

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. E036 OF 2024
(AS CONSOLIDATED WITH)
(PETITION NO. E080 OF 2024 AND E497 OF 2024)
BETWEEN

KATIBA INSTITUTE.....1ST
PETITIONER
ALOISE ONYANGO ODHIAMBO.....2ND
PETITIONER
ERICK MUNYERA ISAMBWA, ALIAS CHAIRMAN.....
....3RD PETITIONER
RAPHAEL KIMANI MACHINE ALIAS KIM,
BUTCHER.....4TH PETITIONER
MUSTAFA KIMANI ANYONI ALIAS MUSTO.....
5TH PETITIONER
STEPHEN ASSISTIVE LIPOPO ALIAS
CHOKRE.....6TH PETITIONER
JANE WANJIKU KAMAU ALIAS
SHIRU.....7TH PETITIONER
MAGRET NJERI
WACIURI.....8TH
PETITIONER
SIMON WAMBUGU
GICHAMBA.....9TH
PETITIONER

VERSUS

THE OFFICE OF THE DIRECTOR OF PUBLIC
PROSECUTIONS.....1ST
RESPONDENT
ATTORNEY GENERAL.....2ND
RESPONDENT

THE JUDICIARY.....3RD
RESPONDENT
PARLIAMENT.....4TH
RESPONDENT
NATIONAL COUNCIL ON ADMINISTRATION OF
JUSTICE.....5TH RESPONDENT
KENYA LAW REFORM
COMMISSION.....6TH RESPONDENT
CHIEF MAGISTRATE’S COURT AT MILIMANI LAW
COURTS.....7TH RESPONDENT
DIRECTOR OF CRIMINAL
INVESTIGATIONS.....8TH RESPONDENT

AND

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS.....1ST
INTERESTED PARTY
KENYA PRISONS SERVICE.....2ND
INTERESTED PARTY
NATIONAL POLICE SERVICE.....3RD
INTERESTED PARTY
ALL INDIVIDUALS WHO, FROM 15 MARCH 2018, HAVE BEEN A VICTIM OF A
CRIME FOR WHICH
AN ACCUSED HAS BEEN CHARGED WITH ROBBERY WITH
VIOLENCE OR ATTEMPTED ROBBERY WITH
VIOLENCE.....4TH INTERESTED PARTY
LAW SOCIETY OF KENYA.....5TH
INTERESTED PARTY
INTERNATIONAL COMMISSION OF JURISTS -
KENYA (ICJ -KENYA) 6TH
INTERESTED PARTY
KENYA HUMAN RIGHTS COMMISSION.....7TH
INTERESTED PARTY

JUDGMENT

Petition No. E036 of 2024_____

1. The Petition dated 29th January 2024 which was subsequently amended on 4th March 2025 is supported by the affidavits of the 1st Petitioner's Litigation Manager, Emily Kinama's and Chris Kerkering.
2. The Petition seeks the following reliefs against the Respondents:

Declarations

- i. A declaration that the Attorney-General, the Kenya Law Reform Commission, and the National Council on Administrative Justice have violated the orders in Kahinga to review and remedy the constitutional infirmities in the offences of Robbery, Robbery with Violence and Attempted Robbery with Violence statutes. A further declaration that the Attorney-General violated the orders in Kahinga by failing to report to the Court 18 months following the Kahinga judgment.***
- ii. A declaration that, since 15th March 2018, the Office of the Director of Public Prosecutions and the Judiciary have violated Articles 2(1)-(4), (5), & (6), 3(1), 20(1), 21(1), and 21(3) of the Constitution by continuing to charge, arraign, detain, try, arrest, and convict people under Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code despite the Kahinga decision.***
- iii. A declaration that the Attorney-General, Kenya Commission on Administration of***

Justice, Kenya Law Reform Commission, the National Council on Administrative Justice, and Parliament have violated Articles 2(1)-(4), (5), & (6), 3(1), 20(1), 21(1), and 21(3) of the Constitution by failing to uphold and respect the Constitution and observe, respect, protect, promote the rights guaranteed under the Bill of Rights.

- iv. A declaration that Parliament has violated Articles 1(3), 93(2), and 94(4) by failing to uphold, protect, and defend the Constitution.**
- v. A declaration that all Respondents have violated the values and principles of good governance under Article 10 of the Constitution.**
- vi. A declaration that the Attorney-General has violated its duty under Article 156(6) and Section 5(e) of the Office of the Attorney-General Act by failing to draft legislative proposals to the National Assembly advising on the inconsistency and ambiguity of Sections 295, 296(1), 296(2), 297(1) and 297(2) and attendant violations to the right to a fair trial.**
- vii. A declaration that, since 15th March 2018, the Respondents, individually and collectively, have violated the fundamental rights and freedoms of all individuals arrested, charged, arraigned, detained, held in custody, tried, convicted, or sentenced under Sections 295, 296(1), 296(2), 297(1) and 297(2), including rights guaranteed under Articles 26, 27, 28, 29, 30, 31, 33, 35(1), 39(1), 48, 50(2)(b) and (n).**

- viii. A declaration that, since 15th March 2018, the Respondents have violated their duties under Sections 4(1) and (2)(f), (i), and (l) of the Victim Witness Protection Act by charging, arraigning, detaining, and trying individuals for violations of Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code.**
- ix. A declaration that the Office of the Director of Public Prosecutions violated Article 35(1) (a) and the Access to Information Act by refusing to give information to Katiba Institute and failing to forward the access to information request to the Judiciary.**
- x. A declaration that information regarding criminal arrests, charges, trials, convictions and sentences for each crime under the Penal Code and other laws is important information affecting the public that must be published and publicized under Article 35(3) of the Constitution.**

Injunctive Orders

- xi. An order prohibiting the Office of the Director of Public Prosecutions from charging and the Judiciary from accepting charges against individuals suspected of offences under Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code.**
- xii. An order directing the Judiciary, Kenya Prisons Service, and the Office of Director of Public Prosecutions to identify all individuals arrested, charged, or convicted of violations of Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code since 15th March 2018.**

- xiii. An order dismissing all pending charges filed under Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code and for the accused people to be released from custody immediately.**
- xiv. An order directing the Judiciary to vacate all convictions from 15th March 2018 for violating Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code.**
- xv. An order directing the Kenya Prisons Service to immediately release from custody all people who are imprisoned based on convictions from 15th March 2018 to the present for violating Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code.**
- xvi. An order directing that, per Article 35(3) of the Constitution, the Respondents publish and publicize information relating to arrests, charges, trials, convictions, and sentences for all crimes, including crimes under the Penal Code.**
- Damages**
- xvii. An order finding that the Respondents are jointly and severally liable for the harm caused by their violations of the Constitution and the law.**
- xviii. An order providing incidental, consequential, and aggravated general damages against the Respondents in favour of all individuals arrested, charged, detained, tried, or convicted of Robbery with Violence or Attempted Robbery with Violence from 15 March 2018 to date.**

- xix. An order for compensatory, incidental, consequential, and aggravated general damages against the Respondents in favour of all who have suffered harm because a family member has been arrested, charged, detained, tried, or convicted of Robbery with Violence or Attempted Robbery with Violence from 15th March 2018 to date.**
- xx. An order of compensatory incidental, consequential, and aggravated general damages in favour of all victims and alleged victims who have or will suffer trauma because the respondents have abrogated their duties and violated the rights of victims guaranteed under the Constitution and the Victim Witness Protection Act.**
- xxi. An order for punitive damages against the Attorney-General, the Judiciary, and the Office of the Director of Public prosecutions for their wilful or grossly indifferent violations of the fundamental rights and freedoms of all individuals arrested, charged, detained, tried, or convicted of Robbery with Violence or Attempted Robbery with Violence from 15th March 2018 to date.**

Structural Interdict

- xxii. Any further relief or orders, including a structural interdict, to ensure that the Respondents comply with the rulings of this Court and that those harmed by the Petitioners' violations of the Constitution and the law are justly and appropriately accommodated.**

Other relief

- xxiii. An order that although this Petition has been filed in the public interest because the Respondents have abdicated their mandates under the Constitution and the law, the Respondents be required to indemnify the Petitioners for the expenses associated with the litigation.**
- xxiv. Any other orders this Court considers appropriate to protect the Constitution and the interests of justice.**

1st Petitioner's Case

3. The 1st Petitioner states that in a Judgment dated 15th September 2016 in **Joseph Kaberia Kahinga & 11 Others [2016] eKLR**, a 3-judge bench found Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code that relate to Robbery, Robbery with Violence and Attempted Robbery with Violence, violated the Constitution because the provisions are too vague to be enforceable hence declared them unconstitutional. The Court then proceeded to suspend its judgment for 18 months to enable the 2nd, 4th and 6th Respondents amend the impugned Sections of the Penal Code.
4. That the judgment has never been appealed and no party has ever sought leave to stay the judgment beyond the 18-month suspension. That the Court's suspension of the aforesaid judgment lapsed on 15th March 2018 yet the police and the 1st Respondent have continued to arrest, charge and prosecute persons while the 3rd Respondent has

continued to try and sentence persons charged with these offences.

5. The 1st Petitioner stated that from the data obtained from the 3rd Respondent, over 10,000 people have been charged and 2000 convicted with the impugned offences since the said Judgment was passed. The Petitioner contends that in itself violates the fundamental principles of criminal justice, constitutional jurisprudence and the core duties of the State actors in the criminal justice system.
6. The 1st Petitioner discloses that on 1st March 2023, vide an email, sought information from the 1st Respondent concerning persons charged with robbery with violence under Sections 295 and 296(1) of the Penal Code. Specifically, *the number of persons who had been charged since 16th February 2018 to date, number of active cases pending determination and persons who had since been convicted.*
7. She avers that the 1st Respondent in its response dated 21st March 2023 stated that, it was in the process of digitizing its data. As such, it directed the 1st Petitioner to access the information from the 3rd Respondent. Further correspondence to the 1st Respondent dated 3rd May 2023 did not elicit any response.

8. The 1st Petitioner then proceeded to make a request for the information from the 3rd Respondent vide a correspondence dated 3rd May 2023 since the 1st Respondent had failed disclose this information. She avers that the 3rd Respondent provided the requested information on 15th June 2023.
9. The 1st Petitioner confirms that following the Court Order dated 30th September 2024, the 1st Respondent on 19th November 2023 issued the 1st Petitioner a schedule of the robbery with violence cases filed between 2018 and 2023.
10. In light of these averments, the 1st Petitioner asserts that by the 1st Respondent by relying on the impugned provisions of the Penal Code to charge, try and convict people of robbery with violence and attempted robbery with violence, is in violation of its duties under Articles 1(1); 2(1), (2) & (4); 3(1); 10(1) & (2); 19(2)(a) & (c); 20(1), 21(1) & (3), 157(6)(a) & (c), 157(10) & (11), 249(1) & (2) of the Constitution. Moreover, violated these persons rights under Articles 26(3), 28, 29(a) & (f), 30(2), 39(1) & (3), 45(1), 48, 49(g) & (h), 50(1), 50(2)(a) -(b) & (n)-(p), 51(1) of the Constitution. The 1st Petitioner adds that the 1st Respondent by failing to supply the sought information has violated Article 35 of the Constitution.
11. Equally, the 2nd Respondent is faulted for being in breach of its duty under Articles 2(1)-(4), (5), & (6), 3(1), 20(1), 21(1), and 21(3) or the Constitution. It is asserted that the 2nd

Respondent failed to review the cited Judgment and issue a professional review of the impugned provisions and further make a Report of the same to the Court.

12. The 3rd Respondent is as well faulted for violating Articles 2(1)-(4), (5), & (6), 3(1), 20(1), 21(1), and 21(3) of the Constitution, by continuing to arraign, detain, try, arrest, convict and affirm the convictions of persons charged under the impugned Sections. The 4th Respondent is similarly accused of being in violation of Section 7 of the Sixth Schedule of the Constitution for failing to amend the Penal Code and specifically the impugned provisions so as to bring them into conformity with the Constitution.
13. The 1st Petitioner claims that the 5th Respondent has failed to ensure a coordinated, efficient, effective, and consultative approach in the administration of justice and reform of the justice system thus in contravention of Articles 2(1)-(4), (5), & (6), 3(1), 20(1), 21(1), and 21(3) or the Constitution. Equal averments are stated in relation to the 6th Respondent.

1st Respondent's Case

14. The 1st Respondent in opposition to the Petition filed ***Grounds of Opposition dated 27th February 2024*** on the premise that:
 - i. *The 1st Respondent herein, the Office of the Director of Public Prosecutions, is an independent Office under Article 157(10) as read with Article*

248 (1) of the Constitution, and consequently, does not require the consent of any person or authority for the commencement of any proceedings and in the exercise of his powers and functions, does not act under the directions and/or control of any person or authority.

- ii. In the exercise of state prosecutorial powers, the 1st Respondent is guided by the Constitution, relevant statutes, sectoral and internal policies and guidelines, always conscious of ensuring that public interest and the wider interests of administration of justice are taken into consideration, and therefore the 1st Respondent should not be prohibited from making decisions whether to prosecute or not to prosecute for offences under Sections 295, 296(1) 296(2), 297(1), and 297 (2) of the Penal Code when those offences are still part of the law.*
- iii. The 1st Respondent in exercise of its Constitutional mandate conferred by Article 157 of the Constitution does not extend to undertaking the role of the legislature as conferred upon it under Article 109 of the Constitution.*
- iv. The 1st Respondent under Section 5 of the ODPP Act No.2 of 2013 particularly under Section 5(1)(d) (f) and (g) has a duty to advise the State on matters relating to administration of the criminal justice or doing other things as are necessary or incidental to the performance of its functions under the Constitution and the ODPP Act which does not extend to carrying out the function of the 6th Respondent (Kenya Law Reforms Commission) as provided under Section 6 of the Kenya Law Reform Commission Act No.19 of 2013 and therefore the 1st Respondent ought not to be prohibited from carrying out its mandate based on the foregoing.*

- v. *In making the decision to charge under Sections 295, 296 (1) 296 (2) and 297 (1) of the Penal Code, the 1st Respondent neither abrogated, breached, infringed nor violated any provision of the Constitution or any human and fundamental rights of the Petitioner or any other written law or regulations made thereunder to the contrary, the 1st Respondent was under obligation at all times to weigh and consider the rights of victims of the offence or Robbery and Robbery with Violence.*
- vi. *The 1st Respondent in exercise of its mandate under Article 157 is in compliance with Comity of Nations by balancing the competing rights of victims of crime as envisaged in the **Kyoto Declaration On Advancing Crime Prevention, Crime Justice And The Rule Of Law Towards The Achievement Of The 2030 Agenda For Sustainable Development** and that prohibits the 1st Respondent from charging under Sections 295, 296 (1) 296 (2) and 297 (1) of the Penal Code, will violate the rights of victims.*
- vii. *Any order prohibiting the institution and or filing of any cases where individuals are charged with the offence of robbery with violence or attempted Robbery with violence under Section 295, 296, (1) 296 (2) 297 (2), 388 and 389 of the Penal Code and the consequential order sought in prayer number 2, 3, 4 and 7:*
- a) *Has the potential to create an environment that enables serious crimes to thrive and threaten the lives and property of all humans whether Kenyan nationals, visiting, or resident foreigners, and for violent criminals to enjoy immunity from prosecution thereby threatening the ability of the state to maintain law, peace and public order necessary for economic growth and development.*

- b) *Is likely to impair the ability of the State through its law enforcement agencies to curb serious violent crimes including containing violent theft and robberies through the detection of crimes, investigation; arrest and prosecution or the processing of the accused through the Criminal justice system.*
 - c) *The prohibition of the law enforcement agencies particularly the 3rd Interested Party from arresting suspects of attempted robbery or robbery with violence to face charges potentially infringes upon or and violates the competing rights to a fair trial to equal protection of law security of the victims of the crime.*
- viii. *The 1st Respondent disagrees with the Petitioners' interpretation of the Court's order in declaring that Sections 295, 296 (1) 296 (2) and 297 (I) of the Penal Code, do not meet the constitutional threshold for whose remedy is an omnibus release of every accused, convicted felon or grant of immunity from arrest and prosecution of any suspects as prayed for in the Petition. The 1st Respondent's interpretation of Order 5 of the Judgement in **Petition No.618 of 2010 Joseph Kaberia & others -vs- The Attorney General** is that, the Petitioners therein were to apply to the Court for mitigation and re-sentencing upon expiry of the stipulated period of 18 months.*
- ix. *The 1st Respondent interpretation of Order 5 in the aforesaid Petition was well demonstrated by the path the said Petitioners took as follows:*
- a) *In Misc. Cr. Application No.393 of 2018 Nairobi (Joseph Kaberia Kahiga -vs- Republic 2019 eKLR) Joseph Kaberia successfully sought rehearing, was given a chance to*

mitigate and was re-sentenced to the term already served.

- b) In Misc. Cr. Application No.378 of 2018 Nairobi (Daniel Kioko Mbuva -vs- Republic 2019 eKLR) successfully sought rehearing, was given a chance to mitigate and was re-sentenced to a term of 10 years from the 13th February, 2019.*
- c) In Misc. Cr. Application No.395 of 2018 Nairobi (Ibrahim Ali Hatake -vs- Republic 2019 eKLR) successfully sought rehearing, was given a chance to mitigate and was re-sentenced to a term of 5 years from the 12th February, 2019.*
- x. In the absence of clarity in terms of the constitutionality or otherwise of Sections 295, 296 (J) 296 (2) and 297 (1), 297 (2) of the Penal Code, (in light of the continued subsistence of these provisions) and given that the Court of Appeal has rendered a decision that has a binding effect on the High Court in the case of **Simiyu -vs- Republic CR. Appeal No.47 of 2018 [2021] KECA 247 (KLR)** the 1st Respondent cannot be faulted and prohibited from charging and prosecuting offenders under Section 297(2) of the Penal Code guided by the decision of the Court of Appeal.*
- xi. The Petitioner's Application and Petition have failed to satisfy the threshold requirement for the grant of the interim reliefs sought, pending determination of this Petition and the relief sought are proportionate to the problem that is to be addressed by allowing the petition.*

xii. *The issues raised in the Petition are matters of grave public interest and would require clarity of the orders and sufficient time to ensure compliance if at all so as to enhance and create good order in the practice of criminal law.*

15. In addition to this, the 1st Respondent filed a Replying Affidavit by the Senior Assistant Director of Public Prosecutions, Jalson Makori sworn on 29th February 2024.
16. With reference to the cited Judgment, **Joseph Kaberia Kahinga & 11 others v Attorney General (Petition No.618 of 2010) [2016] eKLR** delivered on 15th September 2016, he avers that the Court found that Sections 295, 296(1), 296(2), 297(1) & (2) did not meet the constitutional threshold of setting out with precision and differentiating the degree of aggravation of the offense of robbery and attempted robbery.
17. He notes that the Petitioner fails to appreciate that there is a remedy to any prejudice that arises out of any inadequacy in the impugned provisions of law and which has been applied by the High Court and Court of Appeal pending review and legislative amendments. Considering this, he argues that the Petitioner in seeking release of all convicted persons, dismissal of pending cases and prohibition of the 1st Respondent from charging under these Sections, is a misinterpretation of the Orders that were issued by the Court.

18. He depones that the 1st Respondent in exercise of its mandate and as a member of the Kenya Law Reform Commission and the National Council for Administration of Justice, has instigated the process that will ensure compliance with Order No.2 in the cited Judgment as seen in the correspondence dated 16th February 2024.
19. That said, he avers that there is no vacuum existing in the law to bring to justice the offenses of robbery, attempted robbery, attempted robbery with violence and robbery with violence. He stresses that the 1st Respondent cannot fetter his own power to exercise his discretion to make decisions to charge for these offences. He adds that the criminal prosecution is a critical component in maintenance of law, order and the rule of law. On this premise, he urges against grant of the orders sought in the Petition.

4th Respondent's Case

20. The 4th Respondent through its Clerk, Samuel Njoroge C.B.S filed a Replying Affidavit sworn on 3rd July 2024.
21. Reiterating the averments and facts of this case, he commences by noting that the 4th Respondent was not enjoined as a Party in the **Joseph Kaberia Kahinga**(supra) case.
22. He avers that in order for the 4th Respondent to amend the impugned provisions of the Penal Code, the 2nd and 6th

Respondents together with other relevant agencies were required by the Court to prepare a detailed professional review in view of the Judgment and Order made, to enable the 4th Respondent amend the Penal Code. In light of this, he asserts that the 4th Respondent cannot be faulted for non-compliance with the Court Orders as it would only proceed once it received this Review.

23. That's said, he depones that the National Assembly Departmental Committee on Justice has been engaging the 5th Respondent on the proposal to amend the Penal Code and the Criminal Procedure Code. In addition, the 5th Respondent in a letter dated 11th October 2023, issued the 4th Respondent's Rt. Speaker the draft Penal Code and Criminal Procedure Code Amendments Bills, for consideration by the House. He avers that these Bills contain amendments that seek to harmonize and align the Penal Code and Criminal Procedure Code with the Constitution.
24. He depones that at the moment, the Draft Bills are before the 4th Respondent's Committee for consideration and harmonization with the other existing Bills that seek to amend the Penal Code.
25. Furthermore, he depones that there is another Bill before the 4th Respondent that seeks to amend the Penal Code, the Penal Code (Amendment) Bill, 2023 (National Assembly Bill No.55 of 2023). This Bill underwent the First reading on 3rd

October 2023 and thereafter committed to the Departmental Committee on Justice and Legal Affairs.

26. In light of this, he informs that the 4th Respondent is already considering several proposals that seek to amend the Penal Code in line with the cited Judgment. As such, he contends that the Court as guided by the doctrine of separation of powers ought to refrain from interfering and dictating the 4th Respondent's legislative mandate. He argues therefore that if the orders sought are granted, the same will be in violation of the doctrine of separation of powers.
27. He as well asserts that the Petitioner has prior to filing this suit failed to exhaust its right to Petition Parliament as envisaged under Article 119 of the Constitution as read with the Parliament (Procedures) Act. He stresses that no attempts were made to approach the 4th Respondent yet the mandate of amending laws lies with it.
28. To this end, he maintains that the questions raised in the Petition are primarily on law reforms. He for this reason, argues that this Court ought to exercise restraint and give the 4th Respondent a chance to conclude its legislative mandate.

6th Respondent's Case

29. The 6th Respondent's Chief Executive Officer, Joash Dache in reaction to this Petition swore a Replying Affidavit on 25th June 2023.
30. On a preliminary note, he states that the 6th Respondent's mandate is limited to making the necessary proposals for reforms as the legislative authority is solely vested in the 4th Respondent under Article 94(1) of the Constitution.
31. He depones that following the cited Judgment, the 6th Respondent together with the 1st and 2nd Respondent embarked on a journey to address the issues raised issues by forming a Joint Committee. This Committee held several consultative meetings where other stakeholders were also engaged. He avers that this process could not be conducted within the stipulated 18 months as per the Judgment, owing to the wide spectrum of stakeholder engagements and resource constraints.
32. He depones that the **proposed amendments of the Penal Code in line with the cited Judgment have since been initiated through the Penal Code (Amendment) Bill, 2023** which is pending before the 4th Respondent. Having discharged its duty, he asserts that the 6th Respondent has no control over the legislative process.
33. He points out that while the Court issued Orders in **Joseph Kaberia Kahinga** (supra) for the impugned Sections to be

amended, the Court under Order 5 directed that if the orders are not complied with within the set timelines, **the Petitioners were at liberty to make an application**. He asserts that none of the Petitioners in the said case have moved the Court pursuant to its Orders, alleging non-compliance.

34. He postulates that the instant Petition is unnecessary and an abuse of the Court process as it seeks to enforce implementation of Orders that were issued in the cited case. He points out that this is tantamount to supervision of a decision of other High Court Judges contrary to Article 165(6) of the Constitution.
35. He as well argues that the blanket review of the impugned sentences as sought by the Petitioners would be contrary to public policy and a recipe for chaos in the criminal justice system.
36. It is argued that this Court should allow the 4th Respondent enact the amendments to the Penal Code already pending before it, so as to end the stalemate herein.
37. Equally, he notes that the Supreme Court in **Muruatetu & another v Republic; Katiba Institute & 4 others (2021) KESC 31 (KLR)** guided on practical ways to deal with a situation where persons affected by the orders of the High Court can apply for resentencing, being an application by the

1st Respondent and convicted person before the Trial Court, of the appropriate remedy based on the peculiar circumstances of a case.

The Other Respondents' Case

38. The 2nd, 3rd and 5th Respondents' responses to the Petition are not in the Court file or Court Online Platform (CTS).

1st Interested Party's Case

39. The 1st Interested Party through its Chief Executive Officer, Dr. Benard Mogesa filed its Affidavit in support of the Petition sworn on 9th October 2025.
40. Rehashing the facts of this case, he avers that the Court in the cited Judgment, declared the impugned Sections unconstitutional. In his interpretation, the effect of this Judgment was that the offense of Robbery with violence and attempted Robbery with violence ceased to be crimes in Kenya. He notes that the Court suspended its decision for 18 months which lapsed on 15th March 2018, so as to enable the Respondents amend the impugned provisions of the Penal Code.
41. He asserts that the 2nd Respondent has failed to comply with the said Orders while the 1st Respondent has continued to charge accused persons with the impugned offences. He stresses that this is a clear violation of the non-derogable

right to a fair trial and also a blatant disregard of the national values and principles of governance. He adds that Court Orders are not made in vain and as such all persons are duty bound to comply with them as failure to do so undermines the authority of the Court.

42. He equally claims that the 4th Interested Party's fundamental rights under Article 25 and 50 of the Constitution have been violated by the 1st and 3rd Respondent's actions.
43. He clarifies that while the 1st Interested Party supports the Petitioner's case, it does not support the Order sought for release of all suspected and convicted persons without a specific framework that will protect the rights of the victims and complainants. As such, he urges the Court to balance the competing rights of the suspects, convicts and the victims.
44. He equally avers that this Court should impose sanctions on the Respondents to ensure compliance with the cited Orders and also summon the 2nd Respondent to explain the steps taken so far in this matter.

The Other Interested Parties Case

45. The 2nd to 7th Interested Parties responses to the Petition are not in the Court file or Court Online Platform (CTS).

Petition No. E080 of 2024

46. This Petition dated 14th February 2024 is supported by the 2nd Petitioner's affidavit in support. These Petitioners seek the following relief against the 1st and 2nd Respondents:

- i. A Declaration do issue declaring that the Petitioners right to a fair trial as guaranteed under Article 50 of the Constitution was violated by the Respondents by putting them on a trial under Section 296 (2) of the Penal Code, which is un procedural.***
- ii. A declaration that Section 295, 296 (1) (2) 297 (1) & (2) of the Penal code Cap 63 Laws of Kenya are ambiguous and unconstitutional henceforth.***
- iii. An order for Petitioners to be released and their case be remitted back to the police stations to start a fresh with lawful provisions of the law that align with the Constitution or be released forthwith since they are facing unlawful charges.***
- iv. An order awarding cost of the Petition to the Petitioners.***

Petitioners' Case

47. The 2nd Petitioner depones that he alongside the other Petitioners were charged with the offence of Robbery with Violence under Section 296(2) of the Penal Code before the Chief Magistrates Court in **CMCR No.479 of 2015**.

48. He depones that they have brought this matter before this Court for review, following the Judgment delivered by a three - Judge bench on 15th September 2016. The Court therein is

said to have declared Sections 295, 296(1), & (2) ,297(1) & (2) of the Penal Code, unconstitutional. It is claimed that the 3 - Judge bench directed the 2nd Respondent and 4th Respondent to consider the shortcomings set out in its Judgment concerning these Sections, in respect of those charged and convicted within 18 months.

49. He asserts that the Petitioners therefore seek to have the 2nd Respondent and the relevant bodies consider the 3 - Judge bench pronouncement and issue a Report on the process before this Court. The Petitioners aver that in the event the Respondents fail to do so, this Court do adopt Order No.5 of the said Judgment and award the Petitioners and others affected by the impugned Sections, remedies under Article 23 of the Constitution.
50. Furthermore, he contends that the Respondents are withholding information that may help them at their Trial, as the charges they are facing are unconstitutional. As such, he states that they are apprehensive that the Respondents will take action against them such as convicting them, yet the charges are faulty owing to the 3 - Judge bench pronouncement.
51. He avers that the Petitioners are aggrieved by the Respondents' conduct of secrecy and opaqueness in this matter. For these reasons, the Petitioners urge the Court to intervene so as to stop the illegalities being perpetrated by

the Respondents and also to secure their fundamental rights and freedoms and legitimate expectations.

1st Respondent's Case

52. In reaction to this Petition, the 1st Respondent filed its Grounds of Opposition dated 21st February 2024 on the grounds that:

- i. *The instant Application together with the Petition filed herein is misconceived, bad in law and incompetent to the extent that it's not clearly disclosed the prejudice that the Petitioners have suffered in their respective trials notwithstanding the Court's finding, directions and orders issued in **Nairobi HCCHR Petition No.618 of 2010, Joseph Kaberia Kahinga & 11 Others -Versus-Attorney General.***
- ii. *The Petitioners appear to have failed to appreciate that the Court's finding that Section 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code did not meet the constitutional threshold of setting out sufficiently the degree of aggravation of the offence of robbery and attempted robbery did not in any way mean that the said provisions of the law were and still are outrightly unconstitutional and no charges should be brought under them or no such intended charges are known in law, in addition, some of the Court orders said to have not been complied with were suggestive in nature without necessarily binding to the Respondents herein.*
- iii. *All the aspects of a fair hearing or trial as contained under Article 50 of the Constitution as far as the Petitioners' trial is concerned have been met thus, the institution of the instant application*

and Petition amounts to an abuse of the Court process.

- iv. The Petitioners, failure to avail their respective charge sheets or information to show the charges that had been preferred against them, which charges they claim to have no legal basis, is fatal to the application and the Petition filed herein, further, failure to give specific constitutional violation(s) or infringement(s) of rights and freedoms relating to each Petitioner offends the principles of constitutional petitions as was enunciated in the celebrated case of **Anarita Karimi -Versus-Republic (No.1) (1979 1 KLR 154** and as was amplified in the case of **Mumo Matemu -Versus- Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012(2013)eKLR.**
- v. The instant application and Petition is misplaced and an abuse of the Court process meant to scuttle and derail the hearing of the criminal cases i.e. robbery with violence pending in the Magistrate's Courts against the Petitioners herein and whose intent flies in the face of the finding of the Supreme Court of Kenya in the case of **Hussein Khalid And 16 others v Attorney General & 2 others [2019] eKLR** whereby the Court had held that there exists adequate safeguards in the criminal justice system and the Constitution to guard and cushion against any violations of the accused's rights and freedoms and the trial courts are ably equipped to address any issue(s) raised by an accused person legitimately in the course of the trial.

2nd Respondent's Case

53. The 2nd Respondent's response in this Petition is not in the Court file or Court Online Platform (CTS).

Petition No. E497 of 2024

54. The Petition dated 23rd September 2024 is supported by the 3rd Petitioner's affidavit in support. The Petitioners seek the following relief against the 1st, 2nd, 7th and 8th Respondents:

Declarations:

- i. A declaration that the National Police Service had no power and authority to participate in any decision to prefer and institute charges in the Chief Magistrate's Court at Milimani in Criminal Case No. 497 of 2015 and/or to prepare and sign the charge sheet.***
- ii. A declaration that the 1st and 7th Respondents are prohibited from sustaining, proceeding, hearing, conducting or in any manner dealing with the Charge placed before the Chief Magistrate's Court at Milimani in Criminal Case No. 497 of 2015.***
- iii. A declaration that all the Respondents, individually and collectively, violated the Petitioners' fundamental rights and freedoms by arresting, charging, arraigning, detaining, holding in custody and trying them under sections 296(2) including rights guaranteed under Articles 25(c) and 50(2)(b) and (n) of the Constitution.***
- iv. A declaration that the 7th Respondent is prohibited from presiding and or conducting the trial of the petitioners in the Chief***

Magistrate's Court at Milimani in Criminal Case No. 497 of 2015.

- v. **A declaration that the 3rd , 5th and 6th Petitioners were entitled to be assigned legal counsel in Criminal Case No. 497 of 2015 pursuant to Articles 27(1) & (2) and 50(2)(h) of the Constitution.**

Orders

- vi. **An order dismissing the Charge filed under Section 296(2) of the Penal Code against the Petitioners in Criminal Case No. 497 of 2015 and they be released from custody immediately.**
- vii. **An order directing the 7th Respondent to vacate all rulings in Criminal Case No. 497 of 2015 for breaching the right to fair trial and fair hearing.**
- viii. **An order directing the G.K. Remand Prison Nairobi Industrial Area, Lang'ata Women's Remand Prison and Kamiti Maximum Security Prison to immediately release from custody the Petitioners for violating section 296(2) of the Penal Code.**
- ix. **An order nullifying the entire proceedings in Cr No. 497 of 2015 for want of a statutory prohibition.**
- x. **An order nullifying the Prosecution of the 3rd, 5th and 6th Petitioners in Cr No. 497 of 2015 for breaching Article 27(1 & 2) read with Article 50(2)(h).**
- xi. **An order quashing the proceedings in Cr No. 497 of 2015 for want of a valid Charge Sheet.**

- xii. An order quashing the entire proceedings in Cr No. 497 of 2015 for want of a Charge Sheet prepared and executed by the Prosecution.**
- xiii. An order quashing the decision to fix a judgement date in the absence of the 5th Accused while excused from the trial due to sudden illness.**
- xiv. An order compelling the Respondents jointly and severally to pay the Petitioners' costs of this suit.**
- xv. Any such other orders or directions that this Court may deem just and fit to grant to meet the exigencies of justice and the requirements of the Constitution of Kenya.**
- Damages**
- xvi. An order finding that the Respondents are jointly and severally liable for the harm caused to the Petitioners in violation of the Constitution and the law.**
- xvii. An order providing incidental, consequential and aggravated damages against the Respondents in favour of the Petitioners for their arrest, charge, detention and trial for robbery with violence.**
- xviii. An order for punitive damages against the Judiciary, Office of the Director of Public Prosecutions, Office of the Director of Criminal Investigations and Office of the Attorney-General for their willful or grossly indifferent violations of the fundamental rights and freedoms of the Petitioners for their arrest, charge, detention and trial for robbery with violence.**

Structural Interdict

- xix. Any further relieve or orders, including a structural interdict, to ensure that the Petitioners comply with the rulings of this Court and that those harmed by the Petitioners' violations of the Constitution and the law are justly and appropriately accommodated.***

Other Relief

- xx. Any order that although this Petition has been filed in the public interest because the Respondents have abdicated their mandates under the Constitution and the law, the Respondents be required to indemnify the Petitioners for the expenses associated with the litigation.***
- xxi. Any other orders that this Court considers appropriate to protect the Constitution and the interests of justice.***

Petitioners' Case

55. The 3rd Petitioner depones that alongside the co-Petitioners they are charged with the offence of Robbery with Violence in **CR No. 497 of 2015** at the Chief Magistrates Court and offence of murder in **HCCR No.29 of 2015** before the High Court.
56. He depones that he, together with the 5th and 6th Petitioner were prejudiced when the State assigned them legal Counsel in **HCCR No.29 of 2015** however failed to do so in **CR. No. 497 of 2015**, notwithstanding the fact that both offences

carry the death penalty. Similarly, the Petitioners decry that they are prejudiced by the indictable offences in **CR No. 497 of 2015** before a Court of limited jurisdiction and in **HCCR No. 29 of 2015** before a Court with unlimited jurisdiction.

57. He asserts that Section 295 of the Penal Code does not expressly prohibit the felony termed robbery but places guilt on anyone who commits the prescribed acts, thereby lumping prohibition together. Consequently, it is argued that robbery is prohibited under Section 295 of the Penal Code, its punishment set out under Section 296 and further that the words '*robbery with violence*' do not exist in the Penal Code.

58. He states that the Petitioners impugn the Charge Sheet and the same cannot be cured after the close of the Prosecution case. He adds that the Charge Sheet, drawn and signed by a Police Officer contravenes Article 157(10) of the Constitution. He avers thus that the Petition raises weighty legal issues concerning the validity of a Charge anchored on a sanction and a Charge Sheet signed by a police officer.

59. Particularly, the Charge Sheet is faulted for a number of reasons as outlined below:

- a) *Section 295 of Cap 63 combines prohibition and contravention to visit guilt on anyone who uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen.*

- b) *Section 296(2) of Cap 63 sanctions rather than prohibits robbery. There is no offence known as robbery with violence in the Penal Code.*
- c) *Punishment for contravening Section 295 is at section 296(1) if theft includes threat to use actual violence and Section 296(2) if theft is by the use of actual violence.*
- d) *Failure to tie Section 295 to Section 296(2) renders that Charge devoid of a prohibition.*
- e) *The words “at the time of such robbery threatened to use actual violence” used in Counts I, II and III abide with Section 296(1) and not Section 296(2). Use of actual violence is mandatory at section 296(2) yet it is not stated in Counts I, II and III.*
- f) *Counts IV, V, VI, VII and VIII concern a distinct offence in the Firearm Act (Cap 114) (Revised Edition 2012) not allied to section 296(2).*
- g) *The Charge Sheet was drawn and signed by a police officer.*
- h) *Police offices participated in the decision to charge contrary to Article 157(10) of the Constitution.*

60. Furthermore, he points out that the matter in **CR No.497 of 2015** came up for defense hearing on 16th September 2024 in the absence of the 5th Respondent who had taken ill. Considering this, he argues that this was prejudicial to him. Equally, he avers that having voiced their concerns of infringement of their rights, the Court ought to have pronounced itself on the same in the said Ruling.

61. In light of these factors, the Petitioners aver that this Court has an inherent power to interfere with a Trial based on a Charge that is devoid of a prohibition. This is since Section 296(2) of the Penal Code is devoid of any prohibition thus the charge against them, a nullity and an abuse of the Court process.

1st and 8th Respondents' Case

62. In response to the Petition, these Respondents filed their Grounds of Opposition dated 5th November 2024 on the grounds that:

- i. The instant application and Petition is misplaced and an abuse of the Court process since the Petitioners had filed a related matter which is still pending before Court yet to be heard and determined, the instant Petition is related to **HCCHRPET/E080/2024** to the extent that both Petitions are challenging the constitutionality of the offence/charge of Robbery with violence as preferred under section 296(2) of the Penal Code.*
- ii. The application and Petition filed herein is misconceived as its only meant to scuttle and derail the hearing of robbery with violence criminal cases pending in the Magistrate's Courts against the Petitioners herein that is Cr.No.497 of 2015, which is being mentioned by the Petitioners and whose intent flies in the face of the finding of the Supreme Court of Kenya in the case of **Hussein Khalid And 16 others v Attorney General & 2 others [2019] eKLR** whereby the*

Court held that there exists adequate safeguards in the criminal justice system and the Constitution to guard and cushion against any violations of the accused's rights and freedoms and the trial courts are ably equipped to address any issue(s) raised by an accused person legitimately in the course of the trial.

- iii. *The instant application together with the Petition filed herein is bad in law and incompetent to the extent that it's not clearly disclosed the prejudice that the Petitioners have suffered in their respective trials notwithstanding the Court's finding, directions and orders issued in **Nairobi HCCHR Petition No.618 of 2010, Joseph Kaberia Kahinga & 11 Others -Versus- Attorney General.***
- iv. *The Petitioners appear to have failed to appreciate that the Court's finding that Section 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code did not meet the constitutional threshold of setting out sufficiently the degree of aggravation of the offence of robbery and attempted robbery did not in any way mean that the said provisions of the law were and still are outrightly unconstitutional and no charges should be brought under them or no such intended charges are known in law, in addition, some of the court orders said to have not been complied with were suggestive in nature without necessarily binding to the Respondents herein.*
- v. *All the aspects of a fair hearing or trial as contained under Article 50 of the Constitution as far as the Petitioners' trial is concerned has been met thus, the institution of the instant application and Petition amounts to an abuse of the Court process.*

- vi. *The Petitioners have also failed to give specific constitutional violation(s) or infringement(s) of rights and freedoms relating to each Petitioner hence offending the principles of constitutional petitions as was enunciated in the celebrated case of **Anarita Karimi -Versus-Republic (No.1) (1979 1 KLR 154** and as was amplified in the case of **Mumo Matemu -Versus- Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012(2013)**.*

2nd and 7th Respondents' Case

63. These Respondents' response in the Petition are not in the Court file or Court Online Platform (CTS).

1st Petitioner's Submissions

64. The 1st Petitioner through its Counsel, Joshua Malidzo filed submissions dated 3rd November 2025. The issues set out for determination were: *whether the 1st Petitioner exhausted all remedies under Article 119 of the Constitution before coming to this Court, whether the Joseph Kaberia Kahinga and 11 Others v. Attorney-General [2016] eKLR judgment became final and binding law at the end of the 18-month suspension-15 March 2018, whether since 15 March 2018, the Respondents, individually and collectively have violated the Petitioners fundamental rights and freedoms of all individuals arrested, charged, arraigned, detained, held in custody, tried, convicted or sentenced under Sections 295, 296(1), 296(2), 297(1) and 297(2) including the rights guaranteed under Articles 27 and 50(2) and the national*

values and principles under Article 10 of the Constitution, whether the Attorney-General, the Kenya Law Reform Commission, the Office of the Director of Public Prosecution, the National Council on Administrative Justice, the Judiciary and Parliament have violated their state obligations under Article 3(1), 20(1) and 21(1) and (3) of the Constitution by failing to implement the Kahinga judgment and continuing to arrest, charge, convict and detain individuals under Sections 295, 296(1) and 296(2), 297(1) and 297(2) of the Penal Code, whether the Respondents violated Article 35 of the Constitution and the Access to Information Act and what reliefs are the Petitioners entitled to.

65. On the first issue, Counsel relying in the case of **Katiba Institute & another v Attorney-General & another [2017] KEHC 4648 (KLR)** submitted that the Court therein dealing with a similar claim of failure to exhaust the remedy under Article 119 of the Constitution, held that the High Court has jurisdiction under Article 165(3)(d)(i) and (ii) of the Constitution to hear cases on interpretation of the Constitution and whether any law is inconsistent with the Constitution. Thus although Parliament, through a petition could enact, amend or review a legislation, this provision could not usurp the High Court's mandate to determine cases challenging constitutionality of legislation and provide appropriate remedies.

66. Comparable reliance was placed in **Katiba Institute & 4 others v Attorney-General & 3 others; Inuka Kenya ni Sisi & another (Interested Parties) [2025] KEHC 12779 (KLR)** and **Council of Governors & 3 others v Senate & 53 others [2015] KEHC 6965 (KLR)**.

67. Guided by these authorities, Counsel submitted that the question of whether the Respondents violated their State obligation to uphold rights when it continued to uphold the impugned provisions, is a mandate of the High Court under Article 165(3)(b) and Article 165(3)(d)(ii) of the Constitution thus this Court has jurisdiction to entertain this matter. Equally, Counsel argued that the claim of violation of the doctrine of separation of powers cannot stand as the Supreme Court in **Mate & another v Wambora & another [2017] KESC 1 (KLR)** held that:

“A clear inference to be drawn is that, it was the Supreme Court’s stand that no arm of Government is above the law. This being a constitutional democracy, the Constitution is the guiding light for the operations of all State Organs. The Court’s mandate, where it applies, is for the purpose of averting any real danger of constitutional violation.”

68. On the second issue, Counsel submitted that following the lapse of the suspension period on 15th March 2018, the decision in **Joseph Kaberia Kahinga** (supra) became final and binding. Counsel pointed out that this decision has never been appealed nor stayed and neither has the 2nd

Respondent ever issued the required Report as directed by the Court. Counsel further submitted that once the 18-month suspension period lapsed, the Court that rendered the Judgment became functus officio thus this matter cannot be argued to be an abuse of the Court process.

69. To buttress this point, Counsel relied in **Minister of Social Development and Others, Ex Parte (CCT14/06) [2006] ZACC 3; 2006 (4) SA 309 (CC); 2006 (5) BCLR 604 (CC)** where the Court held that where a suspension has expired, it cannot be revived.
70. Comparable reliance was placed in **Minister of Transport and Another v Mvumvu and Others (CCT 62/12) [2012] ZACC 20; 2012 (12) BCLR 1340 (CC), Minister of Justice v Ntuli (CCT15/97, CCT17/95) [1997] ZACC 7; 1997 (6) BCLR 677; 1997 (3) SA 772** and **Firestone South Africa (Pty) Ltd v Genticuro A.G. 1977 (4) SA 298 (A)**.
71. Counsel argued that being that the impugned provisions became invalid following the suspension, Article 2(4) of the Constitution guides that any law inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. Reliance was placed in **Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3**

others [2014] KECA 658 (KLR) where the Court of Appeal held that:

“We do not believe that it would be promoting the purpose of the Constitution, or advancing its principle and values or contributing to good governance to ignore Article 2(4) and hold, on the facts of this case, that a statute that is blatantly violative of the Constitution can form the foundation of valid legal claims. At a time when the Constitution of Kenya is still in its early years of interpretation, the idea that statutory enactments contrary to the Constitution can claim even fleeting validity should not be countenanced, let alone entertained. Holding otherwise would be contributing to the erosion of the supremacy and preeminence of the Constitution in the hierarchy of legal norms.”

72. Counsel submitted that despite the impugned provisions being invalid, the Respondents have continued to violate the Petitioners rights and others under Articles 27 and 50(2) of the Constitution, a non-derogable right, by charging, trying and convicting persons under these provisions. Counsel further argued that the Respondents actions violate the principle of legality as envisaged under Article 2(4) of the Constitution. Counsel also argued that the Respondents actions are offensive to Article 10 of the Constitution and public interest.
73. Further, Counsel submitted that 2nd, 3rd, 4th, 5th and 6th Respondents were in violation of their constitutional obligation to uphold rights under Article 3(1) and 21(1) of the Constitution as their inertia to comply with the said

judgment has facilitated the continuation of the arrest, charge, conviction and detention of individuals under the impugned Sections. Counsel underscored that Article 21(1) of the Constitution mandates the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

74. Counsel stressed that the Respondents actions demonstrate that they have failed to respect the rights of the individuals who were arrested, charged, tried and convicted under the impugned provisions and further take the necessary steps to amend the relevant provisions of the Penal Code. Counsel relied in *Human Rights Committee developed General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004 which guides that the obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole.
75. On the fifth issue, Counsel submitted that the 1st Respondent in failing to issue the requested information to the 1st Petitioner was in breach of Article 35(1) of the Constitution. Counsel relied in **Katiba Institute v President's Delivery Unit & 3 Others [2020] eKLR** where it was held that public bodies must provide the requested information unless they can justify their refusal based on specific exemptions provided in law, such as security or public interest concerns.

76. Further reliance was placed on **Khalifa & another v Principal Secretary, Ministry of Transport & 4 others; Katiba Institute & another (Interested Parties) [2022] KEHC 368 (KLR)**.

77. Equally, the 3rd Respondent is accused of being in breach of Article 35(3) of the Constitution for failing to publish and publicize information relating to the arraignment, detention, convictions, sentences and appeals for all crimes including robbery with violence and attempted robbery with violence. Additional reliance was placed on **Nairobi Law Monthly Company Limited v. Kenya Electricity Generating Company & 2 Others [2013] KEHC 6054 (KLR)** where it was held that:

“The second consideration to bear in mind is that the right to information implies the entitlement by the citizen to information, but it also imposes a duty on the state with regard to provision of information. Thus, the state has a duty not only to proactively publish information in the public interest... this, I believe, is the import of article 35(3) of the Constitution of Kenya which imposes an obligation on the state to ‘publish and publicise any important information affecting the nation’, but also to provide open access to such specific information as people may require from the state.”

78. Equally cited in support of this contention is the case of **Mohamed Ali Baadi & 9 Others v Attorney General [2012] KEHC 3346 (KLR)**.

79. On the final issue, Counsel submitted that Article 23(3) of the Constitution provides for the remedies which this Court can issue that are most appropriate for the violation of rights. Counsel urged that thus that this Court do find that the Petitioners are entitled to general exemplary damages commensurate to each Petitioner's case in addition to a declaration that their constitutional rights were violated to vindicate the violation of the Petitioners' rights and deter future violations and infringements.

80. Reliance was placed in **Hoffmann v South African Airways (CCT17/00) [2000] ZACC 17** where it was held that:

*“The objectives of an appropriate relief are to: (i) address the wrong occasioned by the infringement of the constitutional right; (ii) deter future violations; (iii) make an order that can be complied with; and (iv) of fairness to all those who might be affected by the relief.
”*

81. Counsel similarly cited the cases of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others** **Petition Nos. 14, 14A, 14B and 14C of 2014; [2014] eKLR, Export Processing Zone Authority and 10 Others v National Environmental Management Authority and 6 Others (Supreme Court Petition No. E019 of 2023 as consolidated with Petition E021 of 2023); [2024]eKLR, Musembi & 13 others v Moi Educational Centre Co. Ltd**

& 3 others [2021] KESC 50 (KLR), Gitobu Imanyara & 2 Others v Attorney-General (Civil Appeal No. 98 of 2014); [2016] eKLR, and Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 Others (Petition 14 of 2017); [2018] eKLR to buttress this submission.

3rd, 4th, 5th, 6th, 7th and 9th Petitioners' Submissions

82. These Petitioners in support of their case, filed submissions dated 28th July 2025 through their Counsel, Stephen Ongaro. Counsel underscored the issues for determination as: *whether Section 296(2) (Cap 63) creates a criminal offence; whether Counts I, II and III align with Section 296(2) (Cap 69); whether a Charge Sheet drawn by a police officer is valid and whether the rights to a fair trial and fair hearing were breached by the Court's failure to render a ruling.*
83. Counsel submitted that the offence in **CR No. 479 of 2015** is Robbery with violence contrary to Section 296(2) of the Penal Code. According to Counsel, a crime is a prohibitive command whose obedience is secured by a sanction. Therefore, Section 295 of the Penal Code visits guilt upon anyone who commits the prescribed acts by lumping prohibition together with contravention. Counsel pointed out that sanction for contravention is provided under Section 296(1) if theft is accompanied by a threat to use violence and Section 296(2) if theft includes actual use of violence.

84. As such, Counsel stressed that Section 295 must be read with Section 296 to tie a prohibition to a sanction in the event of a contravention. Accordingly, Counsel stated that while Section 295 can be contravened, sub-section 296(2) cannot as purported in the charge. For this reason, Counsel argued that the Petitioners' trial cannot be said to be fair when the Charge Sheet contains counts that are not aligned with the Charge, which in itself is unlawful.
85. Furthermore, Counsel submitted that the decision to charge is an exclusive preserve of the 1st Respondent under Article 157(10) of the Constitution. In this case, Counsel argued that the Charge Sheet was drawn and signed by a police officer as is evident from its first line at page 1 which states: "POLICE 5 THE KENYA POLICE, POLICE CASE NO. 111/63/2015" notwithstanding that Section 214 of the Criminal Procedure Code was not invoked to amend and vary the Charge.
86. Counsel stressed that this Court in **Constitutional Petition E495 of 2021** held that the investigator's role ends with the collection of evidence and making recommendations. As such, the Court in the end found that the National Police Service did not have the power and authority to make any decision to prefer and institute the charges and sign the charge sheet. Guided by this, Counsel maintained that the

charge sheet was in breach of Article 157(10) of the Constitution.

87. Furthermore, Counsel submitted that the Petitioners are charged with capital offences in **CR No. 479 of 2015** and **HCCR No. 29 of 2015**, arising from the same events and witnesses thus subject to double jeopardy. Counsel also submitted that the Petitioners in both matters are represented by different advocates with different understanding of the same facts and exhibits adduced, yet both matters carry the death penalty.
88. To this end, Counsel maintained that the Petitioners case raises weighty issues on their rights to a fair hearing and also issues of abuse of the legal process by the 1st Respondent. In his view, without a statutory prohibition, the Charge in **CR No. 479 of 2015** is an abuse of the Court process to the extent that a sanction cannot be breached. In sum, Counsel argued that the Petitioners case is merited.

1st Respondent's Submissions

89. The 1st Respondent's Counsel filed submissions dated 6th June 2024 and underscored the issues for determination as: *whether the High Court in the Kahinga decision declared the impugned sections of the law unconstitutional in the manner suggested, whether there has been any change in*

circumstances since the Kahinga decision so as not to warrant an extension of the suspension pending legislative interventions and to avoid a state of anarchy, whether the 1st Respondent has breached the Petitioners right to access information under Article 35(1) of the Constitution and whether this Court can depart from the decision of the High Court in the Kahinga decision.

90. On the first issue, Counsel asserted that the Court in the cited Case, did not declare the impugned provisions unconstitutional as interpreted by the Petitioners. Counsel asserted that the Court clearly intended to reconsider the matter and give further orders as is evident in the Order, to table a detailed report before it upon expiry of the 18 months. In Counsel's understanding this means that, the Court anticipated that in the event of noncompliance, the parties in that Petition could bring the matter again before the Court for further orders and directions.
91. As such, Counsel stressed that the full import of the declaration issued by the 3-Judge bench, in light of non-compliance, can only be determined in the matter upon the parties making appropriate applications. Counsel as well decried that the Petitioner was guilty of duplicity for filing this Petition on its behalf and the 4th Interested Party, which puts the Respondents at a disadvantage.

92. On the second issue, Counsel cautioned this Court against interpreting and enforcing the Kahinga decision in a manner that leads to a breakdown of the rule of law and anarchy. This is since the orders sought herein would have the effect of indiscriminately insulating criminals from investigation, arrest, charges and trials following conduct that endangers lives and property. Counsel added that there are existing alternatives to the orders sought herein flowing from the decision of the Supreme Court in the **Francis Muruatetu** case (supra).
93. Furthermore, Counsel stressed that the Petitioners had failed to consider the significance of decisions post the Kahinga decision. Reliance was placed in **Joseph Kaberia Kainga v Republic [2019] eKLR** where the Court in a re-sentence hearing observed as follows:

“This court has also taken into consideration the nature of the offence that the Applicant was convicted of. It was an attempted robbery where none of the victims were injured. No property was stolen. The Applicants were arrested at the scene of crime by the police. The Applicant states that he is remorseful and has learnt his lesson in the period that he has been in prison. He regrets the offence that caused his incarceration. The State was not opposed to this court reviewing the Applicant's sentence. Applying the Francis Karioko Muruatetu case and Joseph Kaberia Kahinga case, this court holds that the degree of gravity of the offence that the Applicant committed and the mitigation of the Applicant on re-sentencing means

that the period that the Applicant has served in prison is sufficient punishment."

94. Similar observances were also made in **Daniel Kioko Mbuva -vs- Republic [2019] eKLR, Joseph Mwaura Macharia v Republic [2018] eKLR, brahim Ali Hatake -vsRepublic [2019] eKLR, Charles Mulandi Mbula -vs-Republic [2014] eKLR** and **Simiyu v Republic (Criminal Appeal 47 of 2018) [2021] KECA 247 (KLR)** which were also cited in support of this point.
95. On the third issue, Counsel answered in the negative. Counsel submitted that the 1st Respondent on the request issued the Petitioners with a response citing reasons why it was unable to meet the request at the time. It further advised that they seek the information from the 3rd Respondent, as holds all records on those charged before Court. Following this guidance, it was noted that the Petitioners were able to receive the sought information from the 3rd Respondent.
96. On the final issue, Counsel submitted that this Court can depart from aspects of the Kahinga decision for example on conflict between Section 297(2) and 389 of the Penal Code. This is since a binding decision of the Court of Appeal considered the said decision and arrived at a different conclusion that is binding to the High Court under the doctrine of stare decisis. In addition, Counsel submitted that recent jurisprudential pronouncements by Superior Courts in

relation to the mandatory death sentence affords convicted persons an avenue for recourse.

97. That said, Counsel submitted that this proposition can only be done once the 2nd Respondent files a detailed report which may include any developments in the law. For this reason, Counsel urged the Court to consider an extension of the suspension period to allow the report to be filed or the legislative interventions in progress be completed to pave way for further directions by the Court.

2nd, 5th, 6th Respondents' and 2nd and 3rd Interested Parties Submissions

98. Deputy Chief State Counsel, Thande Kuria for these parties filed submissions dated 5th November 2025.
99. On the onset, Counsel relying in the 6th Respondent's Replying affidavit submitted that it is evident that they complied with the Orders issued in the cited Judgment in relation to the impugned provisions of the Penal Code. He stressed that at the time of filing of this Petition, the requisite amendments to the Penal Code in compliance with the cited Judgment had been initiated through the Penal Code (Amendment) Bill, 2023 which was pending before the National Assembly.
100. Counsel submitted that it is trite law under the provisions of Article 94 of the Constitution that only Parliament has the

mandate and the authority to make laws. As such, at this juncture they have no control of the Parliament's law-making power or its legislative calendar.

101. Counsel further challenged the competency of this Petition noting that it raises jurisdiction issues. First, Counsel submitted that the Petition is sub judice as is largely based on the cited Judgment wherein the 3 -Judge bench was clear that if the orders issued were not complied with, the parties were at liberty to apply. He argued that the orders issued therein were made *in rem* and as such any party is at liberty to return back to the Court in relation to the orders issued therein.

102. Reliance was placed in **Kamunyu and Others vs. Attorney General & Others [2007] 1 EA 116** where it was held that:

“In a suit seeking judgement in rem, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world.”

103. Comparable reliance was placed in **George William Kateregga vs. Commissioner for Land Registration & Others Kampala High Court Misc. Appl. No. 347 of 2013, Pattni vs. Ali & Anor (Isle of Mann (Staff of**

Government Division) [2006] UKPC 51, Ernest Orwa Mwai vs. Abdul S Hashid & Another Civil Appeal No. 39 of 1995, Kotis Sandis vs. Ignacio Jose Macario Pedro De Silva Civil Appeal No. 38 of 1950 [1950] 1 EACA 95, The Town Council of Ol'kalou vs. Ng'ang'a General Store Civil Appeal No. 269 of 1997 and Sakina Sote Kaitany and Anor. vs. Mary Wamaitha Civil Appeal No. 108 of 1995.

104. Accordingly, Counsel submitted that having regard to the import of Order 5 in the cited Judgment, the subject matter of that Petition is still alive and so the Petitioners in the cited case, Petitioners herein and anyone affected by the said Judgement, orders and declarations is free to move the Court appropriately. It was noted however that the Petitioners herein did not do so.
105. Likewise, being that the matter is still alive, Counsel submitted that this Petition invokes the doctrine of sub judice. Counsel stressed that the application of sub judice ought to be given a wider judicial interpretation. This is because this is not an ordinary litigation as revolves around a judgment in rem brought under the provision of Article 22 and 258 of the Constitution.
106. Reliance was placed in **Kenya National Commission on Human Rights V Attorney General; Independent Electoral & Boundaries Commission & 16 Others**

(Interested Parties), [2020] eKLR where the Supreme Court held that:

“The term sub judice is defined in Black’s Law Dictionary 9th Edition as: “Before the or Judge for determination.” The purpose of the sub judice rule is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the subject matter before courts with jurisdiction, the matter that is filed later ought to be in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub judice must therefore establish that; there is more than one suit over the same subject matter, that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between `the same parties or their representatives.”

107. Additional dependence was placed in **Mumo Matemu - Versus- Trusted Society of Human Rights Alliance & 5 others 2013] eKLR** and **Pricilla Nyokabi Kanyua - Versus- Attorney General and Another [2010] eKLR.**

108. Furthermore, being that the Petitioners seek to implement the cited Judgment, Counsel submitted that this raises a further jurisdiction issue. This is because attempting to do so will be acting contrary to Article 165(6) of the Constitution especially since Order 5 is still active and can be invoked by the affected parties before the said Court. Moreover, Counsel

argued that although the decision of a Court of concurrent jurisdiction is not binding, if the said decision reflects the true legal position, there would be no basis for a divergent opinion. Reliance was placed in in **'The Nature of the Judicial Process', New Haven; Yale University Press (1921) p. 149** by Benjamin Cardozo's as follows:

"In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."

109. In closing, Counsel submitted that a blanket review of the impugned sentences as sought by the Petitioners would be contrary to public policy and further a recipe for chaos in the Criminal Justice System.

4th Respondents' Submissions

110. Counsel for the 4th Respondent, Henry Abwanzo filed submissions dated 14th July 2025 and set out the issues for discussion as: *whether the Petitioners exhausted the available dispute resolution mechanism; whether the National Assembly has undertaken any steps to amend the*

impugned provisions of the Penal Code and whether the Petition is merited.

111. On the first issue, Counsel noted that the Petitioners seek a declaration that the 4th Respondent failed to amend the impugned provisions of the Penal Code. Counsel referring to the 4th Respondent's averments in its affidavit argued that it cannot be faulted for non-compliance with the cited Court Orders as it never received the professional review in the context of the cited Judgment.
112. That said, Counsel submitted that the Petitioners had failed to exhaust the remedy of petitioning the government under Article 119(1) of the Constitution as read with the Petition to Parliament (Procedure) Act, before filing this Petition. Counsel submitted that this invokes the doctrine of constitutional avoidance which requires the Court to decline to deal with a matter owing to the existence of another remedy provided in law.
113. Reliance was placed in **William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) (2020) eKLR** where it was held that:

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring

that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

114. Equal dependence was placed in **Speaker of the National Assembly v James Njenga Karume [1992] eKLR** and **Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 175 others [2015] eKLR**.

115. Counsel submitted that the Petitioners in the context of this case failed to invoke these provisions before filing this suit. Counsel stressed that the Petitioners ought to have first attempted to obtain relief from Parliament in the form of a petition instead of approaching this Court prematurely. As such, upon exhausting this available avenue, the Petitioners right to move to Court if their grievances would not have been resolved, would have then crystallized. Reliance was placed in **Pharmaceutical Society of Kenya & another v Attorney General & 3 others [2021] KEHC 85 (KLR)** where it was held that:

“Doubtless, Article 119(1) will serve a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation.”

116. Comparable reliance was placed in **Rich Production Limited Vs Kenya Pipeline Company & Another (2014) eKLR**.

117. On the second issue, Counsel submitted that the issue raised in the Petitions is already the subject of pending legislations and legislative proposals before the National Assembly as detailed in the 4th Respondent's affidavit. Counsel in light of this and in view of Article 94 of the Constitution urged the Court to dismiss the Petition so as to give a chance to the legislative process that seeks to address the impugned provisions of the Penal Code.

1st Interested Party's Submissions

118. Counsel, Mwachiro Lynnette Manga for this party filed submissions dated 5th November 2025 and set out the issue for determination as: *whether or not the Petitioners are entitled to the Reliefs sought.*

119. Counsel restating the facts of this case submitted that it was evident that the cited Judgment had not been appealed, reviewed or stay orders sought from the Court. For this reason, Counsel submitted that indeed there was a valid decision and thus this Court needs to determine whether or not the Judgment and the Orders issued have been implemented and complied with.

120. Counsel submitted that as per the Amended Petition, it was clear that despite being aware of this Court's decision, the 1st and 3rd Respondents and 3rd Interested Party had continued to arrest, arraign, charge and convict the 2nd to 9th

Petitioners and others, under the impugned provisions of the Penal Code. Counsel stressed that this flies in the face of the non - derogable right anchored under Article 50(2)(n) of the Constitution, an illegality and thus cannot be sanctioned by this Court. Equally, it was submitted that it was palpable that the Respondents had not complied with the terms of the cited Judgment.

121. To buttress this point reliance was placed in **Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others [1998] eKLR** where it was held that:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

122. Like dependence was placed in **Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Paramount Bank Limited vs. Mohammed Ghias Qureishi, Civil Appeal No. 239 of 2001**, and **Ambala & another V Ambala & another; Butt & Another (Contemnor)(2023)KECA 867 KLR.**

123. On the other hand, Counsel cautioned against release of the Petitioners and any person in custody on the basis of the

impugned provisions without a proper framework, so as to protect the 4th Interested Party and any witnesses from any retaliatory action from these Petitioners. On this basis, Counsel urged the Court to balance the competing interests between the Petitioners and the 4th Interested Party.

124. Reliance was placed in **Charles Muturi Macharia suing as the next of friend of and on behalf of Christine Wangari Muturi) & 6 Others vs the Standard Group & 4 Others, Petition No. 13 (E15) of 2022** where the Supreme Court guided as follows:

“Courts and legal systems in different jurisdictions employ different methods and legal doctrines to determine the appropriate balance between competing rights. To perform this task, the courts in Kenya will construe the concerned provisions of the Constitution in a generous and purposive manner, guided by the principles set out in Article 259, through a holistic manner; in a manner that promotes the purposes of the Constitution, its values and principles; and in a way that advances the human rights and fundamental freedoms in the Bill of Rights...”

5th Interested Party’s Submissions

125. The 5th Interested Party through Kebris Law Advocates LLP filed submissions dated 20th October 2025. The issues for discussion were set out as: *whether the Petitioners exhausted the available dispute resolution mechanism and whether the Amended Petition is merited.*

126. Counsel rebutting the Respondents allegation that the Petitioners had not petitioned Parliament, submitted that the Petition herein revolves around the constitutional validity of the Respondents actions of arresting, prosecuting and sentencing individuals in light of the cited Judgment. In addition, that the Petition raises violations of the fundamental rights and freedoms of all individuals arrested, charged, detained, tried, or convicted on the impugned offences from 15th March 2018. In view of this, Counsel submitted that this Court has the requisite jurisdiction to determine these issues.

127. Considering this, Counsel argued that the doctrine of exhaustion only applies where the Petitioner was required to exhaust all other avenues of dispute resolution before approaching the Court. Reliance was placed in **Speaker of National Assembly vs James Njenga Karume** (supra) where it was held that:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

128. Counsel referring to Article 119 of the Constitution as read with the Petition to Parliament (Procedure) Act submitted that this provision only applies in matters where the Parliament has authority to act over. Counsel maintained

that the Petition herein challenges the constitutionality of the Respondents actions not the legislative mandate. Counsel highlighted that the Court in **Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae) [2012] KEHC 2480 (KLR)** held that it was not in doubt that the High Court is the right forum for cases challenging the constitutionality of actions done under the authority of the Constitution.

129. Equal dependence was placed in **William Odhiambo Ramogi & 3 others** (supra).

130. On the second issue, Counsel answered in the affirmative. Counsel submitted that the continued arrest, prosecution and sentencing of individuals for the impugned offences violates and threatens the infringement of the rights and fundamental freedoms of the people of Kenya in view of the right to a fair trial under Article 50(2) of the Constitution. Reliance was placed in **Republic v Emilio Njoka Mwaniki [2021] KEHC 8884 (KLR)** where it was held that the criminal justice administration system in Kenya places the right to a fair trial at a much higher pedestal and the court is expected to play a balanced role in the trial of an accused person as it is the custodian of the law. The court further ought to ensure that the constitutional safe guards are jealously protected and upheld at all times and should be

judicious, fair, transparent and expeditious and further must ensure compliance with the basic rule of law.

131. Furthermore, Counsel submitted that the Respondents actions amount to breach of the right to life under Article 26 of the Constitution owing to the imposition of the death penalty, without taking into account the ambiguity in the said provisions amount to cruel and inhuman treatment in breach of Article 29 of the Constitution. Counsel added that the same denies accused persons the right to benefit from the least severe of the prescribed punishments for an offence.

132. Moreover, the Respondents actions are argued to be in violation of Article 10 of the Constitution as continue to arrest, charge, try and convict persons for offences that no longer exist. To buttress this point reliance was placed in **India in Behram Khurshid Pesikaka v. State of Bombay (1955) 1 SCR 613** where it was held that:

“The law-making power of the State is restricted by a written fundamental law and any law enacted and opposed to the fundamental law is in excess of the legislative authority and is thus, a nullity. A declaration of unconstitutionality brought about by lack of legislative power as well as a declaration of unconstitutionality brought about by reason of abridgement of fundamental rights goes to the root of the power itself, making the law void in its inception.”

133. Comparable reliance was placed in **Norton v. Shelby County 118 US 425 (1886)**.

134. Correspondingly, the Respondents actions are contended to amount to an abuse of the Court process. This since any criminal proceedings grounded on non-existent offences is an egregious abuse of the Court process. Reliance was placed in **Cyrus Shakhalanga Khwa Jirongo v Soy Developers Ltd & 9 others, SC Petition No 38 of 2019; [2021] eKLR** where the Supreme Court rendered itself regarding termination of criminal proceedings for amongst other reasons, where institution/continuance of criminal proceedings against an accused may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of justice; or where it manifestly appears that there is a legal bar against the institution or continuance of the said proceeding; or where the allegations in the first information report or the complaint taken at their face value and accepted in their entirety, do not constitute the offence alleged.

6th Interested Party's Submissions

135. Mitullah, Shako and Associates Advocates LLP for the 6th Interested Party filed submissions dated 5th November 2025 in support of the Petition.

136. In like manner, Counsel underscored that the 3-Judge bench in **Joseph Kaberia Kahinga** (supra) found the impugned provisions to be inconsistent with the Constitution and guided that the 4th Respondent makes amendments, which has not been done yet, despite the lapse of the 18-month suspension. This is said to be in violation of Article 261(6) (b) & (7) of the Constitution. In addition, it was noted that post 15th March 2018, persons were still being charged and convicted on these offences which no longer exist. For this reason, Counsel contended that all convictions post March 2018 are void ab initio.

137. To buttress this point reliance was placed in **Macfoy v United Africa Company Ltd [1961] 3 All ER 1169** where it was held that:

"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad... every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

138. Comparable reliance was placed in **Bridgeup Container Services Ltd v Isaiah Mwai Mathenge [2002] KEHC 525** and **Suleiman Said Shabhal v Independent Electoral & Boundaries Commission & 3 others [2014] eKLR**.

139. Counsel relying in Article 2(6) of the Constitution submitted that Kenya has an obligation to uphold international law Treaties that are ratified in Kenya. In this regard, Counsel

submitted that the International Covenant on Civil and Political Rights (ICCPR) under Article 15(1) provides for the non-derogable legality principle that *'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed'*. Equally, the African Charter on Human and Peoples' Rights under Article 7 affirms the right to a fair trial. Counsel further submitted that the legality principle under Article 15 of the ICCPR and effective remedy principle under Article 2(3), bind this Court in making its decision.

140. Counsel as well submitted that the accused and convicted persons' rights are also protected under Article 26, 29 and 50 of the Constitution. Considering this, Counsel submitted that the 1st Respondent in continuing to prosecute persons despite the unconstitutionality of the impugned provisions, violated Article 157 of the Constitution while the Trial Courts violated Article 160 of the Constitution. Equally, the 4th Respondent in failing to make the requisite amendments violated Article 261(6)(b) of the Constitution. In sum, all were accused of violating Article 2(4) of the Constitution by continuing to enforce a void law.

141. In terms of remedies, Counsel submitted that when provisions are declared unconstitutional, Kenya routinely provides relief to the affected persons. Counsel further

asserted that all post March 2018 convictions must be vacated as were void in the first place or alternative valid charges be issued.

142. Counsel further urged that the death sentences issued must be set aside and structural interdicts of the implementation framework be ordered. Additionally, Counsel submitted that compensation ought to be issued to the persons wrongfully imprisoned under the void provisions. In sum, Counsel urged the Court to grant the relief sought by the Petitioners in addition to these.

Other Parties' submissions

143. The other Parties' submissions are not in the Court file or Court Online Platform (CTS).

Analysis and Determination

144. It is my humble view that the issues that arise for determination are:

- i. Whether this Court has jurisdiction to entertain this matter in light of the principle of Judgment in rem, doctrine of sub judice and the doctrine of exhaustion.***
- ii. Whether the continued implementation of the impugned Penal Code provisions (previously declared unconstitutional) constitutes violation of the Constitution by the Respondents and infringement of the Petitioners' rights under the Bill of Rights***
- iii. Whether the Petitioners are entitled to the reliefs sought.***

Whether this Court has jurisdiction to entertain this matter in light of the principle of Judgment in rem, the doctrine of sub judice and the doctrine of exhaustion.

145. On lack of jurisdiction, the Deputy State Counsel, Mr. Thande Kuria raised very interesting submissions. Counsel submitting on behalf of the 2nd, 5th and 6th Respondent as well as the 2nd and 3rd Interested Parties contended that the Petition is based on a 3-Judge bench decision of Kahiga case (supra) yet the judgment had clearly specified that if the orders granted were not complied with, parties therein were at liberty to apply but instead of taking action in the same proceedings, the Petitioners herein have opted to file a fresh suit yet by virtue of Order No. 5 in the former judgment, that case is still alive and any party affected should have had the liberty to move the Court in that proceeding as appropriate, hence the Court should find that the instant suit is barred by the doctrine of sub-judice.

146. The other jurisdictional issue came through the 4th Respondent submissions whereby Counsel Henry Abwayo argued that by dint of Article 119 (1) of the Constitution, the Petitioner ought to have petitioned Parliament which exercises legislative mandate pursuant to Article 94 rather than file this Petition.

147. Responding, the 1st Petitioner, through Counsel Joshua Malizo, contended that although the Constitution provides that one can petition Parliament to enact, amend or review a legislation, this provision does not take away constitutional authority of the High Court where the matter requires a constitutional resolution.
148. Counsel submitted that the question of whether the Respondents violated the State's obligation to uphold constitutional rights by continuing the enforcing the impugned provisions is a mandate of the High Court under Article 165(3)(b) and Article 165(3)(d)(ii) of the Constitution, thus this Court has jurisdiction to entertain the matter.
149. A jurisdictional question is a fundamental matter that the Court must determine at the earliest possible opportunity. The Supreme Court in **Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR)** addressing itself question of jurisdiction rendered itself as follows:

“68.A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to

entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

150. The objection to jurisdiction by the Respondents is based on various grounds. One argument was that the Kahinga decision is a *judgment in rem*, and having decided the question constitutionality of the impugned provisions of the Penal Code, that issue need not arise in subsequent proceedings but in the same proceedings as, in fact, one of the orders had given the parties liberty to apply if the judgment was not implemented, thus in filing fresh petition, the instant Petition is basically relitigating a live issue hence and is thus barred by doctrine of sub judice. The Court of Appeal in **Ngutari & 5 others v Okello. & 5 others**

[2025] KECA 505 (KLR) guided as follows in regard to judgment in rem:

“16. In matters of constitutional interpretation, the proceedings more often than not take the in rem form. In rem proceedings give rise to in rem judgements which is a judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from a particular interest in it of a party to the litigation). Such a judgement is said to be conclusive as against all the world in whatever it settles as to the status of a person or property, or as to the right or title to the property and as to whatever disposition it makes of the property itself, or of the proceeds of its sale. All persons regardless whether or not they are parties to any legal proceedings are bound by a judgment in rem and as such are estopped from averring that the status of persons or things, or the right or title to property is other than what the Court has by its judgment declared or made it to be. On the other hand, in personam judgement determines the rights of the parties to an action and those who are privy to them in regard to the subject matter in dispute. See Halsbury Laws of England, 4th edition Volume 16 paragraph 1525 and Hoffmann and Zeffertt: “The South African Law of Evidence” 4th edition, at 339- 340 and Lazarus-Barlow v Regent Estates Co Ltd [1949] 2 KB 465 at 475, [1949] 2 All ER 118 at 122.

17. Therefore, where a court is asked to hand down an in rem judgement, care must be

taken so that those who are not before the court are not unduly prejudiced by the same when their position is not the same as those of the parties before the court. In constitutional interpretation, therefore the court is not bound, in reaching its decision, by the positions taken by the parties before it in deciding the case or granting a relief. In other words, in such proceedings, the parties cannot, by merely taking particular positions, urge the court to decide in a particular way. While consents may be recorded in such proceedings, the court is not bound to adopt such consents when they are clearly not in tandem with the law and the Constitution. Conversely, the mere fact that a party adopts a position which might be deemed to be prejudicial to its interests does not preclude the court from setting the law as it is. Therefore, the mere fact that the 4th respondent took a position at the hearing that it was not mandated to appoint members of the tribunals does not, ipso facto, bind the court if the legal position is to the contrary. One cannot evade the constitutional obligation imposed upon it by merely abdicating its mandate and posturing that the mandate or obligation does not belong to it. Accordingly, the trial court was not bound by the position taken by the 4th respondent.”

151. The Supreme Court in **Dina Management Ltd vs Country Government of Mombasa (SC Petition No.8(E010) of 2021)** where it was held that:

“[76] It is vital to note that the decisions in HCCC No. 131 of 2011 and ELC Petition 12 of

2017 were made by courts of concurrent jurisdiction. By majority, this Court stated in Attorney-General & 2 others v Ndi & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (31 March 2022) (Judgment) that decisions made by courts of concurrent jurisdiction made in rem are not binding on courts of equal jurisdiction. The ideal scenario on stare decisis is for trial court judges to follow decisions of other judges of the same court unless there are compelling reasons to depart from the same. This is to ensure consistency, certainty, predictability, and sound judicial administration.”

152. As regards the application of the principle of sub judice, the matter in question has to be between the same parties or their representatives and the issues in the cases similar or identical. Section 6 of the Civil Procedure Act states:

No Court shall proceed with the trial of any suit or proceeding on in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such or proceedings is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.

153. Just like res-judicata, the sub-judice principle bars not only identical suits between the same parties or their representatives but is also a form of issue-based **estoppel** whose effect is to prevent analogous issues being tried concurrently as separate suits. The Supreme Court in **Kenya National Commission on Human Rights (supra)** had the

occasion to pronounce itself on the subject of sub judice as follows:

“[67] The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

154. Delving into the intricacies of this principle the Court in **Kenya Bankers Association v Kenya Revenue Authority [2019] KEHC 12178 (KLR)** observed as follows:

“33. For section 6 to come into play, the matter in issue in both the suit has to be directly and substantially in issue in the previous. The court may in proper cases invoke its inherent jurisdiction to make such orders as

may be necessary for the ends of justice or to prevent abuse of its process. This may be done where the tests of sub judice apply. As was held by the High Court of Uganda in *Nyanza Garage vs. Attorney General*:-

“In the interest of parties and the system of administration of justice, multiplicity of a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.” suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly,

34. For the doctrine of sub judice to apply the following principles ought to be present:- (a) There must exist two or more suits filed consecutively; (b) The matter in issue in the suits or proceedings must be directly and substantially the same, the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

155. The question thus is, what happens in the case of public interest litigation. Does sub-judice arise? The principle can be invoked given the reasoning of the Court **in Okiya**

Omutatah Vs Communication Authority of Kenya (2015) eKLR, where the Court observed:

“34. Further to the above, explanation (6) of the Civil Procedure Act makes it clear that Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating....”

35. In the previous suit Petition No. 447 of 2016 an order of declaration was issued in relation to the subject matter which was a declaration against seizure and destruction of gaming slot machines. A declaration by its nature is an order in rem. Even persons who were not parties in that suit could avail themselves the benefit of a declaratory relief. The instant petition is brought in public interest and relates to the same subject matter as the former petition. This is therefore a perfect res-judicata barred case.”

156. It means that if a particular issue forming a necessary ingredient in a cause of action has been litigated and decided or is being litigated in a prior pending case is the same in the subsequent proceedings between the same parties or their representatives, though involving a different cause of action, the said issue will attract the sub-judice or res-judicata principle (if the matter is already concluded) if any of the parties seeks to introduce the issue.

157. The question thus becomes, is this Petition barred by the sub-judice rule. In my view, the substratum of the Petition in Kahinga's case was the declaration of unconstitutionality of Sections 295, 296 (2) and 297 of the Penal Code. The Court determined the question and declared the said provisions unconstitutional. In that regard, the Court granted various orders including Order No. 5, which gave the Parties liberty to apply if the orders in the judgment were not complied with.
158. The nature of the judgment was for all purposes a judgment in rem in so far as the unconstitutionality of the said provisions is concerned. That said, it would be improper therefore if any subsequent suit is filed seeking the unconstitutionality of the said provisions.
159. The instant suit however strikes me as a distinct cause of action in the sense that although it acknowledges the existence of the Kahinga decision and the declarations that were issued thereof its substratum is different. The Kahiga case basically invalidated sections 295, 296 and 297 of the Penal Code on account of ambiguity and declared them unconstitutional for violating the right to a fair trial under Article 50 of the Constitution. To that extent, this was a rem judgment as the issue of invalidity of the said provisions was

binding on all and sundry, even non-parties in the said judgement hence it is not possible to relitigate the same. A fundamental relief issued in the judgment was the suspension of the declaration of invalidity for 18 months and the requirement for initiation of legislative amendments to remedy the legal shortcoming. It is not disputed that this period has since lapsed and no such amendments have been secured. Moreover, the State continues to charge persons under these defunct provisions.

160. The instant Petition does not deal with the unconstitutionality of the said provisions of the Penal Code as that is now history. It instead focusses on the continuing impunity whereby the State, despite this binding declaration, continues to charge persons under provisions of law that have been declared unconstitutional.

161. In my humble view, any prosecution subsequent to Kahiga decision constitutes a fresh and separate violation of the rights of the person concerned as it is a charge not sanctioned by law, thus violates Article 50 of the Constitution and is also offensive to the rule of law principle under Article 10 (2) (a) of the Constitution.

162. Under Article 22 and 258 of the Constitution, on the enforcement of the Bill of Rights and Constitution respectively, the affected person or any person in public

interest, can bring a fresh Petition to vindicate the supremacy of the Constitution (Article 2 (4) in view of the prior declaration by halting the continuing infringement. This Petition is thus not sub-judice because it is not identical in terms of issues with the Kahiga case as suggested by the Respondents. This ground must thus fail.

163. Respondents, in particular, the 4th Respondent, urged the Court to decline jurisdiction on the basis of the exhaustion doctrine. The doctrine requires that Courts to desist from adjudicating initial or primary disputes where the statute or a regulatory regime has provided other alternative mechanisms of dispute resolution until such resolution has been undertaken. That position finds support in **Article 159** of the Constitution which obliges the Court in exercising judicial authority, to be guided by the principles stipulated thereunder part of which includes '**alternative forms of dispute resolution.**'

164. The Supreme Court explained the doctrine in **Waity vs Independent Electoral & Boundaries Commission and Three Others [2019] KESC 54 (KLR)** as follows:

"[63] Where the Constitution or the law, consciously confers jurisdiction to resolve a dispute, on an organ other than a court of law, it is imperative that such dispute resolution mechanism, be exhausted before approaching the latter. Were it not so,

parties would bide their time, overlooking the recognized forums, and later springing a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice. We are fortified in this regard, by the persuasive authority by the Court of Appeal, in Geoffrey Muthinja Kabiru & 2 Others; [2015] eKLR; wherein the Appellate Court observed:

“It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”

165. To reiterate, this jurisdictional issue was raised by the 4th Respondent Counsel, Henry Abwayo who argued that by dint of Article 119 (1) of the Constitution, the Petitioner ought to have petitioned Parliament which exercises legislative mandate pursuant to Article 94 rather than file this Petition.

166. Joshua Malizo for the 1st Petitioner objected to jurisdictional bar by virtue of Article 119 (1) of the Constitution contending that the issues raised herein relate to violation of the rights

in the Bill of Rights and the enforcement of the Constitution, hence the Petitioners were properly before the Court.

167. The import of Article 119 (1) of the Constitution has numerous times been judicially considered and I will thus not belabour the point on this particular issue.

168. This Court has firmly asserted its jurisdiction to determine the constitutionality or unconstitutionality of an act or omission by the legislature is not inhibited by Article 119 (1) of the Constitution. In the case of **Pharmaceutical Society of Kenya & another v Attorney General & 3 others [2021] KEHC 85 (KLR)** the Court held thus:

“... The High Court has on a number of occasions pronounced itself on the right to petition Parliament under the article 119 of the Constitution... in the case of Council of Governors & 3 others v Senate & 53 others [2015] eKLR it was held that:

“71. It is useful, however, in closing on jurisdictional questions, to address ourselves to the provisions of article 119(1) of the Constitution. The AG submits that the petitioners ought to have approached Parliament in accordance with the provisions of article 119(1) prior to filing its petition. Article 119(1) and (2) are in the following terms:

“Every person has a right to petition Parliament to consider any matter within its

authority, including to enact, amend or repeal legislation.

2. Parliament shall make provision for the procedure for the exercise of this right.”

72. The question is whether this provision is intended to take away the right of a party to question the constitutionality of an Act of Parliament, or indeed any action taken by the legislature, guaranteed under articles 22 and 258. Further, whether it can also be taken as ousting the jurisdiction of the Court under article 165(3)(d) to determine any question respecting the interpretation of the Constitution, including “the question whether any law is inconsistent with or in contravention of” the Constitution...

73. In our view, the answer must be in the negative. Doubtless, article 119(i) will serve a useful purpose in allowing citizens to petition Parliament to consider matters of concern to them that are within the purview of Parliament, including the repeal or amendment of legislation. It appears to us, however, that article 119 is not intended to cover situations such as is presently before this Court.

74. It would therefore be, in our view, for the Court to abdicate its responsibility under the Constitution to hold that a party who considers that legislation enacted by Parliament in any way violates the Constitution is bound to first petition Parliament with respect to the said legislation. The constitutional mandate to consider the constitutionality of legislation is vested in the High Court, and articles 2(4) and 165(3)(d)(i) mandate this Court to

invalidate any law, act or omission that is inconsistent with the Constitution. This is in harmony with the mandate of the courts to be the final custodian of the Constitution.”

169. The contention that the Petitioners must approach Parliament prior to filing a Petition that seeks enforcement of the Bill of Rights for acts that the Petitioners contend violate the Constitution is thus untenable. The right to approach the Court to challenge an alleged unconstitutional act or omission cannot be limited by Article 119 (1) of the Constitution. That process of petitioning Parliament does not oust the constitutional authority of this Court to determine the constitutional questions raised in the Petition. The authority to interpret the Constitution is vested on the Court, not Parliament.

170. The contention that this Court lacks jurisdiction thus fails.

Whether the continued implementation of the impugned Penal Code provisions (previously declared unconstitutional) constitutes violation of the Constitution by the Respondents and infringement of the Petitioners’ rights under the Bill of Rights

171. It is not in dispute that Sections 295, 296 and 297 of the Penal Code were declared unconstitutional by the 3-Judge Bench of the High Court on account of vagueness. The Court then proceeded to suspend the declaration of invalidity for 18 months which has since lapsed.

172. The Respondents have not undertaken the legislative interventions that were ordered by the Court within the stipulated time and did not also move the Court to seek extension of the said orders if indeed, there were any challenges that needed to be addressed.

173. From the annexures relied by the Petitioners (which was duly supplied by the Respondents) and thus is not disputed, it is apparent that the Respondents have persisted in charging the Petitioners despite the binding declaration based in regard to the unconstitutional provisional provisions of the Penal Code.

174. Firstly, the Respondent's action of enforcing provisions of law declared unconstitutional by a competent Court exercising its authority vested under Article 165 (3) d (i) of the Constitution is a blatant infringement of Article 2 (4) on the Supremacy of the Constitution which declares that:

'(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.'

175. Further, the acts of continuing to charge individuals under a law that has been found and declared unconstitutional by the Court in exercise of its constitutional jurisdiction violates

the fair rights of the affected persons as it is a direct breach of Article 50 (2) (n) of the Constitution which states thus:

“Every accused person has the right to a fair trial, which includes the right—

(n) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya;

or (ii) a crime under international law”

176. Consequently, preferring charges or pursuing prosecution founded on the provisions of law that have been declared unconstitutional and thus invalid is an act of impunity and abuse of State power by Respondents contrary to Article 2 (2) which provides that ***‘No person may claim or exercise State authority except as authorised under this Constitution.’*** The persistent failure to take necessary measures to implement the binding declaration that would have ensured that accused persons are only criminally prosecuted for the offences that are lawfully defined under a valid law infringes Article 2 (2) of the Constitution for it amounts Respondents arrogating themselves non-existent powers to enforce invalid legal provisions.

177. For the reasons aforesaid, this Court thus finds that the State through the Respondents has violated the Constitution and also, the Rights of the accused by continuing to charge

accused persons under invalid legal provisions, in particular, Sections 295, 296 and 297 of the Penal Code which were declared unconstitutional and the State ordered to take remedial measures by way of legislative interventions which the State has failed and/or neglected to effect.

Whether the Petitioners are entitled to the relief sought.

178. In the instant Petition, the Petitioners have sought drastic remedies' over and above the many declarations that have been outlined, the orders they seek in Petition E036 of 2024 include but not limited to the following: *An order prohibiting the Office of the Director of Public Prosecutions from charging and the Judiciary from accepting charges against individuals suspected of offences under Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code; An order directing the Judiciary, Kenya Prisons Service, and the Office of Director of Public Prosecutions to identify all individuals arrested, charged, or convicted of violations of Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code since 15th March 2018; An order dismissing all pending charges filed under Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code and for the accused people to be released from custody immediately; An order directing the Judiciary to vacate all convictions from 15th March 2018 for violating Sections 295,*

296(1), 296(2), 297(1) and 297(2) of the Penal Code; An order directing the Kenya Prisons Service to immediately release from custody all people who are imprisoned based on convictions from 15th March 2018 to the present for violating Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code; An order providing incidental, consequential and aggravated damages against the Respondents in favour of the Petitioners for their arrest, charge, detention and trial for robbery with violence; An order for punitive damages against the Judiciary, Office of the Director of Public Prosecutions, Office of the Director of Criminal Investigations and Office of the Attorney-General for their willful or grossly indifferent violations of the fundamental rights and freedoms of the Petitioners for their arrest, charge, detention and trial for robbery with violence;

179. In E497 of 2024, the some of the specific orders include;

An order dismissing the Charge filed under Section 296(2) of the Penal Code against the Petitioners in Criminal Case No. 497 of 2015 and they be released from custody immediately; An order directing the 7th Respondent to vacate all rulings in Criminal Case No. 497 of 2015 for breaching the right to fair trial and fair hearing; An order directing the G.K. Remand Prison Nairobi Industrial Area, Lang'ata Women's Remand Prison and Kamiti Maximum Security Prison to immediately release from custody the Petitioners for violating section 296(2) of the Penal Code; An order nullifying the entire proceedings in Cr No. 497 of 2015

for want of a statutory prohibition; An order nullifying the Prosecution of the 3rd , 5th and 6th Petitioners in Cr No. 497 of 2015 for breaching Article 27(1 & 2) read with Article 50(2)(h); An order quashing the proceedings in Cr No. 497 of 2015 for want of a valid Charge Sheet; An order quashing the entire proceedings in Cr No. 497 of 2015 for want of a Charge Sheet prepared and executed by the Prosecution; An order quashing the decision to fix a judgement date in the absence of the 5th Accused while excused from the trial due to sudden illness; An order compelling the Respondents jointly and severally to pay the Petitioners' costs of this suit; Any such other orders or directions that this Court may deem just and fit to grant to meet the exigencies of justice and the requirements of the Constitution of Kenya; An order finding that the Respondents are jointly and severally liable for the harm caused to the Petitioners in violation of the Constitution and the law; An order providing incidental, consequential and aggravated damages against the Respondents in favour of the Petitioners for their arrest, charge, detention and trial for robbery with violence; An order for punitive damages against the Judiciary, Office of the Director of Public Prosecutions, Office of the Director of Criminal Investigations and Office of the Attorney-General for their willful or grossly indifferent violations of the fundamental rights and freedoms of the Petitioners for their arrest, charge, detention and trial for robbery with violence.

180. The Respondents urged the Court, in deciding on possible reliefs, to take into consideration public interest and apply appropriate balance to avoid an eventuality that would create chaos and disruptions in the entire criminal justice system.

181. Article 23 (3) of the Constitution specifies the reliefs that this Court may grant in Constitutional Petitions but proceeds to discretionary give the Court to consider an appropriate relief by stating thus:

“in any proceedings brought under Article 22, may grant appropriate relief, including”

182. The use of the word **‘appropriate relief and including’** makes the list non-exhaustive provided and empowers the Court to consider what in its view, is the appropriate relief, meaning that the Court may not be restricted to the list provided for in the Constitution or what is pleaded by the Parties, it can in appropriate cases, decide on the relief that suits the circumstances of the case. _

183. In **L A W & 2 others v Marura Maternity & Nursing Home & 3 others; International Community of Women Living with HIV (ICW) (Interested Party); Secretariat of the Joint United Nations Programme on HIV/AIDS & 2 others (Amicus Curiae) [2022] KEHC 17132 (KLR)** the Court affirmed this approach by holding thus:

“244. As is the case in constitutional petitions, there are arrays of available remedies. what a court endeavours to do upon confirming of any infringement is to grant an appropriate remedy. Even in instances where a party fails to ask for a specific relief, a court, depending on the nature of the matter ought to craft an appropriate relief...”

184. In the circumstances in this case, I am of the view that there is need to consider appropriate proportionate remedies, that would bring to an end the continuing violations by the Respondents while guarding against abrupt wholesome destructive disruption that crushes the criminal justice system in a manner that is detrimental to the interest of the public and the administration of justice generally, thereby avoiding erosion of public confidence and also ensuring the rights of the victims of offences are also taken into consideration.

185. Considering that the Respondents acknowledge that they have now taken steps towards satisfying the legislative interventions necessary to remedy the ambiguities that led to the said provisions being declared unconstitutional, this Court is of the humble view that judicial supervision through a structural interdict order would be appropriate. It is to be noted that the Kahiga case did not have the framework of a structural interdict order. In making this order, I am guided by the words of the Constitutional Court of South Africa in the case of **Black Sash Trust v Minister of Social Development and Others (Freedom Under Law N) (CCT48/17) [2017] ZACC 8; 2017 (5) BCLR 543 (CC); 2017 (3) SA 335 (CC) (17 March 2017)** where in justifying its decision to issue a structural interdict cited the following words of Mogoeng CJ in Mhlope case thus:

“It bears emphasis that this is an exceptional case that cries out for an exceptional solution or remedy to avoid a constitutional crisis which could have grave consequences. It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy. And that explains the unique or extraordinary remedy we have crafted . . .”

186. The Supreme Court in **Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment)** was emphatic structural interdict can rightly issue under Article 23. The Court explained:

“121. We are however, in agreement with the submissions of the appellant and amicus curiae, to the effect that article 23(3) of the Constitution empowers the High Court to fashion appropriate reliefs, even of an interim nature, in specific cases, so as to redress the violation of a fundamental right. As this court has already made an authoritative pronouncement on this matter, we shall say no more. While we acknowledge the fact that the functus-officio doctrine retains its validity, even vitality, in the majority of cases, both criminal and civil, it is our view that in certain situations, this doctrine ought to give way, albeit on a case-by-case basis. To subject article 23 of the Constitution to the limitations of order 21 of the Civil Procedure Rules, would stifle the development of court-sanctioned enforcement of human rights as envisaged in the Bill of Rights. Where a court of law issues an order,

whose objective is to enforce a right, or to redress the violation of such a right, it cannot be said to have abdicated its judicial function as long as the said orders are carefully and judicially crafted.

122. *Having stated thus, we hasten to add that, interim reliefs, structural interdicts, supervisory orders or any other orders that may be issued by the courts, have to be specific, appropriate, clear, effective, and directed at the parties to the suit or any other State Agency vested with a constitutional or statutory mandate to enforce the order. Most importantly, the court in issuing such orders, must be realistic, and avoid the temptation of judicial overreach, especially in matters policy. The orders should not be couched in general terms, nor should they be addressed to third parties who have no constitutional or statutory mandate to enforce them. Where necessary, a court of law may indicate that the orders it is issuing, are interim in nature, and that the final judgment shall await the crystallization of certain actions.”*

187. Despite the violations, this Court finds that an immediate order that stops all prosecutions for robbery, robbery with violence and attempted robbery with violence would create an unprecedented turmoil and confusion that would do cause much harm and uncertainty hence more specific realistic measures under judicial supervision would eventually remedy the harm without igniting an explosive impairment of the entire criminal justice system.

188. Judicially supervised interventions (structural interdicts), will, in my view, provide a more affectatious remedy of

addressing this lingering problem within realistic timeframes. In **Republic v Council of Legal Education; Commission for University Education (Interested Party) (Miscellaneous Civil Application 16 of 2016) [2016] KEHC 7535 (KLR) (4 April 2016) (Judgment)** the Court underscored the utility of structural interdict by stating thus:

“144. One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our Article 23 is what is called structural interdict. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts have been isolated in this respect. In the first instance the court issues a declaration identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations. Secondly, the court mandates government compliance with constitutional responsibilities. The third stage is that the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government's action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth,

once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders... After court approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government's failure to adhere to its plan (or any associated requirements) essentially amount[s] to contempt of court. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Structural interdicts also provide significant advantages for the political branches. The very process of formulating and presenting a plan to the courts can improve government accountability, helping officials identify which organ or department of the State is responsible for providing particular services or for ensuring access to specific rights. In addition, structural interdicts have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst also assisting the judiciary in

gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties. The “check in” hearings that follow the initial interdict facilitate information sharing between qualified experts and government officials grappling with critical policy decisions and may clarify the content the rights at stake. In addition, structural interdicts may help authorities comply with otherwise politically unpopular constitutional obligations. An explicit court order to satisfy constitutional obligations can support government officials against pressure from small but politically powerful interest groups opposed to certain rights. Finally structural interdicts may provide a more fundamentally fair outcome than other remedies in Economic and Social Rights litigation...”

189. This Court is satisfied that the Petitioners have established the continuing violations of their rights by the Respondents. However, this Court has a duty to weigh the vindication of an individual’s right vis-vis the disproportionate harm that granting of such orders may cause to the public and interests of justice as a whole. In my humble view, issuing a blanket order that prohibit immediately all trials for robbery with violence or ordering the release of all persons undergoing those trials or prohibition of any arraignment with immediate effect, would be inimical to the overriding interest of justice that transcends the interest of parties in a constitutional petition. While this Court duly acknowledges there has been non-compliance with Kahiga judgment, and thus the State is guilty of continuing violations, this Court

opines, that the specific orders sought by the Petitioners are not in themselves the appropriate remedy and thus would exercise its discretion to fashion what in its view, are the appropriate reliefs.

190. The orders that commend themselves for issuance in this Petition are thus as follows:

- a) A declaration that, since 15th March 2018, the Respondents continue to violate Articles 2(2) & (4), 3(1), 20(1), 21(1), and 21(3) of the Constitution through arresting, charging, arraigning, detaining, trying and/or convicting people under Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code as these provisions were declared unconstitutional in Kahinga decision due to their ambiguity in definition of the offences thus violating Article 50 (2) (b) of the Constitution.**
- b) A declaration that, since 15th March 2018, the Respondents, have violated the fundamental rights and freedoms of all individuals arrested, charged, arraigned, detained, held in custody, tried, convicted, or sentenced under Sections 295, 296(1), 296(2), 297(1) and 297(2), including rights guaranteed under Articles 27, 28, 29, 48, 50(2)(b) and (n).**
- c) In the interest of administration of justice and to safeguard public interest by avoiding legal vacuum in respect of grave criminal offences and to facilitate orderly legislative intervention towards correcting the defects that led to declaration of unconstitutionality**

of the impugned provisions of the Penal Code, the operation and the effect of orders specified in (a) & (b) above are hereby suspended until the 30th of June, 2027 to allow for the judicial supervised interventions that would ensure compliance.

- d) For the next eighteen (18) months, the Attorney General, the Director of Public Prosecutions and the Parliament shall be required to file an affidavit in this Court every six months commencing on the 30th June 2026 and thereafter, on or before 30th of every 6th month and ending on 30th June 2027 detailing the specific legislative, administrative or policy measures taken towards addressing the ambiguities in law that occasioned the declaration of unconstitutionality of sections 295, 296 and 297 of the Penal Code and, update on the Parliamentary processes involved including the timelines thereof.**
- e) Upon expiry of the 18 months suspension of the declaration of invalidity, on the midnight of 30th June, 2027:**
- i) The declaration of invalidity in respect of Section 295, 296 (1), 297 (1) and 297 (2) of the Penal Code Cap 63 (in the current form) shall take effect forthwith**
 - ii) Any pending/or fresh charges, prosecutions or proceedings based on the aforesaid provisions of the Penal Code (in the form declared unconstitutional) by midnight of 30th June, 2027 stand quashed for the unconstitutionality, and any affected person shall be set free forthwith unless**

where the continuation of such charges, prosecution or trial is justified under any other valid law.

f) Each Party shall bear its own costs.

Dated, signed and delivered in Open Court at Nairobi this 28th January, 2026.

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L N MUGAMBI

JUDGE

ORIGINAL