

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL, HUMAN RIGHTS & JUDICIAL REVIEW
DIVISION
PETITION NO. E002 OF 2025

YUSUF YAQOOB1ST PETITIONER
YAQOOB IBRAHIM2ND PETITIONER
SALEEM MOHAMMAD3RD PETITIONER
BHATTI ABDULGHAFOOR4TH PETITIONER
BAKSHI MOULA5TH PETITIONER
PAKABDOL GHAFARS6TH PETITIONER

-VERSUS-

ATTORNEY GENERAL1ST RESPONDENT
DIRECTOR OF PUBLIC PROSECUTIONS.....2ND RESPONDENT
INSPECTOR GENERAL OF POLICE3RD RESPONDENT

JUDGMENT

1. Sometime in the year 2014, the petitioners were charged in the Mombasa Chief Magistrates’ Court Criminal Case No. 1255 of 2014 with the offence of trafficking in drugs contrary to section 4 (a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994. On 17 February 2023, the petitioners were eventually convicted of the offence. In its judgment delivered on even date, the court (Honourable Mutuku (Ms), Chief Magistrate) held:

“Consequently, I have come to the conclusion that the state has proven its case beyond reasonable doubt against Yousuf Yaqoob, Yaqoob Ibrahim, Saleem Muhammad, Bhatti Abdul Ghafoor, Bakhsh Moula, Pak Abdolghafar and Muhammad Saleh and I

hereby find them guilty of trafficking in Narcotic drugs contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act No. 4 of 1994 and I proceed to convict them accordingly under section 215 of the Criminal Procedure Code.”

2. Three of the petitioners’ co-accused were acquitted of the charges and set free. The petitioners were subsequently sentenced to life imprisonment. Each of them was also fined Kshs. 3,966,336,000/= in default of which they were to serve one year imprisonment.
3. It is against this background that the petitioners have, in the instant petition, petitioned this Honourable Court for the following orders:

“1. A declaration that the Charges levelled against the Petitioners are illegal and unconstitutional because they fail to meet the standards set out in Article 50 of the Constitution of Kenya, 2010.

2. A declaration that the sentence of life imprisonment entered by the learned trial Magistrate Hon. M.W Mutuku delivered on the 17th of February 2023 and 10th March 2023 respectively in Mombasa Criminal Case No. 1255 of 2014 involving the Petitioners herein is unconstitutional as far as application of

fundamental rights and freedoms of the Petitioners are concerned.

3. An order that the Honourable Court to quash the sentence of life imprisonment against the petitioners in Mombasa Criminal Case No. 1255 of 2014 for being in contravention of Articles 27, 28, 29 (f) and 50 (2) (p) of the Constitution of Kenya 2010.

4. An order that that the petitioners jointly to be found to have served their sentence by virtue of being in custody since 2014 when the matter was instituted against them and be released unconditionally.

5. A declaration that in the alternative, the Petitioners jointly be repatriated to their Country of origin at their own expense of their Government of Origin which is the Government of Pakistan;

6. An order of compensation for breach of the Petitioners' rights.

7. An order that That the respondents bear the costs of the petition herein.

8. An order Any other relief that the Honourable Court may deem fit and just to grant in the Interest of justice (sic).”

The petition is dated 24 January 2025.

4. The affidavit in support of the petition has been sworn by Mr. Mohamed Munir Chaudri who has sworn that he is an advocate of this Honourable Court of 55 years standing and that he represents the petitioners.

As to why he is swearing the affidavit in support of the petition, Mr. Chaudri has sworn as follows:

“That I have personal knowledge of the facts of this matter by virtue of my regular visits to the Petitioners while incarcerated, having communicated with them since their arrest on the 2nd day of July 2014. I also derive my knowledge from information provided to me by the Petitioners and documents relevant to this case.”

5. He has proceeded to swear that the Petitioners were jointly charged with the offence of trafficking in narcotic drugs by way of conveyance, contrary to Section 4(a) of the Narcotic Drugs and Psychotropic Substances Control Act, in Mombasa Criminal Case No. 1255 of 2014 and after what he has described as a “prolonged trial spanning approximately eight (8) years” , the petitioners were convicted on 17 February 2023 and, subsequently, sentenced on 10 March 2023 to life imprisonment. In addition, they were each fined KShs.3,966,336.00, with a default sentence of one-year imprisonment.

6. The charges against the petitioners, arose from the interception of a small vessel allegedly carrying narcotic drugs, purportedly disguised as white cement. The ship, enroute to Zanzibar from Iran, was intercepted by the Kenyan Navy in the international waters after refuelling at a Somali/Ethiopian port. The individuals on board included seven (7) Pakistani nationals, three Kenyan shipping agents and two Indian nationals. There was also one Iranian national.
7. Following initial investigations, the three (3) Kenyan shipping agents were “mysteriously” acquitted, and the two Indian nationals were released shortly after their arrest. However, the Petitioners, alongside six (6) other Pakistani nationals and one Iranian national, were convicted and sentenced to life imprisonment, despite what Mr. Chaudri believes was inconclusive evidence linking them directly to the alleged crime. One Pakistani national died before the conclusion of the trial, raising concerns about delayed justice.
8. According to Chaudri, the prosecution’s case relied heavily on the ship as the central piece of evidence. However, the vessel was destroyed at sea in what is alleged to be dubious circumstances, thereby irreparably destroying evidence critical to the petitioners’ prosecution. The destruction of the vessel is said to have violated the Petitioners’ rights to a fair hearing and trial, as guaranteed under articles 25(c) and 50(2) of the

Constitution of Kenya, 2010, which provide for the right to a fair trial as an absolute and non-derogable right.

9. The destruction of the vessel further undermined the principles of evidence preservation and judicial integrity, depriving the Petitioners of a reasonable opportunity to challenge the evidence against them.
10. The Petitioners have remained in custody since 2 July 2014, exceeding 11 years, in violation of their right to an expeditious trial under article 50(2)(e) of the Constitution. Additionally, they claim to have been held incommunicado, without access to their families, contrary to their rights under article 51(1) of the Constitution, which safeguards the rights of persons detained, held in custody, or imprisoned.
11. In what clearly appears to be legal issues disguised as matters of evidence, Mr. Chaudri has contended that the Petitioners challenge the constitutionality of the life sentence imposed by the trial court, arguing that the failure to account for time served in custody violates Section 333(2) of the Criminal Procedure Code, cap. 75 which provides that a sentence must consider the period spent in custody prior to conviction. Specifically, Section 333(2) of the Criminal Procedure Code provides that *“subject to the provisions of Section 38 of the Penal Code (Cap. 63), every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person*

sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody,”.

12. It is also contended that the Petitioners also rely on Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines, which underscore that failing to account for pre-trial detention leads to excessive and disproportionate punishment, contravening the principle of fair administration of justice under Article 27(1). The proviso to section 333(2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial and that failure to do so impacts the overall period of detention, which may result in an excessive punishment that is not proportional to the offence committed. This is emphasised in Clause 7.11 of the Sentencing Policy Guidelines which provides that in determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial period, which in this case is from 2014.

13. According to Mr. Chaudri, the Petitioners' conviction and sentence to life imprisonment violate their right to equality before the law, as guaranteed by article 27 of the Constitution which is in contravention with Court of Appeal decision in **Julius Kitsao Manyeso vs. Republic Criminal Appeal No. 12 of 2023** where the Court is said to have held that an

indeterminate life sentence, without any prospect of release or review, is unconstitutional, discriminatory, unfair, and repugnant to the principle of equality before the law. The learned counsel contends that the Petitioners are subjected to a sentence that is not only disproportionate but also inhumane. The imposition of a life sentence without the possibility of review or release constitutes inhumane treatment and violates the Petitioners' right to dignity as enshrined under article 28 of the Constitution.

14. It is also contended that the sentence meted out against the petitioners is inconsistent with the principle of the least severe punishment, as guaranteed by article 50(2)(p) of the Constitution which ensures that an accused person benefits from the least severe punishment if the penalty prescribed for an offence has changed between the time the offence was committed and the time of sentencing. The Petitioners, it is alleged, were not granted this benefit, as their sentence was disproportionate to the offence they were convicted of.

15. The prolonged detention of the Petitioners for more than 11 years without a fair trial is argued to be a violation of their right to freedom and security under article 29 of the Constitution. It is also alleged that the Petitioners have been denied communication with their families, which is a further violation of their rights under article 51(1) of the Constitution.

16. It is further urged that the sentence of life imprisonment imposed by the trial court is inconsistent with Section 4 of the Narcotic Drugs and Psychotropic Substances Control Act, which does not prescribe life imprisonment as a mandatory sentence for the offence of trafficking in narcotic drugs and as such, the trial magistrate erred in law by imposing such a sentence.

17. The Petitioners contend that their right to a fair hearing, as guaranteed under article 50 of the Constitution of Kenya, 2010, was contravened in the following respects:

a) Right to a fair and public hearing. Article 50(1) provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The trial process leading to the life imprisonment sentence fell short of this requirement, considering the Petitioners were not afforded reasonable accommodations as foreign nationals unfamiliar with the Kenyan legal system.

b) Right to a fair trial; article 50(2) guarantees every accused person the right to a fair trial, including the right:

(a) To be presumed innocent until the contrary is proved;

- (b) To be informed of the charge with sufficient detail to answer it;
- (c) To choose, and be represented by, an advocate, and to be informed of this right promptly;
- (d) To be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
- (e) To benefit from the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence changes between the time the offence was committed and the time of sentencing.

18. It is contended that the imposition of a life sentence without proper consideration of mitigating factors, such as the prosecution's advanced age, prolonged period of incarceration during trial, and their rights to rehabilitation and reintegration into society, violated their right to a fair trial under article 50(2)(p) of the Constitution. Lack of consideration of the Petitioners' status as foreign nationals, the linguistic and procedural barriers they faced during trial, and their resultant inability to fully exercise their rights to adequate legal representation and the opportunity to be heard further undermines the principles enshrined under article 50(2)(a), (b), and (g) of the Constitution.

19. The petitioner's trial, it is alleged, violated their constitutional rights as foreign nationals under the Constitution of Kenya, by failing to uphold the safeguards designed to ensure substantive and procedural fairness in proceedings involving foreign individuals.
20. Despite the trial court's finding that it had jurisdiction under the Constitution, it failed to recognize and mitigate the unique vulnerabilities faced by the Petitioners as foreign nationals, including linguistic and procedural barriers that limited their full participation in the trial. Their inability to secure adequate legal representation due to unfamiliarity with Kenyan law and legal processes contributed to their denial of a fair trial.
21. The Petitioners' right to interpretation was violated, as they did not have meaningful access to translation services, contrary to article 50(2)(m), which guarantees an accused person the right to the assistance of an interpreter if they cannot understand the language used at the trial.
22. It is Mr. Chaudri's position that the Petitioners' fundamental rights under the Constitution of Kenya, have been egregiously violated in the following manner: the destruction of the ship, which was the key evidence in the case, deprived the Petitioners of a fair chance to contest the evidence presented against them, in violation of articles 25(c) and 50(2) of the Constitution. Furthermore, the prolonged pre-trial detention, lasting more than eight years, infringed upon their right to a trial within a reasonable time, as provided under article 50(2)(e) of the Constitution.

23. The death of one of the accused persons, aged 80 years, prior to the trial's conclusion exacerbated the violation of the Petitioners' rights under article 50, as the protracted legal process denied him the opportunity to clear his name or seek justice.

24. Further, the life sentences imposed on the Petitioners are excessive and disproportionate considering the following factors:

a) The Petitioners have already served over 11 years in custody, a duration that exceeds reasonable punitive measures for the alleged offence.

b) The Petitioners are advanced in age, with significant health and family responsibilities.

c) Rehabilitation and reintegration into society should be prioritized as principles of justice.

In view of the foregoing, Mr. Chaudri has urged this Honourable Court to consider granting the following reliefs:

a) That the Petitioners be released from custody, taking into account the period already served.

b) That the Petitioners be repatriated to their home country, Pakistan, at their expense or with the assistance of their government.

25. The learned counsel has invited this Honourable Court to consider the application of Section 333(2) of the Criminal Procedure Code and Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines, which obligate courts to account for the time already spent in custody. Failure to do so results in excessive and disproportionate punishment and that the continued detention of the Petitioners is not only unlawful but also a grave miscarriage of justice, necessitating urgent intervention by this Honourable Court.

26. In light of the foregoing, the Petitioners respectfully request that this Honourable Court: declare the proceedings and sentence in Mombasa Criminal Case No. 1255 of 2014 to be unconstitutional, illegal, and void; order their release and repatriation, taking into account the time already served in custody; and grant any other reliefs that the Court may deem just and appropriate.

27. Ms. Maureen Anyumba swore a replying affidavit on behalf of the 2nd respondent. The learned counsel has introduced herself as a principal prosecution counsel and admitted that indeed the petitioners were charged and convicted of the offence of drug trafficking as stated by Mr. Chaudri.

28. However, Ms. Anyumba has sworn that the petitioners lodged an appeal against both the conviction and sentence by way of a petition dated 3 September 2024. It is urged on behalf of the 2nd respondent that by virtue of section 354(3) of the Criminal Procedure Code, the appellate court is

clothed with powers to address the issue of sentencing. The aspect of sentencing having formed part of the petitioners' grounds of appeal, the petitioners are wrongly before this Honourable Court.

29. According to Ms. Anyumba, the time spent in remand custody in computation of sentence is a matter that can be determined by the appellate court and the petitioners having not exhausted all avenues of appeal should allow the appellate court to determine the issue of sentencing. It was within the trial magistrate discretion to grant the appropriate sentence and it is also within the power of the appellate court to question the exercise of judicial discretion on whether the sentence was excessive. In a nutshell, the issues raised by the petitioners in this petition are issues that have been covered in their appeal.

30. It is urged that under the doctrine of Constitutional avoidance, the Honourable Court should refrain from determining the issues raised in this petition.

31. That notwithstanding, it is urged that according to section 4(a) of the Narcotic Drugs and Psychotropic Substances Act, a person convicted under that Act is liable to life imprisonment.

32. According to article 165 (3)(d) of the Constitution, this Honourable Court, sitting as a first appellate court has original jurisdiction to determine constitutional questions including the constitutionality of the life sentence meted out against the petitioners.

33. It is further urged that it is trite that a wrong decision by a court of competent jurisdiction does not equate to violation of the fundamental rights of a losing party if it is liable to be set aside through an appeal. Accordingly, the 2nd respondent contends that the petition is an abuse of the due process of this Honourable Court and hence should be dismissed.

34. I have considered the petition and the response thereto together with the submissions filed by the contesting parties.

35. One fact material to the petitioners' petition which the petitioners suppressed from their petition and which only came to light in the 2nd respondent's replying affidavit is the appeal the respondents filed against the impugned judgment. In the affidavit sworn by Ms. Anyumba, a copy of the petition filed in Criminal Appeal No. E022 of 2023 has been exhibited. Considering the centrality of the appeal to the outcome of this petition, it is necessary that I reproduce the entire petition here; it reads as follows:

“REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

HCCRA/E022/2023

YOUSU YAQOOB.....1ST APPELLANT

YAQOOB IBRAHIM.....2ND APPELLANT

SALEEM MUHAMMAD.....3RD APPELLANT

BHATTI ABDULGHAFOOR.....4TH APPELLANT

BAKSH MOULA.....5TH APPELLANT

MUHAMMAD SALEH.....6TH APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

PETITION FOR APPEAL

(Being an Appeal against the conviction and sentence of the Hon. M. Mutuku Senior Chief Magistrate delivered on 22nd February 2023 and subsequently sentenced on 10th March 2024 in Mombasa Chief Magistrate's Criminal Case No. 1255 of 2014).

The Appellants/Applicants, YOUSUF YAQOOB, YAQOOB IBRAHIM, SALEEM MUHAMMAD, BHATTI ABDULGHAFOOR, BAKHSH MOULA and MUHAMMAD SALEH having been convicted and sentenced to serve life imprisonment and in addition to pay a fine of Kshs. 3,966,336,00 or serve one year in default by the Hon. M. Mutuku Senior Chief Magistrate delivered on 22nd February 2023 and subsequently sentenced on 10th March 2024 in Mombasa Chief Magistrate's Criminal Case No. 1255 of 2014, hereby appeal against the conviction, judgment

and the sentence of the court on the following grounds, among others:-

1.The trial court destroyed the evidence upon which the conviction and sentence accrued, by reason of which the appellants/applicants are held and continue to be held in the absence of any evidence that sustained the charge, conviction and sentence.

2.i. The Learned Trial Magistrate caused a travesty of justice on the face of the record (page 2 record of proceedings by going ahead to read out the charges in open court without first ensuring there was availability of a Translator/interpreter for the benefit of the Appellants/Applicants, viz: “The substance of the charge(s) and every element thereof has been stated by the Court by the accused person in the language that the accused understands when being asked whether he/she admits or denies the truth of the charge(s) replied”.

ii. (page 2 record of proceedings clearly shows the Column for 'interpretation' marked as without any representative)

3. The learned trial magistrate caused a miscarriage of justice by going ahead to read out the charges without first seeking to know whether the appellants, foreigners of Pakistani origin,

understood English as the language in open court a language alien to the appellants (page 2 record of proceedings), Viz: “charge read over and explained in Kiswahili.”

4. In the learned trial magistrate erred in law and in fact by proceeding to try the appellants on account that the appellant language was “Pakistan” (page 3 of proceedings) when, in fact, evidence will be shown to confirm no such language exists in more than eighty (80) languages of Pakistan.

5. The Trial Magistrate erred in law and in fact by subjecting the Appellants to a 'fresh charge' and forcing them to plead to the same (page 31 record of proceedings):"read to the accused in English language translated into Urdu and Kiswahili language when, in fact, nowhere in the entire record is there evidence that the appellants stated that they speak “Urdu” language or Kiswahili language.

6. The Learned Trial Magistrate erred in law and in fact by subjecting the Appellants to the vagaries of a Trial without legal representation' knowing that as foreigners who were arrested while in the High Seas, holed up in their Ship for weeks, had no access to their embassy or representative and, therefore, lacked the capacity to find a lawyer or their choice to be duly instructed

to appropriately represent them during the trial and, accordingly, any purported legal representation during the trial was not by the choice or instructions of the appellants.

7. The learned trial Magistrate misunderstood and misapplied the law specifically sections to 234 and 251 of the Penal Code.

8. The learned to a magistrate erred in law and in fact by convicting the accused persons in proceedings that were conducted in a language that they did not understand; a purported translator who masqueraded and was allowed by the court to participate in the proceedings did not produce any formal identification, qualifications, accreditation, testimonials, credentials or certification in proficiency and capacity to translate technical judicial proceedings for the benefit of all parties concerned and, in particular, the appellant/applicants.

9. The Appellants/Applicants were ordered to be taken to Court to take Plea purely on account of an alleged 'retrieval' with the naked eye of a 'suspicious package' (page 51 record of proceedings) which had not been subjected to any or further examination, thereby prejudicing the entire process.

10. The Appellants were taken to Court without the benefit of legal representation which the Court admitted to have been the

case (page 51 record of proceedings), Viz: “they had no advocate”.)

11. The learned magistrate erred in law and in fact by convicting the accused persons on a charge without sufficient detail to allow them to answer to

12. The learned trial magistrate erred in law and in fact by relying on a defective charge sheet including substitution of charges dated 9th July 2014 which stated the charges to include “trafficking in narcotic drugs...” when, in fact, the alleged parcels had not yet been subjected to Government chemists for analysis to prove the content, which was done.

13. The learned magistrate erred in law and fact by relying on evidence whose chain of custody could not be ascertained to convict and sentence the Appellants/Applicants, including search, retrieval, transfer to official Government Chemist centres, Analysis and Preparation of Report, including presenting the same to Court, even worse without a representative of the Appellants.

14. The Appellants/Applicants were arrested, searched and traumatized with complete disregard to their status as foreigners, without the presence of a representative of their foreign Mission

or Embassy staff, as well as absence of a legal representative to witness the horror of a search for more than two weeks, and in particular from 2nd July 2014 to 18th July 2014.

15. The appellants/applicants were held incommunicado throughout the period of search and arrest without the presence of a medical doctor and a counsellor, cognizant of the fact that one of their colleagues had died without according to deceased the necessary rituals appurtenant to their religion or custom thereby causing them untold and immense torture to such an extent that by the time they were being charged and prosecuted they were not in their right frame of mind whatsoever.

16. The learned magistrate erred in law and in fact by relying on evidence whose origination, source or chain of custody could not be ascertained or verified to convict and sentence the appellants/applicants.

17. The learned magistrate erred in law and fact by relying on planted evidence whose search and collection was in the absence of the Appellants'/ Applicants' Legal Counsel or legal advice / representation, which was not made available as a matter of right accruing to every human being, more so the Appellants being foreigners.

18. The Trial Magistrate violated the provisions of the Constitution of Kenya, 2010, particularly Article 50 that wouldn't permit such a trial without framing the case for the Accused Persons in order for them to know the specific cases confronting them; in any case, the Accused did not possess the competences to be able to understand the complexities of legal intricacies that come with a sophisticated language such as English which they could not in any way comprehend.

19. The learned trial magistrate erred in law and in fact by convicting and sentencing the appellants to life imprisonment by relying solely on her own assessment but not borne out of the evidence which, in any event was flawed.

20. That the findings of the trial magistrate were against the weight of the available evidence and in particular the whole trial process.

21. The evidence was allegedly taken for forensic analysis at a place and in a process where the appellants/applicants did not have the benefit or opportunity to be present in person or have a representative to witness on their behalf and represent their interests

22. The search and gathering of the alleged evidence was undertaken during both day and in the night, including up to 10PM in particular instances, a process which violated the personal privacy and human rights of the Appellants as accused persons at the time of the trial

23. The Appellants/ Applicants were prejudiced as the case confronting them assumed a high-segment political interest with the Head of State of the Republic of Kenya Hon. Uhuru Kenyatta together with Senior officials of the Government of Kenya giving executive orders for the destruction of the vessel and the evidence "in order to demonstrate to the world that Kenya did not tolerate 'narcotics in her territory', a matter of public notoriety that went against the principle of a fair trial without external influence and interference whatsoever, by reason of which the accused were already presumed to be guilty even before the trial was concluded.

24. The said political interest by the President of the Republic of Kenya adversely affected and prejudiced the innocence of the accused who were already convinced no matter the process they would end up being found guilty, which ended up being the case; it is noteworthy that the court did not issue a public and formal

warning to the Executive and the Government of the Republic of Kenya against conducting a 'public lynch mob' prosecution of the accused before the trial could be concluded thereby exposing the accused to unwarranted political persecution especially on a foreign soil where they did not even have a representative from their embassy or foreign mission.

25. The Investigating Officer did not tender any iota of any 'Intelligence Briefing' or background that led him to dispatch a Team of Officers to 'nail that particular vessel', which gave rise to a reasonable suspicion that the whole process was a scheme and the whole evidence and charges wholly trumped up as against the Accused, a determination which the Trial Magistrate ought to have found in favour of the Accused in the absence of any explanation to the contrary.

26. The destruction of the evidence in particular the shelling and blowing up of the vessel in the middle of the sea in the full glare and witness of the whole world while the trial was still underway on the orders of the Head of State of the Republic of Kenya who witnessed the exercise with the helicopters providing cover in the skies and the international community witnessing and watching through international and national media was a clear indication

that the case the accused were facing had already been determined in the eyes of the world.

27. The trial was conducted without due regard to the provisions of the United Nation's Convention on the Law of the Sea 1982 which is the global foundational law that governs all activities in national as well in international waters, as well as all other Conventions, Treaties and Agreements to which the Republic of Kenya is a party and a signatory in furtherance of Article 2(5) of the Constitution of Kenya, 2010.

28. The arrest and search of the vessel aboard which the Accused were travelling as Crew was not adjudged to have been sailing on national territory such as the Exclusive Economic Zone or, indeed, International Waters in which case appropriate legal interventions would have applied, including regional instruments within the Regional Economic Community framework under the Inter-Governmental Authority on Development [IGAD] in relation to Maritime Security.

29. The learning trial magistrate erred in law and in fact by shifting the burden of proof to the appellants.

30. They learned a trial magistrate erred in law and in fact in convicting and sentencing by relying solely on extraneous material that amounted to hearsay.

31. The learned trial magistrate erred in law and in fact by convicting and sentencing when it was unsafe to do so.

32. The learned trial magistrate wrongly exercised discretion in passing a maximum sentence against compelling evidence to the contrary while relying on an entirely flawed process of arrest, incarceration, seizure and trial among other mitigating considerations which ought to have been held in favour of the appellants.”

The petition is dated 3 December 2024.

36. I have reproduced the petition *in extenso*, in part, to demonstrate that the issues which the petitioners have raised in this petition have been raised as grounds of appeal in the appeal filed against the impugned judgment.

37. In a judgment delivered on 29 May 2025, Kagendo, J. quashed the petitioners’ conviction and set aside the sentence. The learned judge held, *inter alia*:

“211. From all this, the court finds that the charge as drawn was defective and the elements thereof not proved. Further, there

were too many breaches of the law that the appellants cannot be said to have had a fair trial. They cannot be described as minor breaches which can be ignored. Accordingly, the appeal succeeds. 212. The conviction is quashed and the 7 appellants acquitted of the charge of trafficking in narcotic drugs contrary to Section 4(a) of the Narcotic drugs and Psychotropic Substances Control Act No. 4 of 1994. The sentence is set aside and the 7 appellants may be set at liberty. It is so held.”

38. There is no doubt that when the petitioners opted to appeal against the trial court’s judgment, they thereby exercised their right under article 50 (2) (q) of the Constitution which provides that:

50 (2) Every accused person has the right to a fair trial, which includes the right—

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

39. Section 347 of the Criminal Procedure Code also provides that a person convicted of an offence by the magistrates’ court may appeal to this Honourable Court. This section reads as follows:

347. Appeal to High Court

(1) Save as is in this Part provided—

(a) a person convicted on a trial held by a subordinate court of the first or second class may appeal to the High Court.

Subsection (2) of section 347 of the Criminal Procedure Code provides that an appeal to this Honourable Court may be on a matter of fact as well as on a matter of law.

40. It is trite that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed (see **Speaker of the National Assembly –versus- James Njenga Karume (1992) Eklr.**)

41. The Constitution and the Criminal Procedure Code are clear that the recourse available to a person convicted of an offence is an appeal to a higher court and not a constitutional petition. The appeal, by the petitioners, to this Honourable Court, against their conviction and sentence, demonstrates the petitioners' awareness that the remedy to their grievances was always through an appeal and not a constitutional petition.

42. Going by the provisions of article 165(3) of the Constitution, this Honourable Court could competently deal with constitutional questions regarding the arrest, arraignment and the trial of the petitioners in the context of their appeal against the decision of the trial court. After all, it has been noted what has been raised as the grounds upon which the

instant petition is founded are more or less the same grounds upon which decision of the trial court has been challenged. Article 165 (3) on jurisdiction of this Honourable Court reads as follows:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

43. Nothing restricts the exercise of jurisdiction of this Honourable Court under article 165(3) to constitutional petitions; whenever it is necessary and appropriate to do so, the court will always pronounce itself on any question in exercise of its jurisdiction under article 165(3) irrespective of whether the proceedings before it are what one would refer to as a constitutional petition. I suppose it is in this context that the learned judge in her judgment allowing the petitioners' appeal concluded that "*...there were too many breaches of the law that the appellants cannot be said to have had a fair trial.*"

44. I need not say more save to reiterate that the fact that the petitioners suppressed the fact that they had an appeal pending in this Honourable Court against the same decision they have impugned in this petition at the time they filed the petition is sufficient to deny them any of the prayers sought for material non-disclosure. Even then, it is not open for this Honourable Court to delve into the same issues that were either raised or

ought to have been raised in the appeal filed against the impugned decision. In short, the applicant's application is not only misconceived and an abuse of the due process of this Honourable Court but it is also bad for being *sub judice*.

45. What's more, the petitioners' appeal has been determined in their favour. Following the overturning of the judgment of the trial court consequent upon which the conviction of the petitioners was quashed and their sentence set aside, the petitioners' grievances have, by and large been adequately addressed. In the final analysis, there is no merit in the petitioners' petition. It is hereby dismissed. I make no orders as to costs.

Signed, dated and circulated on the CTS on 20 February 2026

Ngaah Jairus
JUDGE