



REPUBLIC OF KENYA



**Kaberia & another v Attorney General & another; Katiba Institute (Interested Party)  
(Petition E001 of 2022) [2024] KEHC 14067 (KLR) (12 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14067 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
PETITION E001 OF 2022  
J WAKIAGA, J  
NOVEMBER 12, 2024**

**BETWEEN**

**MORRIS KABERIA ..... 1<sup>ST</sup> PETITIONER**

**DICKSON MWANGI MUNENE ..... 2<sup>ND</sup> PETITIONER**

**AND**

**THE HON ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PUBLIC PROSECUTION ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**KATIBA INSTITUTE ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. By a Petition filed under certificate of urgency dated 15<sup>th</sup> December 2022 the Petitioners moved the Court for the following orders:
  - a. A declaration that *the constitution* of Kenya 2010 does not in any way allow the State to deprive any human right but rather allows for limitation which must be justifiable and reasonable.
  - b. A declaration that Sections 4, 296 (2) 203 as read with 204 of the Penal Code in so far as they provide death sentence violate Article 26(1) as read together with Article 24 on limitation of human rights and fundamental freedom and therefore unconstitutional.
  - c. A declaration that the impugned Sections of the Penal code are un-constitutional and thus death sentence is invalid.



- d. A declaration that the application of the impugned Sections is not justifiable and reasonable then (sic) they become arbitrary and unequal thus violates Article 27 of *the Constitution*.
  - e. A declaration that the death sentence does not serve any purpose both as a tool for retribution, deterrence, public purpose or moral one. State cannot violate the law to justify public policy on death sentence as this elevate the wrong doer and diminish the moral authority of the state.
  - f. An order that all those prisoners under death sentence approaches their respective Court of the first instance for resentencing of appropriate legal sentence.
  - g. That a sentence of life is not an option because it is like removing a load from the head unto the shoulder. In both cases death is the ultimate end of the individual.
2. The Petition was subsequently amended on 7<sup>th</sup> September 2023 and directions on its disposal issued by this Court, the parties having filed written submissions to the Petition.
  3. By a notice of motion dated 8<sup>th</sup> October 2024, the subject matter of this Ruling, the 2<sup>nd</sup> Respondent moved the Court under Article 165(3) (d) of *the Constitution* that the Court be pleased to certify that the subject matter of the Petition raises substantial question of law pursuant to Article 165(4) for the matter to be placed before the honourable Chief Justice for empanelment of an even number of judges to hear and determine the same.
  4. It was contended that the Petition raises the questions on whether the death penalty as imposed under Sections 24, 25, 40(3), 60, 204, 296(2) and 297(2) of the Penal Code are inconsistent with or in contravention of *the constitution* as it imposes limitation on the right to life for not being reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom under Article 24 of *the Constitution*.
  5. That the Petition raises questions on whether the impugned Sections of the penal code are unconstitutional and seeks for the death sentence to be declared invalid as a punishment for any crime, pursuant to Article 23(3) of *the Constitution*.
  6. That the Petition raises questions on whether the death penalty is a form of psychological torture and a cruel, inhuman and degrading punishment in breach of Article 29 and whether all prisoners sentenced to death are entitled to resentencing.
  7. That the Petition raises the question on whether an Interim Order requiring the Respondents to develop a re-sentencing plan that is time bound, systematic fair and one that regularly report to Court should be formed.
  8. That these questions are of general public importance that necessitate being heard by an uneven number of the High Court Judges.
  9. The application was supported by an affidavit sworn by Pithon Mwangi Gachanja a Principal prosecution Counsel in the Office of the Director of Public Prosecution in which he deposed that the declarations sought by the Petitioners are matters of grave public importance since they concern the conduct of criminal justice system which needs to be heard by an uneven number of Judges to settle the substantial questions of law raised therein.
  10. The application was not opposed by the Petitioner's, Respondents and the Interested Party.



## Analysis And Determination

11. The only issue for determination in this Motion, is whether the Petition herein raises substantive, novel question of law which ought to be referred to the honourable Chief Justice for an empanelment of an uneven number of Judges to hear and determine the same.
12. Article 165(4) of *the Constitution* provides that any matter certified by the Court as raising a substantial question of under clause (3) (b) and (d) shall be heard by an even number of Judges being not less than three assigned by the Chief Justice. This must be matters that relates to the question whether a right or fundamental freedom in the bill of rights has been denied violated infringed or threatened and or the respecting the interpretation of *the constitution*.
13. What constitute substantive question of law was defined by the Court in Harrison Kinyanjui v Attorney General [2012] eKLR to mean a matter that may present unique facts not plainly covered by the controlling precedents, questions concerning the scope and meaning of the decisions of the higher Courts.
14. The Court of Appeal in Okiya Omtatah Okoiti & Another v Anne Waiguru & 3 others [2017] eKLR set out the principles to be applied and stated that for a case to be certified as one involving substantial point of law, the Applicant must satisfy the Court that the issue to be canvased is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest, that the state of law is uncertain and that the matter falls with the enforcement of the bills of right and or interpretation of *the Constitution*.
15. This Petition raises the question of the constitutionality of death sentences in Kenya looked at from the point of view of the Supreme Court decision in Muruatetu 1 and 2 in which the Court only declared the mandatory nature of the death sentence unconstitutional and in Muruatetu 2 restricted the same to the death sentence in respect to Section 204 of the Penal Code.
16. This Court has declared that the offence of robbery with violence under Section 296(2) of the penal code is un-constitutional but the same is still retained in our law and there are several people being charged under the said provision of law and being sentenced to death sentence.
17. I am therefore satisfied that this Petition raises substantive questions of law which ought to be settled by an uneven number of Judges, the questions being, whether in view of the supreme Court decision in Muruatetu, this Court has jurisdiction to declare death sentence rather than the mandatory nature thereof unconstitutional, whether in view of the Supreme Court direction in Muruatetu 2 this Court can proceed to declare death sentence as provided for in the Penal Code unconstitutional for being a violation of the constitutional right to life, thereby making Kenya an abolitionist State.
18. Finally, there is the issue as to whether a declaration by this Court will affect those who are currently serving death sentence and those who like the second Petitioner have had their death sentences commuted to life and the place of re-sentencing in view of the determination thereof in Muruatetu 1. The Court will have to set clear guidelines if any on which should be the resentencing Court in cases where the party has exhausted all the appellate systems available.
19. I am therefore persuaded that this application is merited and is allowed and the matter certified as raising substantial issues of law contained herein and the same is referred to the Honourable Chief Justice for empanelment of bench for the purposes of its determination.

**DATED SIGNED AND DELIVERED AT MURANGA THIS 12<sup>th</sup> DAY OF NOVEMBER 2024**

**J. WAKIAGA**



## **JUDGE**

In the presence of :

Ms Gakumu for the 2<sup>nd</sup> Respondent

Ms Gituru for Mr. Malonzi for 1<sup>st</sup> Respondent

Mr. Kaberia for the 1<sup>st</sup> Petitioner

