



**Odhiambo & another v Attorney General (Constitutional Petition
E022 of 2024) [2025] KEHC 3538 (KLR) (Civ) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL**

CONSTITUTIONAL PETITION E022 OF 2024

EC MWITA, J

MARCH 14, 2025

BETWEEN

**ERASTUS NGURA ODHIAMBO 1ST PETITIONER
PAUL ODHIAMBO OGUNDE 2ND PETITIONER**

AND

THE ATTORNEY GENERAL RESPONDENT

JUDGMENT

1. The petitioners were convicted for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* and sentenced to 20 years in prison. They have served several years of their sentences. They have now challenged the constitutionality of section 26(3) (i) of the *Penal Code* on the premise that it violates Articles 24(1) (e), 27(1) (2) (4) (5), 45, 47 and 53(1) (e) of *the Constitution*.
2. The petitioners urge for uniform application of section 28 of the *Penal Code* to all convicts, including those convicted for murder who are serving definite sentences. The petitioners argued that this court has the jurisdiction under Article 165(3)(d) to determine the petition and grant the prayers sought. They relied on the decisions in *Protus Buliba Shikuku v Attorney General* [2012] eKLR and *AOO & 6 others v Attorney General & another* [2017] eKLR.
3. According to the petitioners, section 26(3) (i) of the *Penal Code* violates Article 27 of *the Constitution* because it does not offer equal consideration for all convicts in terms of punishment options. The section also grants no further direction on whether someone can be considered for a fine after serving the minimum sentence provide by law. The petitioners assert that the section denies judicial officers discretion this violates Articles 19(2), 20(4) and 50 of *the Constitution*.



4. The petitioners were of the view, that all offences which are not explicitly stated to be punishable by fine, should include fine at some point while one serves the sentence. The petitioners argued that section 26(3) (i) only restricts option of a fine to offences with minimum prescribed offence which is unconstitutional. All offences should be considered for fines.
5. The petitioners posited that a fine can achieve the same objectives for sentencing just like a custodial sentence. The option of a fine also resonates with Articles 19(2), 24(1)(e), 45(1) and 53(1) (e) of *the Constitution* and Paragraph 2.7.5 of the *Judicial Service Act* (Sentencing Guidelines 2023).
6. According to the petitioners, the factors considered during sentencing shift after the offender has served part of the sentence. This positive shift should therefore be given favourable consideration and the offender considered for the option of fine so that he can be allowed to participate in responsibilities such as nation building. Moreover, they argued, when a fine is paid it means more revenue for the exchequer and less expenditure in the prisons.
7. The petitioners took the view, that subjecting offenders to custodial sentences without the option of a fine at some point, offends Article 45 (1) and 53 (1) (e) of *the Constitution* as it leaves the family disintegrated and parental responsibility unattended. They relied on Republic v JC [2021] eKLR.
8. The petitioners again argued that the decision in Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR (Muruatetu case) means that there is no minimum prescribed sentence for a murder convict, effectively setting murder offences as subject to fine. In order to realize Article 27 (1) (2) (4) and (5) of *the Constitution*, it is fair that all offenders such as murder convicts be subjected to similar sentencing options, including fines, save for the amount of the fine.
9. The petitioners urged the court to consider the criterion in section 22 (2) of the *Power of Mercy Act*, 2011 to be applied in determining eligibility for fine options for the offenders who are currently serving prison sentences.
10. The petitioners relied on Article 10(3) of the International Covenant on Civil & Political Rights (ICCPR) and the decisions in Muruatetu I and II; Sammy Musembi Mbugua & 4 others v Attorney General & another [2019] eKLR and KNN v Republic [2020] KEHC 3029 (KLR) for the position that convicts already serving custodial sentences should be reconsidered for resentencing with a view of being offered the options of fines based on social enquiry reports from probation officers.
11. The petitioners urged the court to adopt the scale in section 28(2) of the *Penal Code* with respect to conversion of terms of sentences to fines for those already serving custodial sentences if the social enquiry reports favour imposition of fines. They proposed a fine of Kshs. 50,000 for one year; a fine of Kshs. 100,000 for two years; Kshs. 150,000 for 3 years and 200,000 for four years, among others.
12. The petitioners added that 2nd petitioner was convicted and sentenced after the Muruatetu decision and sentenced to 20 years imprisonment. The determinate sentence of 20 years brought him within the purview of sections 24, 26 and 28 of the *Penal Code* and the *Judicial Service Act* (Sentencing Guidelines 2023).
13. According to the petitioners, owing to the Muruatetu decision, 2nd petitioner's sentence does not fall within the purview of section 26(3)(i) of the *Penal Code* and therefore an alternative punishment to fine was in order. They urged the court to consider paragraph 2.2.1 of the *Judicial Service Act* (Sentencing Guidelines 2023) and his application for an option of a fine.
14. They relied on Republic v Lina Mkunde David Kiritta [2008] KEHC 3924 (KLR) and Caroline Auma Majabu v Republic [2014] KECA 269 (KLR) for the argument that section 26 (2) and 26(3)



- of the *Penal Code* are provisions of general application and if murder does not provide for a minimum sentence of imprisonment, then the court has power to impose a fine instead of custodial sentence.
15. The petitioners argued that section 26(3) (i) of the penal Code is unconstitutional since its application is discriminatory to offenders with minimum sentences. They relied on Article 2 (4) of *the Constitution* and the decision in the Muruatetu case.
 16. The decisions in *Tuck and Sons v Priester* [1887] 190BD 629; *Commissioner of Income Tax v Menon* [1985] eKLR; *Christopher Ndarathi Murungaru v Kenya Anti-Corruption Commission & another* [2006] eKLR and *In the Matter of Kenya National Commission on Human Rights* [2014] eKLR were cited on the interpretation of *the Constitution* and statutes.
 17. They argued that within the meaning of sections 24, 26(3), 28(1) of the *Penal Code* read together with paragraph 2.7.5 of the *Judicial Service Act* (Sentencing Guidelines 2023) and Articles 10(1)(b) and 259(1) (c) of *the Constitution*, all offenders are entitled to a fine as an alternative form of punishment instead of custodial sentence.
 18. They urged the court in exercising its discretion to sentencing, to adopt the provisions of sections 21(2) and 22 of the *Power of Mercy Act*, 2011 and section 28 (1) (b) of the *Penal Code*. The court should also be guided by Article 24 of *the Constitution* while imposing the fines. They urged the court to allowed the petition and grant the following reliefs:
 1. A declaration that section 26 (3) (i) of the *Penal Code* is unconstitutional as it does not meet the constitutional threshold of equality and freedom from discrimination.
 2. An order that section 26(3) (i) of the *Penal Code* be expunged.
 3. A declaration that section 28 of the *Penal Code* to be applied equally to all offenders including murder convicts who are already in custody and serving definite sentences, now that the mandatory sentence has been declared unconstitutional; and also in accordance with article 24(1) (e) and 27(1) (2) (4) (5) of *the Constitution*.
 4. An order that all offenders including murder convicts who are serving definite sentences to be commuted to fine option at some point during the service of their sentence subject to;
 - a. Social enquiry report to establish the extent of reformation, intergratability and acceptability to the society.
 - b. Adoption of the fine conversion scale prescribed in section 28 (2) of the *Penal Code*; used in reverse
 - c. Serving part of their custodial sentence just as section 22 (2) of the *Power of Mercy Act* stipulates.
 5. An order that the definite term sentences of all convicts including murder convicts be automatically converted to fine option using the conversion scale and executable; unless the social enquiry report advises otherwise.
 6. A declaration that all first offenders be accorded options for fine if they have been sentenced to definite term sentences.
 7. An order that all first offenders serving definite term sentences be subjected to fine options.
 8. Any other order that the court may deem just.



Respondent's case

9. The respondent opposed the petition through grounds of opposition and written submissions. The respondent contended that the petition offends the principle of constitutional avoidance and seeks orders that would amount to amending or repealing certain legislations a legislative mandate of Parliament.
10. It is the respondent's case, that the petitioners are asking the court to make a determination on a matter whose outcome will limit judicial discretion. Further that the provision for a fine as a penalty is an option, not a substitute to a custodial sentence.
11. The respondent took the view, that enforcing the orders would be a challenge in the event the petition succeeded because the National Assembly (Parliament) is not a party to the petition; the sentence the petitioners are serving is lawful; the section enjoys the presumption of constitutionality and the petitioners will not be beneficiaries in the event the petition succeeded because the law does not apply retrospectively.
12. Miss Robi, counsel for the respondent, submitted that Article 24(1) of *the Constitution* acknowledges that certain rights may be limited to achieve societal justice and good order. The respondent relied on the decision in Federation of Women Lawyers Kenya (FIDA-K) & 5 others v Attorney General & another [2011] eKLR.
13. Learned counsel argued that while the law allows leniency in sentencing for first offenders, there must be balance with the nature of the offence. Counsel asserted that the court's decision in sentencing the petitioners was made with full regard to the proportionality of punishment in relation to the offence committed.
14. Miss Robi took the position that the petitioners are seeking an amendment to the *Penal Code*, a legislative mandate of Parliament. This offends the doctrine of separation of powers. The respondent relied on Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR.
15. Learned counsel maintained that the petitioners have violated the doctrine of constitutional avoidance. They ought to have preferred an appeal instead of filing this petition. Reliance was placed on Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR; Peter Ochara Anam & 3 others v Constituencies Development Fund Board & 4 others [2011] eKLR and KKB v SCM & 5 others [2022] KEHC 289 (KLR).
16. Miss Robi again relied on section 23(3) of the *Interpretation and General Provisions Act* (Cap 2) Laws of Kenya and the decision in Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR) to reiterate that the law does not apply retrospectively. In the event the petition succeeded, the petitioners would not benefit. The was urged to dismiss the petition with costs.

Determination.

17. I have considered the petition, the response and submissions by parties as well as the decisions relied on. The issue for determination is whether section 26(3)(1) of the *Penal Code* is unconstitutional. The petitioners argued in the affirmative and urged that section 28 of the penal code be applied to all offenders, including murder convicts. Section 28 is on the fines and provides on how fines are to be determined in the case where a fine and imprisonment is permitted so that the court will use discretion. The respondent maintained that section 26(3)(1) is constitutional and that the petitioners want the court to amend the law, a mandate reposed on Parliament.



18. The petitioners were convicted for the offence of murder contrary to section 203 as read with section 204 of the *Penal Code* and sentenced to 20 years in prison. They have served part of their sentences. They have now challenged the constitutionality of section 26(3) (i) of the *Penal Code* on grounds that it violates Articles 24(1) (e) on limitation of rights and fundamental freedoms; Article 27(1) (2) (4) (5) on discrimination and Articles 45, 47 and 53(1) (e)) of *the Constitution*.
19. According to the petitioners, section 26(3) (I) denies them the option of a fine thus, violates their right to equal protection of the law and limits a right and fundamental freedom, among other rights.
20. The respondent denied that the section is discriminatory or limits a right or fundamental freedom. The respondent argued that the petitioners are asking the court to make a determination on a matter whose outcome will limit judicial discretion. The respondent asserted that the provision for a fine as a penalty is an option and not a substitute to a custodial sentence.
21. Courts have established principles to consider when determining whether a statute or its provision is constitutionally invalid. First, there is a general but rebuttable presumption that a statute or its provision is constitutional and the burden is on the person alleging unconstitutionality to prove the invalidity. It is generally assumed that the legislature, being the peoples' representative, understands the problems people face and, therefore, enacts legislation with the intention of solving those problems.
22. In that regard, it was held in *Ndynabo v Attorney General of Tanzania* [2001] EA 495, that an Act of Parliament is constitutional and that the burden is on the person who contends otherwise to prove the country.
23. Second, purpose or effect is also used to determine constitutional validity of a statute or a statutory provision. The purpose of enacting a legislation or the effect of its implementation may lead to nullification of a statute or a provision if found to be inconsistent with *the Constitution*.
24. In *Olum and another v Attorney General* [2002] EA, the court held thus:

“To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by *the Constitution*, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by *the Constitution*, the impugned statute or section thereof shall be declared unconstitutional.”
25. In *The Queen v Big M. Drug mart Ltd*, 1986 LRC (Const.) 332, the Supreme Court of Canada stated as follows:

“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus, validity.”
26. See also *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] eKLR for the position that in determining whether a statute is constitutional or not, the court must



- determine the object and purpose of the impugned Act, which can be discerned from the intention expressed in the Act itself.
27. Section 26(3) provides that a person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or in substitution for imprisonment: Provided that—(i) where the law concerned provides for a minimum sentence of imprisonment, a fine shall not be substituted for imprisonment.
 28. Section 26(3) generally allows imposition of custodial sentence in addition to a fine or a fine in substitution of imprisonment. However, a court will not impose a fine alone where the law provides for a minimum sentence.
 29. The petitioners were convicted for murder whose sentence was until the Muruatetu decision, death. Following that decision sentence for murder depends on the circumstances of each case and the discretion of the trial court. That is, sentences vary from life imprisonment to years' imprisonment as the court deems appropriate. There is no option of a fine in murder cases. Even the custodial sentence to be imposed will depend on the circumstances of the case as there is no universal sentence.
 30. The petitioners argued that the impugned section violates Article 24(1) of *the Constitution*. Article 24(1) provides that a right or fundamental freedom in the Bill of Rights should not be limited except by law, and then to the extent only that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
 - a. the nature of the right and fundamental freedom;
 - b. the importance of the purpose of the limitation;
 - c. the nature and extent of the limitation;
 - d. the need to ensure that the enjoyment of rights and fundamental freedoms of any individual does not prejudice the rights and fundamental freedoms of others; and
 - e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.
 31. Article 24(1) prohibits limitation of rights and fundamental freedoms except by a law and to the extent that the limitation is reasonable in an open and democratic society. Section 26(3) (I) is a law and the purpose of the limitation is to punish the offender for the crime committed. Murder is one of the most heinous crimes in society and generally attracts severe punishment.
 32. The sentence of imprisonment is intended to punish for the crime committed. Its aim is retribution, deterrence and rehabilitation of the offender. A court thus, imposes a sentence that is commensurate with the crime committed so that the victim's family gets justice. In that regard, the sentence must be proportionate to the crime committed.
 33. The petitioner's argument is that limiting the sentence to imprisonment without the option of a fine limits their right and fundamental freedom in violation of Article 24(1). It is important to appreciate that Article 24(1) also provides that enjoyment of rights and fundamental freedoms of any individual should not prejudice the rights and fundamental freedoms of others. That is; Article 24(1) recognises equality of rights and requires balancing of these rights so that enjoyment of one's right does not cause prejudice to the rights of others.
 34. In *Jack Mukhongo Munialo & 12 others v Attorney General & 2 others*, [2018] eKLR, the Court observed that Article 24(1) is permissive on limitation of rights and fundamental freedoms on two



conditions; first a right or fundamental freedom in the Bill of Rights should only be limited by a law; and second, to the extent only that the limitation is reasonable and justifiable in an open and democratic society. Even where the right or fundamental freedom has been limited by law, the measure for determining reasonableness and justifiability of the limitation is whether such limitation is acceptable in an open and democratic society.

35. The Court then stated:

“ [70]. The court in considering the limitation under Article 24(1), must bear in mind that there is no superior right and take into consideration factors such as the nature of the right to be limited, the importance and purpose of the limitation, the nature and extent of the limitation and the need to ensure that enjoyment of rights and fundamental freedoms by one individual does not prejudice the rights of others. This calls for balancing of rights under the principle of proportionality because rights have equal value and therefore maintain the equality of rights.” (underlining)

36. The limitation complained of is by law and the purpose of the limitation is to ensure that the convicted person serves the sentence imposed for the offence committed. In meting out the sentence, the court takes into account various factors, including the seriousness of the offence, the appropriate sentence and the aim of the sentence to be imposed. Even where a fine is allowed, the court still exercises discretion on the appropriate sentence. I, therefore do not agree with the petitioners that section 26(3) (I) violates Article 24(1) of *the Constitution*.

Discrimination

37. The petitioners again argued that the application of the section is discriminatory. This is because it applies in some cases only and not others. The respondent denied that there is discrimination in the application of section 26(3)(i).

38. Article 27 (1) of *the Constitution* guarantees everyone equality before the law and the right to equal protection and equal benefit of the law, including full and equal enjoyment of all rights and fundamental freedoms.

39. Article 27(4) further prohibits the State from direct or indirect discrimination on any grounds, including race, sex, pregnancy, mental status, health status, ethnic or social origin, among others. Article 27(5) again prohibits any person from directly or indirectly discriminating against another on any ground, including those listed in Article 27(4). *The Constitution* uses the word, “including” which means the prohibited grounds of discrimination are inconclusive. It is therefore plain that *the Constitution* abhors any form of discrimination and prohibits both the State and any other person from subjecting any person to both direct and indirect discrimination on any grounds.

40. In *peter K Waweru v Attorney General* [2006] eKLR, the Court defined discrimination to mean:

[A]ffording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.”



41. In *Jacqueline Okeyo Manani & 5 others v Attorney General & another* [2018] eKLR, the Court added thus:
- “[28].Discrimination...is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based on such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups.
- Discrimination is, therefore, the unjust or prejudicial treatment of different categories of people, based on the prohibited grounds of, among others, ethnicity, age, sex and disability.”
42. The petitioners’ argument was that the way section 26(3)(i) is applied, is discriminatory to those persons who are serving minimum sentences so that they do not enjoy the option of a fine. The respondent, however, denied that there is any discrimination in the application of the section.
43. As already pointed out, sentencing is the duty of the trial court. The trial court applies the law enacted by Parliament which includes the sentence to be meted out in respect of the offence. Thereafter, one has an opportunity to challenge either or both conviction and sentence on appeal where the appellate court reviews both the conviction and sentence, if the appeal is successful.
44. It must be appreciated that it is not every act or application of the law that is discriminatory. One must demonstrate that the act complained of deliberately and negatively targeted him or a class of people only to mount to discrimination, or that the action has a discriminatory effect. Where a party alleges discrimination, there must be evidence that the treatment he/she is subjected to, is constitutionally forbidden or has a discriminatory effect.
45. As the Court pointed out in *James Nyasora Nyarangi & 3 others v Attorney General* [2008] eKLR, “discrimination that is forbidden by *the constitution* involves an element of unfavourable bias. Thus, firstly unfavourable bias must be shown by the complainant; and secondly, the bias must be based on the grounds set in *the constitution*.”
46. *The Constitution* prohibits unfair discrimination, namely; treating people inherently equal in dignity, differently or in a way that impairs their fundamental dignity. In this petition, the petitioners did not demonstrate that section 26(3)(i) is unfairly applied to them or that they were differently treated to amount to discrimination. Section 26(3)(i) is a general provision since sentence is prescribed by the laws creating the offences. It is the same law that creates the offence that provides for the sentence of imprisonment with or without a fine or both; the length of the sentence and the amount of the fine if provided for. Even where one a minimum sentence is provided for; a court may impose a sentence it considers appropriate depending on the circumstances of the case.
47. My reading of the impugned section 26(3)(i) and taking into account the purpose of sentencing, does not reveal a discriminatory element. The petitioners did not demonstrate that there is differential application of the section targeting them or the class they belong to. They did not show that they were subjected to negative treatment that would amount to discrimination. I am unable to find in their favour in this regard. What the petitioners sought can only be done by way of legislative and not judicial intervention. Any changes to the law should be done by the body *the Constitution* has mandated to legislate namely, Parliament.
48. In the circumstances, having considered the petition and arguments by parties, the conclusion I come to, is that the petition has no merit. It is declined and dismissed. I make no order on costs.



DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH 2025

E C MWITA

JUDGE

