Ramadhan & 8 others v General & another (Petition 5 of 2022 & Constitutional Petition 6 of 2022 (Consolidated)) [2024] KEHC 1173 (KLR) (6 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1173 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

PETITION 5 OF 2022 & CONSTITUTIONAL PETITION 6 OF 2022 (CONSOLIDATED)

OA SEWE, J

FEBRUARY 6, 2024

IN THE MATTER OF: ARTICLES 2(5) & (6), 3, 22, 23, 19(3), 20(1) & (2), 25(A) & (C), 26(1), 27(1), 28, 29(D) & (F), 50(2) (Q), AND 160 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: SECTIONS 216 AND 329 OF THE CRIMINAL PROCEDURE CODE, CHAPTER 75 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: SECTION 296(2) AND 297(2) OF THE PENAL CODE, CHAPTER 63 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION

AND

IN THE MATTER OF: THE SENTENSING POLICY GUIDELINES

BETWEEN

SHABAN SALIM RAMADHAN ..... 1ST PETITIONER

FRANKLIN OTIENO OLANGO ..... 2ND PETITIONER

ABDALLA SAID MBOGA ..... 3RD PETITIONER

CHRISTOPHER BILALI SABAYA ..... 4TH PETITIONER

PAUL KIMANI NJERI ..... 5TH PETITIONER

DOUGLAS OWIYE ..... 6TH PETITIONER

IBRAHIM KATANA KASUNGU ..... 7TH PETITIONER

PETER KIMANI GACHUHI ..... 8TH PETITIONER

KATANA MWADZOMBO ..... 9TH PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

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

JUDGMENT

1. The 9 petitioners are all convicts on death row at Shimo la Tewa Maximum Security Prison, having been convicted either of robbery with violence under **Section 296(2)** of the **Penal Code, Chapter 63** of the Laws of Kenya, or attempted robbery with violence contrary to **Section 297(2)** of the **Penal Code**. They filed their Petition through Kituo Cha Sheria, basically complaining that, although upon their conviction, they were heard for purposes of sentencing, their mitigation was not taken into consideration because of the wording of **Sections 296(2)** and **297(2)** of the **Penal Code.**

2. The petitioners averred that they are all relatively young, and had no previous criminal records as at the date of their conviction; but were nevertheless sentenced in disregard of their mitigating circumstances. As a result, they have been in custody for periods ranging from 6 to 25 years now, and have in the meantime acquired relevant skills while in prison, such as paralegal studies, tailoring, basic education and theology studies, which they have applied towards supporting fellow inmates. They further averred that the wording of **Sections 296(2)** and **297(2)** of the **Penal Code** have the effect of limiting their right to fair trial as contemplated by **Article 25(c)** of the **Constitution,** which is a non-derogable right.

3. The petitioners further contended that their right to life under **Article 26** of the **Constitution** is threatened by virtue of the death sentences that have been meted out against them. In addition, the petitioners made reference to their right to fair trial under **Articles 25(c) and 50(2)** of the **Constitution**, right to appeal under **Article 50(2)(q)** of the **Constitution,** freedom against discrimination under **Article 27** of the **Constitution**, right to dignity under **Article 28** and freedom and security of the person under **Article 29(d) and (f)** of *the Constitution*, and contended that the same have either been violated by dint of their respective sentences or are threatened with violation.

4. Accordingly, the petitioners prayed for the following reliefs vide their Petition filed on 9th March 2022:

   (a) A declaration that the mandatory nature of the death penalty as provided for under Section 296(2) and 279(2) of the Penal Code is unconstitutional.

   (b) A declaration that the petitioners be placed for re-hearing on mitigation and sentence depending on each petitioners' circumstances and the same be considered for their ultimate sentencing.

5. The Petition was supported by the affidavit as well as a Further Affidavit sworn on behalf of all the petitioners by the 1st petitioner, **Shaban Salim Ramadhan**, in which the grounds set forth in the Petition were reiterated. The petitioners annexed copies of research papers and reports recommending the abolition of the death penalty and prayed that their Petition be allowed.

6. In response to the Petition, the 1st respondent averred that the petitioners have misinterpreted the law in so far as the Supreme Court did not invalidate the death sentence in other provisions of the law. Thus, the 1st respondent posited that the Court is bound by the decision of the Supreme Court in **Francis Karioko Muruatetu & Another v Republic & Others** [2017] eKLR (hereinafter, **Muruatetu I**)

in which the issue of the constitutionality of the death sentence has been dealt with extensively and with finality.

7. When the Petition came up for directions on 13th June 2022, it was, at the instance of the parties, consolidated with **Mombasa High Court Constitutional Petition No. 6 of 2022** wherein the 14 petitioners therein seek the same reliefs against the same two respondents. The petitioners are:

   (a) Gerald Muiruri Wathika (1st petitioner)

   (b) Stephen Nganga Gachuhi (2nd petitioner)

   (c) George Gikeria Njihia (3rd petitioner)

   (d) Aggrey Mbai Injaga (4th petitioner)

   (e) John Gitonga Ndungu (5th petitioner)

   (f) Stephen Kamau Mtabuki (6th petitioner)

   (g) Cornelius Mulili Mbui (7th petitioner)

   (h) Robert Njuguna Muthee (8th petitioner)

   (i) Bonface Kuria Karanja (9th petitioner)

   (j) Lawrence Mwanzia Titus (10th petitioner)

   (k) Sammy Muthangya Katuta (12th petitioner)

   (j) Vincent Kasuti Wafula (13th petitioner)

   (k) James Kinyoo Musya (14th petitioner)

8. Accordingly, directions were given that the two Petitions be canvassed by way of written submissions. The written submissions of the petitioners in **Petition No. 5** were filed herein on 8th March 2023 by their counsel, **Mr. Adika**. They provided a detailed background that entailed the global perspective of death sentence and current trends, the African view as well as the Kenyan situation as borne out of recent reports of studies conducted by the by the Office of the Director of Public Prosecutions and the Kenya National Commission on Human Rights.

9. Thus, the petitioners submitted that, from the studies conducted, there is no longer any reasonable justification for the death penalty. They reiterated the provisions of *the Constitution* underpinning their Petition and added that, unless the orders sought are granted the Judiciary will continue to play the role of a conveyor of sentences passed by Parliament on convicts for robbery with violence under **Section 296(2)** of the **Penal Code** and attempted robbery with violence under **Section 297(2)** of the Penal Code. They relied on **Reyes v the Queen** [2002] 2 AC 335 for the proposition that, when enacted law is said to be incompatible with a right protected by *the Constitution*, it is the Court's duty to interpret *the Constitution* and decide whether there is indeed any inconsistency.

10. It was further the submission of the petitioners in **Petition No. 5** that the Supreme Court having pronounced itself in **Muruatetu I**, the same principles ought to apply in the context of robbery with violence and attempted robbery with violence. They pointed out that **Article 27(1), (2) and (4)** of the **Constitution** underscores the principles of equality before the law as well as equal protection before the law and submitted that upon the pronouncement of the **Muruatetu I** judgment, many inmates were released from prison who were on death row for the offences of robbery with violence

and attempted robbery with violence. It was consequently their submission that it is discriminatory to deny them the same benefit.

11. In terms of human dignity, the petitioners submitted that every person has inherent dignity and the right to have that dignity respected and protected. They were of the view that the process of conducting the sentence of death is quite demeaning; and that, on that account, the Court has the jurisdiction to grant the orders sought and declare the unconstitutionality of the mandatory death sentence under **Section 296(2)** and **297(2)** of the **Penal Code.**

12. In **Petition No. 6 of 2022**, written submissions dated 19th July 2022 were filed herein on behalf of the 14 petitioners in the matter. They reiterated the stance that the mandatory death sentence is unconstitutional, the same having been declared as such by the Supreme Court of Kenya; and therefore that cases of robbery with violence and attempted robbery with violence should not be the exception. In addition, they urged that, in the event of re-sentencing, an order be made for compliance with **Section 333(2)** of the **Criminal Procedure Code**, in line with the decision of the Court of Appeal in **Ahamad Abolfathi Mohamed & Another v Republic** [2018], with a view of accounting for the time so far spent by them in custody.

13. In the 1st respondent's written submissions dated 5th April 2023, **Ms. Kiti** proposed the following issues for determination:

    (a) Whether the Court can overturn the decision of the Supreme Court;

    (b) Whether the Court is *functus officio*;

    (c) What orders should be granted.

14. According to the 1st respondent, it is not open for the Court to reconsider the constitutionality of the death sentence because the Supreme Court has already pronounced itself on the same. The 1st respondent relied on **Dodhia v National & Grindlays Bank Limited & Another** [1970] EA 195 to underscore the doctrine of *stare decisis*. Additionally, the 1st respondent submitted that the Supreme Court was deliberate in the **Muruatetu I** and limited its application to murder cases under **Section 204** of the **Penal Code.** Thus, according to the 1st respondent, **Muruatetu I** is no authority for the petitioners' contention that the death sentence, as provided for in **Sections 296(2)** and **297(2)** of the **Penal Code**, is unconstitutional.

15. In support of the Attorney General's arguments, **Ms. Kiti** relied on **John Gilbert Ouma v Kenya Ferry Services Limited** [2021] eKLR and **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others** [2013] eKLR on the doctrine of *functus officio* and urged the Court to find that the constitutionality of the death penalty cannot be re-litigated. Lastly, the 1st respondent revisited the efforts made by the Kenya Law Reform Task Force on the Reform of Penal Laws, 1997 and the report submitted by the Task Force on **Muruatetu I** and postulated that the State intends to do away with the death penalty but is hindered by **Article 26(3)** of the **Constitution.**

16. Thus, the 1st respondent invited the Court to consider directing that a task force on the review of the mandatory nature of the death penalty in robbery with violence cases be established to table its recommendations to the courts and the Attorney General for adoption as guidelines. The 1st respondent was of the view that to allow the Petition would be to create havoc in the criminal justice system as well as inconsistency in sentencing of robbery with violence cases and other capital offence cases. It was further submitted that such a move would negate the intent of **Article 26(3)** and the whole purpose of the decision of the Supreme Court of Kenya in **Muruatetu I**. Accordingly, the 1st respondent prayed for the dismissal of the Petition with costs.

17. The petitioners thereafter filed responses to the respondents' written submissions. They made reference to the directions given by the Supreme Court in **Francis Karioko Muruatetu & Another v Republic** [2021] KESC 31 (KLR) (6 July 2021 (Directions) **(Muruatetu II)** and submitted that, although it limited the applicability of **Muruatetu I** to death sentence under **Section 204** of the **Penal Code**, the principles ought to apply across board. They relied on **Criminal Appeal No. 260 of 2019: Oprodi Peter Omukanga v Republic** and submitted that counsel misconstrued the directions of the Supreme Court in **Muruatetu II.** They relied on paragraph 15 of **Muruatetu II** for their assertion that the Supreme Court thereby opened the way for other capital offences, such as treason, robbery with violence under **Section 296(2)** and attempted robbery with violence under **Section 297(2)** of the **Penal Code** be presented for full argument before the High Court before being escalated to the Supreme Court through the Court of Appeal. They submitted therefore that this Court is rightfully placed to entertain the Petition and grant the reliefs sought.

18. In response to the 2nd respondent's written submissions, the petitioners cited **Omuse v Republic** [2009] KLR 214 to buttress their submission that sentences must be commensurate with the moral blameworthiness of the offenders and the circumstances of the offence. They reiterated the posturing that their Petition is not about the constitutionality of the death sentence in respect of the offences of robbery with violence and attempted robbery with violence, but about the mandatory nature of the sentence; which in their view constitutes not only violations of offenders' rights but also contravenes the doctrine of separation of powers as envisaged by **Article 160** of the **Constitution**. Thus, the petitioners urged the Court to allow their Petition and grant the prayers sought therein.

19. As has been pointed out hereinabove, the petitioners prayed for the following reliefs:

    (a) A declaration that the mandatory nature of the death penalty provided for under Section 296(2) and 279(2) of the Penal Code is unconstitutional.

    (b) A declaration that the petitioners be placed for re-hearing on mitigation and sentence depending on each petitioners' circumstances and the same be considered for their ultimate sentencing.

20. Having given due consideration to the Petition, the affidavits and the written submissions filed by the parties, including the authorities relied on by them, the issues emerging for determination are:

    (a) the constitutionality of the mandatory death sentence as provided for in Sections 296(2) and 297(2) of the Penal Code.

    (b) What reliefs, if any, ought the Court to give.

A. On the constitutionality of the mandatory death sentence as provided for in Sections 296(2) and 297(2) of the Penal Code:

21. The two Petitions are hinged on **Articles 20(1), 22, 23(3)(a) and (d), 29, 48** and **50(2)(q)** of the **Constitution. Article 20(1)** provides for the application of the Bill of Rights to all laws; and is explicit that it binds all state organs and all persons. **Articles 22 and 48** of the **Constitution** provide for enforcement of *the Constitution* and access to justice, respectively. **Article 23(3)(a)** of the **Constitution** is the provision that empowers the Court to grant appropriate reliefs, including a declaration of rights.

22. Article 29(d) and (f) safeguard the right of every person to freedom and security of the person, including the right not to be subjected to torture in any manner, whether physical or psychological; and the right not to be treated or punished in a cruel, inhuman or degrading manner. **Article 50(2)(q)**

of the **Constitution,** on the other hand, provides that every accused person has the right to a fair trial, which includes the right, if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

23. Needless to mention that **Article 259** of the **Constitution** provides for a holistic approach to the interpretation of the provisions of *the Constitution*. In particular, it states in **Sub-Articles (1), (2) and (3)** that:

    (1) This Constitution shall be interpreted in a manner that—

        (a) promotes its purposes, values and principles;

        (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

        (c) permits the development of the law; and

        (d) contributes to good governance.

    (2) If there is a conflict between different language versions of this Constitution, the English language version prevails.

    (3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking..."

24. What amounts to a holistic interpretation was discussed by the Supreme Court in **the Matter of Kenya National Human Rights Commission, Supreme Court Advisory Opinion Ref. No.1 of 2012**, thus:

> "But what is meant by a holistic interpretation of *the Constitution*? It must mean interpreting *the Constitution* in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result."

25. Similarly, in **Institute of Social Accountability & Another v National Assembly & 4 others** [2015] eKLR the approach taken in a comparable situation was as follows:

    56. First, this Court is enjoined under Article 259 of *the Constitution* to interpret *the Constitution* in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of *the Constitution* to protect and promote the purpose and principles of *the Constitution*.

    57. Second, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise (see Ndyanabo v Attorney General of Tanzania [2001] EA 495)...

    58. Third, in determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011] eKLR, Samuel G. Momanyi v Attorney General and Another (supra)). Further, in examining

whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 enunciated this principle 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. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.

59. Fourth, *the Constitution* should be given a purposive, liberal interpretation. The Supreme Court in Re The Matter of the Interim Independent Electoral Commission Constitutional Application (supra) at para. 51 adopted the words of Mohamed A J in the Namibian case of State v Acheson 1991(20 SA 805, 813) where he stated that;

> *The Constitution* of a nation is not simply a statute which mechanically defines the structures of government and the relationship of government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of *the Constitution* must, therefore preside and permeate the process of judicial interpretation and judicial discretion.

60. Lastly and fundamentally, it is the principle that the provisions of *the Constitution* must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3))."

26. Hence, as to the constitutionality of the death sentence generally, the starting point is **Article 26(3)** of the **Constitution,** which is explicit that:

> "A person shall not be deprived of life intentionally, except to the extent authorized by this Constitution or other written law."

27. Sections 296(2) and 297(2) of the **Penal Code** are some of the provisions of written law that provide for the death sentence, in addition to **Section 24** of the **Penal Code**, which generally stipulates that:

> The following punishments may be inflicted by a court—
>
> SUBPARA (a)
>
> death;
>
> (b) imprisonment or, where the court so determines under the *Community Service Orders Act*, 1998, community service under a community service order;
>
> (c) detention under the Detention Camps Act;
>
> (d) Deleted by Act No. 5 of 2003, s. 3;
>
> (e) fine;
>
> (f) forfeiture;
>
> (g) payment of compensation;

(h) finding security to keep the peace and be of good behaviour;

(i) any other punishment provided by this Code or by any other Act.

28. Accordingly, the situation obtaining in Kenya was aptly captured thus by a multiple bench of the High Court in **Joseph Kaberia Kahinga & 11 Others v Attorney General** [2016] eKLR:

> "It can be seen very clearly that in Kenya the courts have stated and re-stated again and again that the death penalty is a lawful sentence which is recognized both under the epoch and the current Constitutions. The cases in Mutiso, (supra) and **Njuguna Mwaura**, (supra) are however in agreement that *the Constitution* envisaged a situation where right to life can 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."

29. Hence, at Paragraph 52 of its decision in Muruatetu 1, the Supreme Court was explicit that:

> "We are in agreement and affirm the Court of Appeal decision in Mutiso that ... *the Constitution* recognizes the death penalty as being lawful..."

30. It is plain therefore that the petitioners' arguments to the effect that death sentence is demeaning and amounts to a violation of the right to life are entirely untenable. The principle of *stare decisis* dictates that points in litigation be determined according to precedent. Accordingly, in **Dodhia v National & Grindlays Bank Limited & Another** [1970] EA 195, it was held:

> "The adherence to the principle of judicial precedent or stare decisis is of utmost importance in the administration of justice in the Courts in East Africa, and thus to the conduct of the everyday affairs of its inhabitant; it provides a degree of certainty as to what is the law of the country, and is a basis on which individuals can regulate their behavior and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each state are bound on questions of law by the decisions of the Court of Appeal and, subject to these decisions, also to the decisions of the High Court in the particular State."

31. Accordingly, the constitutionality of the death sentence as provided for in Sections 296(2) and 297(2) is now settled. In the same vein, it is also indubitable that the mandatory nature of the death sentence for the offence of murder has been settled by the Supreme Court in Muruatetu I. Here is what the apex court had to say in this regard:

> "We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst *the Constitution* recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of

the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness." (emphasis supplied)

32. The Court further held, at paragraphs 58 and 59 of its judgment that:

(58) "To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.

(59) We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of *the Constitution*."

33. Then, at paragraph 69 of its Judgment the Supreme Court made it clear that:

> "Consequently, we find that Section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, *this decision does not outlaw the death penalty*, which is still applicable as a discretionary maximum punishment."

34. It is therefore significant to acknowledge the petitioner's assertion that some inmates benefited from Muruatetu I and had their sentences reviewed and converted into terms of imprisonment. For instance, in **William Okungu Kittiny v Republic** [2018] eKLR, in which the Court of Appeal had occasion to reflect on the ramifications of **Muruatetu I**, it was held that:

> "...The appellant was sentenced to death for robbery with violence under Section 296(2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296(2) and 297(2) is death. By Article 27(1) of *the Constitution*, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies *mutatis mutandis* to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence of death under Section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296(2) and 297(2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with *the Constitution*...as the Supreme Court did not outlaw the death penalty. It follows that the main ground of appeal – the unconstitutionality of Section 204, 296(2) and 297(2) of the Penal Code on the death sentence fails."

35. The Supreme Court has since issued further guidance in connection with the Muruatetu I vide its Directions dated 6 July 2021 (Muruatetu III) thus:

(11) "The ratio decidendi in the decision was summarized as follows;

> "69. Consequently, we find that Section 204 of the Penal Code is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".

(12) We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.

...

(14) It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court."

36. Hence, it cannot be validly argued, as the respondents tried to, that the court is *functus officio* or that the Petition is a non-starter on account of the **Muruatetu I.** This is because, in Muruatetu II the Supreme Court was explicit at paragraph 15 that:

> "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."

37. Accordingly, the *ratio decidendi* in **Muruatetu I** is equally applicable to robbery with violence and attempted robbery with violence as contemplated by **Sections 296(2) and 297(2)** of the **Penal Code.** I find succor in the decision of **Hon. Odunga, J. (as he then was)** in **Maingi & 5 Others v Director of Public Prosecutions & Another** (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) which, though in respect of mandatory minimum sentences under the ***Sexual Offences Act*****,** was hinged on the same *ratio*. It is also significant that the decision was made after **Muruatetu II.** Here is what the learned judge had to say:

> "In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:
>
> Whereas mandatory and minimum sentences, they however fetter the discretion of the courts, sometimes resulting in grave injustice..."

38. Likewise, in Oprodi Peter Omukanga v Republic (Criminal Appeal 260 of 2019) [2023] KECA 430 (KLR) the Court of Appeal aptly stated thus in this regard:

> "...in our view, the application of the doctrine of stare decisis requires that where a court has previously ruled on an issue similar to or closely related to an issue in question in a current

case, the court is required to make its decision in alignment with the previous decision. This must, however, be construed in tandem with the rule that every case must be decided on its own merits. Combining the two rules of jurisprudence, the only aspect of a decision that a court is free to import into its own decision is the rationale applied by the previous court and not the outcome itself. If that is the case, the rationale of the Supreme Court in the Francis Karioko Muruatetu (supra) would be applicable where a court is faced with a situation in which the mandatory nature of a sentence is concerned..."

39. The Court of Appeal further stated, at paragraph 31 of its Judgment that:

> "Even though in its 2021 directions in Muruatetu & Another v Republic...the Supreme Court limited the applicability of its decision in Francis Karioko Muruatetu & Another (supra) to the death sentence under section 204 of the Penal Code; we have no doubt that the deficits identified by the Court in the above excerpt applies to all mandatory death sentences. For instance, the rights to fair trial and dignity as discussed by the Supreme Court above are inherent and applicable to all accused persons. In appreciating and ensuring the rights of all accused persons are preserved, a court within our jurisdiction would of necessity, refer to the decision of the Supreme Court in a bid to protect and preserve these rights. Similarly, we adopt the opinion of the Supreme Court expressed above in dealing with the death sentence passed by the trial court and confirmed by the first appellate court in this matter, even though it was in respect of a robbery with violence case."

40. It is in the light of the foregoing that I find merit in the contention by the petitioners that the mandatory nature of the death sentences provided for in **Sections 296(2) and 297(2)** of the **Penal Code** is unconstitutional.

B. On whether a case has been made out in respect of Section 333(3) of the Criminal Procedure Code:

41. In their written submissions dated 7th March 2023, the petitioners urged that, in the event of re-sentencing, an order be made for compliance with **Section 333(2)** of the **Criminal Procedure Code**, in line with the decision of the Court of Appeal in *Ahamad Abolfathi Mohamed & Another v Republic [2018], with a view of accounting for the time so far spent by them in custody.

42. Section 333(2) of the **Criminal Procedure Code** states:

> "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.

43. Accordingly, in Ahmad Abolfathi Mohammed & Another Criminal[2018] eKLR the Court held:

> "...By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the

court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012..."

44. It is noteworthy however that nowhere in the two Petitions did the petitioners provide the factual basis of their complaints under **Section 333(2) of the Criminal Procedure Code.** Consequently, the issue was not addressed in the Supporting Affidavit or Responses to the Petitions. It is now trite that allegations of violation of *the Constitution* must not only be pleaded with specificity but must also be sufficiently proved. In **Anarita Karimi Njeru v Republic** [1979] eKLR the Court of Appeal held:

> ...if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

45. The principle was affirmed by the Court of Appeal in the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others** [2013] eKLR as hereunder:

> (42) "...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:
>
> > "The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."
>
> (43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of *the Constitution* in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements...

(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference..."

46. In the premises, I endorse the position taken by **Hon. Chacha, J.** in ***Godfrey Paul Okutoyi & others v Habil Olaka & Another*** *[2018] eKLR*, that:

> 65. "It is time it became clear to both litigants and counsel that rights conferred by statute are not fundamental rights under the Bill of Rights and, therefore, a breach of such rights being a breach of an ordinary statute are redressed through a court of law in the manner allowed by that particular statute or in an ordinary suit as provided by procedure. It is not every failure to act in accordance with a statutory provision or where action is taken in breach of a statutory provision that should give rise to a Constitutional petition. A party should only file a constitutional petition for redress of a breach of *the Constitution* or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum in the manner allowed by the applicable law and procedure."

47. Thus, any breaches of **Section 333(2)** of the **Criminal Procedure Code** ought to be dealt with by way of revision on case by case basis. It would serve no useful purpose for the Court to issue a blanket declaration in this regard, without knowing whether or not such a breach ever occurred as a matter of fact**.** It is therefore my finding that this aspect of the petitioner's case must fail.

C. On the applicable reliefs:

48. Article 23(3) **of the** Constitution **provides that in any proceedings brought under** Article 22, **a court may grant appropriate relief, including a declaration of rights. In** Minister of Health & Others v Treatment Action Campaign & Others (2002) 5 LRC 216 at page 249 appropriate relief was defined thus:

> "...appropriate relief will in essence be relief that is required to protect and enforce *the Constitution*. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in *the Constitution* are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

49. In the result, that I find merit in the two Petitions. It is therefore hereby ordered that:

(a) A declaration be and is hereby made that the mandatory nature of the death penalty as provided for under Section 296(2) and 279(2) of the Penal Code is unconstitutional.

(b) The petitioners be presented before the respective sentencing courts for sentence re-hearing upon appropriate applications being made in that regard in line with Paragraphs 2.2.1, 2.2.2, 2.2.3 and 2.2.4 of the Judiciary Sentencing Guidelines.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 6TH DAY OF FEBRUARY 2024

OLGA SEWE

JUDGE