Kamau v Republic (Constitutional Petition 1 of 2022)
[2024] KEHC 2902 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2902 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CONSTITUTIONAL PETITION 1 OF 2022

OA SEWE, J

MARCH 20, 2024

IN THE MATTER OF THE CONSTITUTION OF KENYA,

SUPERVISORY JURISDICTION, PROTECTION OF

FUNDAMENTAL RIGHTS OF AN INDIVIDUAL

AND

IN THE MATTER OF ENFORCEMENT OF THE BILL RIGHTS

UNDER ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE BILL

OF RIGHTS UNDER ARTICLES 19, 24, 25, 26, 27, 29 AND 35

OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLE 49 OF THE CONSTITUTION OF

KENYA

BETWEEN

BETWEEN

PETER WARUI KAMAU ..... PETITIONER

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The petitioner, Peter Warui Kamau, filed this Petition on 2nd February 2022 pursuant to Article 22(1) of the *Constitution* for redress of violations of his rights. He complained that:

   (a) He was detained for more than 24 hours in a police cell and was not arraigned in court in accordance with Article 49 of the *Constitution*.

   (b) That he has been discriminated against after his co-accuseds were re-sentenced from death to imprisonment terms ranging from 12 to 16 years, while he is still under death row.

   (c) That in the premises, Articles 19, 24, 25, 26, 27, 50(1), 51(1), 159 of the *Constitution* have been contravened.

2. Accordingly, the petitioner prayed for a declaration that his constitutional rights have been violated; and an order for his immediate release from custody. In his Supporting Affidavit sworn on 1st February 2022, the petitioner averred that he was arrested on 18th October 2013, which according to him was on a Thursday, and arraigned before the subordinate court on 22nd October 2013 on a charge of robbery with violence contrary to Section 295 as read with Section 296(2) of the Penal Code. He added that he was charged jointly with 4 others and that, although he denied the allegations against him, he was ultimately found guilty and sentenced to death on 30th June 2016.

3. The petitioner further averred that he appealed against his conviction and sentence but the appeal was dismissed and the sentence confirmed by Hon. A. Ongeri, J. on 2nd August 2018. He thereafter filed an application for re-sentencing as did his co-accuseds; but that the applications of his co-accuseds, being Petitions Nos. 110 of 2019, 117 of 2019, 161 of 2020 and 23 of 2021, were consolidated and determined to the exclusion of his petition, Petition No. 71 of 2021. He averred therefore that his co-accused were thereafter re-sentenced to imprisonment for periods ranging from 12 to 16 years in a judgment delivered on 7th June 2021.

4. On account of the foregoing, the Petitioner contended that he has been discriminated against, as compared to his co-accused persons who were re-sentenced and have since been released from prison. In this regard, the petitioner alleged violation of Articles 25, 27 and 28 of the *Constitution*.

5. The petitioner also averred that his rights under Articles 24, 25, 28, 29, 49, 50, and 51(1) have been violated in that, while he was arrested on the 18th October 2013, he was not arraigned in court until 22nd October 2013; way past the period provided for under Constitution. He also averred that his Charge sheet wrongly indicated that he was arrested on the 19th October 2013, whilst he was, in fact, arrested on the 18th October 2013. In his assertion, the discrepancy rendered the Charge Sheet defective; and therefore, the Charge Sheet ought to have been amended in accordance with the provisions of Section 214 of the Criminal Procedure Code. The petitioner annexed copies of the proceedings and judgment of the lower court, the judgment of the High Court on appeal, as well as the judgment of the High Court on revision to his Petition to buttress his averments. He also filed written submissions on which he relied to urge the Petition.

6. Thus, in his written submissions filed on 2nd February 2022, the petitioner proposed the following issues for determination:

   (a) Whether during the trial process there was non-compliance with Article 49 of the *Constitution*;

(b) Whether there was contravention of Articles 24, 25, 27, 28, 29 of the *Constitution*;

7. On the basis of the proceedings of the lower court, the petitioner urged the Court to find as a fact that he was arrested on Thursday 18th October 2013 and arraigned before the lower court on Monday 22nd October 2012; and therefore that his constitutional right under Article 49(1)(f) was violated. He relied on Criminal Application No. 123 of 2007: Mutai v Republic, Criminal Application No. 119 of 2004: Gerald Macharia Githeka v Republic and Criminal Appeal No. 35 of 2006: Paul Mwangi Murunga v Republic in urging the Court to find in his favour.

8. At paragraphs 35 to 41 of his written submissions, the petitioner addressed the Court on Articles 22(1) and 23(1) of the *Constitution* and the need for vigilance in enforcing the ideals espoused in the *Constitution*. He made reference to Criminal Appeal No. 120 of 2004: Albanus Mwasia Mutua v Republic in which the Court of Appeal held that:

> "...an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence in support of the charge."

9 The petitioner likewise submitted that his rights under Article 27 of the *Constitution* have been violated by reason of the differential treatment between him and his co-accused persons. He relied on Peter K. Waweru v Republic [2006] eKLR and Nyarangi & 3 Others v Attorney General [2008] KLR 688 in urging the Court to allow the Petition and grant the orders sought.

10. On behalf of the respondent, written submissions were filed herein dated 19th April 2023. Ms. Anyumba, learned counsel for the respondent submitted that although Article 22(1) of the *Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated, infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. In her submission, the petitioner failed to demonstrate with precision how the actions of the respondent amounted to such violation as alleged by him. Counsel relied on Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR in which the Court of Appeal held that:

> "We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

11. Counsel further submitted that the petitioner was arrested without a warrant because the complaint against him related to a cognizable offence; and therefore his detention was justified from the standpoint of Sections 58 of the *National Police Service Act* and Section 36 of the Criminal Procedure Code. The respondent also pointed out that that since the offence in respect of which the petitioner was arrested is a serious one, there was no obligation on the part of the police to release him on bond. It was further the contention of the respondent that the Police complied with Article 49(1)(f) of the *Constitution* by presenting the petitioner to court as soon as was practicably possible. The respondent explained that the petitioner was arrested on 18th October 2013 which was a Friday and was arraigned

in court on Tuesday, 22nd October 2013 since the 24-hour period provided for in Article 49(1)(f) did not end on an ordinary working day.

12. In response to the assertion by the petitioner that he has been subjected to discrimination, granted the differential treatment given to his co-accused, counsel relied on Francis Muruatetu & Another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) in which the Supreme Court stated:

> "Consequently, we find that section 204 of the Penal Code is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment. We therefore reiterate that, this court's decision in Francis Muruatetu & another v Republic; Katia Intitute 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

13. Thus, it was the submission of the respondent that the petitioner's co-accused's sentences were reduced through a wrong interpretation of the decision of the Supreme Court; and therefore the petitioner cannot claim discrimination based on an illegality. The respondent also pointed out that since the petitioner's sentence was confirmed by a court of concurrent jurisdiction this Court cannot interfere with the decision. In this regard, reliance was placed on Julius Kamau Mbugua v Republic [2010] eKLR. Accordingly, the respondent prayed for the dismissal of the Petition.

14. I have perused and considered the Petition in the light of the averments set out in the Supporting Affidavit. I have similarly taken into consideration the arguments advanced in the written submissions filed herein by the petitioner and counsel for the respondent. The factual basis of the Petition is not in dispute. For instance, there is no dispute that the petitioner was one of the 5 accused persons in Mombasa Chief Magistrate's Criminal Case No. 2526 of 2013: Republic v Peter Warui Kamau and 4 Others in which they were charged with two counts of robbery with violence contrary to Section 296(2) of the Penal Code.

15. There is further no dispute that, although the petitioner denied the charges, he was ultimately found guilty after his trial. He was consequently convicted and sentenced to death as by law provided. The outcome was the same for his co-accused. Hence they jointly preferred an appeal against their conviction and sentence vide Mombasa High Court Criminal Appeal No. 80 of 2016. That appeal was heard and determined by Hon. Ongeri, J. The appeal was dismissed in a judgment delivered on behalf of Hon. Ongeri, J. on 2nd August 2018 by Hon. Chepkwony, J.

16. There is no indication that any of the convicts appealed that decision to the Court of Appeal. What is clear, however, is that each of them approached the High Court individually with Petitions for re-sentencing. Thus, while the petitioner filed his petition as Petition No. 72 of 2021, his co-accused filed Petitions Nos. 161 of 2020, 110 of 2019, 117 of 2019 and 23 of 2021. The judgment of Hon. Ogola, J. in Petition 110 of 2019 confirms the petitioner's averment that Petition No. 110 of 2019 was consolidated with Petitions 161 of 2020, 117 of 2019 and 23 of 2021; and that the consolidated Petitions were heard and determined on 7th June 2021. It is also not in dispute that, for some reason, the petitioner's Petition No. 72 of 2021 was not included in that determination.

17. The judgment delivered in Petition No. 110 of 2019 further confirms the petitioner's assertion that his four co-accused were re-sentenced to imprisonment for periods ranging from 12 and 16 years. He

was therefore right in stating that some of his accused persons have either been released upon serving their jail terms or are due for release soon, for the conclusion of the judgment reads:

> " In the upshot, and with a singular aim of re-integrating the young Petitioners into society, and taking into account that they never caused any injury, I hereby lift the death sentence imposed on them and resentence them to a lighter sentence as hereunder:
>
> (i) The 1st Petitioner Vincent Okoth Matinde shall serve a jail term of 16 years from the date of arrest.
>
> (ii) Petitioners Basilo Michael Kiarie Njue, Ali Mustafa and Derrick Kariuki Kamau, due to their apparent remorsefulness and readiness to aide in a free society, shall all serve a jail term of 12 years from the date of arrest..."

18. The Court has also called for and perused Petition No. 72 of 2021 and noted that the file was, on the 2nd November 2021, placed before Hon. Mativo, J. (as he then was), who dismissed it on the grounds that the petitioner's case did not fall within the guidelines of the Muruatetu case. In the premises, the issues that arise herein for determination are:

(a) Whether the petitioner's right to be arraigned before court within 24 hours under Article 49(1)(f) of the *Constitution* was violated.

(b) Whether, in the foregoing circumstances it can be said that the petitioner has demonstrated that his right to freedom from discrimination under Article 27 of the *Constitution* was violated;

(c) Whether the petitioner's death sentence ought to stand in the light of the directions by the Supreme Court in Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) (hereinafter Muruatetu II) and the recent decisions of the superior courts.

A. On whether the petitioner's right to be arraigned before court within 24 hours under Article 49(1)(f) of the *Constitution* was violated:

19. The petitioner relied on 24, 25, 28, 29, 49, 50, and 51(1) of the *Constitution* to demonstrate that his constitutional rights were violated with respect to his arraignment before the subordinate court. He complained that, although he was arrested on Thursday 18th October 2013, he was not taken to court until Monday 22nd October 2013, beyond the period set under Article 49 (1) (f) of the *Constitution*. That provision states:

> An arrested person has the right—
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> ...
>
> (f) to be brought before a court as soon as reasonably possible, but not later than —
>
> (i) twenty-four hours after being arrested; or
>
> (ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

20. The proceedings of the lower court confirm that the petititoner was arrested on the 18th October 2013 at around 5.30 pm. Article 49 (1) (f) of the *Constitution* requires that an arrested person be brought

before a court as soon as reasonably possible, within twenty-four (24) hours or on the next court day if twenty-four (24) hours ends outside the ordinary court days.

21. Pursuant to Section 60(1)(h) and (o) of the *Evidence Act*, Chapter 80 of the Laws of Kenya, the Court has confirmed that 18th October 2013 was not a Thursday as indicated by the petitioner but a Friday, the 19th October 2013 a Saturday; and therefore the 20th October 2013, a Sunday was a public holiday in Kenya known as Mashujaa Day. The Court further takes judicial notice that in Kenya, the commemoration of a public holiday falling on a Sunday, is extended to the following working day; which in this case was Monday the 21st October 2013. This explains why the Petitioner was presented before the court on the 22nd October 2013. Accordingly, his arraignment on 22nd October 2013 was well in accord with the provisions of Article 49(1) (f) of the *Constitution*.

22. In the same vein, not much turns on the petitioner's assertion that the Charge Sheet was defective for reflecting the date of his arrest as 19th October 2013 instead of 18th October 2013. The Court of Appeal in the case of Jason Akumu Yongo v Republic [1983] eKLR, held: -

> In our opinion, a charge is defective under section 214(1) of the Criminal Procedure Code where:
>
> a) it does not accord with the evidence in committal proceedings because of inaccuracies or deficiencies in the charge or because it charges offences in the charge not disclosed in such evidence or fails to charge an offence which the evidence in the committal proceedings discloses; or
>
> b) it does not, for such reasons, accord with the evidence given at the trial; or
>
> c) it gives a misdescription of the alleged offence in its particulars.

23. In the instant matter, the discrepancy has nothing to do with the charge or its particulars; and therefore no prejudice was thereby occasioned. Hence, the petitioner has utterly failed to demonstrate that his constitutional rights under Article 49(1)(f) of the *Constitution* were violated.

B. On the freedom from discrimination under Article 27 of the *Constitution*:

24. Article 27 of the *Constitution* provides as follows in its Sub-Articles (1) and (2):

> (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

25. And, according to Black's Law Dictionary, "discrimination" is defined to mean:

> " Differential treatment; esp., a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

26. Thus, with regard to the petitioner's allegations of discrimination, it is pertinent to note that the decision in Petition 110 of 2019 was made on 7th June 2021 before the Supreme Court gave its directions in Muruatetu II. More importantly, there is no indication that the existence of Petition 72 of 2021 was brought to the attention of the court in Petition No. 110 of 2019. Moreover, Petition No. 72 of 2021 was, on the 2nd November 2021, also placed before the Court (differently constituted) and was given full attention on the basis of the law as it then stood following Muruatetu II. Again, there is no indication that the outcome of the other petitions, Petitions Nos. 161 of 2020, 110 of 2019, 117

of 2019 and 23 of 2021 (as consolidated) was brought to the attention of the Court in Petition No, 72 of 2021.

27. Indeed, in Jacqueline Okeyo Manani & 5 others vs. Attorney General & another [2018] eKLR it was held that:

> "...discrimination, simply put, is any distinction, exclusion or preference made on the basis of differences to persons or group of persons based such considerations as race, colour, sex, religious beliefs political persuasion or any such attributes that has real or potential effect of nullifying or impairing equality of opportunity or treatment between two persons or groups...the *Constitution* advocates for non-discrimination as a fundamental right which guarantees that people in equal circumstances be treated or dealt with equally both in law and practice without unreasonable distinction or differentiation. It must however be borne in mind that it is not every distinction or differentiation in treatment that amounts to discrimination. Discrimination as seen from the definitions, will be deemed to arise where equal classes of people are subjected to different treatment, without objective or reasonable justification or proportionality between the aim sought and the means employed to achieve that aim."

28. It is therefore my considered finding that, in the circumstances, the contention by the petitioner that he has been discriminated against is untenable.

34. C. On the mandatory nature of the death sentence and whether the petitioner's death sentence ought to stand:

29. The constitutionality of the death sentence as provided for in Sections 296(2) and 297(2) is now settled. In the same vein, it is also indubitable that the mandatory nature of the death sentence for the offence of murder was settled by the Supreme Court in Muruatetu I. Here is what the apex court had to say in this regard:

> "We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the *Constitution* recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the Court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness." (emphasis supplied)

30. The Court further held, at paragraphs 58 and 59 of its judgment that:

(58) To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.

(59) We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with

the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the *Constitution*."

31. Then, at paragraph 69 of its Judgment the Supreme Court made it clear that:

> "Consequently, we find that Section 204 of the Penal Code is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment."

32. It is nevertheless imperative to acknowledge the petitioner's assertion that his co-accused benefited from Muruatetu I and had their sentences reviewed and converted into terms of imprisonment. It is a matter of notoriety that many other inmates benefited from the window between Muruatetu I and Muruatetu II. For instance, in William Okungu Kittiny v Republic [2018] eKLR, in which the Court of Appeal had occasion to reflect on the ramifications of Muruatetu I, it was held that:

> "...The appellant was sentenced to death for robbery with violence under Section 296(2). The punishment provided for murder under Section 203 as read with Section 204 and for robbery with violence and attempted robbery with violence under Section 296(2) and 297(2) is death. By Article 27(1) of the *Constitution*, every person has inter alia, the right to equal protection and equal benefit of the law. Although the Muruatetu's case specifically dealt with the death sentence for murder, the decision broadly considered the constitutionality of the death sentence in general...From the foregoing, we hold that the findings and holding of the Supreme Court particularly Paragraph 69 applies mutatis mutandis to Section 296 (2) and 297 (2) of the Penal Code. Thus the sentence of death under Section 296(2) and 297(2) of the Penal Code is a discretionary maximum punishment. To the extent that Section 296(2) and 297(2) of the Penal Code provides for mandatory death sentence the Sections are inconsistent with the *Constitution*...as the Supreme Court did not outlaw the death penalty. It follows that the main ground of appeal – the unconstitutionality of Section 204, 296(2) and 297(2) of the Penal Code on the death sentence fails."

33. The Supreme Court thereafter gave directions in Muruatetu II as follows:

> "(11) The ratio decidendi in the decision was summarized as follows;
>
> 69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the *Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".
>
> (12) We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute.
>
> ...

(14) It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution*. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court."

34. In Muruatetu II the Supreme Court was explicit at paragraph 15 that:

> "To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under section 40 (3), robbery with violence under section 296 (2), and attempted robbery with violence under section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

35. Accordingly, the ratio decidendi in Muruatetu I is equally applicable to robbery with violence as contemplated by Sections 296(2) of the Penal Code. I find succor in the decision of Hon. Odunga, J. (as he then was) in Maingi & 5 Others *v Director of Public Prosecutions & Another (Petition E017 of 2021)* [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) which, though in respect of mandatory minimum sentences under the *Sexual Offences Act*, was hinged on the same ratio. It is also significant that the decision was made after Muruatetu II. Here is what the learned judge had to say at paragraph 96:

> In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences or non-optional sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:
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> > "Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of the courts, sometimes resulting in grave injustice..."

36. Likewise, in Oprodi Peter Omukanga v Republic (Criminal Appeal 260 of 2019) [2023] KECA 430 (KLR) the Court of Appeal aptly stated thus in this regard:

> "...in our view, the application of the doctrine of stare decisis requires that where a court has previously ruled on an issue similar to or closely related to an issue in question in a current case, the court is required to make its decision in alignment with the previous decision. This must, however, be construed in tandem with the rule that every case must be decided on its own merits. Combining the two rules of jurisprudence, the only aspect of a decision that a court is free to import into its own decision is the rationale applied by the previous court and not the outcome itself. If that is the case, the rationale of the Supreme Court in the Francis Karioko Muruatetu (supra) would be applicable where a court is faced with a situation in which the mandatory nature of a sentence is concerned..."

37. The Court of Appeal further stated, at paragraph 31 of its Judgment that:

> " Even though in its 2021 directions in Muruatetu & Another v Republic...the Supreme Court limited the applicability of its decision in Francis Karioko Muruatetu & Another (supra) to the death sentence under section 204 of the Penal Code; we have no doubt that the deficits identified by the Court in the above excerpt applies to all mandatory death sentences. For instance, the rights to fair trial and dignity as discussed by the Supreme Court above are inherent and applicable to all accused persons. In appreciating and ensuring the rights of all accused persons are preserved, a court within our jurisdiction would of necessity, refer to the decision of the Supreme Court in a bid to protect and preserve these rights. Similarly, we adopt the opinion of the Supreme Court expressed above in dealing with the death sentence passed by the trial court and confirmed by the first appellate court in this matter, even though it was in respect of a robbery with violence case."

38. Hence, while there is no gainsaying that Muruatetu I was specific to cases of murder under Section 204 of the Penal Code, the directions given by the Supreme Court are clear enough that the validity of the mandatory nature of the death penalty prescribed for other capital offences, including robbery with violence under Section 296(2) of the Penal Code can and should be challenged separately. I have no doubt that this Petition constitutes a valid challenge as contemplated by the Supreme Court in Muruatetu II; and therefore it is immaterial that the petitioner's appeal against sentence and his petition for resentence had been had been dismissed by courts of concurrent jurisdiction. I share the viewpoint taken in *Jona & 87 others v Kenya Prison Service & 2 others (Petition 15 of 2020)* [2021] KEHC 457 (KLR) (18 January 2021) in which Hon. Odunga, J. (as he then was) held thus in connection with a re-sentencing application under Section 333(2) of the Criminal Procedure Code:

> " What then is the position where as a result of the failure to apply the said provisions, a person has exhausted his appellate options? In my view, unless the sentence was substituted by the appellate court, the same position applies. Where the appellate court considered the appeal and disallowed the same without interfering with the sentence, it is clear that the decision on sentencing remains that of the trial court and if that sentence was imposed in contravention of the provisions of section 333(2) of the Criminal Procedure Code, nothing bars this court in the exercise of its constitutional mandate pursuant to article 165 of the *Constitution* from redressing the situation. Accordingly, notwithstanding a dismissal of an appeal, a person sentenced in disregard of section 333(2) aforesaid is not thereby disentitled from invoking this court's supervisory jurisdiction to consider whether or not the sentence imposed was lawful. While it may be argued that in so doing this court would be interfering with the decision of the appellate court which in effect affirmed the decision of the trial court, in my respectful view that would not be the position where an appeal is simply dismissed without the sentence being reviewed..."

39. I understand this to be the position taken by the Court of Appeal in the above mentioned case of Oprodi Peter Omukanga v Republic (supra). In the light of the foregoing, that I find merit in the Petition in so far as the mandatory nature of the death sentence is concerned. Thus in Mombasa High court Petition No. 5 of 2022: Shaban Salim Ramadhan & others v Attorney General & another, as consolidated with Mombasa High Court Petition No. 6 of 2022, this Court made orders as follows in similar circumstances:

    (a) A declaration be and is hereby made that the mandatory nature of the death penalty as provided for under Section 296(2) and 279(2) of the Penal Code is unconstitutional.

(b) The petitioners be presented before the respective sentencing courts for sentence re-hearing upon appropriate applications being made in that regard in line with Paragraphs 2.2.1, 2.2.2, 2.2.3 and 2.2.4 of the Judiciary Sentencing Guidelines.

40. [40] In the premises, I reiterate those orders; and for the same reasons that the sentence of death imposed on the appellant's co-accused was replaced with imprisonment, it is hereby ordered that the petitioner's death sentence be replaced with a term of imprisonment for 16 years to be reckoned from the date of his arrest. The other limbs of his Petition fail and are hereby dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF MARCH 2024.

OLGA SEWE

JUDGE