



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 81 OF 2016**

PETER KARIUKI MUIBAU.....1<sup>ST</sup> PETITIONER  
DICKSON MUNENE MWANGI.....2<sup>ND</sup> PETITIONER  
ROBA GALMA.....3<sup>RD</sup> PETITIONER  
RONALD ORARO.....4<sup>TH</sup> PETITIONER  
ANTONY DEBA.....5<sup>TH</sup> PETITIONER  
PETER KIBUE.....6<sup>TH</sup> PETITIONER  
BERNARD KUNGU.....7<sup>TH</sup> PETITIONER  
JACKSON KAIRIAMA.....8<sup>TH</sup> PETITIONER  
CHRISTOPHER MURAYA.....9<sup>TH</sup> PETITIONER  
JOHN KAIBI.....10<sup>TH</sup> PETITIONER  
GERSON KUBAL.....11<sup>TH</sup> PETITIONER  
MATIPEI POSHOI.....12<sup>TH</sup> PETITIONER

**VERSUS**

**THE HONOURABLE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**  
**THE DIRECTOR OF THE PUBLIC PROSECUTION.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The petitioners herein are convicts currently detained at Kamiti Maximum Prison having been charged, convicted and sentenced to death for the offence of murder. Their respective appeals to the Court of Appeal against both the conviction and sentence were unsuccessful thereby precipitating the instant petition in which they challenge the constitutionality of the provisions of Rule 24 of the Supreme Court Rules and Section 4 of the Criminal Procedure Code, the fifth column of the First Schedule thereof.

**PETITION**

2. In the petition filed on 2<sup>nd</sup> March 2016 the petitioners state that the commencement of their trials before the High Court instead of the Chief Magistrate's Court as is the procedure applied in other criminal cases was discriminatory and contravened Article 27(1) (4) of the Constitution.

3. They claim that granting one unqualified and automatic right of appeal to murder convicts as opposed to the two chances of appeal available to convicts for other offences amounts to violation of Article 27(1) of the Constitution. They also challenge the provisions of Rule 24 of the Supreme Court Rules 2012 which gives the Court of Appeal the sole mandate to adjudicate on matters of application for certification for contradicting the objects of Article 47(1), 48 and 259(1) of the Constitution. Their prayers in the petition were as follows:

*1. A declaration that the 2<sup>nd</sup> respondent (DPP) commencement of the proceedings against the petitioners at the High Court instead of the Chief Magistrate Court contravenes Article 27(1) of the Constitution.*

*2. A declaration that in according the petitioners one right of appeal in contradiction to the offences amounts to violation of Article 27(1) (4) which guarantees equality and freedom from discrimination.*

*3. A declaration that in subjecting the petitioner to Rule 24 of the Supreme Court Rules contradict the objective of Article 47(1), 48, 259(1) of the Constitution.*

*4. A clear definition of what constitutes a matter of general public importance and death sentence be considered to constitute matter of great public importance.*

*5. The court orders that the petitioners be accorded unlimited access to Supreme Court or re-trial of the petitioners cases at the Magistrate Court or be released unless unlawfully held.*

#### **PETITIONERS' SUBMISSIONS.**

4. Mr. Mutuma appeared together with Mr. Nyamodi for the petitioners at the hearing of the petition. Mr. Mutuma submitted that even though the petitioners had already exhausted all the appeal processes allowed under the law, they still had a right to come to this court under Article 165(3) (d) (i) of the Constitution to challenge the constitutionality of Section 4 of the Criminal Procedure Code (CPC) in so far as the 5<sup>th</sup> column of the First Schedule gives the High Court the jurisdiction to try murder cases as a trial court in the first instance. According to the petitioners, this provision differentiates murder trials from other criminal cases which are heard by the Magistrates Court in the first instance.

5. Counsel submitted that the petitioners were not challenging the convictions or findings of the High Court and the Court of Appeal, but were contending that their rights were violated during the trial process because they were treated differently from other accused persons facing criminal charges. He submitted that the petitioners' case was brought under Article 22 and 23 of the Constitution that grant every person a right to institute proceedings claiming that the constitution has been contravened or is threatened with contravention. Counsel submitted that the petitioners were not granted enough room or chances to appeal against the decisions of the trial court in comparison to other accused persons thereby limiting their rights as guaranteed under the constitution. He argued that the process that led to the petitioner's conviction was discriminatory and did not meet the constitutional threshold as the impugned Section 4 of the CPC (5<sup>th</sup> column of the First Schedule) lists all other offences as triable by the Chief Magistrate and other subordinate courts except murder and treason where the trial, by default, commences in the High Court.

6. Counsel submitted that the petitioners right to fair trial was limited in an unfair and unreasonable manner by the fact that the trial commenced at the High Court which means that the petitioners only had one chance to appeal to the Court of Appeal as opposed to persons whose trials commence before the lower court who have two opportunities to appeal to the High Court and then to the Court of Appeal. Counsel relied on the decision in the case of **Nelson Andayi Havi vs. Law Society of Kenya and 3 Others Petition No. 607 of 2017** in which the definition of what amounts to discrimination and the criteria for determining whether discrimination is fair or not was discussed.

7. Counsel maintained that there was no justification in commencing murder and treason trials before the High Court and added that there was nothing peculiar in such trials that could only be determined by the judges of the High Court. Counsel equated murder trials to robbery with violence trials which commence before the magistrates court and argued that in both cases, the courts could, at the time, mete out the mandatory death sentence upon conviction.

8. Counsel maintained that because murder charges are serious offences, the accused persons needed to be granted more chances to appeal and argued that Section 4 of the Civil Procedure Code does not meet the test under Article 24 and 27 of the Constitution. It was the petitioners' case that the fact that murder trials commence before the High court, a superior court, put the accused persons in a totally different category from other accused persons and that the presumption of innocence was therefore not the same as that of other offences. According to the petitioners, the level of public condemnation of a suspect charged before the High Court was higher than that of a suspect charged before the lower court.

9. On his part, Mr. Nyamodi submitted that the petition challenges the process by which the petitioners were tried which process, he argues, was illegitimate in which case he states that the sentence flowing therefrom is also unlawful. Counsel relied on the Supreme Court decision in the case **Francis Kariuki Muruatetu and Another vs. Republic & 5 Others [2016] eKLR** ( hereinafter "*Muruatetu case*") in which the court expressed itself on the constitutionality of the mandatory nature of death sentence and made retrospective recommendations that the courts below were directed to adopt.

10. Counsel noted that this petition was filed prior to the decision in the Muruatetu case. He also referred to the case **of Abdi Aden Simba vs. Director of Public Prosecution Malindi High Court Constitutional Petition No. 24 of 2015** in which the court re-sentenced petitioners who had earlier been sentenced to death based on the Supreme Court's decision in the Muruatetu case where the mandatory nature of the

death sentence was found to be unconstitutional.

## **RESPONDENTS CASE**

11. The respondents opposed the petition through the 1<sup>st</sup> respondent's Grounds of Opposition dated 26<sup>th</sup> March 2018 in which they listed the following grounds:

- 1) *The evidentiary burden required of the petitioners to demonstrate that they have exhausted all their rights of appeal under the Constitution or any other written law has not been properly discharged.***
- 2) *The petitioners have misconstrued the role of Parliament in the enactment, amendment, and/or repeal of legislation.***
- 3) *The petitioners have misunderstood and misapplied the import of Rule 24 of the Supreme Court Rules, 2012.***
- 4) *The impugned Rule 24 of the Supreme Court Rules, 2012 a constitutional underpinning by dint of Article 163(4) (b) of the Constitution.***
- 5) *The question as to what constitutes a matter of general public importance, has been settled in inter alia the Kenyan Supreme Court case of Hermanus Phillips Steyn v Giovanni Gneccchi- Ruscone, Sup. Ct Appl. No. 4 of 2012[2013] eKLR.***
- 6) *The instant petition has been couched in material generalities as it does not meet the competency test required of a constitutional petition in accordance with the rules of this court.***
- 7) *The instant petition is unmeritorious and is otherwise a classical description of what constitutes an abuse of the due process of this Honourable Court.***

12. At the hearing of the petition, Mr. Ashimosi, learned counsel for the 2nd respondent submitted that under Article 165 (3) (a) of the Constitution, the High Court is granted unlimited original jurisdiction in all criminal and civil matters. According to Mr Ashimosi, the provisions of the said Article are in tandem with the provisions of Section 4 of the Criminal Procedure Code as it gives the High Court an omnibus provision to try all criminal cases except cases where the sections has donated the trial of the case to the Magistrate Court.

13. Counsel submitted that the requirement of equal protection under the law passed must apply equally to all persons. For this argument, counsel relied on the decision in the case of **Dennis Mugambi Mongare vs. Attorney General & Others 2014 eKLR**. Counsel cited the case of **State of Kerala & Another vs. M.N. Thomas & Others 1976 AIR 490,1976 SCR(1) 906** wherein the Supreme Court of India discussed the principles to be considered where a law is said to be discriminatory.

14. On the petitioners' claim that Rules 24 of the Supreme Court Rules 2011 is unconstitutional, counsel submitted that the said Rule is in tandem with the provisions of Article 163(4) (b) of the Constitution and added that the mere fact that the Court of Appeal declined to certify a matter as being a matter of public importance was not in itself the end of the case as a review of that decision could still be sought and obtained under Article 163(5). It was submitted that the question of what constitutes a matter of general public importance was set out in the case **Hermanus Phillips Steyn v Giovanni Gneccchi- Ruscone, [2013] eKLR**.

15. On the applicability of the decision in **Muruatetu** case to this case, counsel submitted that the said decision did not disturb the validity of any death sentence and urged the petitioners to apply for and await the re-sentence hearing of their cases.

## **DETERMINATION**

16. I have considered the pleadings filed herein and the parties' submissions together with the authorities that they cited. I note that the main issues for determination are:

- 1) Whether Section 4 of the Criminal Procedure Code is discriminatory and therefore unconstitutional.**
- 2) Whether Rule 24 of the Supreme Court Rules 2011 is unconstitutional.**

17. In answering the above questions, the starting point is the principal that there is a general presumption of constitutionality of laws enacted by Parliament, and that declaring a statute to be unconstitutional is a grave issue and the court should be slow to do so. (See **Mount Kenya Bottlers Limited & 3 Others vs. A.G & Others, [2012] eKLR**).

18. Article 2 (3) of the Constitution stipulates that the Constitution is the supreme law of the land and declares that any law or conduct inconsistent with it is null and void to the extent of its inconsistency. The supremacy of the Constitution and the guarantees in the Bill of Rights add depth and content to the rule of law. When upholding the rule of law, the courts are required not only to have regard to the strict terms of regulatory provisions but also to uphold the values underlying the Bill of Rights.

19. I appreciate that determining the issues raised by the petitioners will involve the interpretation of the section of the CPC and the Supreme Court Rules that are alleged to be unconstitutional, and also the relevant provisions of the Constitution that are alleged to be offended by the sections complained of. To effectively address the said issues, this court is alive to the fact that there are principles governing such interpretation.

20. Before dealing with the issues that arose in the petition, it is important to set out the principles that guide Constitutional interpretation. In interpreting the constitution, the first port of call is the Constitution itself. *Under Article 259 of the constitution, the court is enjoined 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 in a manner 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 purposes and principles of the Constitution. Through case law, various courts in different jurisdictions have also expressed themselves on the manner in which the provisions of the Constitution and Acts should be interpreted.*

21. In **Ndyanabo vs. Attorney General [2001] 2 EA 485** the Tanzania Court of Appeal held that in interpreting the Constitution, the Court would be guided by the general principles that, (i) the Constitution was a living instrument with a soul and consciousness of its own, (ii) fundamental rights provisions had to be interpreted in a broad and liberal manner, (iii) there was a rebuttable presumption that legislation is constitutional, (iv) the onus of rebutting the presumption rested on those who challenged that legislation's status save that, (v) where those whom supported a restriction on a fundamental right relied on a claw back or exclusion clause, the onus was on them to justify the restriction.

22. In **Kigula and Others vs. Attorney-General [2005] 1 EA 132** the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are as follows (1) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) 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; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (3) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realise the full benefit of the rights guaranteed; (4) that in determining constitutionality both purpose and the effect are relevant; and (5) that Article 126(1) of the Constitution of the Republic of Uganda enjoins Courts to exercise judicial power in conformity with law and with the values, norms and aspirations of the people. See also **Besigye and Others vs. The Attorney-General [2008] 1 EA 37** and **Foundation for Human Rights Initiatives vs. Attorney General HCCP NO. 20 of 2006 (CCU) [2008] 1 EA 120.**

23. In **Olum & Another vs. Attorney General (1) [2002] 2 EA 508** the Uganda Court of Appeal held that in order to determine the constitutionality of a statute, the Court had to consider the purpose and the effect of the impugned statute, or section thereof and that if the purpose was not to infringe a right guaranteed by the constitution, the Court had to go further and examine the effects of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the constitution, the statute or section in question would be declared unconstitutional. The Court further held that in interpreting the constitution, the constitutional interpretation principle of harmonization, which was to the effect that all the provisions of the constitution concerning an issue should be considered together, would be applied and in addition the widest construction possible, in their contexts, had to be given to the words used according to their ordinary meaning and each general word held to extend to all ancillary and subsidiary matters. Moreover, constitutional provisions were to be given a liberal construction unfettered by technicalities because though the language of the constitution did not change, changing circumstances may give rise to new and fuller import to the meaning of the words used.

24. A similar holding was made in **Obbo and Another vs. Attorney General [2004] 1 EA 265.** in which the Supreme Court of Uganda held that no laws, rules or regulations let alone decisions of any authority which are in conflict with the provisions of the Constitution can stand in opposition to those constitutional provisions since the constitution is the supreme law of the land. The Court's view was that the Uganda Constitution is to be interpreted both contextually and purposefully since it is an ambulatory living instrument designed for the good governance, liberties, welfare and protection of all persons in Uganda. The task of expounding a Constitution is crucially different from that of construing a statute as a statute defines present rights and obligations. It is easily enacted and easily repealed. A Constitution by contrast is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and when joined by a bill or charter of rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

25. The challenged section 4 of the CPC prescribes the courts that can try offences under the Penal Code. It stipulates as follows:

***Subject to this Code, an offence under the Penal Code (Cap. 63) may be tried by the High Court, or by a subordinate court by which the offence is shown in the fifth column of the First Schedule to this Code to be triable.***

26. The Fifth Column of the First Schedule of the CPC lists/specifies the courts (in addition the courts to High Court) by which offences under the Penal Code is triable. The First Schedule of the CPC contains a table that is divided into 5 columns showing the Section of the Penal Code, the offence under the said Section, whether the police may arrest the suspect with or without a warrant, the punishment under the Penal Code and, at the fifth column, the court by which the offence is triable. It is worthy to note that the wordings at the top of the impugned fifth column are – *court (in addition to the High Court) by which the offence is triable.* My understanding of the wording at the top of the fifth column is that the courts specified therein are in addition to the High Court, and this means that the Schedule does not preclude the trial of any offence from commencing at the High Court. The practice in our courts has, however, been that trials of all criminal cases commence before the lower courts except trials for the offences of murder and treason which commence before the High Court. Indeed the impugned column of the First Schedule of the CPC is categorical that trials for all offences except murder and treason may commence before the lower court. It is this exception of murder trials from commencing at the subordinate court that the petitioners claim is unconstitutional on the basis that it is discriminatory in the sense that while persons tried before the lower court in the first instances have 2 chances of appeal to the High Court and then to the Court of Appeal, those whose trials commence at the High Court have only one chance to appeal the decision of the High Court.

27. From the wording of Section 4 in the First Schedule at the Fifth Column is clear that the subordinate courts listed therein are not exclusive, but are in addition to the High Court. A simple reading of that Section shows that trials of all offences can be conducted before the subordinate courts listed in addition to the High Court, which to my mind, means that there is no legal barrier to any criminal trial commencing before the High Court and the mere fact that trials for certain offences commence before the lower court does not preclude the

High Court from hearing any such criminal cases in the first instance.

28. Section 4 of the Criminal Procedure Code is clear that offences under the penal code 'may' be tried by High Court or by a subordinate court by which the offence is shown in the fifth column of the First Schedule'. To my mind, this means that the commencement of a before the High Court or the subordinate is not mandatory requirement and thus, use of the word 'may' as opposed to "shall" which could have inferred a mandatory connotation.

29. It is trite law that jurisdiction of a court to hear a matter flows from the law or the Constitution. In the oft cited case of The Owners of Motor Vessel "Lillian S." v Caltex Oil Kenya Ltd [1989] KLR 1 it was held that jurisdiction is everything and that a Court cannot take any further step the moment it holds that it has no jurisdiction.

30. In the matter of the Interim Independent Electoral Commission [2011] eKLR, the Supreme Court stated that:

***"[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by Statute Law, and by Principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' vs. Caltex Oil (Kenya) Ltd [1989].***

***[30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient court is to apply the same with any limitations embodied therein ... in the case of the Supreme Court, the Court of Appeal and High Court, these respective jurisdictions are donated by the Constitution."***

31. Article 165(3) (a) of the Constitution provides that subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Clause (5) of the said Article provides that the High Court shall not have jurisdiction in respect of matters (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2). Article 162(2) on the other hand provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. It is therefore clear that while the High Court has original and unlimited jurisdiction in all criminal matters, it no longer has the same jurisdiction in civil matters as it used to have under the old Constitution. However, it is my view that the jurisdiction of the High Court can only be limited as provided by the Constitution itself and any purported limitation not founded on the Constitution, is in my considered view, and is null and void. In this regard, I find that since section 4 of the CPC does not limit the jurisdiction of the High Court in Criminal matters and therefore the claim by the petitioners that the said section is unconstitutional is unfounded.

32. Going by the dictum in the above cited cases on jurisdiction, the principles of interpretation of the Constitution and the provisions of Article 165 (3), it is clear to me that the jurisdiction of the High Court, to hear murder trials and indeed any other criminal trial for that matter is a mandate that is prescribed and regulated by the Constitution. The commencement of other criminal trials before the Subordinate Court, as opposed to the High Court, is a matter that is regulated by statute, in this case, section 4 of the CPC and the impugned Schedule. To my mind therefore, the mere fact that trials of all criminal cases, except murder and treason, commence before the lower court does not make section 4 of the CPC unconstitutional.

33. The Petitioners' further contention was that the impugned **Section 4 (First Schedule at the 5<sup>th</sup> Column) of the CPC** is discriminatory as it offends Articles 24 and 27 of the Constitution which guarantees equal protection under the law. The petitioners' case was that the provision creates discrimination on account of the section of the Penal Code under which an accused person has been arraigned in court as it provides that all the offences except murder and treason may be tried before the lower court.

34. The question which arises is the standard by which the constitutional validity of the challenged Section should be judged. Courts have laid down two main standards in determining constitutional validity as follows:-

**a) The first is the "rationality" test. This is the standard that applies to all legislation under the rule of law;**

**b) The second, and more exacting standard, is that of "reasonableness" or "proportionality", which applies when legislation limits a fundamental right in the Bill of Rights. Article 24 (1) of the Constitution provides that such a limitation is valid only if it is "reasonable and justifiable in an open and democratic society."**

35. The petitioners' case was that Section 4 of the Criminal Procedure Code is discriminatory of murder suspects and therefore ought to be declared unconstitutional. As I have already found in this judgment, the original jurisdiction of the High Court to entertain criminal and civil cases is provided for under the Constitution in which case, I find that it would be an absurdity for one to say that a clear provision of the constitution, to wit, Article 165 (3) (a), is unconstitutional. I am however still minded to address the issue of the alleged discriminatory nature of the impugned section.

36. Turning to the issue of discrimination, it is trite law that only unfair discrimination is reprehensive. In Nyarangi & 3 others vs. Attorney General [200] KLR 688, cited in Petition 444 of 2016: Lucy Nyaguthii Wachira v Council for Legal Education & 3 Others [2017] eKLR, the court pronounced itself as hereunder:

***"34. The Blacks Law Dictionary defines discrimination as follows: "the effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." Wikipedia, the free encyclopedia defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. The Bill of Rights Handbook, Fourth Edition 2001, defines discrimination as follows: - "A particular form of differentiation on illegitimate ground.....The law does not prohibit***

discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of Griggs vs. Duke Power Company 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job application was found “to disqualify Negroes at a substantially higher rate than white applicants”.

37. In Petition No. 15 of 2011: John Kabui Mwai & 3 Others vs Kenya National Examination Council & 2 Others[2011] eKLR cited in Petition 444 2016: Lucy Nyaguthii Wachira vs Council for Legal Education & 3 Others [2017]eKLR, it was held that:

**“33.....it should be noted that discrimination which is forbidden by the Constitution is unfair or prejudicial treatment of a person or group of persons based on certain characteristic. (James Nyasora Nyarangi and Others –Vs- Attorney General, HC. Petition No. 298 of 2008 at Nairobi). The element of what is unfair or prejudicial treatment has to be determined objectively in the light of the facts of each case. The High Court above cited with approval the observation in President of the Republic of South Africa & Another –vs John Philip Hugo 1997(4) SAICC para 41 as follows: “We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom in our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in different context.” At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyze a claim of discrimination has both a subjective and an objective component.” (Emphasis added)**

38. In Jacques Charl Hoffmann vs. South Africa Airways, CCT 17 of 2000 cited in Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General[2011]eKLR, and further cited in Petition 444 of 2016: Lucy Nyaguthii Wachira v Council for Legal Education & 3 Others[2017]eKLR, the court stated:

**“ 35....This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purposes. If the differentiation bears no such rational connection, there is a violation of Section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, his will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependant on whether the measure complained of is contained in a law of general application.”**

39. As I have already observed in this judgment, all criminal case could in an ideal situation commence before the High Court by dint of the provisions of Article 165(3) of the Constitution. I however find that as regards the first enquiry as to whether there is a rationale for the impugned section 4 of the CPC which gives a differentiation in the courts handling different criminal cases such differentiation is not unique to the Kenyan legal system as it is the practice in court systems all over the world. In our system, which borrows heavily from the British/Victorian court’s system, courts are arranged in order according to the seriousness and the nature of the matters that they hear. This arrangement is necessitated by four main reasons; firstly, for purposes of specialization, courts are divided according to the matters they hear so that court personnel at each level become familiar with the types of cases heard, the relevant laws to those cases and the procedures to be followed. This is done so that courts can employ specialist personnel who may understand the specific needs of the parties coming before them. A very good example in our context is the establishment of the specialized courts under Article 162(2) of the Constitution to deal with employment and land cases as I have already observed in this judgment.

40. Secondly, the Doctrine of Precedent cannot operate effectively without a court hierarchy. Under this doctrine, rulings and judgments on new matters from superior courts are binding on all lower courts in the hierarchy. This is for the purpose of ensuring that the law is consistently applied.

41. Thirdly, is the recognition that appeals can only work effectively with a court hierarchy. If a party is not satisfied with the outcome of their case, they must have the opportunity to have their case reviewed by a superior court. This is a crucial element to ensuring that trials are fair and unbiased. In the instant case I note that the petitioners’ complaint was not that they were denied an opportunity to appeal, but rather that they were not able to have a second chance on appeal as other suspects whose hearings commenced before the subordinate court. I am however not persuaded by the petitioners’ argument that because they did not have a chance to a second appeal, this amounted to the denial to a right to fair hearing as Article 50 (2) (q) of the Constitution on the right of appeal does not stipulate that such a right must occur twice. The said article stipulates as follows:

***Every accused person has a 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 the law.***

42. Lastly, the setting of the hierarchy of courts is for administrative efficiency so that minor matters are heard locally or by lower courts and major matters by higher courts. This ensures that the administration of justice is streamlined thereby reducing court delays, backlog and costs because court personnel under such a system have specialized knowledge and can process cases quickly. In the present case, petitioners argued that there was nothing peculiar about murder trials so as to necessitate their trials commencing before the High Court as opposed to other offences.

43. According to the petitioners, murder cases should be treated on equal basis as robbery with violence cases as both cases previously attracted the mandatory death sentence upon conviction. My take, however, is that the law makers had valid reasons for placing murder and treason cases in a different category from other criminal cases and this must have informed their decision to make provisions that their trials commence before the High Court. The seriousness of a murder charge cannot be gainsaid as it is an offence that may pose danger to the very existence of the human race if left unchecked. Section 203 of the penal Code stipulates as follows:

***Any person who of malice aforethought causes death of another person by an unlawful act or omission is guilty of murder.***

44. It is worthy to note that the offence of murder was, until very recently after the enactment of the new Constitution 2010, considered to be so grave that it was not even bailable. This has however changed after the promulgation of the new Constitution which under Article 49 (1) (h) stipulates that all arrested persons have a right to be released on bond or bail. This court takes judicial notice of the fact that historically, some subordinate courts were manned by lay magistrates and prosecutions were conducted by police officers who did not have formal legal training and this must have informed the decision by the law makers to legislate that serious offences such as murder and treason be tried by the High Court which was manned by judges of wide experience and training in law. In view of the seriousness with which the law perceived murder cases, it is to be noted that until very recently, murder trials were conducted in a very elaborate manner that included preliminary committal proceedings before the lower court after which the matter was sent to the High Court judge for hearing before a judge with the assistance of court assessors as opposed to other criminal trials where the magistrates sit alone during the trials. In view of the fact that currently, all subordinate courts are manned by magistrates and prosecutions conducted by state counsel who in most cases have the same training and experience in law as judges of the High Court, perhaps it is a high time that the law makers relooked the impugned section 4 of the CPC with a view to amending so as to make it relevant to the present realities and to make it possible for murder trials to commence before the magistrates court.

45. From the above reasons, I find that there is legitimate justification in the differentiation in the courts handling different cases and that such differentiation does not amount to unfair discrimination. In the case of **Harksen vs. Lane NO and Others [1997] ZACC 12** the South Africa Constitutional Court laid down the test for determining whether a claim based on unfair discrimination should succeed as follows:-

***“They are:-***

***(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 of the ...Constitution).***

46. The jurisprudence on discrimination, which I have referred to in this judgment, as can be discerned from both local and foreign decisions is that not all differentiation amounts to discrimination. This means that where there is a legitimate reason for differential treatment, the conduct or the law complained of cannot amount to discrimination. On the other hand, unequal treatment or protection by the law in the absence of a legitimate reason is not acceptable. In other words, differentiation is permissible if it does not constitute unfair discrimination. From the above position, it is clear that what is not permitted is not discrimination *per se*, but unfair discrimination.

47. It is my view that the qualifications prescribed in section 4 of the CPC has not been shown to be unreasonable and or violating the Petitioners’ rights as alleged. The provision in question was intended to advance a compelling public interest to ensure the efficient, specialized, cost effective and expeditious hearing of criminal cases. My take is that a law aimed at promoting legitimate public interest is fair, reasonable, and is in my view consistent with the provisions of the Constitution which provisions must be read and interpreted in a wholesome manner.

48. In sum, my reading of the challenged provision does not in any manner reveal any infringement of the provisions of the constitution. I find that the said provision is clear, precise, and unambiguous as it reinforces what is already provided for under Article 165(3) of the Constitution. On the flip side, if at all any limitation is, under section 4 of the CPC, imposed on the rights of the petitioners or any citizen, and then in my view such a limitation is proportionate and reasonable considering the purpose of the law in question. To me, the provision satisfies the requirements set out under article 24 of the Constitution in that the limitation is provided under the law and that the same is reasonably justifiable in a modern democratic society.

49. Having found that there is a legitimate reason for the commencement of murder trials before the High Court and having found that the High Court has original jurisdiction in both criminal and civil matters I find that the claim that Section 4 of the Criminal Procedure Code is discriminatory is unfounded.

## **Rule 24 of the Supreme Court Rules 2011.**

Rule 24 of the Supreme Court Rules deals with applications for grant of certification as follows:

- 1. An application for certification shall at first instance be made in the court or tribunal it is desired to appeal from.**
- 2. Where the court of appeal has certified a matter to be of general public importance, an aggrieved party may apply to the Court for review within fourteen days.**
- 3. The Court shall in granting review matters that have been certified to be of general public importance.**
- 4. An application under this rule shall be by originating motion in Form K set out in the First Schedule.**

50. The petitioners' case was that the above Rule is unconstitutional while the respondents' case was that the said rule accords with Article 163(4) (b) of the Constitution which stipulates as follows:

***(4) Appeals shall lie from the Court of Appeal to the Supreme Court-***

***(a) as of right in any case involving the interpretation or application of this Constitution; and***

***(b) in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)***

***(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.***

51. My finding is that a plain reading of Rule 24 of the Supreme Court Rules in conjunction with the provisions of Article 163 (4) and (5) of the Constitution shows that the power of the Court of Appeal to certify a matter to be of general public importance is derived from the Constitution itself and for that reason I find that the claim that Rule 24 of the Supreme Court Rules is unconstitutional is unfounded.

### **Re-hearing on sentence**

52. At the tail end of their submissions, the petitioners' advocates suggested that in the event that the prayers sought in the petition are not allowed, then this court should apply the Supreme Court's decision in the **Muruatetu** case and re-hear the petitioners on sentence. I note that the Supreme Court made the following final orders in the Muruatetu case:

***“(a) The mandatory nature for the death sentence as provided for under section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26 (3) of the Constitution.***

***(b) This matter is hereby remitted to the High Court for re-hearing on sentence only, on a priority basis, and in conformity with this judgment.***

***(c) The Attorney General, the Director of Public Prosecutions and other relevant agencies shall prepare a detailed professional review in the context of this judgment and order made with a view to setting up a framework to deal with sentence re-hearing cases similar to that of the petitioners herein. The Attorney General is hereby granted 12 months from the date of this judgment to give a progressive report to this court on the same.***

***(d) We direct that this judgment be placed before the Speakers of the National Assembly and the Senate, the Attorney General, and the Kenya Law Reform Commission, attended with a signal of the utmost urgency, for any necessary amendments, formulation and enactment of statute law to give effect to this judgment on the mandatory nature of the death sentence and the parameters of what ought to constitute life imprisonment.”***

53. I further note that the instant petition was filed before the decision in the above cited Muruatetu case was delivered. The said decision is clear that the re-hearing on sentence is to be done before the High Court and my understanding of the order is that the re-hearing proceedings ought to be conducted before the High Court that tried the petitioners in the first instance. That being the case, and considering that the issue of re-hearing on sentence is not one of the issues that was up for the determination by this court in this petition and is therefore not an issue that is within the purview of this court, I find that the petitioners are at liberty to pursue and ventilate the same before the respective High Courts where their trials were conducted.

54. Having regard to the findings and observations that I have made in this judgment, I find that the instant petition is not merited and I hereby dismiss it with no orders as to costs.

**Dated, signed and delivered in open court at Nairobi this 9<sup>th</sup> day of October 2018.**

**W.A. OKWANY**

**JUDGE**

**In the presence of:**

Mutuma for the 1<sup>st</sup> petitioner.

Miss Ndong for Nyamodi for 2<sup>nd</sup> petitioner

Miss Kihara for Ashimosi for Director of Public Prosecution.

Miss Omuom for Ogosso for the Attorney General.

Court Assistant – Kombo.