article 27** of the **Constitution** provides for equality of all persons before the law and freedom from discrimination. This right is also enshrined under **Article 7** of the **Universal Declaration of Human Rights** as well as **Article 3** of the **African Charter on Human and Peoples Rights** to which Kenya has ratified. By dint of the **Articles 2 (5)** and **2 (6)** of the **Constitution** the general rules of international law and any treaty or convention ratified by Kenya shall form part of our law. See generally ***East African Community v. Republic*** [1970] EA 457.

123. However, this issue requires careful consideration. First and foremost, **Article 165** expressly gives the High Court original jurisdiction to try any criminal or civil case. As stated, a provision of the **Constitution** cannot be subject to challenge before any court or any State organ. The truth however is that the choice of cases to originate at the High Court is to be found, not in the **Constitution**, but in statutes or adopted procedural practice. A good example is **sections 4** and **5** of the **Criminal Procedure Code** and the **First Schedule** thereof. It is thus open to us to interrogate the rationale of trying murder cases at the High Court.

124. Secondly, as between the petitioner and other suspects charged with murder, unfair discrimination does not arise. True, there is some distinction or differentiation that has arisen between the trials at the High Court and magistrates' court, as a result of the former having original jurisdiction under **Article 165**. But such differentiation cannot be equated with discrimination.

125. In ***Black's Law Dictionary,*** 9th Edition, discrimination is defined as-

> ***"(1) The effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship***
>
> ***(2) Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."***

126. This was well explained in ***Peter K Waweru v Republic,*** [2006] eKLR:

> ***"Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to … restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description… Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex … a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."***

127. In ***James Nyasora Nyarangi & 3 others v Attorney General***, [2008] eKLR the court defined discrimination as:

> ***"Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word "discriminatory" in section 82 of the Constitution.***
>
> ***Both discrimination by substantive law and by procedural law, is forbidden by the Constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:-***
>
> *(i)* ***it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and***
>
> ***(ii) the differentia must have a rational relation to the object sought to be achieved by the law in question;***
>
> ***(iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the classification."***

128. We thus find that there are categories of cases that should be ideally tried at the High Court. Some high crimes against the security of the State such as treason and related insurrections are good examples.

129. Thirdly, the right to *equality* does not bear the same meaning as *uniformity*. Equality before the law is *not* absolute and may be limited as long as the limitation is reasonable in an open and democratic society. A good example is the differentiation in applicability of the death sentence where the law creates an exemption for pregnant women under **Sections 211** and **212** of the **Penal Code.** The basis of this exception is that the convict is carrying an innocent life which should not be punished for the sins of the mother.

130. Fourthly, not all murder trials in the High Court end in a conviction; and, though it may be presumed, not all trials take longer in the High Court than in the magistrates' court. The petitioner has not provided any such data. The Further Amended Petition makes broad statements that have not been fully backed by facts. For instance, he alleges, without evidence, that there is "preferential treatment" for accused persons whose trials commence before a magistrates' court; or, that trying murder at the High Court "elevates the seriousness of such offences yet the maximum sentence of death can also be imposed by a subordinate court". It remains a principal tenet of the law of evidence that he who alleges must prove. See **sections 107 (1)** and **109** of the **Evidence Act.**

131. Fifthly, it is true that initiation of murder trials at the High Court is not supported by any specific legal framework or policy or logic. A close reading of **sections 3, 4** and **5** of the **Criminal Procedure Code** and the ***First Schedule*** leaves no doubt that the High Court was to try murder charges by default. As to whether the policy that informed the law is still sound is a matter that we have addressed elsewhere in this judgment. But it would be a misnomer to say that there was a specific legal framework or policy in place that deserves to be up held by this court.

132. Sixthly, the petitioner's murder trial at the ***Kisumu High Court Criminal Case Number 13 of 2017*** is still pending. We agree with counsel for the 1st, 2nd and 5th respondents that it would be presumptuous to conclude that the petitioner will, after conclusion of trial, will be convicted or acquitted; or, even whether an appeal will lie upon such decision.

133. Seventh, it is also not entirely true as urged at paragraph 8 of the Further Amended Petition that, the only sentence provided for under **Section 204** of the **Penal Code** is death, "*and that the trial court has no discretion on sentencing*". Following landmark decision of the Supreme Court in ***Francis Karioko Muruatetu & another v Republic***, [2017] eKLR, the *mandatory nature* of the death sentence under **Section 204** of the **Penal Code** was declared unconstitutional.

134. Nevertheless, we take judicial notice that murder trials take an unduly long time to be concluded at the High Court. Some of the reasons have to do with other players in the justice chain; and, the limited number of judges' *vis a vis* the volume of criminal and civil cases filed annually.

135. **Article 48** of the **Constitution** obligates the State to ensure access to justice for all persons. We thus find that from the standpoint of

access to and *expeditious* delivery of justice, murder suspects would significantly benefit if their trials were held in the magistrates' court. As we have stated earlier, there is no longer sufficient justification for holding these trials at the High Court.

Has any case been made against the 1st, 3rd , 4th and 5th respondents? Were they necessary parties?

136. The 4th respondent is a creature of **Article 59 (1)** of the **Constitution**. The legislature however created three distinct commissions under the **Kenya National Commission on Human Rights Act 14 of 2011**; The **Commission on Administrative Justice Act 23 of 2011**; and, the **National Gender and Equality Commission Act Chapter 5C of 2011**. The petition before the Court is primarily based on discrimination and equality and seeks to align some legislation to conform with **Articles 27** and **50** among others. Those matters fall largely within the purview of the National Gender and Equality Commission and not the 4th respondent. The 4th respondent was thus not a necessary party to these proceedings, and the petition against it is struck out under **Rule 5(d)(i)** and **(ii)** of the ***Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013***.

137. Is the Cabinet Secretary Ministry of Interior and Coordination of National Government a necessary party? Considering the reliefs sought, it appears that the only true respondents are the Attorney General, the Director of Public Prosecutions and perhaps the Kenya Law Reform Commission. We therefore hold that his inclusion to these proceedings was superfluous as he is ably represented by the Attorney General who has the legal mandate under **Article 156** of the **Constitution** to represent government in proceedings before the court.

Final Orders

138. The final orders that commend themselves to us to grant are as follows:

a) That the 1st, 2nd, 3rd and 5th respondents shall jointly and severally, within 18 months of today's date, take such steps as are necessary to align **sections 3, 4 and 5** of the **Criminal Procedure Code**, and the subsidiary legislation, regulations and rules thereof to the **Constitution**, and in particular to **Article 27**, **48** and **50** thereof.

b) That the entire petition against the 4th respondent be and is hereby struck out with no order as to costs.

c) That all the other prayers in the petition are disallowed.

139. Costs ordinarily follow the event and are at the discretion of the court. We find that the Further Amended Petition raised constitutional issues in the public interest. We order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **KISUMU** this 27th day of November 2020.

J. LESIIT

JUDGE

L. KIMARU

JUDGE

K. KIMONDO

JUDGE

Judgment read in open court in the presence of-

Mr.……..for the petitioner instructed by Onsongo & Company Advocates.

Ms.…….for the 1st, 2nd & 5th respondents instructed by the Hon. Attorney General.

Mr.…….for the 3rd respondent instructed by the Office of the Director of Public Prosecutions.

Ms……..for the 4th respondent instructed by the Kenya National Commission on Human Rights.

Mr./Ms.……..Court Assistants