REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 618 OF 2010

IN THE MATTER OF ARTICLES 22 (1) (2)(b), 21 (1) (4), 20 (1) (2) (4) (a) OF THE CONSTITUTION OF KENYA

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25 (a) (c), 26 (1), 27 (1) (2), 28, 29 (a) (d) (f), 48 AND ARTICLES 50 (1) (2)(h)(p), (6) (a)(b)

AND

ARTICLES 23 (1) AS READ WITH ARTICLES 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 216 AND 329 OF THE CRIMINAL

PROCEDURE CODE

AND

IN THE MATTER OF SECTIONS 204, 296(1)(2), 297(1)(2) OF THE PENAL CODE

Lesiit, Kimaru and Mutuku, JJ

BETWEEN

JOSEPH KABERIA KAHINGA …..……1ST PETITIONER

JOSEPH BARIU IMIEMBA……..……2ND PETITIONER

FREDERICK DAVID TSUMA……..……3RD PETITIONER

JOSEPH MUTUMA……..……4TH PETITIONER

DANIEL KIOKO MBUVA……..……5TH PETITIONER

JOSEPH MWAURA……..……6TH PETITIONER

MUSA OMOLO OGOLLA……..……7TH PETITIONER

PETER MATIKU MUHIRU……..8TH PETITIONER

TITUS MUTULU KIMOMO……9TH PETITIONER

AGGREY CHITEKI……...10THPETITIONER

WILSON MWANGI KINYUA……....11THPETITIONER

IBRAHIM ALI HALAKE……....12THPETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL……..……....RESPONDENT

JUDGEMENT

Introduction

The twelve (12) Petitioners were separately charged with various offences under **Section 296 (2)** of the Penal Code (robbery with violence), **Section 297 (2)** of the Penal Code (attempted robbery with violence) and **Section 203** as read with **Section 204** of the Penal Code (murder). They were tried by different courts, were convicted and were sentenced to death. Their respective appeals were dismissed by the High Court and the Court of Appeal and the convictions and death sentences confirmed. The Petitioners have invoked this court's constitutional jurisdiction. They have moved this court by way of Petition dated 22nd October 2010 and filed on the same day in which they are asking this court to invoke the powers conferred to it under **Articles 20 (4) (a), 22 (1), (2) (b)** and **23 (1)** of the **Constitution of Kenya 2010** and provide redress for what they term as violation, denial, infringement and continued threat of their fundamental rights under the Constitution.

The Petitioners are seeking the following prayers:

(i) A declaration that the death sentences imposed by the respective trial courts, confirmed by the High Court and the Court of Appeal and later commuted to life imprisonment by the President, is inconsistent with **Article 50 (2) (h) (p)** of the Constitution and **Section 329** of the Criminal Procedure Code.

(ii) A declaration that **Sections 296 (2), 297 (2)** and **204** of the Penal Code are inconsistent with **Articles 26 (1), 27 (1) (2), 28, 48, 50 (1) (2) (p)** of the Constitution.

(iii) A declaration that the constitutional rights of the Petitioners have been violated.

(iv) An order remitting the Petitioners' cases to the High Court for mitigation and determination of proportionate sentence in line with **Article 50 (2) (p)** of the Constitution.

(v) An order, in the alternative, for a review of the Petitioners' cases in the interest of justice.

The Petitioners urged this court to intervene and remit their respective cases to the trial courts for the purpose of reception and consideration of their mitigation or to proceed to acquit all the petitioners in view of the violations of their fundamental rights and freedoms by the decisions of the said courts. They are also seeking such other orders and reliefs that this court may deem appropriate to grant.

The Petition is supported by the affidavit of Joseph Kaberia Kahinga, 1st Petitioner, who swore it in his own capacity and as a representative of the other Petitioners. He has attached an authority from the other eleven (11) Petitioners empowering him to swear the affidavit on their behalf. He deposes that the death sentence is a cruel form of punishment; that the Petitioners were denied the right to mitigate their circumstances before sentence; that even if they had exercised their right to mitigate their sentences the same would not have been considered given that the declaration by the courts that the mandatory death sentence as provided by the law did not allow the exercise of discretion on the part of the court and that the Petitioners' right to mitigate was denied as not being justiciable; and, that the violation of the Petitioners' constitutional rights and freedoms rendered the trials null and void.

In these proceedings, Mr. Ondieki appeared for the 1st to 10th Petitioners, all inclusive, and the 12th Petitioner. The 11th Petitioner appeared in person. Mr. Ashimosi represented the Respondent.

The Petition is opposed by the Respondent. The Respondent opted to file grounds of opposition and written submissions instead of a Replying Affidavit. However at the time of hearing this matter there were no grounds of opposition filed. The Respondent through Mr. Ashimosi filed written submissions in support of his opposition to the Petition.

The Background

In order to put this matter into perspective, we wish to give some background. This Petition was presented in court together with an Application under certificate of urgency seeking conservatory orders to have the sentences imposed against each Petitioner suspended until the Petition is heard and determined. The Application was placed before Warsame J (as he then was). After taking submissions, the learned judge dismissed both the Application and the Petition *in limine*. The Petitioners were aggrieved by that order and challenged the same before the Court of Appeal. The appeal was allowed. The Court of Appeal reversed the decision of the High Court and remitted the Petition back to the High Court for hearting and determination on merits. The Honourable Chief Justice constituted a bench of three (3) judges. This matter was placed before this bench for hearing and determination. Directions were taken on 1st October 2015. The matter proceeded for hearing after all the parties had filed their written submissions.

The 1st to 10th, 12th Petitioners' Submission

The 1st to 10th Petitioners and 12th Petitioner submitted on the issues raised as follows:

(i) That the Petitioners are asking this court to reconcile and harmonize the conflicting decisions of the Court of Appeal. Their case is that the Court of Appeal had issued conflicting decisions on similar offences thereby violating the Petitioners' rights to be considered equally before the law. The Petitioners flagged out **Evanson Muiruri Gichane v. Republic Criminal Appeal No. 277 of 2007** and **David Mwangi Mugo v. Republic Criminal Appeal No. 368 of 2007,** where the Court confirmed conviction on the charge of attempted robbery with violence contrary to **Section 297 (2) of the Penal Code** but overturned the death sentences that had been imposed by the two lower courts and sentenced the Appellants therein to serve seven years imprisonment as provided under **Section 389 of the Criminal Procedure Code**. The Petitioners pointed out the contradictions of these decisions to the decision rendered by the same court in **Joseph Baariu Imiemba & 2 others v. Republic Criminal Appeal Nos. 87, 88 and 89 of 2007** where the Court agreed with the two lower courts and confirmed the death sentences as the only lawful sentence for the offence of attempted robbery with violence contrary to **Section 297(2) of the Penal Code.** The Petitioners asked the court to harmonize and reconcile the two contradictory decisions and release the Petitioners who have already served the term of 7 years

imprisonment.

(ii) The Petitioners submitted that they were not given the opportunity to mitigate their circumstances before they were sentenced by the respective courts. They contended that this was a violation of their right to fair trial given that mitigation is part and parcel of the principles of fair trial. They also urged that even those of them who mitigated their circumstances before they were sentenced, their respective mitigations were not taken into account. The Petitioners urged this court to evaluate that issue in this Petition and remit the cases to the trial courts to allow the Petitioners' to put forward their respective mitigations. They urged that the decision made by the President to commute their respective death sentences to life imprisonment did not address the violation they had suffered. They urged the court to breathe life to Bill of Rights under the Constitution of Kenya 2010 and uphold their rights and fundamental freedoms.

(iii) The Petitioners submitted that a death sentence is a cruel, inhuman and degrading punishment, and violates the rights of the Petitioners. They submitted that death-row prisoners live in isolation and are denied basic services. The Petitioners urged the court to declare the death penalty unconstitutional.

(iv) The Petitioners submitted that **Sections 295, 296 (1) and (2) of the Penal Code** contravenes the principles of fair trial as protected by the Constitution, and that there is apparent ambiguity in the definition regarding the circumstances that are aggravated under **Section 296 (2) of the Penal Code**; that the ambiguity in this provision is in direct conflict with the principles of fair trial, and that the wording of **Sections 295, 296 (1), 296 (2) and 204 of the Penal Code** as read with **Sections 216 and 329 of the Criminal Procedure Code** meant that the Petitioners were prejudiced during their respective trials.

(v) The Petitioners set out different approaches to constitutional interpretations and urged the court to adopt a pragmatic and realistic approach to constitutional interpretation, and to take into account the fact that the framers of the Constitution may not have anticipated every situation that may arise when a party is seeking enforcement of the Bill of Rights. They urged this court to consider the issues raised in this Petition with a view to upholding the Petitioners' rights and fundamental freedoms and to develop the law to give effect their rights and fundamental freedoms. The Petitioners further submitted that this court possesses inherent jurisdiction to do all that is necessary to ensure the realization of their rights.

(vi) The Petitioners pointed out the predicament this court will face when considering whether or not to correct a mistake made by a higher court. They submitted that this court has requisite jurisdiction under **Article 163 of the Constitution**, and that the circumstances of this Petition favours this court's exercise of its jurisdiction to correct the mistakes. They urged the court not to be persuaded by the argument advanced by the Respondent to the effect that if the prayers sought by the Petitioners are granted it will open a Pandora's Box. This is because each case must be considered on its own merit and peculiar circumstances. The Petitioners further submitted that despite the doctrine of *stare decisis,* the issues raised in this Petition are constitutional in nature and raise new and emerging areas of the law in respect of upholding the Bill of Rights as enshrined in the Constitution. They urged that this court has power to address the issues raised and advance the law as provided under **Articles 20, 21, 23 and 259 of the Constitution**.

(vii) The Petitioners submitted that they have legitimate expectation to enjoy the full benefit and protection of the law; that this right was violated when the Petitioners were sentenced to serve a harsher sentence thus contravening their right under **Article 50 (2)(p) of the Constitution** which decrees that a convicted person should benefit from the least severe of the prescribed punishments for an offence. They urged that the fact that they were sentenced to death instead of 7 years imprisonment in respect of those charged under **Section 297 (2) of the Penal Code** contravened their constitutional right to fair

trial.

The 11th Petitioner's Submission

The 11th Petitioner's case is that the Petitioners' fundamental rights to a fair trial have been breached by the application of the mandatory death sentence provisions of the Penal Code (**Sections 204, 296 (2) and 297 (2)**).

He also raised the following issues:

(i) It is the duty of the courts to consider mitigating circumstances of persons convicted as provided under **Sections 216 and 329 of the Criminal Procedure Code,** and that it is legally erroneous and a breach of the Petitioner's fundamental rights to a fair trial for the courts to deny the Petitioners the right to mitigate their circumstances before exercising their discretion to sentence.

(ii) The Petitioners who were convicted of attempted robbery with violence under **Section 297 (2) of the Penal Code** were entitled to a maximum of 7 years imprisonment and not mandatory death sentence.

(iii) There is ambiguity in the definition of the ingredients of what constitutes the offence of robbery with violence under **Section 296 (1) and (2) of the Penal Code,** and that the Petitioners who were convicted of robbery with violence but whose facts did not reveal the use of or threat to use violence were entitled to be sentenced to serve a maximum term of 14 years imprisonment under **Section 296 (1)** as read with **Section 295 of the Penal Code**.

(iv) The imposition of death sentence on the Petitioners without taking into account the ambiguity between the above provisions amounted to cruel and inhuman treatment in breach of **Section 74 (1) of the repealed Constitution** and is an arbitrary deprivation of life in breach of **Section 71 (1) of the repealed Constitution** and a denial of a fair trial in breach of **Section 77 of the repealed Constitution.**

The Respondent's Submission

The Petition is opposed by the Respondent. The Respondent submitted as follows:

(i) The Petitioners have failed to demonstrate new and compelling evidence to this court to enable them come under the purview of **Article 50 (6) of the Constitution**. The Respondent cited several authorities including **Peter Mason Okeyo v. Republic [2014] eKLR** to support the argument that in order for a petition under **Article 50(6) of the Constitution** to succeed, the petitioner must adduce new and compelling evidence that could not have been obtained with reasonable diligence for use at the trial or was not available at the time of the hearing.

(ii) That **Section 295 of the Penal Code** only defines the offence of robbery and does not create it and that the correct provision creating this offence is section **296 (2) of the Penal Code**.

(iii) That the death penalty is allowed under **Article 26 (3) of the Constitution** to the extent authorized by the law; that the right to life is limited by law for the offences of murder, treason, robbery with violence and attempted robbery with violence; that the limitation of the right to life is reasonable given the gravity of these offences and that the application of this limitation is not arbitrary and is justifiable under the law; that the right to life in Kenya is qualified in contrast to the right to life in South Africa which is unqualified and therefore the death sentence in Kenya cannot be considered as arbitrary, insensitive, cruel, inhuman and unfair part of the trial process.

(iv) That this court is bound by decisions of the Court of Appeal and where there are conflicting authorities by the Appellate Court the same can only be resolved by a bench of the Appellate Court consisting of a higher number of the judges of the Court.

(v) The Respondent urged this court to find that **Sections 296 (2), 297 (2) and 204 of the Penal Code** are consistent with **Articles 24 (1), (2) and 26 (1) (3) of the Constitution.** The Respondent urged the court, in the event it finds the death penalty to be inherently cruel and contrary to the Constitution, to take note of **Mbushu and Another v. Republic (1995)** a Tanzanian case in which the court found the death penalty inherently cruel, inhuman and/or degrading but declined to declare it unconstitutional.

(vi) That the Petitioners did not demonstrate the nature of the violations of their constitutional rights as claimed in their Petition. The Respondent asked this court to dismiss the Petition with costs.

The Issues for Determination

We have flagged out the following issues in this Petition for determination:

(i) Whether this court has jurisdiction -

(a) to hear this Petition; and

(b) to grant the declarations and orders sought.

(ii) Whether there is a conflict between the provisions of Sections 297 (2) and 389 of the Penal Code, and whether the sentence for the offence under Section 297 (2) of the Penal Code should be the one prescribed under Section 389 of the Penal Code.

(iii) Whether there is ambiguity in the definition, ingredients and penalty between Sections 295, 296 (1) and (2) of the Penal Code.

(iv) Whether the death sentence is cruel, inhuman and degrading punishment, and whether the death sentence is in violation of the Constitution of Kenya 2010.

(v) Whether a court is required in law to take into consideration the mitigation of an accused person who has been convicted under Sections 203 as read with Section 204, 296(2) and 297(2) of the Penal Code and whether the court has jurisdiction to vary the death sentence and if so whether the sentence thereby meted is constitutional.

(vi) Whether the declarations and orders sought in this Petition should be granted.

Analysis and Determination of Issues

Whether this court has jurisdiction to (a) hear this petition and (b) to grant the declarations and orders sought.

This court notes that the Petition before us is a constitutional petition. The Petitioners crave for appropriate orders from this court to remedy what they consider to be breaches of their fundament rights and freedoms under **Articles 21(1)(2)(4)(a), 22(1)(2)(b), 23, 25(a)(c), 26(1)(3), 28, 29(a)(f), 48, 50(1)(2)(h)(g)(p) 6(a)(b) of the Constitution**. **Article 165(3) of the Constitution** sets out the various jurisdictions of the High Court. **Article 165(3)(b**) grants the High Court:

"Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied; violated; infringed or threatened;"

Article 165 (3)(d) provides that the High Court has:

"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 if any law is inconsistent with; or in contravention of, this Constitution; …"

In the present Petition, the Petitioners have argued, *inter alia*, that their rights and fundamental freedoms were breached in that they were sentenced to serve a sentence, which, firstly, constituted inhuman and degrading punishment under **Article 25(a) of the Constitution**, and secondly, which was arrived at after the court had failed to take into consideration their respective mitigations. In their submission, failure by the court to record their respective mitigations breached their right to fair trial as enshrined in **Articles 25(c) and 50(2) of the Constitution**. The Petitioners further argued that they were convicted on the basis of **Sections 203** as read with **Section 204, 296(2) and 297(2) of the Penal Code** which did not accord due regard to the aggravating circumstances or otherwise of each particular case.

In this respect, the Petitioners argued that under **Article 50(2)(p) of the Constitution** which provides that they were entitled **"to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed from the time that the offence was committed and the time of sentencing;"** and were entitled to be sentenced respectively under **Sections 296(1), 297 (1)** and **329 of the Penal Code** instead of the more severe sentences that were meted on them under **Sections 296(2)** and **297(2)** of the **Penal Code**.

Mr. Ashimosi for the Respondent opposed the Petition essentially by stating that the Petitioners were properly tried, convicted and sentenced. Their respective appeals to the highest court in the land have been considered and dismissed. He doubted that this court had the requisite jurisdiction to hear the Petitions lodged by the Petitioner's herein. He explained that, under **Article 50(6)(b) of the Constitution**, no *"new and compelling evidence"* had become available to clothe this court with jurisdiction to hear the Petition. He argued that if this court was to assume jurisdiction and consider the merits of the petition, it would result in an incongruous situation where the High Court would apparently be sitting on appeal in decisions already rendered by a higher court i.e. the Court of Appeal. Learned Counsel was in effect saying that such a prospect would upset the duly established hierarchy of courts.

We have carefully considered the rival submission in regard to whether this court has jurisdiction to entertain the Petition. We have taken on board the injunction given by the court in **Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1** per Nyarangi, JA:

"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court

or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.....Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

In the present Petition, it is clear that the question whether this court has jurisdiction will depend on the understanding of the issues brought before this court by the Petitioners. Whereas the Petitioners insist that they do not challenge their respective convictions, and therefore the merits of the said cases, the Respondent on the other hand is of the view that the issues raised by the Petitioners are issues which have been adjudicated upon, or which ought to have been adjudicated upon when the trials and the respective appeals of the Petitioners were still live before they were conclusively and finally determined by the Court of Appeal.

We have considered the arguments made in that regard. We are of the considered opinion that the issues canvassed by the Petitioners raise constitutional questions whose effect is to properly invoke the jurisdiction of this court. The Petitioners' case is predicated upon, *inter alia*, **Articles 22(1) and 23(1) of the Constitution**. **Article 22(1)** provides thus:

"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened".

Article 23(1) states that:

"The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."

This court has noted that it has jurisdiction, in particular, to hear and determine whether the Petitioners' rights and fundamentals freedoms which cannot be limited as provided under **Article 25(a)** and **(c)** have been violated.

This court has jurisdiction to inquire and determine the question as to whether the allegations made by the Petitioners to the effect that their inalienable rights and fundamental freedoms have been denied, violated or infringed, or is threatened.

We have held that we have jurisdiction to hear this Petition. The other issue for our consideration is the principles of interpretation of the Constitution that this court should take into account in determining the constitutional questions posed by the Petitioners. The Petitioners have, *inter alia*, challenged the constitutionality of certain statutory provisions. In arguing that the death sentence provided under **Sections 204, 296(2)** and **297(2) of the Penal Code** violates their constitutional right to fair trial, in that their right to mitigate before being sentenced had been violated, the Petitioners are saying that since **Sections 216** and **329 of the Criminal Procedure Code** require that an accused person who has been convicted be given a chance to mitigate before he is sentenced, where he is then sentenced to serve a mandatory term or sentence, that constitutes a violation of his right to fair trial as guaranteed under **Article 50(2) and 25(c) of the Constitution**. They further argued that the fact that **Sections 296(2)** and

297(2) of the Penal Code did not give room for aggravating or mitigating circumstances to be considered, violates their constitutional right to be sentenced to serve a prison term or at least benefit from the least severe sentence as provided under **Article 50(2)(p) of the Constitution**. All these questions and others posed, which we shall address later in this judgement, require constitutional and statutory interpretation.

Prior to the promulgation of the Constitution of Kenya on 27th August 2010, courts grappled with the principles of interpretation that it ought to take into consideration when interpreting constitutional or statutory provisions. For instance, in **Republic vs. El Mann [1969] EA 357**, the Court cited the following passages at page 359:

"Counsel on both sides are in substantial agreement as to the principles of construction to be applied and each of them has referred us to the same passage in CRAIES ON STATUTE LAW (6th Edn) which appears at p.66. The passage reads:

"The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. "The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject matter with respect to which they are used and the object in view"'.

Pausing there, we note that the citation comes from the high authority of LORD BLACKBURN in Direct United States Cable Co. v. The Anglo-American Telegraph Co. 2 A.C. 394, a case decided in 1877. The passage continues:

"In Barnes v. Jarvis, [1953] W.L.R. 649 LORD GODDARD, C.J. said:

'A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered.'

If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver.

'Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.'

The last sentence is a citation from TINDAL, C.J., in Warburton v. Loveland (1832), 5 E.R. 499, a case decided in 1832, and reference is made in a footnote to a large number of subsequent cases in which the principle has been upheld."

At page 360 the court then held thus:

"But we think that the issue is put into true perspective in the citation which appears on p. 55 of BASU, in which DAS, J., in Keshava Menon v. State of Bombay, [1951] S.C.R. 228, a Bombay case, said:

"An argument founded on what is claimed to be the spirit of the Constitution is always attractive for it has a powerful appeal to sentiment and emotion: but a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be

the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view."

We respectfully adopt this dictum as setting out the correct approach to the interpretation of a constitution. We do not deny that in certain contexts a liberal interpretation may be called for, but in one cardinal respect we are satisfied that a constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous they are to be construed in their ordinary and natural sense. It is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words."

What is now referred to as the "*El Mann doctrine*" was considered to be too restrictive when a court is interpreting a constitution. Latter decisions challenged the notion that the Constitution could be interpreted is the same notion as an ordinary statute is interpreted. This is because the courts were of the view that the Constitution embodied certain values, principles and tenets which require broad and liberal interpretation to give meaning and effect to these values, principles and tenets. For instance, in **Njoya & Others vs. Attorney General and Others [2004] 1 KLR 232** per Ringera, J (as he then was) held at paragraph 18 that:

"I shall accordingly approach constitutional interpretation in this case on the premise that the Constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles; and that whenever the consistency of any provision(s) of an Act of Parliament with the Constitution are called into question, the court must seek to find whether those provisions meet the values and principles embodied in the Constitution. To affirm that is not to deny that words even in a constitutional text have certain ordinary and natural meanings in the English or other language employed in the Constitution and that it is the duty of the court to give effect to such meaning. It is to hold that the court should not be obsessed with the ordinary and natural meaning of words if to do so would either, lead to an absurdity or plainly dilute, transgress or vitiate constitutional values and principles. And what are those values and principles" I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other, none is supreme: the Constitution is supreme and they all bow to it. I would also include the thread that runs throughout the Constitution - the equality of all citizens, the principle of non-discrimination. The doctrine of separation of powers is another value of the Constitution. And so is the enjoyment of fundamental rights and freedoms. Those, to my mind, are the values and principles of the Constitution to which a court must constantly fix its eyes when interpreting the Constitution."

The Constitution itself instructs the court on how the Constitution should be interpreted when applying the provisions of the Bill of Rights.

Article 20 of the Constitution provides that:

"(2) Every person shall enjoy this rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall –

(a) develop the law to the extent that it does (not) give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote –

(a) the values that underlie on open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights."

Article 21(2) of the Constitution places a fundamental duty upon the State and every state organ including the judiciary to **"observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights"**. **Article 23(3) of the Constitution** sets out the reliefs that may be granted by the court when exercising its jurisdiction in considering a petition where a person is claiming that a fundamental freedom in the Bill of Rights has been denied, violated or infringed or is being threatened. These reliefs include a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights, an order for compensation and an order of judicial review.

Article 259(1) of the Constitution provides that:

"This Constitution shall be interpreted in the manner that:

a) Promotes its purposes, values and principles;

b) Advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights;

c) Permits the development of the law; and

d) Contributes to good governance."

Article 259(3) states that:

"Every provision of this constitution shall be construed according to the doctrine of interpretation that the law is always speaking…"

In regard to the laws that existed prior to the promulgation of the Constitution, **Section 7 (1) of the Sixth Schedule** provides thus:

"All laws in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."

In the present Petition, the Petitioners crave for this court's determination of the broad question whether their rights and fundamental freedoms as enshrined in the Bill of Rights have been violated firstly, in the manner in which their trials were conducted especially during sentencing and secondly, whether **Sections 296(2), 297(2)** and **204 of Penal Code** are unconstitutional in so far as they mandate the courts to impose mandatory death sentence and whether the definition of the offence as provided under

Sections 296(2) and **297(2) of the Penal Code** is so broad as to condemn them, upon conviction, to a more severe sentence than they would have otherwise been sentenced to serve. In essence therefore, the Petitioners are alleging that their rights and fundamental freedoms as provided in the Bill of Rights have been violated. They are also saying that the aforementioned sections of the Penal Code are unconstitutional.

We have set out these articles of the Constitution that have been invoked by the Petitioners in this Petition. The courts have had occasion to consider the principles upon which the courts are called upon to interpret this Constitution. **In the Matter of Kenya National Human Rights Commission, Supreme Court Advisory Opinion Ref. No.1 of 2012**, the Supreme Court held that in interpreting the Constitution, the court should adopt a holistic approach. It stated thus:

"But what is meant by a holistic interpretation of the Constitution" It must mean interpreting the Constitution in context. It is contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions in each other, so as to arrive at a desired result."

In **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others, Supreme Court Petition No. 26 of 2014 [2014] eKLR** the court held that in interpreting the Constitution a purposive approach must be employed. The court held in paragraph 167 as follows:

"In Pepper v. Hart [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:

"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

Court of Appeal in **County Government of Nyeri & Anor. Vs. Cecilia Wangechi Ndungu [2015] eKLR** held that:

"14. Alive to the fact that we are called upon to interpret the aforementioned provision, we remind ourselves that the cardinal rule for construction of a statute; that is a statute should be construed according to the intention expressed in the statute itself".

The intention of a statute can be identified through a number of factors. In Cusack –vs- Harrow London Borough Council (2013) 4 ALL ER 97, the Supreme Court observed:-

“Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.”

The court then held that in interpreting an Act of Parliament, the court must ensure that the Act conforms to the Constitution. The court noted that the preamble to the Constitution provided that in adopting and enacting the Constitution, the people of Kenya recognize the aspirations of all Kenyans for a government based on the essential values of human rights, freedom, democracy, social justice and the rule of law.

In **Institute of Social Accountability & Anor. Vs. National Assembly & 4 others [2015] eKLR** the High Court had this to say in regard to its jurisdiction to interpret the Constitution where certain provisions in an Act of Parliament are sought to be declared unconstitutional:

“56. First, this Court is enjoined under Article 259 of the Constitution to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance. In exercising its judicial authority, this Court is obliged under Article 159(2)(e) of the Constitution to protect and promote the purpose and principles of the Constitution.

57. Second, there is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on any person who alleges otherwise (see Ndyanabo v Attorney General of Tanzania [2001] EA 495). We therefore reiterate that this Court will start by assuming that the CDF Act 2013 is constitutional and valid unless the contrary is established by the petitioners.

58. Third, in determining whether a Statute is constitutional, the Court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself (see Murang’a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011]eKLR, Samuel G. Momanyi v Attorney General and Another (supra)). Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect. The Canadian Supreme Court in the R v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 enunciated this principle as follows;

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation’s object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation’s object and thus the validity.

59. Fourth, the Constitution should be given a purposive, liberal interpretation. The Supreme Court in Re The Matter of the Interim Independent Electoral Commission Constitutional Application (supra) at para. 51 adopted the words of Mohamed A J in the Namibian case of State v Acheson 1991(20 SA 805, 813) where he stated that;

The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship of government and the governed. It is a mirror reflecting the "national soul" the identification of ideas and ..... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.

60. Lastly and fundamentally, it is the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other (see Tinyefuza v Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3))."

In **Coalition for Reform and Democracy (CORD) & 2 others vs. Republic of Kenya & 10 others [2015] eKLR** the High Court held thus:

"In considering this question, we are further guided by the principle enunciated in the case of Ndyanabo vs Attorney General [2001] EA 495 to the effect that there is a general presumption that every Act of Parliament is constitutional. The burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional.

96. However, we bear in mind that the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 which we shall analyse in detail later in this judgment, there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article.

97. The Court is also required, in determining whether an Act of Parliament is unconstitutional, to also consider the objects and purpose of the legislation: see Murang'a Bar Operators and Another vs Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011] eKLR and Samuel G. Momanyi vs Attorney General and Another High Court Petition No. 341 of 2011."

It is clear from the foregoing citations that this court is well guided on the principles of interpreting the Constitution both by the Constitution itself and by decided cases both prior and subsequent to the promulgation of the Constitution. We are mandated to uphold the supremacy of the Constitution and the principles, values and tenets set out by the Constitution and specifically, the Bill of Rights.

Whether there is a conflict between the provisions of sections 297(2) and 398 of Penal Code, and whether the sentence for the offence should be the one prescribed under section 389 of the Penal Code.

The Petitioners' case is two-pronged: they have argued that the ingredients supporting the charge of attempted robbery with violence under **Section 297(2) of the Penal Code** did not set out the degree of aggravation to warrant a person convicted of committing the offence to face the ultimate punishment of the death sentence. It was the Petitioners' case that those among them who were convicted of the offence of attempted robbery with violence contrary to **Section 297(2) of the Penal Code** had their constitutional right to fair trial as guaranteed by **Articles 50(2)** and **25(c) of the Constitution** violated because the ingredients of the offence did not leave room for the court to consider attenuating circumstances of the particular case. For instance, the Petitioners argued that if a person in company with one or more person(s) attempts to commit a robbery by stealing a mobile phone from a victim, yet

no violence was used, irrespective of the existence of alleviating circumstances, courts have convicted such person(s) for the more serious offence of robbery with violence contrary to **Section 297(2) of the Penal Code**. The Petitioners argued that there was no distinction apparent in the ingredients that constitute the charge of attempted robbery with violence contrary to **Section 297(2)** and attempted robbery contrary to **Section 297(1) of the Penal Code**. If such differentiation existed, then some of the Petitioners who were convicted of the more serious charge of attempted robbery with violence contrary to **Section 297(2) of the Penal Code** would have been convicted of the lesser charge of attempted robbery with violence contrary to **Section 297(1) of the Penal Code.**

The Respondent's response to the submission made by the Petitioners in that regard was straight forward. The Respondent argued that since the Petitioners had been tried before competent courts, and since the Petitioners had exhausted all avenues of appeal available to them, they should not be allowed to re-open cases which had been concluded. We understood the Respondent to say that the Petitioners had the opportunity to canvass this issue when their respective cases were before the trial courts and later before the appellate courts that heard their respective appeals. For added emphasis, the Respondent submitted that the trial and the appeal process itself had adequate safeguards which ensured that the Petitioners' right to fair trial was not violated or infringed. It was further the Respondents' case that there were no new and compelling evidence as contemplated under **Article 50(6) of the Constitution** that would entitle this court to re-open the respective cases of the Petitioners. The Respondent argued that there was no evidence placed before the court that will entitle the Petitioners to the orders craved in the Petition.

We have carefully considered the rival arguments made by the Petitioners and the Respondent. We also observe that most of the Petitioners whose complaint fell under this issue for determination were charged and convicted prior to the promulgation of the Constitution. It may be argued that this court cannot delve into an issue that arose before the commencement of the Constitution. We are nevertheless of the view that since the Petitioners under this head are complaining that they are serving an illegal sentence, given that they ought to have been sentenced to a less severe sentence, we have the requisite jurisdiction to address their complaints.

The offence of attempted robbery under **Section 297 of the Penal Code** is an offence that falls under the broad category of offences referred to as inchoate offences. Inchoate offences are sometimes referred to as incomplete offences, or acts involving a tendency to commit a crime or consists of acts that indirectly points to participation in the commission of a crime. **"Black's Law Dictionary – Free Online Legal dictionary"** defines **"inchoate"** as:

"Imperfect; unfinished; began, but not completed; as a contract not executed by all parties".

An inchoate offence is therefore an offence which the person convicted of did not actually complete the commission of, to necessitate such person to be charged with the commission of the actual offence. **Section 297 of the Penal Code** creates such offence. It provides thus:

"297(1) Any person who assaults any person with the intent to steal anything, and, at or immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property in order to obtain the thing intended to be stolen, or prevent or overcome resistance to its being stolen, is guilty of a felony and is liable to imprisonment for seven years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or

immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

For the prosecution to secure a conviction for the offence of attempted robbery with violence contrary to **Section 297(1) of the Penal Code** the following ingredients must be established -

(i) That the accused assaulted the victim with the intent to steal.

(ii) That immediately before or immediately after the time of the assault, uses or threatens to use actual violence to any person or property;

(iii) In order to obtain the thing intended to be stolen;

(iv) Or to prevent or overcome resistance of its being stolen.

The offence is aggravated under **Section 297(2)** if, in addition to the above ingredients:

(v) The offender is armed with dangerous or offensive weapon or instrument, or

(vi) Is in company with one or more person(s), or

(vii) If at or immediately before or immediately after the time of the assault, he wounds, beats, strikes, or uses any other personal violence to any person.

The above cited ingredients to establish the offence of attempted robbery with violence contrary to **Section 297(2) of the Penal Code** are considered disjunctively: the offence is established when one of the ingredients is proved.

According to **Merriam – Webster's Learner's Dictionary** "assault" is defined as:

"a violent physical or verbal attack; a threat or attempt to inflict offensive physical contact or bodily harm on a person (as by lifting a fist in a threatening manner) that puts the person in immediate danger of or in apprehension of such harm or contact."

Black's Law Dictionary Free Online Legal Dictionary defines "assault" as:

"An unlawful attempt or offer, on the part of one man, with force or violence, to inflict a bodily hurt upon another. An attempt or offer to beat another, without touching him; as if one lifts up his cane or his fist in a threatening manner at another; or strikes but misses him. 3 Bl. Comm.120; steph. Comm 469. Aggravated assault is one committed with the intention of committing some additional crime; or one attended with circumstances of peculiar outrage or atrocity. Simple assault is one committed with no intention to do any other injury. An assault is an unlawful attempt, coupled with a present ability, to commit a violence, injury on the person of another."

The Penal Code does not define what assault is. Nevertheless, under **Sections 250 – 253**, all inclusive, it sets out instances of assault. The gravity of the assault increases with the circumstances defined upon which the assault occurs.

Having carefully read **Section 297(1)** and **Section 297(2) of the Penal Code** in light of the submission

made by the Petitioners, it is clear to us that the Petitioners have a point when they assert that a person may be charged under **Section 297(1)** and another under **Section 297(2) of the Penal Code** on the basis of the same facts and circumstances. The difference, if convicted, will be in regard to the sentence that is meted out on such convicted person. While the convict charged under **Section 297(1)** faces a maximum sentence of seven (7) years imprisonment, the convict charged under **Section 297(2)** faces a death sentence. Our reading of the two sections disclose lack of sufficient particularity to distinguish between an offence committed under **Section 297(1)** and that which is committed under **Section 297(2) of the Penal Code**. In both instances, there is either threat or the use of actual violence. **Section 297(2)** provides that the offence of attempted robbery with violence is aggravated when the offender is armed with a dangerous or offensive weapon or instrument or is in company with one or more person(s) or actually assaults and wounds the victim of the attempted robbery with violence at the time of the commission of the crime.

We find and hold that the Petitioners have a case when they argue that the sub-sections of **Section 297 of the Penal Code** are ambiguous and not distinct enough to enable a person charged with either offences to prepare and defend himself due to lack of clarity on what constitutes the ingredients of the charge. **Article 50(2) of the Constitution** proclaims what constitutes “a fair trial” when a person is charged with a criminal offence. **Article 50(2)(b)** states that:

“Every accused person has the right to a fair trial, which includes the right to be informed of the charge, with sufficient detail to answer it”.

From the argument advanced by the Petitioners, it is apparent that a person charged under **Section 297(2) of the Penal Code** faces prejudice because he can, as is the case of some of the Petitioners, be convicted and sentenced to death where the same facts and circumstances may have constituted facts which supported the charge for the lesser offence of attempted robbery with violence contrary to **Section 297(1) of the Penal Code.**

Generally, inchoate offences attract less severe punishment than completed offences. That is the general trend in the Penal Code. For instance, under **Section 220 of the Penal Code** a person convicted of the charge of attempted murder is liable to be sentenced to serve a maximum term of life imprisonment while, if a person is charged with committing murder under **Section 203 of the Penal Code**, the sentence is death.

Section 389 of the Penal Code states that:

“Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years.”

The exception to this general rule is the punishment provided under **Section 297(2) of the Penal Code** in respect of the offence of attempted robbery with violence. It may be argued that a person who sets out to commit the offence of robbery with violence, and is prevented from completing the offence, is a dangerous criminal who should face the same punishment as the person who actually committed the offence. There is validity in this argument. This is more so if it is taken that such a person had the intention or the requisite *mens rea* to commit the actual offence. This is more so if it is considered that such attempted robbery with violence may result in grievous harm or death of the victim(s). However, we are of the considered opinion that the definition of what constitutes the offence of attempted robbery with violence under **Sections 297(1)** and **297(2) of the Penal Code** should be sufficiently set out in

detail so that there is no ambiguity in regard to the degree of the gravity of the offence. As it is now, the ambiguity and lack of clear distinction as to what constitutes an offence under **Section 297(1)** and **Section 297(2) of the Penal Code** violates an accused person's right to a fair trial in that he cannot be informed, as envisaged under **Article 50(2)(b) of the Constitution,** of the charge and with sufficient detail to be able to answer to it.

The lack of clarity and distinction in these two sub-sections under **Section 297 of the Penal Code** has resulted in some situations where the decision to charge an accused person under either of the sub-sections of **Section 297 of the Penal Code** may be in some instances be deemed to be arbitrary, whimsical or capricious. There must be certainty in the law that creates offences.

Articles 50(2)(b) of the Constitution demands that such laws should be clear so that a person accused of committing such offence may know in sufficient detail the nature and the scope of the charge that he is facing. In such situations of ambiguity as is apparent in the plain reading of **Section 297(1)** and **Section 297(2) of the Penal Code**, Parliament shall be required to enact appropriate amendments to the said sections of the **Penal Code** to set out in sufficient detail the degrees of gravity in the case of attempted robbery with violence with the attendant aggravation in the punishment to be meted out.

Parliament will also make appropriate interventions to resolve the apparent conflict that exists between **Section 297(2)** and **Section 389** of the **Penal Code** in regard to the punishment to be ordained when a person is found guilty of committing an inchoate offence of attempted robbery with violence. This will not be the first time that courts have urged Parliament to address the issue of this conflict. In **David Mwangi Mugo vs. Republic [2011] eKLR** the Court of Appeal held thus:

"The submission on the legality of it is that section 297(2) of the Penal Code which prescribes the sentence of death, is in conflict with section 389 of the same Code which requires that in offences of attempt to commit a felony, the sentence should not exceed seven years' imprisonment. Section 389 states as follows:

"Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided, to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years."

And section 297(2) provides:

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the assault, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

It is manifest at once that there is an apparent conflict in those provisions in relation to the sentence to be imposed. The section under which the appellant was convicted provides for death sentence, while section 389 provides for a term not exceeding seven years. Mr. Onalo, learned counsel for the appellant, drew our attention to a recent decision of this Court where a similar issue arose and the court expressed itself as follows:

"The appellant was convicted of an offence (attempted robbery with violence) punishable by death. In terms of section 389 of the Penal Code the appellant shall not be liable to imprisonment for a term exceeding seven years. But he was sentenced to death. The apparent conflict in the

law may only be resolved by Parliament. But the appellant is entitled to the less punitive of the two sentences…"

We have come to the conclusion, after careful consideration, that the issue of ambiguity and the apparent conflict in the definition of the offences under **Section 297(1) and (2) of the Penal Code,** and the punishment to be meted out under **Section 389 of the Penal Code,** it is also apparent in the next issue that we shall determine. In that regard therefore we shall address the declarations and orders sought to be granted in respect of this particular issue later in this judgment.

Whether there is ambiguity between robbery contrary to Section 296 (1) of the Penal Code and robbery with violence contrary to Section 296(2) of the Penal Code.

The Petitioners raised the issue whether there is ambiguity between robbery under **Section 296 (1)** of the **Penal Cod**e and robbery under **Section 296(2)** of the **Penal Code**. They argued that these two sections of the law are sentencing provisions which must be read together with the provision creating the offence which is **Section 295** of the **Penal Code**. The Petitioners urged that the definition of robbery under **Section 295 of the Penal Code** gives two key ingredients for the offence of robbery which is stealing and the use of violence or threat to use violence. They argued that **Section 296 (1) of the Penal Code** provides that the offence of robbery attracts a penalty of a maximum sentence of fourteen (14) years imprisonment.

The Petitioners argued that the offence under **Section 296 (2)** of the **Penal Code** has three (3) key ingredients and the proof of any one of them is sufficient for a conviction. The sentence provided for is the death. They argued that **Section 296(2)** of the **Penal Code** has had the effect of lumping together all charges brought under the section under one umbrella irrespective of the gravity of the facts and the circumstances under which the offences were committed. This has resulted in the most innocuous and the gravest of the facts and circumstances being considered at par.

They then posed the question as to the nature or degree of violence that is contemplated under **Section 296 (1)** of the **Penal Code** and which degree of aggravation falls under **Section 296 (2)** of the **Penal Code**. They were of the view that the plain reading of the sections did not provide any answer with certitude. They argued that there is actually no offence which is expressly designated as robbery with violence under the Penal Code, and that all offences of robbery have an element of the use of violence, the threat of use of violence or an attempt to use violence. They further argued that due to this lack of definition, a practice had evolved where charges brought under **Section 296 (2)** of the **Penal Code** are referred to as robbery with violence while charges brought under **Section 296 (1) Penal Code** are referred to as simple robbery yet both sections contemplate an element of violence.

The Petitioners submitted that the true interpretation of the two sub-sections of **296** as read with **Section 295** of the **Penal Code** lay in the purposive interpretation that Parliament intended to graduate the offence of robbery into simple robbery and aggravated robbery.

In support of their proposition, the Petitioners relied on **Harun Thomas Nyandoro vs. AG Nairobi High Court Originating Summons No. 657 of 2005** . They also relied on two other cases **Joseph Yusuf Mumo vs. Republic. Kisumu Misc Appl No. 119 of 2010** and **Abdala Omondi Osala vs. Republic Kisumu Misc. Application No. 135 of 2009.** They submitted that in both cases the accused persons had been convicted of robbery with violence and sentenced to death but had their sentences reduced to five years and 3 years imprisonment respectively. The Petitioners submitted that it was clear from these cases that the courts were unable to make a distinction between what offences ought to be brought under **Sections 296 (1)** and **(2)** of the **Penal Code.** This lack of distinction and differentiation had

occasioned miscarriage of justice to many convicts.

Section 295 of the **Penal Code** defines robbery in the following terms:

“Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”

Section 295 sets out the elements of the offence of robbery as follows -

(i) The act of stealing, and

(ii) Use of or threat to use actual violence to any person or property immediately before or immediately after stealing intended to obtain or retain the stolen item or prevent or overcome resistance to the stealing.

Section 296 of the **Penal Code** provides for both the offences of robbery and aggravated robbery and their respective penalties under **sub-sections (1)** and **(2)** as follows:

(1) Any person who commits the felony of robbery is liable to imprisonment for fourteen years.

(2) If the offender is armed with any dangerous or offensive weapon or instrument, or is in company with one or more other person or persons, or if, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other personal violence to any person, he shall be sentenced to death.

The offence under **Section 296(2)** of the **Penal Code** in addition to the ingredients specified under **Section 295** of the **Penal Code** has the following ingredients:

(i) The offender is armed with a dangerous or offensive weapon or instrument, or

(ii) The offender is accompanied with one or more person(s)

(iii) The offender wounds, beats, strikes, or inflicts any otherpersonal violence to any person immediately before or after the time of robbery.

The distinction between the offence of robbery and aggravated robbery lies in the definition and additional ingredients and sentence that make the latter a more serious offence. However, from the description above, there is a common ingredient in both sub-sections. Under sub-section (1) the words used are *‘uses or threatens to use actual violence to any person or property’.* Under sub-section (2) the words used are ***‘**wounds, beats, strikes or uses any other personal violence to any person**’*.**

The term **robbery** has been defined in various cases. In the case of **Shadrack Karanja vs. Republic Criminal Appeal 119 of 2005;[2006] eKLR**, the Court of Appeal stated as follows:

“The same issue was raised in Moneni Ngumbao Mangi vs. Republic Criminal Appeal No.141/2005 (UR) and this court examined in detail the essential ingredients of the offence of robbery with violence under Section 296(2) of the penal Code as analyzed in Johana Ndungu vs. Republic, Criminal App. No.116/1995 (UR). After noting that the charge sheet in that case stated,

as it does in this case, that the Appellant "robbed" the Complainant, the Court continued:-

'The word "robbed" is a term of art and connotes not simply a theft but a theft preceded, accompanied or followed by the use of threat or use of actual violence to any person or property in order to obtain or retain stolen property. The predecessor of this Court so held in Opoya vs. Uganda [1967] E.A. 752. …'

As already stated there are three ingredients, any one of which is sufficient to constitute the offence of robbery with violence under Section 296(2) of the Penal Code. If the offender is armed with any dangerous or offensive weapon or instrument that would be sufficient to constitute the offence. Secondly, if one is in company with one or more other person or persons that would constitute the offence too. And lastly if at or immediately before or immediately after the time of the robbery he wounds, beats, strikes or uses any other violence to any person that would be yet another set to constitute the offence …"

This deviates from an earlier decision in the case of **Mose v Republic [2002] 1 EA 163** where the court held that in a charge of robbery contrary to **Section 296(1)** of the **Penal Code**, the particulars of the charge ought to read no more than that the accused robbed the complainant of whatever articles, however, no reference should be made to violence or threat to use violence having been made at, before or after the robbery. That reasoning by the court in **Mose**, (supra) seems to ignore the elements of the use or threat to use violence set out under **section 295 of the Penal Code**. Thus, with regard to the offence of aggravated robbery, the element of the use of violence is subsumed in the definition part under **Section 295,** such that the other two elements in the definition under **Section 296(2) of the Penal Code** are what differentiate the offence in **Section 296(1).**

In the case of **Johanna Ndungu v Republic Criminal Appeal No. 116 of 1995**, the Court of Appeal stated as follows:

'In order to appreciate properly as to what acts constitute an offence under section 296 (2) one must consider the sub-section in conjunction with s.295 of the Penal Code. The essential ingredient of robbery under section 295 is use of or threat to use actual violence against any person or property at or immediately before or immediately after to further in any manner the act of stealing. Therefore, the existence of the afore-described ingredients constituting robbery are pre-supposed in the three sets of circumstances prescribed in s.296 (2) which we give below and any one of which if proved will constitute the offence under the sub-section:

1. If the offender is armed with any dangerous or offensive weapon or instrument, or

2. If he is in company with one or more other person or persons, or

3. If, at or immediately before or immediately after the time of the robbery, he wounds, beats, strikes or uses any other violence to any person.

Analyzing the first set of circumstances the essential ingredient, apart from the ingredients including the use or threat to use actual violence constituting the offence of robbery, is the fact of the offender at the time of robbery being armed with a dangerous or offensive weapon. No other fact is needed time (*sic*) of robbery being armed with a dangerous or offensive weapon. No other fact is needed to be proved. Thus if the facts show that at the time of commission of the offence of robbery as defined in S.295 of the Penal Code, the offender was armed in the manner afore-described then he is guilty of the offence under sub-section (2) and it is mandatory for the

court to so convict him. In the same manner in the second set of circumstances if it is shown and accepted by court that at the time of robbery the offender is in company with one or more person or persons then the offence under sub-section (2) is proved and a conviction there under must follow. The court is not required to look for the presence of either of the other two set of circumstances.

With regard to the third set of circumstances there is no mention of the offender being armed or being in company with others. The court is not required to look for the presence of either of these two ingredients. If the court finds that at or immediately before or immediately after the time of robbery the offender wounds, beats strikes or uses any other violence to any person (may be a watchman and not necessarily the complainant or victim of theft) then it must find the offence under sub-section (2) proved and convict accordingly."

Going by the above case of **Johanna Ndungu** (supra) it is apparent that the offence of aggravated robbery, in addition to the ingredients under **Section 295 of the Penal Code,** is sufficiently proved if any of the three elements set out under S**ection 296(2)** of the **Penal Code** is established. In **Johanna Ndungu** case (supra) the court found the offence proved based on the facts which they set out thus:

'In this appeal the facts that are proved are as follows:

i). The appellant at the time of robbery as defined in S.295 of the Penal Code was a member of a gang of three, one of whom was armed with a knife and one other was armed with a stick. That finding alone was enough to convict him under sub-section (2) of section 296 of the Penal Code.

ii). The appellant was in company with two other persons at the time of the said robbery. That finding again on its own was enough for a conviction under S.296 (2).

iii). The complainant (victim) at the time of robbery was actually beaten and wounded by the gang of three of which the appellant was a member. That finding also on its own was enough to convict appellant under sub-section (2).'

The result of the application of this finding in **Johanna Ndungu** case (supra) is that with regard to the third element on the use of violence, it can result in a person being convicted under **Section 296(2)** of the Penal Code and therefore, sentenced to death. On the other hand, the same element of use of violence can be applied in convicting an accused person under the offence of robbery under **Section 296(1)** of the **Penal Code** which attracts a maximum penalty of 14 years' imprisonment. There is clearly an issue for consideration.

Having carefully read **Section 296(1)** and **Section 296(2)** of the **Penal Code** in light of the submission made by the Petitioners and the response made thereto by the Respondent, it is clear to us that the Petitioners have a point when they assert that a person may be charged under **Section 296(1)** and another under **Section 296(2)** of the **Penal Code** on the basis of the same facts and circumstances. The difference, if convicted, will be in regard to the sentence that is meted out on such convicted person. While the convict charged under **Section 296(1)** faces a maximum sentence of fourteen (14) years imprisonment, the convict charged under **Section 296(2)** faces death sentence. Since, as defined in **Shadrack Karanja** case (supra), *robbery connotes not simply a theft but a theft preceded, accompanied or followed by the threat or the use of actual violence to any person or property in order to obtain or retain stolen property, whether it is robbery or aggravated robbery, the same ingredients constitute the offences under the sub-sections of* ***Section 296 of the Penal Code.*** *There is nothing under* ***Section 296(2) of the Penal Code*** *which distinguishes aggravated robbery from the robbery under* ***sub-section***

(1) *of* ***Section 296 of the Penal Code*** *which only sets out the penalty. The definition of what constitutes robbery is found in* ***Section 295 of the Penal Code****. The sections do not set down any aggravating circumstances that would create particularity and clarity as to what constitutes robbery and what constitutes aggravated robbery. There is nothing under* ***Sections 295*** *and* ***296 of the Penal Code*** *to guide the courts, and indeed the investigators and prosecutors, in assessing which sets of facts and circumstances would qualify to constitute either of these two offences.*

We are aware of the additional ingredients under ***Section 296(2) of the Penal Code*** *which, if any one of them is proved, would be sufficient to establish the offence of aggravated robbery. A close scrutiny of these three additional ingredients does not make the situation any different. The first ingredient is if one is armed with a dangerous or offensive weapon or instrument; the second, if one is in company with one or more other person(s); and, third, if one* wounds, beats, strikes or uses any other personal violence to any person. The third ingredient is superfluous as under **Section 295** of the **Penal Code**, the element of use of actual violence is included as an ingredient of the offence termed robbery. That implies that only the first two ingredients remain as the additional ingredients, either one of which if proved would sustain a charge of robbery under **Section 296(2)** of the **Penal Code**. It therefore means that once it is established that the person committed the offence in the company with one or more person(s), or alternatively that he was armed with dangerous or offensive weapon or instrument, then aggravated robbery is established. The question then is; does it mean that robbery under **Section 296(1)** of the **Penal Code** can only be preferred where a lone person commits the offence and that once there is evidence the offence was committed by more than one person then it implies that the two or more persons should be charged under **Section 296(2)** of the **Penal Code**"

Further, what constitutes a dangerous weapon has not been defined, and that is an issue which has drawn conflicting interpretations from various courts. While some instruments or weapons would be obvious without the need of defining them, there are others which are not as obvious. For instance, under the definition of dangerous or offensive weapon, it includes at one extreme a stone or stick and the other extreme a firearm. The point we are making is that the law is not clear what circumstances would constitute robbery under **Section 296(1)** of the **Penal Code**, and what constitutes robbery under **Section 296(2)** of the **Penal Code.**

After a careful consideration of the two sub-sections of ***Section 296*** *of the* ***Penal Code*** *we are in agreement that t*he two sub-sections disclose a lack of sufficient particularity and clarity to distinguish between an offence committed under **Section 296(1)** and that which is taken to be committed under **Section 296(2)** of the **Penal Code**. In both instances, there are common ingredients of theft accompanied by either threat or the use of actual violence.

We agree with the Petitioners that the way these two sub-sections have been applied by the actors in the criminal justice system leaves it open for the subjective application of **Sections 295** and **296(1) and (2)** of the **Penal Code** at the discretion of either investigators, prosecutors and the courts which is wholly undesirable, and which makes its application arbitrary, capricious and unpredictable.

To demonstrate what we mean, we have compared **Sections 296(1)** and **(2),** and **297(1)** and **(2)** of the **Penal Code** with provisions from the **Indian Penal Code** and the **Nigerian Criminal Code Act** set out here below. In the **Indian** and **Nigerian Codes**, the offence of robbery is defined and graduated from the most innocuous to the gravest, and different sentences provided the attendant categories of the offence of robbery in line with the gravity of the offence.

In **Chapter 36** of the **Nigerian Criminal Code Act**, various categories of the offence of robbery are defined in the following sections:

“401. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is said to be guilty of robbery.

402. (1) Any person who commits the offence of robbery shall upon conviction be sentenced to imprisonment for not

(2) If-

(a) any offender mentioned in subsection (1) of this section is armed with any firearms or any offensive weapon or any obnoxious or chemical materials or is in company with any person so armed; or

(b) at or immediately before or immediately after the time of robbery, the said offender wounds any person, the offender shall upon conviction be sentenced to death.

403. (1) Any person who with intent to steal anything, assaults any other person and at or immediately after the time of assault, uses or threatens to use actual violence to any other person or any property in order to obtain the thing intended to be stolen shall upon conviction be sentenced to imprisonment for not less than fourteen years but not more than twenty years.

(2) If-

(a) any offender mentioned in subsection (1) of this section, is armed with any firearms or any offensive weapon or is in company with any other person so armed; or

(b) at or immediately before or immediately after the time of the assault the said offender wounds or uses any other personal violence to any person, the offender shall upon conviction be sentenced to imprisonment for life with or without whipping.

(3) Any person found in any public place in possession of any firearms whether real or imitation and in circumstances reasonably indicating that the possession of the firearms is with intent to the immediate or eventual commission by that person or any other person of any offence under section 402 of this Act shall upon conviction be sentenced to imprisonment for not less than fourteen years nor more than twenty years.

403A. Any person who conspires with any person to commit an offence under section 402 of this Act whether or not he is present when the offence is committed or attempted to be committed, shall be deemed to be guilty of the offence as a principal offender and shall be punished accordingly.

403B. For the purposes of section 402, 403 and 403A-

"firearms" includes any canon, gun, flint-lock gun, revolver, pistol explosive or ammunition or other firearm, whether whole or in detached pieces;

"offensive weapon" means any article apart from a firearm made or adapted for use for causing injury to the person or intend by the person having it for such use by him and it includes an air gun, air pistol, bow and arrow, spear, cutlass, matchet, dagger, cudgel, or any piece of wood,

metal, glass or stone capable of being used as an offensive weapon."

In the **Indian Penal Code of 1860,** various categories of the offence of robbery with the attendant penalties are provided as follows:

"390. Robbery: **In all robbery there is either theft or extortion.**

When theft is robbery- Theft is "robbery" if, in order to the committing of the theft, or in committing the theft, or in carving away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery- Extortion is "robbery" if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation- The offender is said to be present if he is sufficiently near to put the other person in fear of instant death, of instant hurt, or of instant wrongful restraint.

Illustrations

(a) A holds Z down and fraudulently takes Z's money and jewels from Z's clothes without Z's consent. Here A has committed theft, and in order to the committing of that theft, has voluntarily caused wrongful restraint to Z. A has therefore committed robbery.

(b) A meets Z on the high roads, shows a pistol, and demands Z's purse. Z in consequence, surrenders his purse. Here A has extorted the purse from Z by putting him in fear of instant hurt, and being at the time of committing the extortion in his presence. A has therefore committed robbery.

(c) A meets Z and Z's child on the high road. A takes the child and threatens to fling it down a precipice, unless Z delivers his purse. Z, in consequence delivers his purse. Here A has extorted the purse from Z, by causing Z to be in fear of instant hurt to the child who is there present. A has therefore committed robbery on Z.

(d) A obtains property from Z by saying- "Your child is in the hands of my gang, and will be put to death unless you send us ten thousand rupees". This is extortion, and punishable as such; but it is not robbery, unless Z is put in fear of the instant death of his child.

391. Dacoity

When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

392. Punishment for robbery

Whoever commits robbery shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and, if the robbery be committed on the highway between sunset and sunrise, the imprisonment may be extended to fourteen years.

393. Attempt to commit robbery

Whoever attempts to commit robbery shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

394. Voluntarily causing hurt in committing robbery

If any person, in committing or in attempting to commit robbery, voluntarily causes hurt, such person, and any other person jointly concerned in committing or attempting, to commit such robbery, shall be punished with [152][imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

395. Punishment for dacoity

Whoever commits dacoity shall be punished with [152][imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

396. Dacoity with murder

If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or [152] [imprisonment for life], or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine.

397. Robbery, or dacoity, with attempt to cause death or grievous hurt

If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.

398. Attempt to commit robbery or dacoity when armed with deadly weapon

If, at the time of attempting to commit robbery or dacoity, the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years.

399. Making preparation to commit dacoity

Whoever makes, any preparation for committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine

400. Punishment for belonging to gang of dacoits

Whoever, at any time after the passing of' this Act, shall belong, to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with [152][imprisonment for life], or with rigorous imprisonment for a term which may extend to ten years, and shall also be

liable to fine

401. Punishment for belonging to gang of thieves

Whoever, at any time after the passing of this Act, shall belong to any wandering or other gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of 'thugs or dacoits, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

402. Assembling for purpose of committing dacoity

Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine.

402. Assembling for purpose of committing dacoity

Whoever, at any time after the passing of this Act, shall be one of five or more persons assembled for the purpose of committing dacoity, shall be punished with rigorous imprisonment for a term which may extend to seven years, and shall also be liable to fine."

Having considered the submission by both parties, the authorities cited in this judgement, together with the comparative laws we find and hold that the Petitioners have a case when they argue that the sub-sections of **Sections 296 and 297** of the **Penal Code** are ambiguous and not distinct enough to enable a person charged with either of the offences to prepare and defend himself due to lack of clarity on what constitutes the ingredients of either charge. **Article 50(2)** of the **Constitution** proclaims what constitutes "a fair trial" when a person is charged with a criminal offence. We have already set it out herein above. We find and hold that all the persons that have been charged with and convicted of the offences of robbery and attempted robbery under **Sections 296(1)** and (**2)** and **297(1)** and **(2)** of the Penal Code did not have the full benefit of the right to fair trial as provided under **Article 50(2)** of the **Constitution Section 77(1)** of the repealed **Constitution**.

Whether death sentence as provided under Sections 204, 296(2) and 297(2) of the Penal Code is cruel, inhuman and degrading punishment.

The Petitioners have challenged the constitutionality of mandatory nature of the death sentence prescribed for the offences of **murder** under **section 204** of the **Penal Code**, of **robbery with violence** under **section 296(2)** of the **Penal Code** and of **attempted robbery with violence** under **section 297(2)** of the **Penal Code.** Along with that, the Petitioners also challenge the practice by courts that once they convict for any of these three offences they have no discretion in sentencing.

The Petitioners submitted that the death sentence is cruel, inhuman and degrading punishment and urged the court to invoke **Article 28** of the **Constitution** to abolish the death penalty. The Petitioners urged that they suffer from 'death-row syndrome' and with it, unique existential stress and torture by the daily threat of death hanging over their heads. They stated that they were denied basic services of life, *inter alia,* showering, exercise, psychological and medical care. However, the Petitioners did not proof that these services were denied to them. They urged that they had been denied the full and equal enjoyment of their rights and fundamental freedoms as prescribed under **Article 27** of the **Constitution** which provides for equality and freedom from discrimination. The Petitioners cited the case of **Geoffrey Ngotho Mutiso vs. Republic[2010] eKLR** and **Joseph Njuguna Mwaura and**

others vs Republic [2013] eKLR.

In response to this submission, the Respondent argued that the death sentence is not unlawful. The Respondent submitted that the death sentence is allowed under **Article 26(3)** of the Constitution which provides for limitation of the right to life under written law. This authorizes the death penalty where a person is convicted of treason under **Section 40** of the **Penal Code**, murder under **Section 203** as read with **Section 204** of the **Penal Code** and aggravated robbery under **Section 296(2)** of the **Penal Code and** attempted robbery under **Section 297(2)** of the **Penal Code**. He concluded by submitting that the validity of the death sentence was not directly an issue that was raised in the Petition.

How has the issue of the death sentence been address by other jurisdictions and the international fora"

The Constitution in Article 2(5) provides that the general rules of international shall form part of the law of Kenya. Article 2(6) provides thus:

“Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”

Therefore, any international treaty to which Kenya is signatory or has ratified shall form part of the law of Kenya in so far as it enriches the Kenyan jurisprudence and promotes internationally acceptable minimum standards of democracy, good governance and human rights.

In South Africa, the Constitutional Court **In the Matter of State Vs T Mwakanyane and another CCT/3/94,** Justice Chaskalson considered this question at length in terms of **Section 277** of the Criminal Procedure Code of South Africa which not only provided for but laid down the criteria for passing the death sentence. The judge was of the view that numerous factors come to play before a trial judge makes a determination to either convict or acquit an accused person before them. He mentioned that the outcome of the trial may be depended on factors ranging from the way the case was investigated by the police, the way it was prosecuted, how effectively the accused was defended and the personality of the judge trying the case. Other factors that were considered in the South African context were poverty, race and chance play. He was of the view that all these factors led to arbitrariness and the possibility of error in the implementation of the death sentence and in his judgment, which was supported by the other judges in the final order of that court, the State was prohibited from executing or implementing the death sentences, and all death sentences that were pending execution were stayed. South Africa has since abolished the death sentence.

The Constitution of United States of America recognizes the death penalty as lawful. Under the Eighth and Fourteenth Amendments to the Constitution, cruel and unusual punishment is prohibited. However challenges to the validity of the death penalty before the Supreme Court have not been successful because of the fact that the Constitution recognizes it as a lawful punishment. In **Furman Vs Goergia 408 US 238,290 (1972)** the court stated that the dragging of the trial and appeal process resulting in the prisoners remaining on death-row for many years characterized the punishment as being cruel and degrading. However that did not result in the court setting aside the death penalty. In **Trop vs Dulles 356 US 86, 101 (1958)** it was accepted by the Supreme Court that although the US Constitution does not contain a specific guarantee of human dignity, the concept of human dignity is at the core of prohibition of ‘cruel and unusual punishment’. The Supreme Court in **Gregg vs Goergia 428 U.S. 153, 173 (1976)** affirmed the death penalty.

In **Woodson vs. North Carolina 428 U.S. Supreme Court 280 (1976)** a challenge was raised against a North Carolina law that made death penalty mandatory for the offence classified as first degree murder.

The court found that the law was unconstitutional as it violated the Eighth and Fourteenth Amendments of the US Constitution for several reasons including the following:

'A third constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. In *Furman*, members of the Court acknowledged what cannot fairly be denied -- that death is a punishment different from all other sanctions in kind, rather than degree. *See* 408 U.S. at 408 U. S.286-291 (BRENNAN, J., concurring); *id.* at 408 U.S. 306 (STEWART, J., concurring). A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."

The bottom line in regard to the question of the validity of the death penalty in the US is that the Supreme Court has addressed itself primarily to the concerns of due process which include a requirement that statutes are clear and that discretion is curtailed without ignoring the peculiar circumstances of each accused person. However the Supreme Court has remained divided and has not resolved the issue between the Constitution which prohibits cruel and unusual punishments versus the Constitution which contemplates the death sentence, finding rather that the death sentence is not *per se* unconstitutional but may be arbitrary in certain cases and thus unconstitutional.

In Germany, death penalty has been abolished. In the Federal Constitutional Court in **[1977] 45 BVerfGE 187, 228** it was held:

"Respect for human dignity especially requires the prohibition of cruel, inhuman, and degrading punishments. [The State] cannot turn the offender into an object of crime prevention to the detriment of his constitutionally protected right to social worth and respect."

In the case of **Reyes v The Queen [2002] UKPC 11, [2002] 2 AC 235,** which emanated from Belize and was heard by the Judicial Committee of the Privy Council, the appellant argued that the blanket mandatory death sentence on all persons convicted as murderers amounted to inhuman and degrading treatment for the reason that it removes any opportunity for an accused person to present mitigation; it also fails to take into consideration the peculiar facts of the particular case or the personal circumstances of accused person; and further that such a blanket imposition, the sentence might be wholly disproportionate to the accused person's criminal responsibility. The Privy Council concluded that:

' In a modern liberal democracy it is ordinarily the task of the democratically elected legislature to decide what conduct should be treated as criminal, so as to attract penal consequences, and to decide what kind and measure of punishment such conduct should attract or be liable to attract. The prevention of crime, often very serious crime, is a matter of acute concern in many countries around the world, and prescribing the bounds of punishment is an important task of those elected to represent the people. The ordinary task of the courts is to give full and fair effect to the penal laws which the legislature has enacted. It is sometimes described as deference shown by the courts to the will of the democratically-elected legislature. But it is perhaps more aptly described as the basic constitutional duty of the courts which, in relation to enacted law, is to interpret and apply it.

…the provision requiring sentence of death to be passed on the appellant on his conviction of murder by shooting subjected him to inhuman or degrading punishment or other treatment incompatible with his right under section 7 of the constitution in that it required sentence of death to be passed and precluded any judicial consideration of the humanity of condemning him to death…. But there will also be murders of quite a different character… in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 exists to protect.'

It is important to note that the Privy Council in the **Reyes** case (supra) restricted itself to the nature of the penalty for the offence of murder which the appellant had been convicted of, as prescribed by Belize law, which was death by shooting. The Privy Council found that punishment to be cruel, inhuman and degrading for that reason and for the further reason that the sentence was imposed before mitigating circumstances of the appellant were heard and considered. The Privy Council, consequently concluded that a recommendation be made to allow the appeal on sentence and to have the death sentence meted against the appellant quashed, and further that the case be remitted to the Belize Supreme Court for the appropriate sentence to be prescribed upon consideration of evidence that would be presented.

Kenya is signatory to the **International Covenant on Civil and Political Rights (ICCPR)** since May 1972. ICCPR, *inter alia*, makes provisions on the death penalty under **Article 6** provides as follows:

'…2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court. …

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.'

ICCPR, under **Article 6** recommends that in the countries where the death penalty has not been abolished, then the death sentence should only be passed for the most serious of crimes, thus alluding to the proportionate principle in sentencing. It further recommends that the convicted person should be tried by a competent court or tribunal and must also be given an opportunity to seek amnesty, pardon or commutation of sentence.

Similar standards as those contained in **ICCPR** have also been addressed by the **UN Commission on Human Rights (UNCHR).** The **UNCHR** has recommended for the abolition of the death sentence as a mandatory sentence. This is set out in **Human Rights Resolution 2005/59: "The Question of the Death Penalty"** dated 20 April 2005, E/CN.4/RES/2005/59 which urges all States that still maintain the death penalty:

'…(d) Not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgment rendered by an independent and impartial competent court, and to ensure the right to a fair trial and the right to seek pardon or commutation of sentence;

…

(f) To ensure also that the notion of "most serious crimes" does not go beyond intentional crimes with lethal or extremely grave consequences and that the death penalty is not imposed for non-violent acts such as financial crimes, religious practice or expression of conscience and sexual relations between consenting adults nor as a mandatory sentence.'

In **Pagdayawon Rolando v. Philippines, Communication No.1110/2002, U.N. Doc. CCPR/C/82/D/1110/2002 (2004)** Pagdayawon Rolando, a Filipino national, was tried and convicted for the offence of rape in the local courts and sentenced to death, as well as pay the sum of 50,000 pesos to the victim. The death sentence of the trial court was affirmed by the Supreme Court in exercise of its automatic review procedure, but the civil liability was enhanced to 75,000 pesos and "an additional award of 50,000 pesos by way of moral damages." The conviction was challenged. Also challenged was the failure by the Supreme Court to hear testimony in exercise of its review procedure. Another issue that was appealed against was the extension of the death penalty to crimes such as rape by virtue of the **1997 Republic Act No. 8353** which he alleged violates the State Party's obligation to restrict the death penalty to the "most serious crimes", in accordance with **Article 6** of the **ICCPR**.

The Human Rights Committee made the following observations on the issue of mandatory death penalty in line with **Article 6 of the ICCPR**:

'Thus, the death penalty was imposed automatically by operation of article 335 of the Revised Penal Code, as amended. The Committee recalls its jurisprudence that the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life, in violation of article 6, paragraph 1, of the Covenant, in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence. (7) It also notes that rape, under the law of the State party is a broad notion and covers crimes of different degrees of seriousness. It follows that the automatic imposition of the death penalty in the author's case, by virtue of the application of article 335 of the Revised Penal Code, as amended, violated his rights under article 6, paragraph 1, of the Covenant.'

Similar provisions as in **ICCPR,** and as considered by **UNCHR,** are prescribed under the **UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty,** approved by the **Economic and Social Council** in its **Resolution No. 1984/50** of 25th May 1984. It provides:

1. In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.

2. Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

…

5. Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political

Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings.

6. Anyone sentenced to death shall have the right to appeal to a court of higher jurisdiction, and steps should be taken to ensure that such appeals shall become mandatory.

7. Anyone sentenced to death shall have the right to seek pardon, or commutation of sentence; pardon or commutation of sentence may be granted in all cases of capital punishment.

8. Capital punishment shall not be carried out pending any appeal or other recourse procedure or other proceeding relating to pardon or commutation of the sentence…'

It is quite clear from these international instruments and determinations that the death penalty is still recognized as a lawful sentence but with certain qualifications. The **ICCPR,** the **UNCHR** and the **UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty** in the respective covenants, resolutions and decisions, make provision for safeguarding of the lives of those facing death penalties, provided that in countries which have not abolished the death penalty, then they are required to comply with certain safeguards which include the prerequisites not to make death penalty a mandatory sentence, thus ensuring that the sentence is imposed only for the most serious crimes, and even then, an opportunity be given to the convict to mitigate and seek pardon or commutation of the sentence.

Nearer home in Uganda, in the case of **Attorney General v Susan Kigula & 417 Others, Supreme Court of Uganda Constitutional Appeal No. 3 of 2006**, the provisions of the law providing for mandatory death sentences were challenged as unconstitutional for the reason that convicted persons were deprived of their right to appeal against the sentences, and were therefore denied the right to equal protection before the law. On the question of the mandatory death sentence, the Constitutional Court found that the statutory provisions which prescribed mandatory death sentences were inconsistent with **Articles 21, 22(1), 24, 28,44(a) and 44(c)** of the **Constitution of Uganda** and were therefore, unconstitutional.

This finding was challenged on appeal by the Attorney General to the Supreme Court of Uganda. The Supreme Court found that the statutory provisions imposing the mandatory death sentences were inconsistent with **Article 126** of the **Constitution** of **Uganda** as they limited the exercise of judicial power; therefore were unconstitutional. The court reasoned thus:

'A trial does not stop at convicting a person. The process of sentencing a person is part of the trial. This is because the court will take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. This is clearly evident where the law provides for a maximum sentence. The court will truly have exercised its function as an impartial tribunal in trying and sentencing a person. But the Court is denied the exercise of this function where the sentence has already been pre-ordained by the Legislature, as in capital cases. In our view, this compromises the principle of fair trial.'

In the Uganda case several factors were at play, and these included the delay in execution of the death sentences by the State and the fact the legislature pre-ordained the maximum sentence, and particularly the death sentence while taking away the function of the court to receive evidence before passing sentence. This is more or less similar to the situation prevailing in Kenya in relation to offences that attract capital punishment.

Back home in Kenya, **Godfrey Ngotho Mutiso** case (supra) been cited for our consideration. In that case, the Appellant was convicted of the offence of murder and sentenced to death. In his appeal before the Court of Appeal, he challenged, among others, the imposition of a mandatory death sentence as arbitrary and unconstitutional. This was premised on the argument that such a sentence was passed without the accused being given the opportunity to mitigate his circumstances; and without taking into consideration the detailed facts of the particular case or the personal history and circumstances of the offender, and further, taking into account whether such sentence might be disproportionate to the accused's criminal culpability.

The court held that:

'…section 204 of the Penal Code which provides for a mandatory death sentence is antithetical to the Constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. We note that while the Constitution itself recognises the death penalty as being lawful, it does not say anywhere that when a conviction for murder is recorded, only the death sentence shall be imposed. We declare that section 204 shall, to the extent that it provides that the death penalty is the only sentence in respect of the crime of murder is inconsistent with the letter and spirit of the constitution, which as we have said, makes no such mandatory provision.'

The court proceeded to hold:

"the appellant in this case was entitled to have his antecedents and other mitigating factors recorded for purposes of assisting the President in exercise of the prerogative of mercy; **adding that the trial court has the power under section 329 of the Criminal Procedure Code to receive such evidence he thought fit in order to inform himself as to the proper sentence to pass. The court further held that while … in appropriate cases, the courts will continue to impose the death penalty…that will only be done after the court has heard submissions relevant to the circumstances of each particular case.."**

The **Mutiso** case, (supra) made a clear finding that **section 204 of the Penal Code**, and indeed all other provisions in the Penal Code which provide for the mandatory death sentence are antithetical to the constitutional provisions on protection against inhuman or degrading punishment or treatment and fair trial. That court clearly stated the reason as to why it was persuaded that **Section 204 of the Penal Code** was unconstitutional by virtue of the reasons stated above. It is clear that it is the mandatory nature of the sentence prescribed under **section 204 of the Penal Code** which the Court of Appeal felt went beyond what the constitution provided for.

The court ordered that the case be remitted back to the High Court for the consideration of parties' submissions before a sentence could be imposed. While the court held that its findings were in respect of murder cases, it acknowledged that the holding could be applied to other capital offences. In effect the judgment of this court was to hold that a court has a discretion to pass any sentence other than the death sentence in capital cases and secondly that the court must receive evidence on mitigation before passing sentence.

The effect of the **Mutiso** case, (supra) was to, *inter alia*, give trial courts in Kenya the discretion to vary the death penalty in murder trials. Indeed several accused persons facing murder trials benefited from this case for the duration it the holding in the decision prevailed.

In a later decision from the same Court, which has also been cited to us, **Joseph Njuguna Mwaura& 2**

Others (supra), the Court of Appeal upheld the mandatory death sentence and stated that the courts had no discretion to vary the sentence of death. The appellants had been charged with the offence of robbery with violence and sentenced to death. Their first appeal before the High Court was dismissed. At the second appeal, the appellants argued among other issues that the death sentence violated the constitutional provisions on the right to life and right against inhuman and degrading treatment. The Court of Appeal observed as follows:

'Clearly, the Constitution envisages a situation in which the right to life can be curtailed, a fact recognised by the Court in *Godfrey Ngotho Mutiso v R [2010] eKLR (Criminal Appeal 17 of 2008).*The situations in which a person's right to life may be curtailed are contained in the following sections of the Penal Code: section 24 which provides that the punishments which may be inflicted by a court include the death sentence, section 25 (1) which provides that *'Where any person is sentenced to death, the form of the sentence shall be to the effect only that he is to suffer death in the manner authorized by law'.*

As we have stated before, the sentence of death is imposed on those found guilty of the following offences: administering an oath to commit a capital offence, murder, treason, robbery with violence and attempted robbery with violence. These offences are provided for in the Penal Code.

Since the Constitution, both in the former epoch and the current, clearly envisages that the right to life is not absolute, the state can limit it in accordance with any written law. The law in this case is the Penal Code.

Indeed some of the international instruments envisage a situation where the right to life may be curtailed in furtherance of a sentence imposed by a court of law. Article 6 of International Covenant on Civil and Political Rights provides that:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime…. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

Kenya has been party to this Covenant since May 1972. This country, however, is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights which aims at the abolition of the death penalty. This is instructive because it points out that under our law as it stands, the death sentence continues to be a valid sentence that can be passed by a court of law. …Our present Constitution was sanctioned by the people of Kenya by way of a referendum on 4th August 2010, and the voice of the people was loud and clear: that they wished to retain the limitation on the right to life, which now presents itself in Article 26 (3).'

The effect of this case was to take away the courts discretion to vary a death penalty with any other penalty.

It can be seen very clearly that in Kenya the courts have stated and re-stated again and again that the death penalty is a lawful sentence which is recognized both under the epoch and the current Constitutions. The cases in **Mutiso**, (supra) and **Njuguna Mwaura**, (supra) are however in agreement

that the Constitution envisaged a situation where right to life can be curtailed; and that the sentence of death provided in the Penal Code, for offences of murder under **Section 204 of the Penal Code**, aggravated robbery under **Section 296(2) of the Penal Code** and attempted robbery under **Section 297(2) of the Penal Code** was in line with the Constitutional provisions giving the State power to limit the right to life through written law.

In the **Njuguna Mwaura** case, (supra) this is what the judges of the Court held concerning the decision in the **Mutiso** case:

"14. The decision in the *Godfrey Ngotho Mutiso* case was *per incuriam* in so far as it purported to grant discretion in sentencing with regard to capital offences. The offences of murder contrary to section 203 as read with 204 of the Penal Code, treason contrary to section 40 of the Penal Code, administering of oaths to commit a capital offence contrary to section 60 of the Penal Code, robbery with violence contrary to section 296 (2) of the Penal Code and attempted robbery with violence contrary to section 297 (2) of the Penal Code carried the mandatory sentence of death."

Regarding the death penalty the same court held:

"We must now consider whether the death sentence as envisaged under our law amounts to cruel and inhuman or unusual punishment which is prohibited by the Constitution. Black's Law Dictionary (9th Edition) defines torture as '*the infliction of intense pain to the body or mind to punish, to extract a confession or information or to obtain sadistic pleasure*,' and cruel and unusual punishment as '*punishment that is torturous degrading, inhuman, grossly disproportionate to the crime in question or otherwise shocking to the moral sense of the community.'* Inhuman treatment is defined as *'physical or mental cruelty that is so severe that it endangers life or health'*. Based on these definitions cruel, inhuman and degrading punishment is that which is done for sadistic pleasure, in order to cause extreme physical or mental pain, and that is disproportionate to the crime, so that it causes moral outrage within the community. We do not think that the death sentence falls within these definitions. The death sentence is not done for the sadistic pleasure of others. It cannot also be said to be shocking to the moral sense of the community due to the fact, as we have stated above, that it has now been endorsed by the people of Kenya through the referendum, and by the fact that it continues to exist in our statute books with constitutional underpinning. We also do not consider that the deprivation of life as a consequence of unlawful behaviour is grossly disproportionate. In Kenya, death is a penalty for what can be considered as the most serious of crimes. It is a proportionate punishment for the offences committed, which in many cases result in the loss of life, and the loss of dignity for the victims."

We can say no more. The death sentence in Kenya as a penalty for the offences prescribed under the Penal Code, as stated above, is not unconstitutional. It was contemplated in the Constitution in that the same envisaged a situation where the right to life provided under **Article 26(3) of the Constitution** could be curtailed by written law. Conversely the death sentence *per se* is not cruel, inhuman or degrading punishment. We however note that the issue presented before us for determination is the constitutional question whether the imposition of the death sentence irrespective of the circumstances in which the offences were committed is unconstitutional. This also applied to cases where the mitigating circumstances of the offender were not considered before the sentence was meted out. Our focus is therefore not to answer the question whether the death sentence is unconstitutional, but rather whether due process leading to the meting out of the death sentence met the constitutional threshold of a fair trial. Further, the pertinent issue is whether the statutory provisions upon which the charges were brought against the Petitioners were clear and free from ambiguity as to attract the death sentence upon

their conviction. These issues have not been directly addressed in the **Joseph Njuguna Mwaura** case (supra) and **Godfrey Ngotho Mutiso** case (supra). In any event, the courts in the above two cases were considering appeals and not constitutional issues.

We are fully aware where our jurisdiction in this matter lies. As the court in the **Reyes** case, (supra) emphasized, "**the ordinary task of the courts is to give full and fair effect to the penal laws which the legislature has enacted. It is sometimes described as deference shown by the courts to the will of the democratically-elected legislature. But it is perhaps more aptly described as the basic constitutional duty of the courts which, in relation to enacted law, is to interpret and apply it**." The people of Kenya, both the citizens during the referendum, and their representatives in Parliament, and many other parties and persons throughout the Constitution making process had a great opportunity to change the law on the death penalty, among many other concerns Kenya as a country had, and maybe continues to have. With a resounding voice, they chose to retain the laws on the death penalty by giving those laws constitutional underpinning. We believe that we cannot undo what Kenyans did during the constitutional making process. Just as the Justices in the **Mutiso** case, (supra) stated, as long as the law in Kenya continues to prescribe death as a punishment, the courts cannot do otherwise than pass it.

We cannot however stop there. We wish to associate ourselves with holding in the **Reyes** case, (supra) in the following paragraphs of that judgment:

"It has however been recognized for very many years that the crime of murder embraces a range of offences of widely varying degrees of criminal culpability. It covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other mercy-killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are by no means equally heinous. The Royal Commission on Capital Punishment 1949 – 1953 examined a sample of 50 cases and observed in its report (1953) (Cmd 8932), p 6, para 21 (omitting the numbers of the cases referred to):

'Yet there is perhaps no single class of offences that varies so widely both in character and in culpability as the class comprising those which may fall within the comprehensive common law definition of murder. To illustrate their wide range we have set out briefly … the facts of 50 cases of murder that occurred in England and Wales and in Scotland during the 20 years 1931 to 1951. From this list we may see the multifarious variety of the crimes for which death is the uniform sentence. Convicted persons may be men, or they may be women, youths, girls, or hardly older than children. They may be normal or they may be feeble-minded, neurotic, epileptic, borderline cases, or insane; and in each case the mentally abnormal may be differently affected by their abnormality. The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood. The crime may be committed in order to carry out another crime or in the course of committing it or to secure escape after its commission. Murderous intent may be unmistakable, or it may be absent, and death itself may depend on an accident. The motives, springing from weakness as often as from wickedness, show some of the basest and some of the better emotions of mankind, cupidity, revenge, lust, jealousy, anger, fear, pity, despair, duty, self-righteousness, political fanaticism; or there may…"

Having taken into consideration the above factors, we are of the considered view that the sections of the Penal Code upon which the Petitioners were charged and convicted, insofar as they did not allow the

possibility of differentiation of the gravity of the offences in a graduated manner in terms of severity or attenuation, and the failure to give an opportunity for the consideration of the circumstances of the offender, rendered those sections, i.e. **Sections 204, 296(2) and 297(2) of the Penal Code** deficient in terms of assisting those administering the justice system to be able to charge offenders with the appropriate offences that will ultimately attract a proportionate sentence. It in that context that the complaints by the Petitioners that the imposition of the death sentence as a one-stop-shop contravenes their fundamental rights to fair trial.

Whether the court is required in law to take into consideration the mitigation of an accused person who has been convicted under Sections 203 as read with 204, 296(2) and 297(2) of the Penal Code and whether the court has jurisdiction to vary the death sentence and if so whether the sentence thereby meted is constitutional.

On this issue, the Petitioners submitted that they were deprived of the right to protection and full benefit of the law when the court denied them a chance to mitigate and/or failed to take into consideration their mitigation on account that the court's hands were tied, and that, the Constitution and the law grants discretion to courts to consider mitigation before sentencing. The Petitioners cited **Sections 216** and **329 of the Criminal Procedure Code** and argued that the sentences meted out without taking into account mitigating factors are void. They further argued that **Sections 216** and **329 of the Criminal Procedure Code** and **Section 389 of the Penal Code** are sections for general application and bind all trial courts when sentencing. The Petitioners have urged this court to find that failure to take the above provisions into account during sentencing is a violation of **Article 27 (1) (2) and (3) of the Constitution** and **Section 70 of the repealed Constitution.**

The Petitioners further argued on the same issue that **Sections 216** and **329 of the Criminal Procedure Code** affords the trial courts sentencing discretion by requiring them to consider the mitigating circumstances of the offender before passing sentence. They submitted, further, that this is meant to ensure that in exercising their exclusive functions in the administration of justice, courts are able to make fair decisions especially when the effect of such decisions is to deprive the accused persons of their fundamental right to life and liberty. The Petitioners compared these two Kenyan provisions with the Ugandan **Section 98 of The Trial on Indictment Act** (Cap. 23 Laws of Uganda) which makes it an obligation for the courts to receive and consider mitigation for all offences save for offences carrying the death sentence. They further submitted that Kenya's **Sections 216** and **329 of the Criminal Procedure Code** are progressive provisions of the law which guarantees enjoyment of human rights as they are intended to have the elements of fair trial manifested in all criminal trials.

But what is mitigation in our context" Simply understood, the word mitigation means the act of lessening or making less severe the intensity of something unpleasant such as pain, grief or extreme circumstances. It is an act of making a condition or consequence less severe and in our case it is the act of making a punishment or sentence in a criminal case less severe. In **Black's Law Dictionary Free Online Legal Dictionary 2nd Ed**. mitigation is defined as:

"Alleviation; abatement or diminution of a penalty or punishment imposed by law. 'Mitigating circumstances' are such as do not constitute a justification or excuse of the offence in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability."

Section 216 of the Criminal Procedure Code provides that:

"The court may, before passing sentence or making an order against an accused person under

section 215, receive such evidence as it thinks fit in order to inform itself as to the sentence or order properly to be passed or made."

Similar provision is found under **Section 329 of the Criminal Procedure Code** which is worded thus:

"The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed."

These provisions, in our view, are clear in their intent and purpose. They require trial courts to receive such evidence and mitigating circumstances as it thinks fit before passing sentence in order to inform itself as to the proper sentence to pass.

In **Edwin Otieno Odhiambo v Republic [2009] eKLR the appellant was charged with the offence of murder. Upon conclusion of the trial, the court found him guilty of the lesser charge of manslaughter and sentenced him to 15 years' imprisonment. He challenged both conviction and sentence. The appeal was argued on the ground that the sentence was manifestly harsh and excessive. It was submitted that the** superior court did not give the appellant an opportunity to mitigate before the sentence was imposed as stipulated in **Sections 215** and **216** of the **Criminal Procedure Code.** The Court faulted the trial court for failing to hear the appellant in mitigation. It stated:

"On the issue of the sentence, it is clear to us that the trial court did not offer the appellant an opportunity to mitigate and on this we are in agreement with the appellant counsel's submission. Although we appreciate that *section 216* of the Criminal Procedure Code is worded in permissive terms, we are certain that on matters of sentencing if a court disregards the provision and therefore fails to take into account mitigating circumstances, the chances of not coming up with an appropriate sentence are enhanced. We are also concerned that, in this matter the court went on to impose a sentence of 15 years without taking into account that the appellant had been held in custody for 3 years before the commencement of the trial. We think the court ought to have taken this into account when imposing the sentence. On the issue of intoxication and provocation, while we note that the court did address this in the judgment and consequently reduced the charge of murder to manslaughter, nevertheless, on the issue of the sentence there is nothing to show that the court considered these factors at all. We are equally of the view that the court should have separately recorded any mitigating circumstances.

We are of the view that the superior court had a duty to record the mitigation after a conviction and before sentencing. This statement is not a reinvention of the wheel. In the case of *JOHN MUOKI MBATHYA V. REPUBLIC* Criminal Appeal No. 72 of 2007 (unreported)"

In **Joseph Njuguna Mwaura 2 Others** case, (supra), the Court of Appeal in reference to **Godfrey Ngotho Mutiso** case, (supra), had this to say:

"The import of this decision is that mitigation is now required to determine the appropriate sentence in cases where there had been convictions for capital offences. In effect, the holding in this case introduced sentencing discretion to judicial officers in murder cases. Decisions by this Court are generally binding, but we do have the power to depart from those decisions where we consider that in the circumstances, it is correct to do so. The Court will also not follow a case that it considers *per incuriam*."

After due consideration of the matter as to whether courts have discretion in meting out any other forms of sentences in respect of capital offences and our understanding of the above authorities (**Edwin**

Otieno Odhiambo, Godfrey Ngotho Mutiso and Joseph Njuguna Mwaura, (supra**),** and also in light of the interpretation that we have given to our mandate, we are of the view that although it may appear that Kenyan courts have no discretion to consider mitigation in the case where an accused person is convicted of a capital offence, however, we hold that it is a constitutional requirement for such an accused person to be granted an opportunity to present his mitigating circumstances before sentencing. This is because **Article 50(2) of the Constitution** sets out some of the principles that are considered to constitute fair trial. One of these principles is the right to lodge an appeal or apply for review in a higher court, if convicted (see **Article 50 (2) (q**)). Such mitigation will enable a court hearing the appeal to have a holistic view of the case, and in the event that the appellate court decides to alter the conviction from a capital offence to any other offence, it will have all the facts and circumstances of the accused on record to enable it assess the appropriate sentence for the reduced offence. Further, some mitigating circumstances may disclose certain facts that materially affect the finding made by the court to such an extent that it may result in the court arriving at a different decision. For instance, it is not unknown that many of the criminal charges brought before the courts relate to some form or other of land disputes. There can be circumstances where the trial court does not take into account such underlying circumstances. It may also be that the accused suffers from some form of mental illness which may not have been apparent during the trial. This court is not oblivious of the fact that in the majority of criminal trials especially before the magistrates' courts, accused persons are not represented and may not be aware of their rights and due procedure of the court. Such circumstances may sometimes be brought out during mitigation of sentence. If such an accused person is denied a chance to mitigate the sentence solely because he has been convicted of a capital offence, we are of the considered view that it will deny him his constitutional right to fair trial.

We wish to put mitigation in its proper place in the trial process. The law under **Sections 216** and **329 of the Criminal Procedure Code** requires the court to receive such evidence as it thinks fit to guide it as to the proper sentence to impose on an accused person after conviction. Mitigation is an important part of the trial where the court obtains information, which may be in the form of evidence or reports, whether expert or otherwise (for instance a medical or Probation Officer's or Children Officer's reports) giving the circumstances either of the offender, or the victim or their respective families or members of the community to which either of the parties belong. Some of this information have statutory underpinning, for instance under **Section 323 of the Criminal Procedure Code** the court is required to ask the accused person whether he has anything to say after his conviction and before sentence. Under **Section 333(2) of the Criminal Procedure Code** the court is require to take into account the period the accused person spent in custody before conviction. It may be argued that this provision is not relevant where an accused has been sentenced to death but this does not preclude the court from performing its statutory duty imposed on it to consider such information. The previous criminal record of the accused, and whether he is a first offender, and any other circumstances personal to the accused person should be received at this stage of the proceedings before sentence is passed. Although it has not been the practice for courts to carry out a hearing as part of the sentencing process, however, with the coming into force of the **Sentencing Policy Guidelines,** it is now a mandatory requirement and, in accordance with International and Regional Sentencing Standards, it is good practice. Upon conducting a hearing before sentence, the court then delivers a reasoned ruling in which it sets out all the factors that it has taken into account in determining the appropriate sentence to be meted to the convict. It is not uncommon for the appellate court to set aside a sentence imposed by the trial court which is not preceded a reasoned ruling based on statutorily required pre-sentencing circumstances.

Although under **Sections 329A, 329B, 329C, 329D and 329E of the Criminal Procedure Code** it is not mandatory to receive the Victim Impact Statement and attendant reports, however, the law recognizes the importance of receiving this information before sentence is passed.

It is not by chance that stakeholders in the criminal justice system agitated for the formulation of sentencing policy guidelines. The policy has been published by the Judiciary and is titled **"Sentencing Policy Guidelines**" (Policy) and has been in use since 2015. It is a product of stakeholders in the criminal justice system. In Part 1, paragraph 3 the Policy sets out the principles underpinning the sentencing process. They include proportionality, equality/uniformity/parity/consistency/impartiality,

accountability/transparency, inclusiveness, respect for human rights and fundamental freedoms and adherent to domestic and international law with due regard to recognized international and regional standards on sentencing. The object of the **Policy,** *inter alia,* includes the promotion of consistence, transparency and certainty in the sentencing process with the aim of ultimately enhancing delivery of justice and promoting confidence in the judicial process. The **Policy** recognizes that **"the sentences imposed impact on the criminal justice system as a whole. In fact, it is the penal sanctions ordered that either give effect to or undermine the objectives of sentencing."**

We have compared **Sections 216** and **329 Criminal Procedure Code** with **Section 98 of The Trial on Indictments Act of Uganda** which provides thus:

"The court before passing any sentence <u>other than a sentence of death</u>, any make such inquiries as it thinks fit in order to inform itself as to the proper sentence to be passed, and may inquire into the character and antecedents of the accused person either at the request of the prosecution or the accused person and may take into consideration in assessing the proper sentence to be passed such character and antecedents including any other offences committed by the accused person whether or not he or she has been convicted of those offences……"

It is clear to us that unlike the Kenyan provisions, the Ugandan law on the issue of mitigation is specific that mitigation is not an option for those convicted of charges that attract the death sentence.

The second component of this issue is whether the court has jurisdiction to vary the mandatory death sentence and if so whether the sentence thereby meted is constitutional"

The Petitioners are asking us to resolve this issue in finding in the affirmative. The position in Kenya is that all the provisions of the law that impose the death sentence are couched in mandatory terms (see Sections 204, 296(2), 40(3), 60 and 297(2) of the Penal Code). While discussing this issue in the **Joseph Njuguna Mwaura case** (supra) the Court of Appeal had this to say in regard to jurisdiction:

"A look at all the provisions of the law that impose the death sentence shows that these are couched in mandatory terms, using the word "shall". It is not for the Judiciary to usurp the mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purports to impose another sentence than has been provided in law."

We understand the Court of Appeal to be saying that courts have no jurisdiction to alter the death sentence and purport to impose another sentence that is not provided for in law. With greatest respect to the above decision, the fact that the trial court may impose a death sentence in circumstances alluded to in the judgement does not excuse or exempt the trial court from receiving and considering the mitigation and other reports that are legally required after the conviction of the accused and before sentencing. We have also taken cognizance of the fact that the above decision may have been rendered by the Court without the benefit of the kind of submission that was presented before us and also before the **Sentencing Policy Guidelines** came into effect. Therefore, it may be possible that the court seized with jurisdiction in the particular case may vary a sentence that requires the convict to be sentenced to death and give a sentence other than the death sentence. Such instances include where a female convict is

found to be pregnant, is a child, or is a person with mental disability. We find and hold that mitigation by a convict facing any criminal charge before sentencing is a constitutional imperative of fair trial.

Conclusions

After a careful evaluation of the facts of the Petition and the applicable law and decided cases, we have come to the conclusion that as regards issue (i), we hold that we have jurisdiction to hear the Petition and grant the orders sought as shall be apparent herein below. We also hold that in interpreting the Bill of Rights provisions under the Constitution we have adopted the interpretation that promotes its purposes, values and principles, that advance the rule of law, human rights, and that contributes to good governance. We are also guided that in determining whether sections in the Penal Code are constitutional, the general presumption is that every Act of Parliament is constitutional unless the contrary is established by the Petitioners. We hold that in determining whether a statute is constitutional, this court shall be guided by the object and purpose of the statute that is sought to be impeached. We are of the view that the Constitution should be given a purposive and liberal interpretation that gives effect to its aspirations. Finally, we will, in interpreting the provisions of the Bill of Rights, consider the cited Articles as an integrated whole (see **Institute of Social Accountability and Another** case (supra)).

We shall combine issues (ii) and (iii) in light of the findings that we shall make.

We have examined **Sections 295, 296(1)and (2) and 297(1) and (2) of the Penal Code** and have come to the conclusion that the said sections of the Penal Code are ambiguous and are conflicted to such an extent that it violates an accused person's right to fair trial as provided under **Article 50 (2)(b) of the Constitution** and **Article 27 of the Constitution** that requires accused persons, who are a special category of persons facing criminal trial, to be given equal treatment and to be accorded equal protection and equal benefit under the law. We have found that although **Section 295 of the Penal Code** gives the definition of the offence of robbery, the definition is inadequate and insufficient in its scope and application so that the penalty sections provided under **Section 296(1), 296(2), 297(1) and 297(2) of the Penal Code** do not set out in required detail that meets the constitutional threshold that requires certainty and clarity of the offence charged to enable an accused person to prepare and conduct their defence. This lack of clarity and presence of ambiguity evident in the said sections has resulted in persons being charged with either offence under **sub-sections (1)** and **(2) of Sections 296** and **297 of the Penal Code** based on similar facts and circumstances, with consequent miscarriage of justice to those accused persons convicted of the aggravated offences. The said sections of the Penal Code do not distinctively clarify and differentiate the degrees of aggravation of the offence of robbery and attempted robbery with sufficient particularity as to enable those accused to adequately answer to the charges and prepare their defences. The observations we have made above is similar to the sentiments made by Mumbi J in **Geoffrey Adare –Vs- Attorney General & 2 Others [2016] eKLR** where the Learned Judge was called upon to consider whether **Section 29** of **The Kenya Information and Communication Act** was constitutional. In the pertinent part of her holding, she held thus:

"77. I have considered the words used in the section. I note that there is no definition in the Act of the words used. Thus, the question arises: What amounts to a message that is "grossly offensive", "indecent" "obscene" or "menacing character"" Similarly, who determines which message causes "annoyance", "inconvenience", "needless anxiety"" Since no definition is offered in the Act, the meaning of these words is left to the subjective interpretation of the Court, which means that the words are so wide and vague that their meaning will depend on the subjective interpretation of each judicial officer seized of the matter.

78. It is my view, therefore, that the provisions of section 29 are so vague, broad and uncertain that individuals do not know the parameters within which their communication falls, and the provisions therefore offend against the rule requiring certainty in legislation that creates criminal offences. In making these findings, am guided by the words of the case of Sunday Times –Vs- United Kingdom Application No.65 38/74 para 49, in which the European Court of Human Rights stated as follows:

"(A) norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen regulates his conduct: he must be able –if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequence which a given situation may entail.""

We are of the view that the said sections of the Penal Code are imprecise, broad and vague in scope that it does not muster the constitutional threshold of sufficient precision to enable an accused person adequately prepare and conduct his defence if charged under the said sections.

As regards issues (iv), (v) and (vi), we hold that the death sentence is not a cruel, inhuman and degrading punishment. **Article 26(3) of the Constitution** specifically provides that where the death sentence is provided under any other law, it shall not amount to the deprivation of the right to life. However, we hold that a person convicted of a capital offence cannot be sentenced to serve a death sentence as a matter of course without the court considering the mitigating circumstances and other statutory pre-sentencing requirements. Therefore, we hold that it will amount to the violation of accused persons' right to fair trial as provided under **Article 50 (2) of the Constitution** if the court does not receive and consider mitigating factors and other statutory and **Policy** pre-sentencing requirements. In that regard, in the context of the illustrations we have cited in this judgement, it is not mandatory for the courts to pass a death sentence against persons charged with capital offences.

Declarations and Orders

1. We hereby declare that Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code do not meet the constitutional threshold of setting out in sufficient precision, distinctively clarifying and differentiating the degrees of aggravation of the offence of robbery and attempted robbery with such particularity as to enable those accused to adequately answer to the charges and prepare their defences.

2. In light of (1) above, we recommend that the Attorney General, the Kenya Law Reform and other relevant agencies to prepare a detailed professional review in the context of the judgment and order made with a view to enabling Parliament to appropriately amend Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code with a view to removing the ambiguity and inconsistency inherent in the said sections as regards the definition of the offence of robbery and differentiate and graduate the degrees of aggravation and the attendant penalties. In considering the amendments, it should be recommended to Parliament to take into consideration International good practices on sentencing, so as to accord similar facts to similar charges of equal gravity.

3. In view of the fact that there are pending trials before the courts at various stages of the hearing process where accused persons have been charged under the impugned sections of the Penal Code, and in order not to prejudice those trials, the effects of the declaration in(1) above, is suspended for eighteen (18) months from the date of the delivery of this judgment to enable the Attorney General, the Kenya Law Reform and Parliament to act and appropriately amend the

impugned sections of the Penal Code with a view to removing the identified ambiguities and inconsistencies and setting out the degrees of aggravation, and differentiate and graduate the various aspects of the offence of robbery.

4. As regards the Petitioners, and those other convicts in the same situation as them, we direct the Attorney General, in consultation with other relevant authorities, to consider the shortcomings identified in this judgement in relation to those charged and convicted under Sections 295, 296(1), 296(2), 297(1) and 297(2) of the Penal Code, with a view to remedying any prejudice that may have suffered and prescribe appropriate solution. The Attorney General is granted eighteen (18) months to give a report to this court.

5. If the above orders are not complied with within the stipulated period, the Petitioners shall be at liberty to apply.

6. The Petitioners' prayer for declaration (ii) in their Petition to have their respective cases remitted to the trial courts for the reception and consideration of their mitigating circumstances is hereby dismissed.

7. Since this is a constitutional matter, and due to the public interest involved, we are of the view that the appropriate order to make in regard to costs is that there shall be no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF SEPTEMBER, 2016

LESIIT, J.

JUDGE

KIMARU, L.

JUDGE

MUTUKU, S. N.

JUDGE