



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KISUMU

CONSTITUTIONAL REFERENCE NO.3 OF 2011

PROTUS BULIBA SHIKUKU.....PETITIONER

VERSUS

HONOURABLE ATTORNEY GENERAL.....RESPONDENT

JUDGMENT

The petitioner has approached the seat of justice by way of a petition dated 31st day of January, 2011 and filed on the 8th day of February, 2011.

For purposes of the record, the petition has been presented under the High Court Practice and Procedure Rules 2006 popularly known as the Gicheru Rules, Articles 21(1 & 2) (2)(b), 22(1), 3(c) and 23(1&2), 26(1&2)48, 50(2) (b) C&P (6a&b), Sections 389 and 297(2) of the Penal Code.

The background information is that the petitioner had been charged in the Resident Magistrate's Court at Mumias vide Criminal Case No.341 of 2003 in Count 1 and 2, with the offence of Robbery with Violence Contrary to Section 296(2) of the Penal Code.

In Count 3 with the offence of Rape contrary to section 140 of the Penal Code in that on the 20th day of December, 2002 in Butere/Mumias District within Western Province unlawfully had Carnal knowledge of J. A. without her consent,

In Count IV with the offence of attempted Robbery contrary to Section 297(2) of the Penal Code in that on the night of 20th December, 2002 in Butere/Mumias District within Western Province jointly with others not before court being armed with a dangerous weapon namely AK 47 Rifle attempted to rob David Munyendo and at or immediately before or immediately after the time of such attempted robbery assaulted him and threatened to use actual violence.

It is undisputed that the petitioner was tried in the lower court and found guilty of a substituted offence to Count (III) of indecent assault contrary to Section 144(1) of the Penal Code, and sentenced to serve 7 years imprisonment. He was also found guilty and convicted for the offence of attempted Robbery in Count (v) and sentenced to hang as prescribed by law.

The lower court gave the appellant his undoubted right of appeal within 14 days which the petitioner duly exercised. The exercise of that right gave rise to Kakamega HCCRA No.21 of 2004 which was heard by a two Judge High Court Bench M. R. Ombija and G.B.M. Kariuki who in a judgment delivered on the 20th day of May, 2008 dismissed the appeal, upheld both the convictions and the sentences.

The appellant was still dissatisfied and he accordingly once again exercised his undoubted right of appeal to the Court of Appeal and in a judgment delivered on the 26th day of June, 2009 summarized the last position on the petitioner's second appeal to the Court of Appeal at page 17 of the judgment line 8 from the top thus: -

"We have said enough, we believe to indicate that the appellant's appeal against the conviction on Counts three and four must fail. We dismiss the appeal against convictions. On all, we shall do is to order that the sentence of seven years imprisonment shall remain in abeyance as the appellant was sentenced to death. Save for that amendment the appeal against the sentence also fails. Those shall be our orders on the appeal."

The full stop to the afore setout passage marked the end of the litigation road of the petitioner in his pursuit for a reprieve against the convictions and the sentences which had been handed out to him by the lower court and as confirmed by the superior court.

We as the superior court are now faced with this petition calling upon us to revisit that issue through the cited constitutional provisions. A total of eight grounds of the petition are put forward namely: -

(1) That the petitioner is a convict serving life imprisonment after the death sentence that was imposed on him was commuted to life by the President.

(2) That the petitioner was convicted of the charge of indecent assault contrary to Section 144(1) and attempted robbery contrary to Section 297(2) of the Penal Code and sentenced to serve seven years for indecent assault and to suffer death for the attempted robbery respectively.

(3) That mandatory death sentence meted on the petitioner was excessive arbitrary and inhuman and deprived the petitioner the right to fair trial contrary to Article 50(2) of the Constitution of Kenya.

(4) That the provisions of Section 297(2) prescribing mandatory death sentence for the offence of attempted Robbery is at variance with Sections 389 of the Penal Code which prescribes punishment for attempted robberies for which the punishment is life imprisonment or death.

(5) That the petitioner has suffered inhuman and degrading punishment and deprived the right to life arbitrarily in breach of Article 26(1)(3) of the Constitution of Kenya.

(6) That the law was not fully observed when convicting and sentencing the petitioner thus denying him access to justice in breach of Article 48 of the Constitution of Kenya.

(7) That the petitioner was wrongly convicted of indecent assault and sentenced to seven years a charge he was never informed of and even given sufficient time to respond to and neither was it an alternative charge on the charge sheet in breach of Article 50 (b) (c) of the Constitution.

(8) That if orders prayed herein are not granted then the petitioner's fundamental rights and freedom which the Constitution of Kenya endeavours to protect will be violated and taken away, hence defeating the cause of justice.

On the basis of the aforesaid grounds the petitioner anchored 4 reliefs namely: -

(i) That the Honourable Court be pleased to grant a declaration that the Constitutional rights of the petitioner have been breached by the respondent by convicting and sentencing the petitioner to serve an unlawful sentence.

(ii) That the respondent be ordered to release the petitioner who has served eight years, one year in excess of the sentence:

(iii) That Section 297(2) of the Penal Code contradicts Section 389 as to the sentence for the offence of attempted robbery and goes against the letter and spirit of the Constitution enshrined in Article 26(18,2) and Article 50(2) of the Constitution of Kenya and the benefit of the contradiction should be given to the petitioner.

(iv) That the costs be provided for in of the petitioner in any event.

The petition is supported by a supporting affidavit whose content is a reiteration of the content of the grounds in the petition. We have not received any reply to the petition by the State but both counsels for the petitioner and the state filed written skeleton arguments which they orally highlighted before us, and a summary of the points stressed by the petitioners counsel are that the appellant has exhausted all his appellate rights up to the Court of Appeal which was the then highest court of appeal of this jurisdiction, the exhaustion sealed the petitioners fate of serving the sentences, one of seven years for indecent assault and another of death which was later commuted to life imprisonment. They have no complaint about the sentence of seven years because it has been served.

They complain about the sentence of death which was commuted to life imprisonment because all the courts through which the petitioner was processed failed to reconcile the contradictions in the provisions of Section 297(2), 388 and 389 of the penal dealing with the general penalty of attempted felonies and sentence him to a lesser sentence of seven years considering that attempted robbery is a felony falling under those Sections. That the court of appeal has in recent decisions taken this move in decisions cited to this court. That it is on this basis that they have approached this court to bestow that benefit onto the petitioner as well. It is their stand that this court sitting as a constitutional court has the mandate to do for the petitioner what the court of appeal in advertently failed to do for him at the time his appeal has disposed by that court.

The respondents' response in the skeleton arguments undated but filed on 2nd March, 2011 as well as the oral highlights reiterated that the appellant has exhausted his appellate process which culminated with a court of appeal decision on his appeal to that court in a judgment delivered on the 26th day of June, 2009 and an issue arises as to whether this court has jurisdiction to entertain this petition or not. They contend that this court's jurisdiction invoked under Article 50(6) of the Constitution does not lie because the said Section can only arise where there is demonstration of existence of new and compelling evidence which is not being retied upon herein. Instead, the petitioner seeks to rely on errors committed during trial, misdirection by the court, wrong applications of the law or a situation of a contradiction as seen under Section 389 and 297(2) of the Penal Code, matters not envisaged by that section. But concedes that a reading of Section 388 and 389 of the Penal Code tends to demonstrate that these two sections are complete in so far as definition of what an attempt to commit an offence of the character of a felony is and the punishment for such an attempt at the commission of the felony is also provided. that they concede that there is no dispute that attempted robbery is a felony but it is unique in itself in that it stands on its own as it has its own definition as given in Section 297(1) and followed by a penalty for an attempted commission of it in Section 297(2).

Concedes that this contradiction has been appreciated by the Court of Appeal in the case of ***Evanson Muiruri Gichane versus Republic CA No.277 of 2002, Godfrey Ngotho Mutiso versus Republic CA No.17 of 2008 and Boniface Juma Khisa versus Republic CA No.268 of 2009.***

The court is invited to note that all those decisions were decided before 27th August, 2010 when the current Kenyan Constitution enshrining Article 50 was not yet born and for this reason, the Court of Appeal did not have an opportunity to reconcile and address the contradiction in those provisions in Section 388, 389, 297(1), (2) vis a vis the prescriptions is in Article 50 and for this reason this court has no jurisdiction to revisit that issue.

In further submissions of the petitioner dated 24th day of March, 2011 and filed the same date response to the State' submissions, they stress that this court has jurisdiction to entertain the petition reason of Section 84(1) of the defunct Constitution under which the petitioner cause of action arose, the said cause is available for interrogation by this court through the transitional provisions of Article 262, and the

mandate donated by Article 23 of the current 2010 Constitution.

On case law, the court was referred to the case of ***Reyes versus the Queen [2002] 2AC 235a decision of the Privy Council page 245 - 256***. Where there is found observations on interpretation of both the constitution and statute and in our opinion the following extracts of the said observations are relevant to the issues for determination herein: -

“(i) It is the duty of the legislature to determine what conduct should be treated as criminal as to attract penal consequence.

(ii) Also to decide what kind and measure of punishment such conduct should attract or be liable to attract.

(iii) The prevention of a crime and often a serious crime is a matter of a life concern in many countries around the world and prescribing the bounds of punishment is an important task of those elected to represent the people.

(iv) The ordinary task of the court is to give full and fair effect to the penal laws which the legislature has enacted.

(v) When enacted law is said to be incompatible with a right protected by a Constitution, the courts duty remain one of interpretation. Where an issue arises as to the meaning of the law the court has to resolve that issue and having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not.

(vi) When called upon to interpret the Constitution the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution---. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society---

(vii) The board is however satisfied that the provision requiring sentence of death to be passed on the defendant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under section 7 of the Constitution in that it required sentence of death to be passed and precluded any judicial consideration of the humanity of condemning him to death. The use of firearms by, dangerous and aggressive criminals is an undoubted social evil---. In crime of this kind there may well be. Matters relating both to the offence and the offender which might properly be considered before the sentence is passed."

On the basis of the reasoning in number (i) - (vii) above, the Privy Council went on to hold, allowing the appeal that:

"Since the character of the offence of murder by shooting cannot vary widely, the imposition of the death penalty for some such offence would be plainly excessive and disproportionate and so to deny a person convicted of murder by shooting the opportunity to seek to persuade the court before sentence was passed that in all the circumstances to condemn him to death would be disproportionate and inappropriate would be to treat him as no human being should be treated and to deny him his basic humanity-

The case of ***Godfrey Ngotho Mutiso versus Republic Mombasa Criminal Appeal No.17 of 2008*** decided by the Court of Appeal on the 30th day of July, 2010 in which the Law Lords of the Court of Appeal ruled on page 35-36 thus: ***"We are persuaded and now so hold that Section 202 of the Penal Code which provides for a mandatory death sentence is antithetical to the constitutional provisions on protection against inhuman or degrading punishment or treatment and lair We note that while the Constitution itself recognizes the death \\'penalty as being lawful it does not say anywhere that when a conviction for***

murder is recorded only the death sentence shall be imposed. We declare. That Section 204 shall to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the Constitution which as we have said makes no such mandatory provision.

We have confined this judgment to sentence in respect of murder cases, because that was what was before us and what the Attorney General conceded to. But we doubt if different arguments could be raised in respect of other capital offences such as treason under Section 40(3), robbery with violence under Section 296(2) and attempted robbery with violence under Section 297(2) of the Penal Code. Without making conclusive determination on those other sections, the arguments we have set out in respect of Section 203 as read with Section 204 of the penal code might well apply to them."

the case of *Evanson Muiruri Gichane versus Republic Nairobi CA No.277 of 2007* decided by the Court of Appeal on the 10th day of December, 2010; At page 7 of the judgment line 11 from the top the law Lords of the Court of Appeal had this to say: -

"---in terms of Section 389 of the Penal Code, the appellant shall not be liable to imprisonment for a term exceeding seven years. But he was sentenced to death. The apparent conflict in the law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two sentences---"

The case of *Bonitace juma Khisa versus Republic Eldoret Criminal Appeal Number 268 of 2009* decided by the Court of Appeal on the 17th day of February, 2011. At page 3 of the judgment line 8 from the bottom there is observation that *"--The submissions on the legality of it is that Section 297(2) of the Penal Code which prescribes the sentence of death is in conflict with Section 389 of the some code which requires that in offences of attempt to commit a felony the sentence should not exceed seven years imprisonment.--"* At page 4 line, 10 from the top the learned Law Lords of the Court of Appeal went on thus: -

"It is manifest at once that there is an apparent conflict in those provisions in relation to the sentence imposed. The Section under which the appellant was convicted provides for death sentence, while Section 389 provides for a term not exceeding seven years---"

At the same page 4 there is observation that the court's attention had been drawn to a recent decision of the same court in the case of *Godfrey Ngotho Mutiso versus Republic (Supra)* on a similar issue. They went on at page 5 of the judgment line 8 from the top to observe and hold: *"Learned Counsel Mr. Oluoch who appeared for the State readily conceded the appeal on the legality of the sentence and we think he was right to do so. In the result we dismiss the appeal on conviction and allow the appeal on sentence. We set aside the sentence of death imposed on the appellant and substitute therefore a sentence of five years imprisonment The term of imprisonment shall run from the date of the appellant's conviction by the trial court on 15th October, 2008."*

We have on our own in addition to the above cited authorities sought to draw inspiration from the decision in the case of *Julius Kamau Mbugua versus Republic Nairobi Criminal Appeal No. 50 of 2008* decided by the Court of Appeal on the 8th day of October, 2010. We appreciate the coal of appeal dealt with a different aspect of breach of fundamental right but would like to draw on the general principles or guidelines set by this case on constitutional interpretation of provisions relating to alleged breaches of fundamental rights and application of such interpretation and or construction on the facts before the court. These have been summarized and itemized at pages 29-31 of the judgment. Not all of them are relevant to the situation herein, hence the singling out of those we feel are relevant to the situation herein. They read thus: -

(i)

(ii) *The right is not an absolute right as the right of the accused must be balance with equally fundamental societal interests in bringing those accused of crime to stand trial and account for their actions.*

(iii) *The general approach to the determination whether the right has been violated is not by a mathematical or administrative formula but rather by judicial determination whereby the court is obliged to consider all the relevant factors within the context of the whole proceedings.*

(iv)

(v) *Although an applicant has the ultimate legal burden throughout to prove a violation, the evidential burden may shift depending on the circumstances of the case. However, the court may make a determination on the basis of the facts emerging from the evidence, before it without undue emphasis on whom the burden of proof lies.*

(vi) -----

(vii) *Although the procedure for raising a violation of the right varies from one jurisdiction to the other, the violation of the right should be raised the earliest possible stage in the proceedings to enable the court to give an effective remedy otherwise the right may be defeated by the doctrine of waiver where applicable.*

(viii).....,

(ix),

(x),

We have given due consideration to the above principles of case law assessed and applied them to the rival arguments herein and we are of the opinion that a number of jurisdictional issues have arisen which require determination before the merits of the petition can be interrogated. The first jurisdictional issue arises because it is apparent that the petitioner's cause of action arose on the 26th day of June, 2009 when the court of appeal of this jurisdiction sitting as the ultimate highest appellate court dismissed the petitioner's appeal, confirmed the death penalty imposed by the lower court and as confirmed by the superior court without reconciling an apparent conflict of law between Section 297(2) of the Penal Code and Sections 388 and 389 of the same Penal Code as it subsequently did in the *Gichane case (supra)* and the *Juma Khisa case (supra)*. Also without calling upon the petitioner to persuade the court that confirming an outright death sentence would be disproportionate to the crime committed and inappropriate in the circumstances. It is also not disputed that had the petitioner thought it fit to complain then, his complaint would have been laid under the old constitutional arrangement, whose provisions ceased to operate upon the promulgation of the current constitutional arrangements which took effect on the 27th August, 2010. It is also not disputed that the jurisdiction of this court has been approached in its capacity as the superior court inferior in rank to the Court of Appeal both as it was then and as it is now. It is therefore necessary to provide basis for existence of the mandate then before translating it to the existence of the mandate as it is now.

It is now written and we have judicial notice of this fact that where issues of jurisdiction arise either on the motion of the court or upon them being raised by the parties, these have to be determined first. There is the case of *owners of the motor vehicle Lillians versus Caltex Oil Kenya Ltd [1989] KLR I* where Nyarangi JA as he then was at page 14 paragraph 30 to page 15 paragraph 5 had this to say:-

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by a statute, charter or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, to the area over which the jurisdiction shall extend or it may partake of both these characteristics, where a court takes it upon itself to exercise a jurisdiction it does not possess its decision amounts to nothing. The moment a court discovers that it has no jurisdiction, it has to down its tools. Jurisdiction must be acquired before judgment is given—". Then went on to hold

inter alia that: -

"(5) A question of jurisdiction may be raised by a party or by a court on its own motion and must be decided forthwith on the evidence before the court."

The case of **Boniface Waweru Mbiyu versus Mary Njeri and another Misc. Application No.639 of 2005** where Ojwang J as he then was now Judge of the Supreme Court of Kenya had this to say:

"The entry point into any court, proceedings is jurisdiction. If a court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a court or tribunal and its absence disqualifies the court or tribunal from determining the question--."

The case of **Desai versus Warsame [1969] EA 350** where it was held inter alia that: - **"No court can confer jurisdiction on itself."**

The case of **Air Alfaraj Ltd versus Raytheon Aircraft Credit Corporation and another [2000] KLR 624** Where it was also held inter alia that: -

"Any issues regarding jurisdiction ought to be considered first so that in the event the court coming to the conclusion that it has no jurisdiction the merits of the issues at stake should not be gone into."

Lastly the case of **Wambui M. Versus Geoffrey Njogu Kimani Nairobi HCCC Misc. Application No.412 of 2003** decided by Mutungi J as he then was (now rtd,)that:-

"To reiterate, this court must be properly moved under the correct legal provisions for it to grant the relief sought."

It is not disputed that the petitioner having exhausted his undoubted appellate rights any grievance arising after the exhaustion of those appellate rights could only be directed to a constitutional court. Interrogation of the constitutional avenues, then available leads us to the provisions of the defunct Section 84(1) which we have judicial notice of that it has been construed and applied by courts of concurrent jurisdiction. It read: -

Section 84(1) Subject to subsection (6) if a person alleges that any of the provisions of Section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person or that other person may apply to the high court for redress.

(2) The high court shall have original jurisdiction: -

(a) To hear and determine an, application made by a person in pursuance of subsection (1)

2(b)

3,4,5,6,7.....

In the case of **Marete versus Attorney General [1987] KLR 690** Shields J as he then was held inter alia that: -

(1) 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 because of such contravention.

(2) Such redress can include compensation for loss of earnings consequent on the contravention and recompense for the inconvenience and distress suffered. The court can give aggravated damages but not exemplary or punitive damages."

The case of **Labhsons Limited versus Manila Haulier Ltd T/A Tausi Travelers Nairobi Milimani**

Commercial Court No.204 of 2003 decided by Nyamu J as he then was now JA on the 28th day of January, 2005. In this case the learned Judge sitting in this capacity as a judge of the Constitutional court was confronted with a constitutional challenge to an order made by a court of concurrent jurisdiction and the issue which arose before him was whether in determining the said case the learned judge would be accused of sitting on appeal over an order made by a court of concurrent jurisdiction. After the construction of the said section 84 of the defunct constitution the learned judge made the following findings:-

(i) That Section 84 of the defunct Constitution gave the court original jurisdiction on matters presented to the court under that section.

(ii) The said section 84 is not subject to any exception except the rules made under section 84(6).

(iii) The section provides for the rights namely a direct right of access to the High Court under Section 84(1) and a referral right under section 84(3) from the subordinate court.

(iv) Any application under the section is a constitutional right in terms of the section and anything that purports to hinder the hearing of any such application would violate the section”.

The section 84 procedure is limited to alleged breaches or threatened breaches of rights set out in sections 70-83 of the same defunct Constitution. Emukule J in the case of **Benjoh Amalgamated Ltd and another versus Kenya Commercial Bank Limited [2007] LLR 6045 (HCK)** decided on the 30th day of May 2007 ruled that “**transactions entered into by private individuals are governed by private law and have nothing to do with the State.**” The case of **Kenya Bus Services Ltd and 2 Others versus the Attorney General Nairobi HCCC Misc. application Number 413 of 2005** where once again Nyamu J as he then was now JA was categorical that:

(i) Fundamental rights and freedoms are contained in the Constitution.

(ii) These are principally available against the state.

(iii) The Constitutional function is to define what constitutes government and the governed.

(iv) The constitution goes further to make provision for the regulation of the relationship between the government and the governed.

(v) Rights of individual interests are taken care of in the principle of private law and are invariably dealt with as such.

Upon revisiting construction of the said provision on our own we are in agreement with the fore assessed decisions of courts of concurrent jurisdiction that the said case law construed the said provision correctly and there is no need for us to depart from the stand taken and we fully associate ourselves with those constructions that the high court had mandate under Section 84 as it was then to handle effectively and determine finally issues referred to it under that section.

Having established existence of jurisdiction vested in the superior court prior to the 27th August, 2010 had the petition been presented then and having opined that the cause of action arose in 2009 when the commission omission on the part of the court of appeal arose, we now come to determine Whether the said cause of action survived the transition and this superior court is properly seized of the matter as submitted to us by the petitioner's counsel. The petitioner's Counsel has maintained that it did survive the transition through the transitional clause Article 262 provision. It reads: -

"Article 262. The transitional and consequential provisions set out in the sixth schedule shall take effect on the effective date."

Clause Six of the sixth schedule reads: -

"Except to the extent that this Constitution expressly provides to the contrary, all rights and obligations however arising, of the government or the Republic and subsisting immediately before the elective date, shall continue as rights and obligation of the National Government or the Republic under this Constitution."

We have duly construed this provision and are satisfied that the provision is plain and clear that rights, duties and obligations subsisting against the government survive the transition. On that account we rule that the petitioner's petition is properly before this court, save that the said rights are not to be availed under the defunct provisions but under the current constitutional 2010 prescriptions.

These fall into two categories namely those flowing in through the Article 2(5) provisions whereby ***"the general rules of international law shall form part of the law of Kenya"*** on the one hand, and those prescribed by the current 2010 Constitution itself.

Those under the Articles 2(5) of the Constitution usher in or bring on board the application of the provisions of Articles 7 and 8 of the Universal Declaration of Human Rights, Articles 14(1) and 26 of the International Covenant on Civil and Political Rights, Articles 3(1), (2) and 7(1) of the African (Banjul) Charter on Human and Peoples Rights all of which guarantee equality before the law, equal protection of the law, the right to have one's cause heard, equality before national courts or tribunals and right to an effective remedy.

On the home front there are several prescriptions in the current 2010 Constitution. The central command in Article 19 in a summary is for this court to note that the bill of Rights is ***"an integral part of Kenya's democratic State"***. Sole purpose of recognizing and enforcing the bill of rights is ***"to preserve the dignity of the individual and communities and to promote social justice and the realization of the potential of all human beings"***.

These belong to each individual.

Vide Article 20 the Court is enjoined to note that the bill of rights applies to all and binds all state organs and all persons inclusive of the court. Vide Article 20(3) there is a re echo of the Observations made by the learned Judges in the cited case of ***Reyes versus the Queen (supra) that "when applying the Bill of Rights a court shall develop, the law in order to give effect to the enjoyment of a right or fundamental freedom and adopt an interpretation that favours the enforcement of a right or fundamental freedom."***

Article, 21(1) on the other hand commands ***"the state and every State organ inclusive of the courts to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights"***. Whereas as Article 22(1), 3(d) and a clearly ***"gives a right to every person to institute court proceedings claiming that While observing the rules of natural justice they shall not be unreasonably right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened."*** And when so approached courts are enjoined to note that ***"while observing the rules of natural justice, they shall not be unreasonably restricted by procedural technicalities"***. Further that ***"absence of rules made under the current 2010 constitution is no bar to a litigant availing him/herself of the prescriptions in the Constitution"***, meaning that the old rules under the defunct section 84(6) are still applicable and operational.

The mandate of the high court is spelt out clearly in Article 23(1) this mandate is to be exercised in accordance with Article 165 of the same Constitution which entrenches the high court in the Constitution. The mandate donated to the high court is to hear and determine applications for ***"redress of denial, violation or infringement or infringement of or threat to a right or fundamental freedom in the Bill of Rights."***

We also note as observed by Nyamu J as he then was now JA when construing the mandate of the high court under the defunct Section 84(1) procedures that this mandate is without exceptions, meaning that issues touching on the Bill of Rights are proper candidates for interrogation by the superior court even if these have arisen as a result of actions of a court higher to the superior court like the scenario we are

faced with herein, the only caveat being that these must be those that touch on the Bill of Rights as between individuals and state organs.

We also wish to note that unlike its counter part the defunct section 84(1), Article 23(3) has gone a step further to prescribe and entrench the reliefs or remedies available. There is a purposeful use of the word "**including**" meaning that the court's hands are not tied to the remedies enumerated. It can award any other remedy lawfully known to law. These include: -

- (a) A declaration of rights;**
- (b) An injunction;**
- (c) A conservatory order;**
- (d) A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
- (e) An order for compensation; and**
- (f) An order of judicial review.**

Article 26(1) which guarantees every one right to life. In addition to the above we wish also to take particular note of the prescriptions in Article 27(1), (2) Which, guarantees equality before the law and equal protection of the law. Equality is defined in Article 27(2) (a) as including "**the full and equal enjoyment of all rights and fundamental freedoms.**" Article 28 on human dignity whereby. `every person has the inherent dignity and the right to have that dignity respected and protected. Article 48 on "**access to justice to all**". Article 50(6) (a),(b) Which reads:

"Article 50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or of appropriate another independent and impartial tribunal or body."

"Article 50(6) a person who is convicted of a criminal offence may petition the high court for a new trial if:-

- (a) The person's appeal if any has been dismissed by the Highest court to which the person is entitled to appeal or the person and not appeal within the time allowed for appeal; and**
- (b) New and compelling evidence has become available."**

Article .159, (2) (a) and (d) which stipulates that when exercising judicial authority the court of tribunal, are to be guided by the following principles among others: -

- (a) That justice shall be done to all**
- (d) That justice shall be administered without undue regard to procedural technicalities.**

Articles 165(i), 3(a) (b)(d), (i) (ii) which establishes the high court with unlimited original jurisdiction in criminal and civil matters, jurisdiction to determine the question

"whether a right or a fundamental freedom in the Bill of Rights has been denied, violated, infringed or violated, jurisdiction to hear any question respecting the interpretation of this constitution including the determination of: -

- (i) The question whether any law is inconsistent with or in contravention of this constitution.**

(ii) The question whether anything said to be done under the authority of this constitution of any law is inconsistent with, or in contravention of this Constitution.

We have given due consideration to the afore set out assessment of the applicable legal prescriptions both at the International and Municipal levels and applied them to the rival arguments for and against the petition and we proceed to make the following general findings on the petition before us.

(1) It is common ground that the petitioner herein has exhausted his undoubted right of appeal up to the then highest court of appeal of this jurisdiction namely the Court of Appeal culminating in its dismissal by the said court of appeal on the 26th day of June, 2009.

(2) That we have not been approached in an appellate jurisdiction to overturn that decision in our capacity as an appellate court over the court of appeal notwithstanding that there is no such jurisdiction vested in this court being a court of inferior jurisdiction to the court of appeal.

(3) That instead, the petitioner wishes us to interfere with that decision partially from a constitutional front alleging a breach of a fundamental right. We have said partially because the petitioner's counsel has submitted before us that they are not complaining about the conviction and sentence of seven years for the substituted offence of indecent assault. They are only pursuing their complaint on failure to reconcile the sentence for the attempted felony of attempted robbery in Section 297(2) of the Penal Code to be in line with the general sentence prescribed for felonies in Section 389 of the same penal code.

(4) That from the facts before us this breach accrued to the petitioner on the same date the appeal was dismissed namely 26th day of June, 2009.

(5) At the time of dismissal of the said appeal, constitutional grievances could be directed to the high court vide the provisions of the then defunct section 84(1) (2) and 84(6) of the defunct constitution.

(6) It is common ground that the Section 84(1) procedures are now defunct but causes of actions that had accrued under the said provision did not become defunct. They have been given a new lease of life through the transitional provisions in the current new 2010 Constitution vide Article 262 of the Constitution and clause 6 of the sixth schedule and for this reason we are satisfied that the petitioner is procedurally before this seat of justice.

(7) We are in agreement that Article 23 procedures of the current Constitution is the equivalent of the Section 84(1) procedures.

(8) That case law assessed with regard to jurisdiction of the high court under the defunct section 84(1) demonstrate that the High Court's vesture of jurisdiction depended on issues arising being limited to those dealing with threatened or actual breaches of the fundamental freedoms and rights this jurisdiction was granted without exception and by reason of this, the high court when seized of jurisdiction under section 84(1) of the defunct Constitution had mandate to sit and even where appropriate overturn decisions of courts of concurrent jurisdiction not in an appellate capacity but in an original capacity.

(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 offend 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 adjudicable 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.

(11) The petitioner's complaint centers on three provisions of Law namely Section 297(2), 388(1) and 389 all of the Penal Code. These read: -

"Section 297(2) of the Penal Code provides: If the Offender is armed with any dangerous or offensive weapon or instrument or is in company with one or more other persons or if at or immediately before or immediately after the time of the assault he wounds, beats, strikes, or uses any other personal violence to any person he shall be sentenced to death.

Section 388(1) of the Penal Code provides: When a person intending to commit an offence, begins to put his intentions into execution by means adopted to its fulfillment and manifests his intention by some other act but does not fulfill his intention such an extent as to commit the offence, he is deemed to commit the offence.

Section 389 of the Penal code provides: Any person who attempts to commit a felony or a misdemeanor is guilty of an Offence and is liable if no other punishment is provided to one half of such punishment as may be provided for the offence attempted, but so that if that offence is once punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years."

(12) That it is now trite that constitutional provisions have primacy over any other legislation such as those of the penal code and Criminal Procedure Code and where there is conflict then the constitutional provision has primacy. This is enshrined in article 2(1) of the current constitution which provides that **"This constitution is the supreme law of the Republic and bind all persons and all state organs at both levels of government"**

(13) The highest court of this jurisdiction then has ruled as in the case of *Godfrey Ngitho Mutiso versus Republic (supra)*.

(14) The same highest court of this jurisdiction then has reconciled discrepancy between Section 297(2) Sections 283(1) and 389.alt.Of the Pena code in two decisions cited to us namely ***Evanson Muiruri Gichene versus Republic (Supra) and Bonfiace Juma Khisa versus Republic (Supra)***. The said reconciliation was as a result of the court of appeal exercise of jurisdiction under the Criminal Procedure Code,

(15) The state of affairs the appellants in the cases, mentioned in number 14 above faced the same set of circumstance that faced the petitioner herein when he appeared before the same court of appeal in the year 2009 but no reconciliation was done in his favour.

(16) Article 50(6) (a)(b) is clear that jurisdiction to revisit a concluded trial up to the appellate stage in of a jurisdiction other than the constitutional jurisdiction can only arise in circumstances where there is demonstration of \existence of new and compelling evidence a matter not demonstrated to exist herein.

(17) This court -has a mandate donated by Article 23(1) as read with Article 165(1)(2), 3(a)(b)(d)(i)(ii) to interrogate Section 297(2) 388(1), 389 all of the penal code and arrive at a determination as to whether these conflict with any of prescriptions in the Bill of Rights enshrined in the 2010 Constitution, declare the existence of incompatibility and then proceed to render an effective remedy to the petitioner.

Turning to the merits, complaints raised in the petition and the rival submissions to them, we have identified three questions for determination namely: -

(1) Whether in light of Article 50(a) and (b) of the Constitution we have jurisdiction to hear the matter and make a declaration that the petitioners rights were violated when the court of appeal affirmed the death sentence meted out by the trial court and as confirmed by the superior court

(2) Whether there is a contradiction between Sections 297(2) and 388 all of the Penal Code and if so,

(3) Car this court give the benefit of the contradiction to the petitioner by ordering for his release?

We have considered these questions in the light of the rival argument for and against the petition, the general assessment done by us general observations or findings set out herein and the applicable guiding principles as found in general finding number (10) and we proceed to make the following concluding findings as hereunder: -

(1) Although we have jurisdiction under Article 50) (a) & (b) to reopen the matter and order a retrial, we are inclined not to take that route because of the following reasons: -

(a) We are in agreement with the submissions of the State Counsel that this procedure is more applicable where there is demonstration of existence of discovery of new and compelling evidence which has not been demonstrated to exist herein by the facts put forward by the petitioner. We do appreciate that the stand of the court of appeal after reconciling the discrepancies in Sections 297(2) and 388(1) and 389 in similar situation in the ***Gichane case (supra) and the Khisa case (supra)*** is a new development in the law and state the current prevailing jurisprudence on the law on this subject and although we are in agreement that the petitioner ought to have received similar treatment earlier, and should also benefit from a similar exercise, we do not think this falls into the category of new and compelling evidence. To our understanding and we have judicial notice of this fact that "**evidence**" as we know it relates to facts that tend to prove or disprove the commission or non commission of the offence that the petitioner had been charged with, none of which has been placed before us.

(b) Reopening the matter by sending the petitioner back to the court of appeal to seek review or to the lower court for a retrial may cause injustice and more suffering for the petitioner because retrial may not be most efficacious considering the period of incarceration so far undergone. It may not be most efficacious considering the period of incarceration so far undergone. It may not be easy for the prosecution to trace witnesses, and there is no guarantee that he will get a preferential speedy disposal trial.

(c) We are satisfied that on the basis of the mandate bestowed on us

by the constitutional provisions assessed above, there are other alternative available efficacious disposes which will ensure justice is done to both sides of the competing interests which can be rerouted to by this court in the disposal of this matter.

(2) We are in agreement with the assertion of the petitioner both in the petition and submissions and as not seemingly contested by the State that there is conflict between Section. 297(2), 388(1) and 389 all of the Penal Code, a position confirmed by the Court of Appeal in the ***Gichane Case (supra)*** and the ***Juma Khisa Case (supra)***. We are also in agreement that this is the current correct position in law and binding on court's subordinate to the court of appeal in the exercise of their criminal jurisdiction. -

(3) We appreciate the decisions in the ***Gichane Case (supra)*** and the ***Juma Khisa. Case (supra)*** were made long after the decision in the petitioner's case But it cannot be ignored that these two decisions went to benefit appellants who faced similar situations as those faced by the petitioner in 2009.

(4) That since there is no period of limitation prescribed in the Constitution as to when one can avail himself/herself benefit of a fundamental right which ought to have accrued to her/him earlier, there is nothing that can prevent the petitioner from claiming equal treatment on the basis of the recent jurisprudential development of the law which has benefited others like him.

(5) Reconciling the discrepancy between section 297(2) 388(1) and 389 all of the Penal Code will be in order just and equitable because: -

(a) It will be in line with the requirement of fair treatment envisaged under Article 50(2)(p) which provides that: -

"Every accused person has the right to a fair trial which includes the right to the benefit of the least severe of the prescribed punishment 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." By reason of our mandate in Article 20(3) as read with articles 165(1)(2), 3(a)(b)(d)(e)(ii), that the courts do interpret the constitutional provisions broadly, liberally With a view to favouring the enforcement of enjoyment of the right by the individual, we wish to construe this provision Article 50(2)(p) and state that it applies also to recent jurisprudential development in law that bestows a right on to an individual and which right is not limited to the beneficiary alone but can be enforced to be enjoyed by other beneficiaries in similar situations. Herein we have no doubt that the jurisprudence generated by the ***Gichane case (supra)*** and ***Juma khisa case (supra)*** will benefit others in like situations other than the original beneficiaries and there is no reason as to why the petitioner should not benefit in a like manner.

(b) It will be in line with the principle in the assessed international norms and best practices and as enshrined in Article 27(1)(2) on equality before the law and equal protection of the law considering that there is no prohibition of retrospective benefit of a fundamental right in international norms or the Constitution.

(c) It will be in line with the principle in Article 20(3) (a) (b) of interpreting the fundamental right to equal treatment before the law and equal protection of the law, broadly so as to make it available for enforcement and enjoyment by litigants, who ought to have benefited from the same on the day pronouncement on the last appellate right were made.

(d) it will be in line with the principle in Article 28 of the Constitution on the observation, respect and protection of the petitioner's inherent human dignity because failure to give him the benefit that was bestowed to the appellants in the ***Gichane Case (supra)*** and the ***Juma Khisa Case (Supra)*** will be tantamount to rating the petitioner to be an inferior human being undeserving of equal treatment on equal footing with ***Gichane and Khisa***.

(e) it will be in line with the principle in Article 19(2) in that sentencing a young man of the age of the petitioner to death but later commuted to life if allowed to stand would be against the realization of the

full potential of the petitioner as a human being as he will not be in a position to contribute to the common good of himself and that of his community due to long incarceration and by the time he will be released upon serving the life sentence he will be too old as his prime life would have been spent in rotting in jail

(f) It will be in line with the principle in the **Julius Kamau Mbugua Case (supra)** of balancing the societal needs of the society demanding that those who commit crimes against society be brought to book with a corresponding demand that the punishment meted to such persons who commit crimes against society should be commensurate to the wrong done. Herein the wrong was attempted and not accomplished and a death sentence commuted to life imprisonment would not be proportionate to the attempt (see also **Reyes versus the Queen (supra)**).

(g) It will be in line with the mandate donated to the superior court vide Article 165(1)(2)(3)(a),(b)(d)(i) (ii) of being enabled to declare existence of incompatibility and then go ahead to provide a remedy.

(h) It will be in line with the recent jurisprudential development in the **Godfrey Ngotho case (supra)** that the provision of a death penalty is antithetical to the right of life and a right against subjection of an individual to inhuman and degrading treatment contrary to the provision of the Constitution.

(6) By reason of what has been stated in number (1) - (5) above, we invoke our mandate in Article 23(3) as read with Articles 165(1) (2) 3(a) (b) (d) (i)

(ii) of the Constitution and proceed to grant the following reliefs: -

(a) An order be and is hereby made and declared that Section 297(2) of the Penal Code contradicts Section 389 of the Penal Code as to the sentence of the offence of attempted robbery and goes against not only the letter and spirit of Article 389 providing a general penalty for attempted felonies among them attempted robbery as robbery is a felony, but also goes against the provisions of the Constitution as well as International norms and best practices accessed through Article 2(5) of the Constitution assessed above.

(b) An order be and is hereby made and declared that Section 297(2) of the Penal Code has no primacy over Section 389 of the Penal Code.

(c) An order be and is hereby made ordered and declared that the petitioner is entitled, as of right to benefit from the general sentence provided for under Section 389 of the Penal Code as opposed to the penalty of death prescribed therein because as opined and found by the court of appeal in the **Godfrey Ngotho case (Supra)** a death penalty where it exists negates an individual's right to life and protection against subjection of an individual to inhuman and degrading punishment more so when all the courts through the petitioner was processed never gave him an opportunity to address them on the issue of non proportionality and inappropriateness of handing out a death penalty for an attempted offence from which the perpetrator never benefited.

(d) That an order be and is hereby made, ordered and declared that by what we have stated in number (6) (c) above, and by reason of the petitioner having served a sentence in excess of seven years prescribed in Section 389 of the penal code, and which we have no doubt would have been served concurrently with that of indecent assault, had the court of appeal availed to him the same benefit as that availed to appellants in the **Gichane case (supra)**, and the **Juma Khisa case (supra)** the petitioner is ordered to be released from prison forthwith unless held for reasons other than those which led to the filling of the petitioner herein.

(7) Each party to bear own costs.

DATED, READ AND DELIVERED AT KISUMU THIS 13th DAY OF February 2012.

R.N. NAMBUYE

JUDGE

**A.ARONI
JUDGE**