Mbugua & 9 others v Attorney General & 3 others (Constitutional Petition E002 & E003 of 2024 (Consolidated)) [2025] KEHC 1248 (KLR) (24 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1248 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CONSTITUTIONAL PETITION E002 & E003 OF 2024 (CONSOLIDATED)

JN KAMAU, J

FEBRUARY 24, 2025

IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS UNDER ARTICLE 22(1), 23(1), 25(D), 51(2), 165(3)(A)(B)(D)(I)(II), (6) & (7) OF THE CONSTITUTION AND SECTION 327(2), 346, 362, 364 OF THE CRIMINAL PROCEDURE CODE (CAP 75) LAWS OF KENYA AND IN THE MATTER OF ARTICLE 19, 20(1), (2), (4), 21(1), 48, 159, 258 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA AND IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2(6), 25(C), 27(1) & (2), 28, 29(D), (F), 47, 50(2)(H) & (P), 51(1) AND 160 OF THE CONSTITUTION AND SECTION 216, 329, 333(2) OF THE CRIMINAL PROCEDURE CODE (CAP 75) AND SECTION 38 OF THE PENAL CODE (CAP 63) LAWS OF KENYA AND IN THE MATTER OF SECTION 296(2) AS READ WITH 297(2) OF THE PENAL CODE (CAP 63) LAWS OF KENYA AND IN THE MATTER OF CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES 2013

BETWEEN

KBS/135/2023/LIFE STEPHEN NJAU MBUGUA ..... 1ST PETITIONER

KBS/479/2012/LIFE GREGORY OUMA OYOTA ..... 2ND PETITIONER

KBS/144/2023/LIFE ELIJA MUGO MURIMI ..... 3RD PETITIONER

KBS/108/2023/LIFE PHILIP SIMIYU MUKANGAI ..... 4TH PETITIONER

KBS/040/2023/LIFE JAMES MASINDE WAFULA ..... 5TH PETITIONER

KBS/145/2023/LIFE CHARLES MAINA WAMAI ..... 6TH PETITIONER

KBS/754/012/LIFE SILAS MALIOLO ZAKAYO ..... 7TH PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

AS CONSOLIDATED WITH

CONSTITUTIONAL PETITION E003 OF 2024

BETWEEN

KBS/255/015/LIFE ALFRED EYASE KINAMUNDU ..... 1ST PETITIONER

KBS/239/01/LIFE SETH JUMBA ALIAS MADIABA ..... 2ND PETITIONER

KBS/252/015/LIFE FRANCIS AGAIN ..... 3RD PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION ..... 2ND RESPONDENT

JUDGMENT

Introduction

1. The Petitioners' undated Petition herein was consolidated with Constitutional Petition No E003 of 2024 Alfred Eyase Kinamundu & 2 Others vs Attorney General & Another with this Petition being the lead file.

2. The Petitioners herein sought the following orders:-

    a. That may this honourable court be pleased to declare the mandatory nature death penalty imposed upon the petitioners under section 296(2) and 297(2) of the *Penal Code* unconstitutional.

    b. A declaration be made that nature of the sentences currently served by petitioners are inconsistent with Article 28 of *the Constitution* as they disenfranchise the petitioners' dignity.

    c. A declaration be made that the petitioner are constitutionally guaranteed for all the benefits of the law including the benefit of the least of the severe punishment and invocation of sections 216, 329 and 333(2) of the C.P.C.

    d. That may this court be pleased to grant an order rendering the applicant case to the trial courts for mitigation and determination of re-sentencing as to the appropriate sentence that is in line with Article 25(c), and 50(2)(p) of *the Constitution*.

    e. That may this honourable court pleased to grant an order rendering resentencing in petitioner's cases.

    f. Any other order that this court may deem fit/just in the circumstances of this petition.

3. The Petitioners' undated Written Submissions were filed on 2nd September 2024. The 1st and 2nd Respondents did not file any response or any Written Submissions to the Petitioners' Petition despite having been given an opportunity to participate in the proceedings herein. The two (2) Petitions were therefore technically unopposed. The Judgment herein is therefore based on the said Petitioners' Written Submissions only.

The Petitioners' Case

4. The 1st Petitioner in Constitutional Petition No E002 of 2024 swore an Affidavit supporting the Petition on 27th March 2024 on his behalf and on behalf of the 2nd, 3rd, 4th, 5th, 6th and 7th Petitioners herein. On his part, the 1st Petitioner in Constitutional Petition No E003 of 2024 on his behalf and on behalf of the 2nd and 3rd Petitioners therein on the same date of 27th March 2024.

5. They contended that they were charged in different files in various courts in the Republic of Kenya for the offence of robbery with violence contrary to Section 295(1) as read with 296(2) of the *Penal Code* and were convicted and sentenced to death after full trial. They asserted that they had exhausted all avenues of appeals and hence their fate remained death row.

6. They averred that the imposed death penalties were later commuted to life imprisonment by a presidential decree. They invoked Articles 22, 23, 50, and 165 of *the Constitution* of Kenya, 2010 and Sections 327, 346 and 362 of the *Criminal Procedure Code* and sought redress of the infringement and denial of fair trial in sentencing due to the mandatory nature of sentence imposition under Section 295(1) as read with 296(2) of the *Penal Code*.

7. They were categorical that this court had the jurisdiction to hear and determine a petition of this nature since it raised a matter of public interest. They contended that their continued incarceration without any prospect of being released from jail amounted to psychological torture on their part and also to their relatives and friends, contrary to Articles 28 and 29(f) of *the Constitution*. of Kenya

8. They urged this court to consider that the indefinite nature of the life sentence derived from the original death sentence as per presidential decree was harsh, excessive, torturous, humiliating and degrading punishment hence inconsistent with Article 29(f) of *the Constitution* of Kenya. They also pleaded with this court not to condemn them to court fees as they were paupers.

Legal Analysis

9. Having considered the Petition herein, the affidavit evidence and the Petitioners' Written Submissions, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the mandatory nature of death sentence under Section 296(2) and 297(2) of the *Penal Code* was unconstitutional;

    b. Whether or not the Petitioners' constitutional right under Article 28 of *the Constitution* of Kenya, 2010 had been infringed upon and if so, what reliefs were they entitled to;

    c. Whether or not the Petitioners were entitled to mitigation and re-sentencing to an appropriate sentence that was in line with Section 216, 329 and 333(2) of the *Criminal Procedure Code* and Articles 25(c) and 50(2)(p) of *the Constitution* of Kenya, 2010.

10. The court therefore deemed it prudent to address the aforesaid issues under the following distinct and separate heads.

    I. The Constitutionality Of Section 296(2) And 297(2) Of The Penal Code

11. The Petitioners submitted that the imposition of the mandatory death penalty upon them amounted to unfair discrimination of the law, degrading punishment and to some extent disenfranchised their dignity contrary to Article 25(c), 27(1), (2), (4), 28, 29(e) and (f) and 50(1)(2)(p) of *the Constitution*.

12. They explained that historically, despite the mandatory nature of the death sentence under Section 296(2), 203 as read 204 of the *Penal Code*, the last execution of the death penalty in Kenya was in

1987. They asserted that for many decades therefore, many offenders who had been convicted under the said sections had been sentenced to death without it being executed. They added that in that regard, those who had been sentenced to suffer death ended up in life imprisonment sentences after their death sentences were commuted to life imprisonment.

13. They pointed out that since then, four (4) groups of death row convicts in the year 2003, 2009, 2016 and 2023 had been commuted to life sentences and a number of them released through the power of mercy.

14. They further submitted that the dispensation of *the Constitution* of Kenya, formulation of Sentencing Policy Guideline, Criminal Procedure Bench Book 2016 and the Supreme Court Judgment in the case of Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) (14 December 2017) (Judgment) (hereinafter referred to as "Muruatetu I") had brought an end of mandatory sentences in capital offences and consequently a large number of former death convicts were released through court processes especially resentencing of murder convicts following the Supreme Court directive in the said Muruatetu I.

15. They averred that by dint of the commutation of death sentences into life imprisonments through Presidential decrees, it was implied that three thousand (3000) of the approximate eleven thousand (11000) convicts whose death penalties were commuted to life imprisonment as per Presidential decree since the year 1987 to date were still languishing in prison without their fate being known while serving indefinite life sentences.

16. It was their contention that the imposition of the mandatory death penalties on them was not judicial evaluated sentence but a legislative fiat.

17. They invoked Article 165(3) and Article 20 of *the Constitution* of Kenya and contended that their Petition fell under the jurisdiction of this court. In this regard, they urged this court to declare mandatory death sentence under Section 296(2) of the *Penal Code* unconstitutional as it was contrary to Article 25(c), 27(1), 2,4 and 50(2)(p) of *the Constitution* of Kenya.

18. They also urged this court to consider that they had been discriminated in sentencing since the period during trial of their cases when the death penalty was the only sentence in capital offences until the current jurisprudence where sentencing was a matter for the discretion of the trial court as held in several cases among them Fatuma Hassan Solo vs Republic (eKLR citation not given) and Yawa Nyale vs Republic[2018]eKLR.

19. They asserted that most of their Co-Accused persons, for example, Paul Ng'ag'a Chege in HCCC No 2302 of 2006 and fellow death row convicts had had their death penalties substituted with various proportionate sentences in accordance with the circumstances of an individual case. In this regard, they relied on the case of Daniel Gichimu Githini & Another vs Republic Criminal Appeal No 27 of 2009 (eKLR citation not given). They also urged this court to be guided by the decision in John Sila Mutua vs Republic Petition No 18 of 2020(eKLR citation not given) where the issue of disparity in sentencing was further expressed.

20. The Petition herein was rightly before this court because the High Court has jurisdiction under Article 165(3) of *the Constitution* of Kenya, 2010 to determine cases where the rights and fundamental freedoms of citizens under the Bill of Rights had been violated.

21. Article 48 of *the Constitution* of Kenya guarantees everyone a right to justice while Article 50 of *the Constitution* of Kenya provides for the right to fair trial, which includes the right to downward review of sentence by being given the least prescribed sentence. Over the years, death sentences have been

imposed on persons who were convicted for capital offences such as murder and robbery with violence and later commuted to life imprisonment through Presidential decrees.

22. Notably, Article 26 of *the Constitution* of Kenya provides that:-

    1. Every person has the right to life.

    2. The life of a person begins at conception.

    3. A person shall not be deprived of life intentionally, except to the extent authorised by this Constitution or other written law(emphasis court)."

23. Further, Article 24 of *the Constitution* of Kenya provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law, which in this case it was the *Penal Code* had had limited one's right to life.

24. Article 6 of the International Covenant on Civil and Political Rights (ICCPR) envisages a situation where the right to life may be curtailed in furtherance of a sentence imposed by a court of law. It provides that:-

    1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

    2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime.... This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

25. It was important to establish under what legal regime death sentence found itself in the Kenyan law. Notably, Article 1 of *the Constitution* of Kenya provides that:-

    1. All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

    2. The people may exercise their sovereign power either directly or through their democratically elected representatives.

    3. Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

        a. Parliament and the legislative assemblies in the county governments;

        b. the national executive and the executive structures in the county governments; and

        c. the Judiciary and independent tribunals.

    4. The sovereign power of the people is exercised at—

        a. the national level; and

        b. the county level.

26. Article 2 further provides as follows:-

    " Supremacy of this Constitution.

    1. This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.

2. No person may claim or exercise State authority except as authorised under this Constitution.

3. The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.

4. Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

5. The general rules of international law shall form part of the law of Kenya.

6. Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

27. Treaties and conventions such as the ICCPR form part of the Kenyan law. In addition, any law that is not inconsistent with *the Constitution* of Kenya is not invalid. Towards this end, Legislature which had the constitutional mandate to enact law and exercises power that had been donated by the people of Kenya had retained the death penalty in Section 296(2) of the *Penal Code*. The said Section 296(2) of the *Penal Code* provides that as follows:

> "If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death."

28. Going further, it was very clear that in Kenya the courts have stated and re-stated again and again that the death penalty was a lawful sentence which is recognized under *the Constitution* of Kenya, 2010.

29. This court had due regard to the case of Godfrey Ngotho Mutiso vs R [2010]eKLR that was in agreement that *the Constitution* envisaged a situation where right to life could be curtailed; and that the sentence of death provided in the *Penal Code*, for offences of murder under Section 204 of the *Penal Code*, aggravated robbery under Section 296(2) of the *Penal Code* and attempted robbery under Section 297(2) of the *Penal Code* was in line with the Constitutional provisions giving the State power to limit the right to life through written law.

30. As the law stood in Kenya, the death sentence continued to be a valid sentence that could be passed by a competent court of law. Our present Constitution was sanctioned by the people of Kenya by way of a referendum on 4th August 2010, and the voice of the people was loud and clear; that they wished to retain the limitation on the right to life, which now presents itself in Article 26 (3) of *the Constitution* of Kenya.

31. To that extent, this court found and held that the death sentence as prescribed under Section 296(2) and Article 297(2) of the *Penal Code* did not contravene, infringe and/or violate *the Constitution* of Kenya. It remained a constitutional sentence.

32. The Petitioners also relied on Articles 25 and 29 of *the Constitution* of Kenya to buttress their argument that the death sentence infringed their right of freedom from torture, cruelty, inhuman and degrading treatment. Article 25 of *the Constitution* provides as follows:-

Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited-

a. Freedom from torture and cruel, inhuman or degrading treatment or punishment"

1. Article 29 (f) of *the Constitution* of Kenya further provides that:-

> "Every person has the right to freedom and security of the person, which includes the right not to be treated or punishment in a cruel, inhuman or degrading manner."

34. In considering whether the death sentence as envisaged under the Kenyan law amounted to cruel and inhuman or unusual punishment that was prohibited by *the Constitution* of Kenya, this court had due regard to what constituted torture.

35. Black's Law Dictionary (9th Edition) defined torture as 'the infliction of intense pain to the body or mind to punish, to extract a confession or information or to obtain sadistic pleasure,' and cruel and unusual punishment as 'punishment that is torturous degrading, inhuman, grossly disproportionate to the crime in question or otherwise shocking to the moral sense of the community.' Inhuman treatment was defined as 'physical or mental cruelty that is so severe that it endangers life or health'.

36. Based on these definitions cruel, inhuman and degrading punishment had to be done for sadistic pleasure, in order to cause extreme physical or mental pain, and that was disproportionate to the crime, so that it caused moral outrage within the community.

37. In the mind of this court, the death sentence was not per se cruel, inhuman or degrading punishment. It was not done for the sadistic pleasure of others as was held in the case of Joseph Njuguna Mwaura & 2 Others vs Republic [2013] eKLR. It was intended to fulfil the purpose of retribution which was one of the objectives for sentencing so that justice could not only done but it had to be seen in cases that involved heinous crimes.

38. With regard to the mandatory nature of the death sentence in Section 296 (2) and 297(2) of the *Penal Code*, this court had due regard to the case of Godfrey Ngotho Mutiso vs Republic (Supra) where the Court of Appeal made a clear finding that Section 204 of the *Penal Code*, and indeed all other provisions in the *Penal Code* which provide for the mandatory death sentence (emphasis court) were antithetical to the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. In other words, the Court of Appeal took the view that the prescribed mandatory nature of the death sentence exceeded what *the Constitution* of Kenya contemplated.

39. While the Court of Appeal held that its findings were in respect of murder cases, it acknowledged that the holding could be applied to other capital offences. Indeed, several accused persons facing death row benefited from this case for the duration the holding in the decision prevailed.

40. It was this court's considered view, that Section 296 (2) and 297(2) of the *Penal Code* in their present landscape curtailed the discretion of the court in a mandatory manner, which the Supreme Court in the Muruatetu I case abhorred.

41. The Supreme Court held the view that all persons shall be equal before the courts and tribunals in the determination of any criminal charge against them, or of their rights and obligations in a suit at law. The apex court stated that:-

> "If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability....Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.

> ...Another aspect of the mandatory sentence in Section 204 that we have grappled with is its discriminate nature; discriminate in the sense that the mandatory sentence gives differential treatment to a convict under that Section, distinct from the kind of treatment accorded to a convict under a Section that does not impose a mandatory sentence."

42. The Supreme Court also had addressed the Penal Section vis a vis Article 27 of *the Constitution* of Kenya and Article 26 of the ICCPR on the issue of non-discrimination.

43. Article 27 (1) of *the Constitution* of Kenya provides as follows:-

> " Every person is equal before the law and has the right to equal protection and equal benefit of the law."

44. Further, Article 26 of the ICCPR provides that:-

> " All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

45. In addressing the issue of non-discrimination, the Supreme Court stated as follows:-

> " Having laid bare the brutal reality of the mandatory nature of the sentence under Section 204 of the *Penal Code*, it becomes crystal clear that that Section is out of sync with the progressive Bill of Rights enshrined in our Constitution specifically; Articles 25 (c), 27, 28, 48 and 50 (1) and (2)(q). That Section therefore cannot stand, particularly, in light of Article 19 (3) (a) of *the Constitution* which provides that the rights and fundamental freedoms in the Bill of Rights belong to each and every individual and are not granted by the State, ... A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing."

46. The Supreme Court thereafter gave directions in Muruatetu II as follows:-

> " To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the *Penal Code*, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

47. Hence, while there was no gainsaying that Muruatetu I was specific to cases of murder under Section 204 of the *Penal Code*, the directions given by the Supreme Court were clear enough that the validity of the mandatory nature of the death penalty prescribed for other capital offences, including robbery with violence under Section 296(2) of the *Penal Code* could and should be challenged separately.

48. As the Petition herein was a subject of Section 296(1) of the *Penal Code* on the offence of robbery with violence whose mitigating circumstances were impeded by the mandatory nature of sentence under Section 296 (2) of the *Penal Code* which prescribed death sentence as the only punishment, the

mandatory nature of the sentence was unconstitutional as it was discriminative in nature. This Petition therefore constituted a valid challenge as contemplated by the Supreme Court in Muruatetu II.

49. It was nevertheless imperative to acknowledge the Petitioners' assertion that many other inmates benefited from the window between Muruatetu I and Muruatetu II and had their sentences reviewed and converted into terms of imprisonment.

50. Having taken into consideration the above factors, this court was of the considered view that Sections 296(2) and 297(2) of the *Penal Code* under which the Petitioners herein were charged and convicted, in so far as they did not allow the possibility of differentiation of the gravity of the offences in a graduated manner in terms of severity or attenuation, and the failure to give an opportunity for the consideration of the circumstances of the offender, those Sections were deficient as they did not give those administering the justice system unfettered discretion to mete out proportionate sentences depending on the gravity of the offence.

51. Indeed, Sections 296(2) and 297(2) of the Penal Offence limited the trial courts to mete out appropriate sentences due to non-differentiation of the circumstances of the offence. The provisions ought to have allowed the exercise of discretion of the trial courts to mete out the least severe sentence where there were aggravating circumstances.

52. It was therefore the considered view of this court that while the death sentence was not unconstitutional under the Kenyan law, the mandatory nature of the death sentence irrespective of the gravity of the offence rendered Sections 296(2) and Section 297(2) of the *Penal Code* unconstitutional for the reason that the said Sections were discriminatory against persons who had been convicted of the offence of robbery with violence and attempted robbery with violence.

53. Even so, this court observed that time had reached as a country to re-consider the place of death sentence as a form of punishment. It had not been carried out for years but yet the same continued to be handed down to persons who had been convicted for robbery with violence and attempted robbery with violence causing the convicts to suffer from the death row syndrome. The emotional and psychiatric trauma that those on death row suffer before their sentences are commuted to life imprisonment is immense. It damages the convicts who are maladjusted and unable to be properly reintegrated in the society.

II. Whether Or Not The Petitioners' Right Under Article 28 Of *The Constitution* Of Kenya, 2010 Had Been Infringed

54. The Petitioners invoked Article 27 and 28 of *the Constitution* of Kenya and submitted that the indefinite nature of life sentence as commuted from the original death sentences made them live in prisons without any future based prospects of release and were therefore suffered psychological torture contrary to the said Articles of *the Constitution* of Kenya. They argued that the rule of law required that there be uniformity in the dispensation of the law but that under Section 296 (2) of the *Penal Code*, the Bill of Rights was not observed, respected, promoted, recognised or protected which was a total contravention principle of law.

55. They cited Article 2 of *the Constitution* of Kenya and invited the court to consider Article 6(4) of the ICCPR as read with Article 50(2)(q) and Article 165 (3),(5) and (6) of *the Constitution* of Kenya in considering the review of their sentences in order to retrieve their dignity disenfranchised by the indefinite nature of life sentence derived from original death penalty under the presidential decree as the continued incarceration without any prospect of release which would totally ruin the rest of their rights contrary to the primary purpose of a sentence of imprisonment as stipulated in the United Nations Minimum Standard Rules (Mandela Rules No 4).

56. They urged the court to consider the Court of Appeal Cases of George Munyinyi Kihuyu vs Republic (eKLR citation not given) and Oprodi Peter Omukanga vs Republic (eKLR citation not given) without highlighting the holding they relied on therein. They were emphatic that the mandatory death penalty that was later commuted to life sentence was harsh to an extent that it granted them no chance to atone for the offence they had committed or even reform which was inconsistent with the rules of natural justice.

57. They further contended that the ambiguity in robbery charges had been addressed in Joseph Kaberia and 11 Others vs Republic where the court declared the robbery charges as ambiguous and directed the respondents herein to ensure that the charges under section 295(1) as read with 296(2) of the *Penal Code* to be redefined within the period of eighteen (18) months but unfortunately the same order had never been acted upon.

58. They added that the robbery charges were also challenged in the case of Saban Salim *Ramadhan & 8 Others vs Republic Consolidated Petition No 5 and 6 of 2022* (eKLR citation not given) where the court pronounced itself over the same. They pointed out that this issue was halfway determined and what was left was the pronouncement that section 296(2) of the *Penal Code* was unconstitutional as by doing so this court would put an end to the historical injustices in respect of sentence imposition under the said Section of the law.

59. They invoked Part II of the Sixth Schedule at Clause 7(1) of *the Constitution* of Kenya and argued that the mandatory nature of the death sentence under Section 296(2) of the *Penal Code* was inconsistent with the spirit of *the Constitution* of Kenya and it was for that reason that they sought the prayers herein in conformity with the case of Joseph Muthee Kago vs Republic Petition No 9 of 2022 and Obed Mugeni Lime & Another vs Republic Petition No 21 and 55 of 2019(eKLR citations not given). They further pointed out that although the Supreme Court of Kenya clarified in Muruatetu II was only applicable in murder cases, that did not bar this court from applying the ratio decidendi and/or its reasoning while approaching cases of similar nature.

60. It was the Petitioners' further submission that even though their death sentence was commutated to life imprisonment by the President, their incarceration without the prospects of release amounted to cruel punishment contrary to Articles 27 and 28 of *the Constitution* of Kenya.

61. The Supreme court in the Muruatetu 1 had this to say about Article 28 of *the Constitution* of Kenya:-

> "It is for this court to ensure that all persons enjoy the right to dignity. Failing to allow a judge discretion to take into consideration the convict's mitigating circumstances, the diverse character of convicts and the circumstances of the crime but instead subject them to the same (mandatory) sentence treating them as undifferentiated mass, violates their right to dignity."

62. In addressing the import of Article 28 of *the Constitution* of Kenya, the Court of Appeal in the case of Julius Kitsao Manyeso vs Republic (2023) KECA 827(KLR) rendered itself as follows:-

> "In addition, an indeterminate life sentence in our view is also inhumane treatment and violates the right to dignity under Article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others vs The United Kingdom (Application nos. 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international

law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

63. It was discriminatory for some of the capital offenders who were serving the death sentence under Section 204 of the *Penal Code* for the offence of murder to have their sentences reviewed while other those serving death sentences for the offences under Section 296(2) and 297(2) of the *Penal Code* were denied the same opportunity.

64. It was also discriminatory that offenders who were serving life imprisonment under the *Sexual Offences Act* Cap 63 A (Laws of Kenya) were benefitting from the review of the life sentences but those serving life imprisonment for robbery with violence after their death sentences were commuted to life imprisonment were not been granted audience of the courts for review in view of the directions of Muruatetu II.

65. Article 27 (1) of *the Constitution* of Kenya is clear that:-

> " Every person is equal before the law and has the right to equal protection of the law and equal benefit before the law."

66. To the extent that it was now settled that murder convicts did not suffer death as a mandatory sentence, there was no reason why the persons who had been convicted for the offence of robbery with violence under Section 296(2) and 297(2) of the Penal code had to suffer death as a mandatory sentence. Both offences were capital in nature. The subsisting discrimination against convicts of robbery with violence offended the provisions of Article 27(1) of *the Constitution* of Kenya.

67. The purpose of incarceration is rehabilitation and reformation of prisoners. It was psychological torture for a prison to take numerous courses to improve himself or herself in prison but never use those skills in the society. Indeed, learning of skills had the purpose of easing the integration of prisoners back into the society. Life imprisonment denied convicts who were on life sentence hope for a better future. It was discriminatory that all convicts had hope of going home other than those who had been convicted of the offence of robbery with violence and attempted robbery with violence. There had to be a determinate period within which a person had to atone for their sins.

68. The long indeterminate incarceration while undergoing rehabilitation programs without the prospect of being released was in the considered opinion of this court a blatant violation of the Petitioners' right to dignity contrary to Article 28 of *the Constitution* of Kenya.

III. Mitigation And Resentencing

69. The Petitioners further invoked Article 25 and Article 27 of *the Constitution* of Kenya and argued that formal justice required that all cases be treated alike but that in their case, due to the mandatory nature of sentence imposition under Section 296(2) of the *Penal Code*, Section 216 and 329 of the *Criminal Procedure Code* were not applicable in their case hence a contravention of Articles 25(c) and 27(1),(2) and (4) of *the Constitution* of Kenya.

70. They were emphatic that the said Sections should have applied in their cases as where freedom of a person was at stake, justice exceeded the desire for certainty. In that regard, they placed reliance on the case of R vs Gould (1968) 2 QB 65 without highlighting the holding they relied therein.

71. They were categorical that failure by the trial courts to consider their mitigation among other relevant factors of consideration in sentencing amounted to unfair discrimination in the penalty Sections in the *Criminal Procedure Code*. They argued that imposition of the mandatory sentences shackled the

judges' and magistrates' discretion leaving the courts to act as legislative rubber stamp. To illustrate that they referred the court to the 2nd Petitioner case on trial where the Learned Trial Magistrate held that his past records and mitigation notwithstanding, her hands were tied by the law as the charges bore a mandatory death penalty and proceeded to sentence him to death.

72. Notably, the word "mitigation" means the act of lessening or making less severe the intensity of something unpleasant such as pain, grief or extreme circumstances. It was an act of making a condition or consequence less severe.

73. In Black's Law Dictionary Free Online Legal Dictionary 2nd Edition "mitigation" was defined as:-

> " Alleviation; abatement or diminution of a penalty or punishment imposed by law. 'Mitigating circumstances' are such as do not constitute a justification or excuse of the offence in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."

74. Notably, Section 216 of the *Criminal Procedure Code* provides that:-

> " The court may, before passing sentence or making an order against an accused person under section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made."

75. A similar provision is found in Section 329 of the *Criminal Procedure Code* which states that:-

> " The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed."

76. In the case of Joseph Njuguna Mwaura 2 Others vs Republic (Supra), the Court of Appeal held that mitigation was now mandatory to determine the appropriate sentence in cases where there had been convictions for capital offences.

77. Mitigation was an important part of the trial. It also had statutory underpinning under Section 323 of the *Criminal Procedure Code* which required the trial court to ask the accused person whether he had anything to say after his conviction and before sentence.

78. The provision of meting out the least severe prescribed sentence as envisaged under Article 20(2)(p) of *the Constitution* of Kenya could only be realised through trial courts obtaining evidence in line with Section 216 and 329 of the *Criminal Procedure Code*. It was at this stage that trial courts obtained information, which could be in the form of Medical, Pre-Sentence or Children Officer's reports giving the past history of an offender, the Victim Impact Assessment and/or Statement, the views of secondary victims, members of the community and local administration.

79. Certain mitigating circumstances could disclose certain facts that materially affect the finding made by the court to such an extent that it could result in the court arriving at a different decision. For instance, the accused person may have suffered from some form of mental illness which may not have been apparent during the trial. He or she may have been intoxicated or under the influence of drugs at the time of committing the offence. A female convict could be found to have been pregnant at the time of sentencing.

80. The previous criminal record of the accused, and whether he was a first offender, and any other circumstances personal to the accused person ought to be received at this stage of the proceedings before sentence is passed.

81. If such an accused person was denied a chance to mitigate the sentence solely because he had been convicted of robbery with violence or attempted robbery with violence under Sections 296(2) and 297(2) of the *Penal Code*, this would definitely have denied him his constitutional right to a fair trial.

82. Although it had not been the practice for courts to have sentencing hearing, relevant information can only be brought out during mitigation. Under the Sentencing Policy Guidelines, sentence hearing which entails mitigation is now a mandatory requirement and, according to the International and Regional Sentencing Standards, it is good practice. This is because the trial courts are able to render reasoned rulings which set out all the factors that have been taken into account in determining the appropriate sentence to be meted to the convict.

83. Sections 216 and 329 of the *Penal Code* were clear in their intent and purpose. There was also nothing in *the Constitution* of Kenya that barred persons convicted for robbery with violence or for attempted robbery with violence from benefiting from mitigation before sentencing. Mitigation was an important aspect of trial courts were able to receive such evidence as they thought fit to guide them to determine the appropriate sentence to impose on accused persons upon conviction.

84. It was not by chance that stakeholders in the criminal justice system agitated for the formulation of sentencing policy guidelines. The Sentencing Policy Guidelines included proportionality, equality/ uniformity/parity/consistency/impartiality, accountability/transparency, inclusiveness, respect for human rights and fundamental freedoms and adherent to domestic and international law with due regard to recognized international and regional standards on sentencing. The object of the Policy, inter alia, included the promotion of consistency, transparency and certainty in the sentencing process to ultimately enhance delivery of justice and promote confidence in the judicial process.

85. A right to fair trial was a constitutional requirement for any accused person irrespective of the offence he or she had committed. Every convicted person was entitled to be given an opportunity to present his mitigating circumstances before being sentenced by the trial court.

86. For those who had been convicted and did not have the benefit of mitigating before being sentenced such as the Petitioners herein, they had a reprieve in Article 50(2) of *the Constitution* of Kenya which sets out some of the principles that were considered to constitute fair trial. One of these principles was the right to lodge an appeal or apply for review in a higher court, if convicted as stipulated in Article 50 (2) (q)) of *the Constitution* of Kenya.

87. Such mitigation, which would include the behaviour while in prison and proof of reformation and possibility of reintegration in the society which would enable an appellate and/or review court have a holistic view of the case. During appeal or review of a case, a higher court would have had all the facts and circumstances of the accused on record to enable it assess the appropriate sentence in case there was merit for a sentence reduction.

88. It was not uncommon for the appellate court to set aside a sentence imposed by the trial court which was not preceded by a reasoned ruling based on statutorily required pre-sentencing circumstances.

89. In the premises, this court therefore found and held that mitigation by a convict facing any criminal charge before sentencing was a constitutional imperative of fair trial.

90. It was therefore discriminatory to deny offenders who had been convicted of the offence of robbery with violence and attempted robbery with violence the right to have their mitigation during trial considered, while the non- capital offenders enjoy that right. In the words of Article 27(1) of *the Constitution* of Kenya, persons who had been convicted for robbery with violence and attempted

robbery with violence were also equal before the law, they have a right to be protected before the law and must derive equal benefit from the law as the non- capital offenders.

91. Going further, under Section 333(2) of the *Criminal Procedure Code*, courts were mandated to take into account the period accused persons had spent in custody before conviction. The implication here was that accused persons who had been convicted of robbery with violence could not benefit from being granted this period if they were sentenced to death. This was also true where their death sentence was commuted to life sentence as they would have to remain in jail for an indeterminate period.

92. As every accused person was entitled to equal benefit of the law and was equal before the law, it was discriminatory for accused persons who had been convicted of the offence of robbery with violence and attempted robbery with violence not to be granted the benefit of the periods that they stayed in custody while their trial was going on or remission which convicts with determinate sentences enjoyed while their sentences were being computed.

93. Granting the period under Section 333(2) of the *Criminal Procedure Code* was a statutory duty that was imposed on the trial court or superior courts where the same had not been considered. Section 333(2) of the *Criminal Procedure Code* provides that:-

> " Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

94. This was also restated by the Court of Appeal in the case of Ahamad Abolfathi Mohammed & Another vs Republic [2018] eKLR.

95. In the premises, this court also found and held that persons who had been convicted for robbery with violence and attempted robbery with violence were entitled to the benefit of enjoying reduction of their sentences by considering Section 333 (2) of the *Criminal Procedure Code* where it was not considered by the trial court.

Disposition

96. For the foregoing reasons, the upshot of this court's decision was that the Petitioners' Petition dated was partly merited in the following terms:-

    a. A declaration be and is hereby made that the nature of the sentences currently being served by Petitioners are inconsistent with Article 28 of *the Constitution* of Kenya as they disenfranchise the Petitioners' dignity.

    b. A declaration be and is hereby made that the Petitioners herein are constitutionally entitled to the benefit of the least of the severe punishment and invocation of Sections 216, 329 and 333(2) of the *Criminal Procedure Code*, Cap 75 (Laws of Kenya) as failure to give them the benefit of the least severe sentence was discriminatory and in contravention of Article 27(1) of *the Constitution* of Kenya, 2010.

    c. A declaration be and is hereby made that the Petitioners are at liberty to apply for mitigation and re-sentencing to determine their appropriate sentences in line with Article 25(c), and 50(2)(p) of *the Constitution* of Kenya, 2010 as failure to give them an opportunity to mitigate and

for them to be re-sentenced was discriminatory and in contravention of Article 27(1) of *the Constitution* of Kenya, 2010.

97. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF FEBRUARY 2025

J. KAMAU

JUDGE