REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. 17 OF 2019

LAWRENCE MUCHINA NGUGI.....PETITIONER

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

1. The Petitioner herein, *Lawrence Muchina Ngugi,* was charged, tried and convicted of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. That was in Criminal Case No. 534 of 2007 at Kikuyu Principal Magistrates Court.

2. Being dissatisfied with the conviction and sentence, the Petitioner lodged an appeal before the High Court at Nairobi. It was Criminal Appeal No. 457 of 2009. The appeal was heard and dismissed.

3. The Petitioner lodged yet another appeal before the Court of Appeal. That was Criminal Appeal No. 367 of 2011. He again lost.

4. The Petitioner is now before this Court with a constitutional Petition. The Petition is brought under Articles 27(1), 29(a) & (f), 47(1), 50(1), (2)(p) & (q) of the Constitution. The Petitioner is unrepresented.

5. The Petitioner challenges the manner he was sentenced. According to the Petitioner, the trial Magistrate failed to exercise her discretion under Section 8(3) of the Sexual Offices Act by holding that the law provided for a mandatory life sentence on conviction. To him, the finding is discriminatory to the extent that the Petitioner did not benefit from the law which only provides for a minimum sentence of 20 years' imprisonment on conviction.

6. The Petitioner prays that the Petition be allowed and the sentence varied to 20 years' imprisonment.

7. The Petition is not opposed. Despite this Court severally granting the Director of Public Prosecutions time to file a response, none was forthcoming.

8. The Petitioner filed extensive, but repetitive written submissions. He argued that the High Court has jurisdiction to review any sentence even when all the avenues of appeal are exhausted. He referred to several decisions where the Courts referred the cases back to the trial Courts for re-sentencing. The cases include the Supreme Court in *Francis Karioko Muruatetu vs. Republic Petition No. 15 of 2015* among others.

9. It is further argued that the Petitioner was denied the benefit of the least possible sentence when the trial Court held that it had no discretion as the sentence provided in law was mandatory, a fact which was false.

10. The Petitioner, relying on *Caroline Auma Majabu vs. Republic (2014) eKLR*, submits that Section 8(3) only provides for a minimum sentence of 20 years' imprisonment hence the Court favoured itself with a wrong interpretation of the law.

11. Upon reference to various provisions of the Constitution, the Criminal Procedure Code, the Sexual Offences Act and decisions, the Petitioner eventually urged this Court to allow the Petition.

12. I have carefully considered the Petition, submissions and the decisions referred to. There is only one issue for determination in this matter. It is whether the Petitioner was discriminated against in passing the sentence against him.

13. The starting point is the Constitution. The sovereignty of the people of Kenya and the supremacy of the Constitution cannot be subject to challenge in any manner. *Article 2 inter alia* declares the Constitution as the supreme law of the land which binds all persons and all State organs at both levels of government. *It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency.* Further, any act or omission in contravention of the Constitution is invalid. *Article 3* places an obligation upon every person to respect, uphold and defend the Constitution.

14. *Article 10* provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions. The Constitution also provided for alignment of the laws then in force at its promulgation in Section 7(1) of the Sixth Schedule.

15. **Chapter 4** of the Constitution creates the Bill of Rights. *Article 19* provides that the Bill of Rights, which comprises of the human rights and fundamental freedoms, is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. It also gives the purpose of recognising and protecting human rights and fundamental freedoms being to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. The human rights and fundamental freedoms are inherent in that they belong to each individual and are not granted by the State. They are also only subject to the limitations contemplated in the Constitution.

16. As this matter centres on how the Constitution and statutes ought to be generally interpreted, I will, before dealing with the above issue, first, look at the manner in which the Constitution and the statutes ought to be interpreted.

17. This Court dealt with this subject recently in ***Nairobi High Court Constitutional Petitions No. 33 and 42 of 2018 (Consolidated) Okiya Omtatah Okoiti vs. Public Service Commission & 73 Others*** (unreported). The Court rendered itself as follows: -

> *54. As regards the interpretation of the Constitution, suffice to say that the Constitution itself gives guidelines on how it ought to be interpreted. That is in Articles 20(4) and 259(1).*
>
> 55. *Article 20(4) requires Courts while interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and the objects of the Bill of Rights. Article 259(1) command Courts 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, permits the development of the law and contributes to good governance.*
>
> 56. *Courts have also rendered how the Constitution ought to be interpreted. The Supreme Court in a ruling rendered on 21st December, 2011in* ***In the Matter of Interim Independent Electoral Commission [2011] eKLR*** *discussed the need for Courts, while interpreting the Constitution, to favour a purposive approach as opposed to formalism. The Court stated as under: -*
>
> *[86] …. The rules of constitutional interpretation do not favour formalistic or positivistic approaches* ***(Articles 20(4)*** *and* ***259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction****. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the* ***Preamble,*** *in* ***Article 10,*** *in* ***Chapter 6****, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya.* ***Article 159(1)*** *states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.*
>
> *[87] In* ***Article 259(1)*** *the Constitution lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance."* ***Article 20*** *requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.*
>
> *[88] …..* ***Article 10*** *states clearly the values and principles of the Constitution, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.*
>
> *[89]* ***It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation.***
>
> 57. *On the principle of holistic interpretation of the Constitution, the Supreme Court in* ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2015] eKLR*** *affirmed the holistic interpretation principle by stating that:*
>
> *This Court has in the past set out guidelines for such matters of interpretation. Of particular relevance in this regard, is our observation that the Constitution should be interpreted in a holistic manner, within its context, and in its spirit.*
>
> 58. *The meaning of holistic interpretation of the Constitution was addressed by the Supreme Court in In the* ***Matter of the Kenya National Human Rights Commission,*** *Sup. Ct. Advisory Opinion Reference No. 1 of 2012; [2014] eKLR. The Court at paragraph 26 stated as follows: -*

> ***…But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the 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 into each other, so as to arrive at a desired result.***

59. *In a Ugandan case in* ***Tinyefuza v Attorney General, [1997] UGCC 3 (25 April 1997)*** *the Court was of the firm position that the Constitution should be read as an integrated whole. The Court observed as follows: -*

> *…. the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, the rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution.…..*

60. *In* ***Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR,*** *the Court of Appeal summarized the various principles of constitutional interpretation as follows:*

[21] …. Before the High Court embarked on the interpretation of the contentious provisions of the Constitution, it restated the relevant principles of interpretation of the Constitution as extracted from case law thus: -

> *· that as provided by Article 259 the Constitution should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance.*
>
> *· that the spirit and tenor of the Constitution must preside and permeate the process of judicial interpretation and judicial discretion.*
>
> *· that the Constitution must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism.*
>
> *· that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle).*

These principles are not new. They also apply to the construction of statutes. *There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution.*

18. In ***Advisory Opinion Application No. 2 of 2012, In the Matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR,*** the Supreme Court spoke to purposive interpretation of the Constitution. It had the following to say: -

> ***…****The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution.*

19. The Court went ahead and gave further meaning of the term *purposive* by making reference to the decision in the Supreme Court of Canada in ***R -vs- Drug Mart*** (1985) when it made the following remarks: -

> *The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.*

20. The Supreme Court, while referring to the South African Constitutional decision in ***Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC)***, went further and stated that a purposive approach is 'a *generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.*'

21. The Learned Judges of the Supreme Court further agreed with the South African Constitutional Court in ***S -vs- Zuma (CCT5/94) 1995*** when it stated that in taking a purposive approach in interpretation, regard must be paid to the legal history, traditions and usages of the country concerned.

22. The Supreme Court embellished the need to pay attention to legal history while interpreting not only the Constitution but also statutes. It observed as follows: -

8.11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.

23. The Court of Appeal while dealing with holistic interpretation of the Constitution in ***Civil Appeal 74 & 82 of 2012, Centre for Rights Education and Awareness & Another v John Harun Mwau & 6 others [2012] eKLR*** stated that the entire Constitution must be read as an integrated whole and no one particular provision destroying the other so as to effectuate harmonization principle.

24. Having said so, I will now deal with the issue at hand. **Article 27(1)** of the Constitution provides as follows: -

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

25. As stated, the Petitioner contends that he was not accorded equal protection and benefit of the law in sentencing. Courts have variously addressed the right against discrimination and to equal treatment of the law.

26. In a Multi-Judge bench in ***Petition 56, 58 & 59 of 2019 (Consolidated), Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) [2020] eKLR,*** the Court considered whether differential treatment amounts to violation of the right to equality and non-discrimination as guaranteed under Article 27 of the Constitution. The Learned Judges made reference to various decisions and finally observed as follows: -

983. The precise meaning and implication of the right to equality and non-discrimination has been the subject of numerous judicial decisions in this and other jurisdictions. In its decision in Jacqueline Okeyo Manani & 5 Others v. Attorney General & Another (supra) the High Court stated as follows with respect to what amounts to discrimination:

26. Black's Law Dictionary, 9th Edition defines "discrimination" as (1)" the effect of a law or established practice that confers privileges on a certain class because of race, age sex, nationality, religion or hardship" (2) "Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured".

27. In the case of Peter K Waweru v Republic [2006] eKLR, the court stated of discrimination thus: -

> *Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to … restrictions to which persons of another description are not made subject or have accorded privileges or advantages which are not accorded to persons of another such description… Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age sex … a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."(emphasis)*

28. From the above definition, discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based 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. Article 27 of the Constitution prohibits any form of discrimination stating that. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law, and that (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

29. The Constitution advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. ***It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination.*** *Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim.*

30. In this regard, the Court stated in the case of Nyarangi & 3 Others V Attorney General [2008] KLR 688 referring to the repealed constitution; "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 constitutional definition of the word "discriminatory" in section 82 of the Constitution.

984. ***It is thus recognised that it is lawful to accord different treatment to different categories of persons if the circumstances so dictate.*** *Such differentiation, however, does not amount to the discrimination that is prohibited by the Constitution. In John Harun Mwau v. Independent Electoral and Boundaries Commission & Another (supra), the court observed that:*

> *[i]t must be clear that a person alleging a violation of Article 27 of the Constitution must establish that because of the distinction made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of the constitution.*

985. When faced with a contention that there is a differentiation in legislation and that such differentiation is discriminatory, what the court has to consider is whether the law does indeed differentiate between different persons; if it does, whether such differentiation amounts to discrimination, and whether such discrimination is unfair. In EG & 7 others v Attorney General; DKM & 9 others (Interested Parties); Katiba Institute & Another: Petition 150 & 234 of 2016 (Consolidated) the court held that:

288. From the above definition, it is safe to state that the Constitution only prohibits unfair discrimination. In our view, unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization."

986. In Harksen v Lane NO and Others (supra) the Court observed that the test for determining whether a claim based on unfair discrimination should succeed was as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not, then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis: -

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination,' does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation…

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.

987. It must also be noted, as observed by Mativo J in Mohammed Abduba Dida v Debate Media Limited & another (supra) that:

It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.

27. The above decision largely sets out the guiding principles in determining whether one is discriminated against.

28. In this case, the Petitioner was charged and convicted upon trial of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act. The provisions state as follows: -

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years ***is liable upon conviction to imprisonment for a term of not less than twenty years.***

(Emphasis added).

29. The Sexual Offences Act is an Act of Parliament to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes. It is a law which generally, and in equal measure, applies to everyone in Kenya facing charges under that law.

30. It can only be the position that the sentence for one charged and convicted under Section 8(1) as read with 8(3) of the Sexual Offences Act is *imprisonment for a term of not less than twenty years.*

31. In passing the sentence, the trial Court in Kikuyu Principal Magistrates Criminal Case No. 534 of 2007 partly stated as follows:

…….. The offence that you committed is a very serious one that under S/8(1) & (3) Sexual Offence Act has only one penalty and that is life imprisonment….

…… You are now sentenced to serve a life imprisonment for the offence of defilement C/S. 8(3) Sexual Offence Act.

32. A reading of Section 8(3) of the Sexual Offences Act yields that a person convicted under that provision of the law is liable upon conviction to imprisonment for a term of not less than twenty years. The term '*is liable to*' has severally been described by Courts.

33. In ***M K v Republic [2015] eKLR,*** the Court of Appeal described the words '*is liable to'* as follows: -

> *19. What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of* ***Opoya -v- Uganda*** ***(1967) EA 752*** *had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in* ***James -v- Young*** ***27 Ch. D. at p.655*** *where North J. said:*
>
> > ***"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".***
> >
> > ***We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are "shall be sentenced to death".***
>
> *20. On our part, we contrast the wordings in* ***Section 8 (2)*** *of the* ***Sexual Offences Act*** *with the proviso in* ***Section 20 (1)*** *of the said Act. The contrast will shed light as to whether the sentence in the proviso to* ***Section 20 (1)*** *is minimum and mandatory or otherwise.* ***Section 8 (2)*** *provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in* ***Section 20 (1)*** *provides that the accused shall be liable to imprisonment for life.*
>
> *21. Guided by the decision in* ***Opoya -v- Uganda*** ***(1967) EA 752*** *and the persuasive dicta of North J. in* ***James -v- Young*** ***27 Ch. D. at p.655;*** *we are satisfied that the sentence stipulated in the proviso to* ***Section 20 (1)*** *of the* ***Sexual Offences Act*** *is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in* ***Section 20 (1)*** *we hereby state that the correct interpretation of the proviso in* ***Section 20 (1)*** *is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.*

34. In the above case, the Appellant was charged, tried and convicted of the offence of incest contrary to Section 20(1) of the Sexual Offences Act. He was sentenced to 20 years' imprisonment by the trial Court. On appeal to the High Court, the sentence was enhanced to life imprisonment. The High Court interpreted the words '*liable to life imprisonment'* to mean a minimum mandatory sentence of life sentence. On a second appeal to the Court of Appeal, the appeal was allowed and the sentence of life imprisonment set-aside. The Court reinstated the initial sentenced of 20 years' imprisonment.

35. In faulting the High Court, the Court of Appeal stated ad follows: -

> *22. Based on the foregoing interpretation, we are of the considered view that in the instant case, the learned judge erred in law in holding that the twenty (20) years term of imprisonment meted to the appellant by the trial court was an illegal sentence. We find that the twenty (20) years term of imprisonment was not an illegal sentence and was lawful in the context of the decision in Opoya -v-Uganda (1967) EA 752. It follows that the learned judge erred in correcting and or enhancing the sentence from 20 years to life imprisonment.*

36. In ***Caroline Auma Majabu v Republic [2014] eKLR,*** **the Court of Appeal** dealt with the interpretation of the words '*shall be liable'* as follows: -

> *[13] In our view, the word "shall" is used in relation to the guilt of the offender and the word used in relation to the sentence is "liable". The Concise Oxford English Dictionary 12th Edition defines the word "liable" as: -*
>
> > *"(i) Responsible by law, legally answerable, (liable to) subject by law to;*
> >
> > *(ii) (Liable to do something) likely to do something;*
> >
> > *(iii) (Liable to) likely to experience (something undesirable).*
>
> ***Black's*** *Law Dictionary defines "liable" as*
>
> > *i. Responsible or answerable in law; legally obligated,*
> >
> > *ii. Subject to or likely to incur (a fine, penalty etc.)*
>
> *[14] Applying the above definition, the use of the word "liable" in* ***section 4(a)*** *of Narcotic Drugs and Psychotropic Substance Control Act merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms. The following examples from the Penal Code provides such mandatory sentences expressly and concisely as follows:*
>
> *204. Any person convicted of murder shall be sentenced to death.*

296(2) which provides capital punishment for the offence of robbery provides as follows:

> *"if the offender is armed with any dangerous or offensive weapon or instrument or is in company of one or more other person (s) or of 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"*

[15] The Sexual Offences Act, is another legislation which provides for a mandatory sentence. ***Section 3*** *of that Act which provides the penalty for the offence of rape provides as follows:*

> *(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.*

Although the word used in section 3 of the Sexual Offences Act is "liable", the provision is clear that the sentence provided is minimum by use of the words "shall not be less than", thus giving allowance for discretion on the upper limit and not the lower limit. In the case of section 4(a) of the Narcotic Drugs and Psychotropic Substance Control Act, the provisions does not contain such clear and unambiguous language with regard to mandatory sentence. In our view, this leaves room for judicial discretion and we would be reluctant to adopt an interpretation that would defeat or muzzle the exercise of such judicial discretion. *With respect, we must depart from the finding in* ***Kingsley Chukwu v R*** *(supra) as the same was made per in curium. Both the trial magistrate and the learned Judge misdirected themselves in holding that the sentence was mandatory, and failing to exercise their discretion by addressing the appellant's mitigating circumstances. An error of law was thereby committed which justifies the intervention of this Court.*

37. Deriving from the foregoing, the correct interpretation of the sentence under Section 8(3) of the Sexual Offences Act *[…liable upon conviction to imprisonment for a term of not less than twenty years]* is, therefore, that a sentencing Court has the latitude or discretion to sentence a convict to a minimum of 20 years. The section provides for only the lower limit. It then bestows discretion upon the sentencing Court to set any other higher sentence, if need be, including a life sentence. That is different from alluding that the provision sets a minimum mandatory sentence of a life sentence.

38. It is clear that the trial Court misinterpreted Section 8(3) of the Sexual Offences Act to the extent of holding that there is only one sentence provided for therein and that the sentence is life imprisonment. As said, the sentencing Court has a discretion under Section 8(3) of the Sexual Offences Act to meet out any sentence from a minimum sentence of 20 years' imprisonment to any other higher sentence provided for under the law.

39. The Petitioner in this case was, hence, denied the opportunity of the sentencing Court exercising its discretion in light of the facts and circumstances of the case. The Court firmly stated that the life sentence was the only one provided in law and was a mandatory sentence.

40. Given that the Sexual Offences Act applies uniformly to all persons convicted under its provisions, I do not find any justification as to why the Petitioner should be treated differently. The Petitioner has a right to an equal treatment just like all other people facing like charges. He is also entitled to the benefit of the law. It will be a travesty of justice to sentence the Petitioner to a mandatory sentence whereas every other person convicted under Section 8(3) of the Sexual Offences Act benefits from the discretion of a minimum sentence of 20 years' imprisonment to any other higher sentence provided for under the law.

41. Having said so, this Court is alive to the Supreme Court in Petition No. 15 & 16 of 2016 ***Francis Karioko Muruatetu & Another v Republic*** [2017] eKLR where the apex Court declared *the mandatory nature of the death sentence as provided for under Section 204 of the Penal Code as unconstitutional.*

42. This Court is, therefore, satisfied that the Petitioner was discriminated against in sentencing him differently and without any lawful justification from any other person convicted under Section 8(3) of the Sexual Offences Act. The Petitioner was further discriminated against in not according him the right to equal protection and equal benefit of the law. His rights under Article 27(1) of the Constitution were hence infringed. Further, this Court finds that the discrimination infringed the Petitioner's right to inherent dignity and the right to have that dignity respected and protected under Article 28 of the Constitution. Also, the Petitioner's right not to be treated or punished in a cruel, inhuman or degrading manner under Article 29(f) of the Constitution stands infringed.

43. As a result, the minimum mandatory sentence of life imprisonment passed against the Petitioner in Kikuyu Principal Magistrates Court Criminal Case No. 534 of 2007 Lawrence Muchina Ngugi vs. Republic on 7th September, 2009 and which sentence was upheld in Nairobi High Court Criminal Appeal No. 457 of 2009 and in Nairobi Court of Appeal Criminal Appeal No. 367 of 2011 is unconstitutional for contravening Articles 27(1), 28 and 29(f) of the Constitution.

44. The totality of this discussion is that the Petition is merited.

45. As to reliefs, this Court is empowered to grant any appropriate relief in a constitutional Petition. I have previously dealt with the powers of a superior Court in Constitutional Petitions. In ***Nairobi High Court Constitutional Petition No. E364 of 2020 Okiya Omtatah Okoiti vs. Attorney General & 5 Others [2020] eKLR*** this Court was confronted with the question as to whether a Court can issue a conservatory order in proceedings challenging the constitutionality of a law brought under Article 258 given that the Constitution is silent on grant of such a remedy. It was argued that the position was unlike in proceedings challenging infringement or threats of infringement of the rights and fundamental freedoms provided in Article 22 of the Constitution where the Constitution clearly provides for the remedies which include a conservatory order.

46. In answering the question in the affirmative and holding that a superior Court has powers to grant **any appropriate relief** in proceedings

under Articles 22 and 258 of the Constitution, I stated as follows: -

> *28. A Court is always possessed of residual inherent powers. Such powers allow the Court to make any orders in the wider interest of justice. It is for the Court to fashion an appropriate remedy even in instances where the Constitution and the law are silent. A Court cannot just, helplessly so, stare at a Petitioner whose rights and fundamental freedoms are trampled upon or when it is ostensibly demonstrated that the Constitution is either contravened or so threatened. Unless a Court raises to, and asserts its authority, high are chances that it may fail the calling in Article 3 of the Constitution. The result will, undoubtedly, be anarchy and lawlessness in the society.*
>
> *29. The Court of Appeal in* ***Total Kenya Limited vs Kenya Revenue Authority (2013) eKLR*** *held that even in instances where there are express provisions on specific reliefs a Court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. The High Court in* ***Simeon Kioko Kitheka & 18 Others vs. County Government of Machakos & 2 Others (2018) eKLR*** *held that Article 23 of the Constitution does not expressly bar the Court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.*
>
> *30.* ***In Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another Nairobi HCCC No. 473 of 2006, [2008] 2 EA 311****,* ***Rawal, J*** *(as she then was) stated that:*
>
> > *While protecting fundamental rights, the Court has power to fashion new remedies as there is no limitation on what the Court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. See Gaily vs. Attorney-General [2001] 2 RC 671; Ramanoop vs. Attorney General [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); Wanjuguna vs. Republic [2004] KLR 520…The Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many facetted jurisdiction and discretionary powers of the High Court. See* The Judicial Review Handbook *(3rd Edn) by Michael Fordham at 361.*
>
> *31. The Constitutional Court of South Africa in* ***Fose vs. Minister of Safety & Security [1977] ZACC 6 emphasized the foregoing as follows: -***
>
> > ***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 courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.***
>
> (Emphasis added)

47. This Court is further alive to the direction by the Supreme Court in ***Francis Karioko Muruatetu & Another v Republic*** case (supra) where upon finding that the mandatory death sentences were unconstitutional, ordered re-sentencing proceedings before the trial Courts.

48. Currently, there is an on-going debate on whether the re-sentencing proceedings ought to be undertaken by the trial Court or the Constitutional Court. The starting point is the distinction between the powers of a Court exercising its appellate jurisdiction and the powers of a Court exercising its constitutional mandate under Article 165(3)(d) of the Constitution.

49. The powers of an appellate Court are provided for in Article 165(3)(e) of the Constitution and Section 354 of the Criminal Procedure Code, Cap. 75 of the Laws of Kenya.

50. Section 354 gives the High Court, as an appellate Court, the powers to *inter alia* reverse the finding and sentence, acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction, alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence; in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.

51. Article 165(3)(d) of the Constitution grants the High Court the jurisdiction to interpret the Constitution as follows: -

> *(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of: -*
>
> > *(i) the question whether any law is inconsistent with or in contravention of this Constitution;*
> >
> > *(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*
> >
> > *(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and*
> >
> > *(iv) a question relating to conflict of laws under Article 191;*

52. In exercising its jurisdiction as an appellate Court, the High Court is obligated to *inter alia* review the facts and the law as applied by the surbodinate Court or Tribunal. In exercise of such powers, the High Court can confirm, set-aside or review a sentence. The Court can also undertake re-sentencing proceedings. However, that is not the position when the High Court is exercising its jurisdiction as a Constitutional Court.

53. The calling of the High Court under Article 165(3)(d) of the Constitution is clear. The Court is called upon to only interpret the Constitution as specifically provided therein. The Court may eventually find the subject issue unconstitutional. If the issue is held to be and is declared unconstitutional, the Court may make further orders including those provided for under Article 23(3) of the Constitution.

54. I will now juxtapose the foregoing with the position in this matter. The facts are not disputed. The Petitioner was convicted and sentenced to life imprisonment. He lost his twin appeals to the High Court and the Court of Appeal respectively. Having lost at the Court of Appeal, the conviction and sentence were confirmed.

55. The Petitioner then approached this Court and pleaded unconstitutionality of the sentence. He pleaded that his rights and fundamental freedoms were variously infringed by the sentence. This Court has by now agreed with the Petitioner that the sentence as rendered by the trial Court and eventually confirmed by the Court of Appeal is unconstitutional. As such, the sentence cannot stand. The effect thereof is that the Petitioner stands convicted, but not sentenced.

56. This Court, while exercising its mandate under Article 165(3)(d) of the Constitution, is not vested with the powers to review the facts and the law as applied in sentencing. The Court is to only determine the constitutionality or otherwise of the sentence. As this Court is not sitting as an appellate Court, the Court lacks the jurisdiction to undertake the re-sentencing proceedings. Such proceedings can only be taken by the trial Court. In this case, the High Court is not the trial Court.

57. But, even if the High Court is the trial Court, still the re-sentencing proceedings cannot be done in the Constitutional Petition file. The Court must call upon the original criminal matter in which the Petitioner was convicted and then complete the proceedings by re-sentencing.

58. Having said so, I remain alive to the seemingly unending nature of matters which, even after final determination by the highest Court on appeal, can be re-opened under the prism of Article 165(3)(d) of the Constitution. That is a challenge which Courts must face.

59. It is only when the Constitution is appropriately upheld that the intentions of Kenyans in passing it can be realized, notwithstanding any inconveniences or challenges posed to anyone including the Courts.

60. I believe I have said enough on the issue. I now end this discussion.

61. Consequently, and in the unique circumstances of this matter, the following final orders hereby issue: -

1. A declaration be and hereby issue that the Petitioner's right against discrimination and the right to equal protection and equal benefit of the law under Article 27(1) of the Constitution were infringed.

2. A declaration be and hereby issue that the Petitioner's right to inherent dignity and the right to have that dignity respected and protected under Article 28 of the Constitution were infringed.

3. A declaration be and hereby issue that the Petitioner's right not to be treated or punished in a cruel, inhuman or degrading manner under Article 29(f) of the Constitution was infringed.

4. A declaration be and hereby issue that the minimum mandatory sentence of life imprisonment passed against the Petitioner in Kikuyu Principal Magistrates Court Criminal Case No. 534 of 2007 Lawrence Muchina Ngugi vs. Republic on 7th September, 2009 and which sentence was upheld in Nairobi High Court Criminal Appeal No. 457 of 2009 and in Nairobi Court of Appeal Criminal Appeal No. 367 of 2011 is unconstitutional.

5. An order of judicial review by way of *Certiorari* be and is hereby issued to bring into this Court and quash the sentence of life imprisonment passed against the Petitioner in Kikuyu Principal Magistrates Court Criminal Case No. 534 of 2007 Lawrence Muchina Ngugi vs. Republic on 7th September, 2009 and which sentence was upheld in Nairobi High Court Criminal Appeal No. 457 of 2009 and in Nairobi Court of Appeal Criminal Appeal No. 367 of 2011.

6. The Petitioner herein, Lawrence Muchina Ngugi, shall be presented before the Principal Magistrates Court at Kikuyu in Criminal Case No. 534 of 2007 Lawrence Muchina Ngugi vs. Republic for re-sentencing.

7. There shall be no order as to costs.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **1st** day of **July, 2021**

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Lawrence Muchina Ngugi, the Petitioner in person.

Elizabeth Wambui – Court Assistant