REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(CORAM: MARAGA CJ & P, MWILU DCJ &VP, OJWANG, WANJALA, NJOKI AND LENAOLA SCJJ.)

PETITION NO. 15 OF 2015

(AS CONSOLIDATED WITH PETITION NO 16 OF 2015)

BETWEEN

FRANCIS KARIOKO MURUATETU .....1ST PETITIONER

WILSON THIRIMBU MWANGI…….....2NDPETITIONER

AND

REPUBLIC……..RESPONDENT

KATIBA INSTITUTE……..AMICII CURAII

DEATH PENALTY PROJECT KENYA NATIONAL

COMMISSION ON HUMAN RIGHTS

INTERNATIONAL COMMISSION OF JURISTS-KENYA CHAPTER

LEGAL RESOURCES FOUNDATION

ATTORNEY GENERAL

(Being an appeal from the Judgment of the Court of Appeal sitting in Nairobi (E.O. O'Kubasu, P.N. Waki & J.W. Onyango Otieno JJ.A) delivered on delivered on 11th July, 2014 in Civil Appeal No. 93 of 2014)

JUDGMENT

A. INTRODUCTION

[1] This appeal raises a fundamental legal issue that has engaged many global jurisdictions in seemingly unending controversy: whether or not the mandatory death penalty is unconstitutional.

[2] The petitioners and others were arraigned before the High Court (Mbogholi Msagha J.) for the offence of murder. Upon their conviction, they were sentenced to death as decreed by Section 204 of the Penal Code. Their appeal to the Court of Appeal against both that conviction and sentence was dismissed. Aggrieved by that decision, they filed two separate appeals in this Court which have since been consolidated.

[3] Messrs. Ngatia and Kilukumi represented the 1st and 2nd petitioners respectively. Upon their applications, the Death Penalty Project; the Kenya National Commission on Human Rights (KNCHR); the Kenya Section of the International Commission of Jurists (ICJ- Kenya); the Legal Resources Foundation; and the Katiba Institute as well as the Attorney General were all admitted in this matter as *amicii curiae.*

[4] The gravamen of petitioners' appeal is that the mandatory death sentence imposed upon them and the commutation of that sentence by an administrative fiat to life imprisonment are both unconstitutional and therefore null and void. In the circumstances, the petitioners are entitled to damages the quantum of which this Court should assess.

[5] On 3rd March 2016, this Court (Mutunga CJ & P, Rawal DCJ & VP, Tunoi, Ibrahim, Ojwang, Wanjala, Njoki SCJJ) heard the appeals to completion and reserved their judgment for delivery a later date. However, before the judgment could be delivered, Mutunga CJ & P, Rawal DCJ & P and Tunoi SCJ retired from the Court necessitating the hearing of the matter de novo before this bench.

B. SUBMISSIONS OF PARTIES

i. Petitioners.

[6] The petitioners' case, presented to us by Mr. Ngatia for the 1st petitioner and Mr. Kilukumi for the 2nd petitioner, is that the mandatory nature of the death penalty under Section 204 of the Penal Code jettisons the discretion of the trial forcing it to hand down a sentence pre-determined by the Legislature thus fouling the doctrine 0f separation of powers. They submitted that the sentencing process is part of the right to a fair trial enshrined in Article 50(2) of the Constitution. They contended that the mandatory death penalty under Section 204 of the Penal Code, violated that right in that it denied the trial Judge discretion in sentencing.

[7]The petitioners further contended that Article 50 (2) (q) of the Constitution entitles any person who has undergone a criminal trial to appeal or seek a review from a higher Court. This includes a second appeal. However, as Section 261 of the Criminal Procedure Code limits second appeals to convictions only, if not set aside by the first appellate court, the mandatory nature of the death sentence therefore violates the convicts' rights to a fair hearing under Article 50 (2) (q) of the Constitution.

[8] Besides The petitioners relied on Articles 1(1), 1 (3), 2(4), 19(3), 201(1), 25, 26 (1), 27 (1), 28, 29, 50(2), 159 (1), 160 (1), the petitioners relied on a number of authorities in case law, including the decision in ***Patrick Reyes v the Queen [2002] 2 App. Case 235 (Reyes)*** in support of submissions. Like in this appeal, the Privy Council was called upon to consider the mandatory death sentence imposed on the appellant upon his conviction for the offence of murder. **It unanimously quashed Reyes's death sentence.** In reaching that conclusion, the Privy Council cited with approval the 1989 House of Lords Select Committee's Report on Murder and Life imprisonment which had concluded that murders differ so greatly from each other and as such it is wrong to prescribe the same punishment for all murders and the observation of the Inter-American Commission that the mandatory imposition of the death sentence is unconstitutional as it disregarded an offender's personal

circumstances thus robbing him of personal dignity.

[9] The Privy Council also referred to decisions of other courts. The first one was the US Supreme Court decision in ***Woodson v The State of North Carolina (Woodson)*** (1976) 428 US 280 in which it had been held that a statute that prescribes a mandatory sentence on conviction has the effect of *'treating 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 second authority was another US Supreme Court decision in ***Robertson v Louisiana*** (1977) 431 US 633 which declared a statute that prescribed the mandatory death penalty on conviction of certain classes of murder as unconstitutional. The third decision was that of the Indian Supreme Court in ***Mithu v State of Punjab*** [1983] 2 SCR 690 (***Mithu***) which had held that a standardized mandatory death sentence that excludes the involvement of the judicial mind fails to take into account the facts and circumstances of each particular case and must therefore be stigmatized as arbitrary and oppressive .

[10] The petitioners also relied on the cases of ***Susan Kigula and 416 others v AG 2005 Constitutional Petition Number 6 of 2003 (Kigula) in which*** the Ugandan Supreme quashed the mandatory death penalty imposed upon the appellant in that case as unconstitutional and remitted the case to the High Court for resentencing and the decision of the Constitutional Court of Malawi in ***Francis Kafantayeni & 5 Others v the Attorney General*** [2007] MWHC1, 9***. (Kafantayeni)*** that sentencing was a legal issue that formed part of the principle of fair trial and required judicial determination in the course of a trial and could not be achieved by a legislative fiat. In the circumstances, the imposition of the mandatory death sentence which denied the convicted person an opportunity to seek review from a higher Court amounted to inhuman treatment or punishment.

[11] The petitioners in further support of their arguments cited the Court of Appeal decision in ***Godfrey Ngotho Mutiso v R,*** Cr. App No. 17 of 2008 (***Mutiso case***), in which the Court of Appeal appreciated that a uniform sentence deprives the Courts from considering mitigating circumstances and fails to appreciate that sometimes there may be unequal participation in a crime which would result to different charges and sentences on the accused persons.

[12] The petitioners urged this Court to overturn the Court of Appeal decision in ***Mwaura & 2 others v R,*** **Criminal Appeal,** No. 5 of 2008 (***Mwaura***) that *the death penalty is grounded in the Constitution* as bad law. They urged this Court to find that the Appellate Court grossly erred by failing to find that the mandatory nature of the death sentence set out in Section 204 of the Penal Code is unconstitutional. Contending that only a valid sentence in law can be commuted by the President of the Republic, counsel for the petitioners dismissed the commutation of the petitioners' death sentence to life imprisonment as untenable given that the mandatory death sentence imposed upon them was unconstitutional. Consequent upon those findings, the petitioners prayed the mandatory death sentence which has since been commuted to life imprisonment be set aside and the be set free; a definite term of imprisonment, subject to the applicable remission rules, be meted out to them or alternatively, an order be made remitting the matter to the High Court to undertake a sentence hearing for the purpose of determining an appropriate definite sentence.

[13] Describing their incarceration for 17 years in the segregated death row as agonizing, they urged this Court to find that they are entitled to compensation for that unconstitutional detention and proceed to assess the quantum thereof.

[14] The petitioners did not stop there. They urged that this Court's declaration that the mandatory death sentence prescribed by Section 204 of the Penal Code is unconstitutional and the consequent award of damages for that illegality should apply to all convicts suffering the same fate.

ii. Respondent

[15] Relying on the State's written submissions dated 26th February 2016, Mr. Nderitu for the Director of Public Prosecutions (DPP), the respondent, submitted that as is clear from Article 26 of our Constitution, the right to life is not absolute. Under our Penal Code, the death penalty is a lawful, though not the only sentence (see the Court of Appeal Decision in the Mutiso case), for the offences of treason (Section 40); oathing to commit a capital offence (Section 60); murder (Section 204); robbery with violence (Section 296(2) and attempted robbery with violence (Section 297(2)). He, however, conceded that the mandatory aspect of such sentence is unconstitutional. He concurred with counsel for the petitioners that sentencing is a judicial function. As such, under the doctrine of separation of powers, the Legislature ought not encroach upon territory that constitutionally belongs to the Judiciary. Counsel submitted that while conducting a trial, the court gathers valuable information relating to the guilt or innocence of an accused person. In event of a conviction, such information should serve as mitigating or aggravating factors in the determination of an appropriate sentence in each case.

[16] Counsel for the respondent urged this Court to be persuaded by the recent High Court decision (*Lesiit, Kimaru, Mutuku S.N JJ*) in ***Joseph Kaberia Kahinga and Others v The Attorney-General,*** Constitutional Petition No. 680 of 2010, [2016] eKLR, which determined that it would 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.

[17] In conclusion on that point, Mr. Nderitu once again concurred with counsel for the petitioners that the matter be referred back to the High Court for resentencing where the petitioners will be accorded an opportunity to put their case across; the prosecution and the victims of the crime in this matter be fully heard; the time the appellants have spent in custody be taken into account in determining the appropriate sentence. He urged this Court to set timelines for that hearing.

[18] Since the petitioners have not challenged their conviction by the High Court, Mr. Nderitu dismissed their claim for damages as baseless. In any event, he urged, the award for damages is a civil claim that demands a separate and distinct hearing. He termed as sweeping and totally untenable counsel for the petitioners' recommendation that the Court's decision in this matter do apply to other convicts who are not before it.

iii. Amici Curiae (Katiba Institute (KI), the Death Penalty Project (DPP), the Kenya National Commission on Human Rights (KNCHR), the Kenyan Section of the International Commission of Jurists (ICJ-K) and the Legal Resources Foundation (LRF))

[19] The first five *amici curiae* relied on their joint written submissions dated 4th February, 2016. They submitted that the core issue in the present appeal is the compatibility of the mandatory death penalty with the Constitution not the constitutionality of the death penalty itself. The latter having not been in issue in this appeal, they observed that the same should be left to another day and in an appropriate case.

[20] On Section 204 of the Penal Code, the amici curiae submitted the mandatory aspect of the death penalty under that Section is not only inimical to international law and customs and hence fouling Articles 2(5) & (6) of the Constitution but is also a violation of one's constitutional rights to be free from cruel, inhuman, and degrading treatment under Articles 29(f) and 25(a); the rights to a fair trial under Articles 50(1) and (2) and 25(c); the doctrine of separation of powers articulated in Chapters 9, 10, and 11 of the Constitution; and the authority and independence of the Judiciary under Articles 159 and 160. Citing the

cases of ***Attorney Gen v Kigula, et al*** [2009] UGSC 6, ***Kafantayeni v Attorney Gen***[2007] MWHC 1, 9, ***Reyes v R* (Belize)** [2002] 2 AC 35, ***Bachan Singh v State of Punjab*** 2 SCC 475, ***Mithu v State of Punjab*** 2 SCR 690, ***Woodson v North Carolina*** (1976) 428 US 280, ***Hughes v R (Saint Lucia),*** 2002 2 AC 259, ***Simmons &Anor v* R Rev 1 (Bahamas)** [2006] UKPC 19, ***Jones v the Queen*** (The Bahamas) [2006] UKPC 43, ***Bowe (Junior) &Anor v R*** Rev 1 (Bahamas) [2006] UKPC 10, ***Boucherville v The State of Mauritius (Mauritius)***[2008] UKPC 37, ***Fox v R (Saint Christopher and Nevis)*** [2002] 2 AC 284, ***Boyce & Anor V R*** (Barbados) [2005] 1 AC 400, the rest of the submissions of counsel for the amici curiae echoed those presented for the petitioner that the mandatory death sentence robbed the offender an opportunity for an individualized sentence that took into consideration factors relating to the offender; prohibits the offender from presenting mitigating evidence to the Court thereby depriving the offender of his right to a fair trial under Article 25 (c) of the Constitution; and that, contrary to the doctrine of separation of powers, it prevents the Court from exercising its discretion in sentencing thus leaving it to Parliament to control sentences in all murder cases.

[21] On damages, the *amici curiae* asserted that even though their trial had been concluded and death sentences were imposed upon them under the former Constitution, the appellants' petitions addressed a continuing violation of their fundamental rights and were therefore entitled to a remedy for a breach of their constitutional rights.

[22] As regards the commutation of the petitioners' sentences to life imprisonment, the *amici* submitted that did not affect their entitlement to challenge the constitutionality of the mandatory death sentence imposed upon them. They urged this Court to find that only a lawful sentence could be commuted.

[23] In conclusion, the *amici curiae* urged this Court to be guided by experience from other jurisdictions especially Uganda and Malawi, where the mandatory death penalty has most recently been abolished and declare the mandatory nature of the life sentence under Section 204 of the Penal Code unconstitutional and remit the matter to the High Court for resentencing.

iv. Amicus Curiae; the Attorney General.

[24] The Attorney General relied on his written submissions dated 25th March, 2016 and submitted that under section 71 (1) of the repealed Constitution, the mandatory death sentence was, at the time it was imposed on the petitioners, expressly legal and constitutional. He, however, asserted that under the current Constitution, it unconstitutional not because it is cruel, inhuman and degrading, but because it compromised the right to a fair trial. That being the case and since the current Constitution has no retrospective application, the Attorney General urged that the petitioners were not entitled to challenge the constitutionality of the mandatory death sentence. At any rate, he further submitted, death sentence having been commuted to life imprisonment by the President, it was otiose to challenge its legality. He therefore dismissed the petitioners' the prayer that the matter be referred back to the High Court for resentencing.

E. ISSUES FOR DETERMINATION

[25] Having considered all the pleadings, written and oral submissions of the parties, we find the following issues arising for determination:

a) Whether the mandatory nature of the death penalty provided for in the Penal Code under section 204 is unconstitutional"

b) Whether the indeterminate life sentence should be declared unconstitutional"

c) Whether this Court can or should define the parameters of a life sentence; and

d) What remedies, if any, accrue to the petitioners"

F. ANALYSIS

[26] We wish to make it clear from the onset that we decline to consider the wider issues raised by *Amicii curae* in relation to the issues of the constitutionality of the death sentence and an accompanying interpretation of Article 26 of the Constitution for the simple reason that they did not arise in this appeal.

i. Violation of the right to fair trial

[27] As stated at the outset of this judgment, the constitutionality of the mandatory nature of the death penalty has engaged many court in various jurisdiction globally. It is the major issue in this appeal. It has also engaged the High Court and the Court of Appeal in many cases in this country resulting in divergent opinions. It started with the Mutiso case under the repealed Constitution in which the Court of Appeal opined that as it denied an accused person right to fair trial in breach of Section 77 of the repealed Constitution, the mandatory death sentence was arbitrary and unconstitutional. In their own words, the learned Judges of that Court observed that:

" On our own assessment of the issue at hand and the material placed before us, we are persuaded, and now so hold, 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 recognizes 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 Section 204 shall, to the extent 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."

[28] That remained the position until the ***Mwaura case*** in which the Court of Appeal changed it holding that by the use of the word 'shall' Section 204 of the Penal Code was couched in mandatory terms leaving the court with no discretion but to impose the death penalty. It delivered itself thus:

"We hold that the decision in *Godfrey Mutiso v R* ***to be*** *per incuriam* ***in so far as it purports to grant discretion in sentencing with regard to capital offences."***

[29] Though **some** High Court Judges, notably Muya J. in ***Republic v Abduba Guyo Wada*** Criminal Case No. 7 of 2013 [2015] eKLR, have questioned the propriety of the Mwaura decision, they have nonetheless deferred to the doctrine of stare decisis and followed it. The High Cort decisions in ***Jackson Maina Wangui & another v Republic****,* Criminal Case No. 35 of 2012 [2014] eKLR; ***Republic v Thomas Kipkemoi Kipkorir & 2 others*** Criminal Case No. 29 of 2012 [2016] eKLR; ***Republic v Dickson Mwangi Munene & Another*** Criminal Case No. 11 of 2009 [2011] eKLR; ***Republic v Jared Nyakundi Ratemo & 3 others*** Criminal Case No. 55 0f 2009 [2016] eKLR; and ***Republic v Eric Mutua Danie*****l** Criminal Case No. 30 of 2012, [2016] eKLR are but a few illustrations which speak to this point.

[30] The overarching position flowing from the Mwaura case is that the couching Section 204 of the Penal Code with mandatory word 'shall' gives trial judges no option or discretion to mete out any other sentence save the death penalty. Some Kenyan courts have even observed that mitigating factors in such cases were at best, superfluous in terms of the sentence provided. It therefore serves no

purpose for the trial judges to hear mitigating factors from convicts in such cases.

[31] On the international arena, however, most jurisdictions have declared not only the mandatory but also the discretionary death penalty unconstitutional. In ***Roberts v. Louisiana,*** 431 U.S. 633 (1977) a Louisiana statute provided for the mandatory imposition of the death sentence. Upon challenge, the US Supreme Court declared it unconstitutional since the statute allowed for no consideration of particularized mitigating factors in deciding whether the death sentence should be imposed. In ***Reyes*** (above)*, t*he Privy Council was of the view that a statutory provision that denied the offender an opportunity to persuade the Court why the death sentence should not be passed, denied such an offender his basic humanity. And in ***Spence v The Queen; Hughes v the Queen*** (***Spence & Hughes***) (unreported, 2 April 2001) where the constitutionality of the mandatory death sentence for the offence of murder was challenged, the Privy Council held that such sentence did not take into account that persons convicted of murder could have committed the crime with varying degrees of gravity and culpability. In the words of Byron CJ;

“In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, all with a view to ensuring that the death penalty is imposed in only the most exceptional and appropriate circumstances. There should be a requirement for individualized sentencing in implementing the death penalty.”

[32] Two Indian decisions also merit mention. In ***Mithu v State of Punjab***, Criminal Appeal No. 745 of 1980, the Indian Supreme Court held that “a law that disallowed mitigation and denied a judicial officer discretion in sentencing was harsh, unfair and just” while in ***Bachan Singh v The State of Punjab (Bachan Singh)*** Criminal Appeal No. 273 of 1979 AIR (1980) SC 898, it was held that “It is only if the offense is of an exceptionally depraved and heinous character, and constitutes on account of its design and manner of its execution a source of grave danger to the society at large, the Court may impose the death sentence.”

[33] **T**he UN United Human Rights Committee has also had occasion to consider the mandatory death penalty. In case of ***Eversley Thomson v St. Vincent,*** Communication No. 806/ 1998U.N. Doc. CCPR/70/806/1998 (2000), it stated that such sentence constituted a violation of Article 26 of the Covenant, since the mandatory nature of the death sentence did not allow the judge to impose a lesser sentence taking into account any mitigating circumstances and denied the offender the most fundamental of right, the right to life, without considering whether this exceptional form of punishment was appropriate in the circumstances of his or her case.

Interrogating Section 204 of the Penal Code

[34] In the light of the above positions, it falls upon this Court to bring clarity and make a determination as to whether the mandatory nature of the death penalty under Section 204 of the Penal Code meets the constitutional standard. The Section categorically decrees that ***“Any person convicted of murder shall be sentenced to death.”***

[35] To determine the matter, it is imperative to consider certain constitutional provisions in relation to the above section.

Article 19 (3) (a) of the Constitution provides:

“3. The rights and fundamental freedoms in the Bill of Rights

(a) belong to each and every individual and are not granted by the State."

Articles 20 (1) and (2) of the Constitution provides that:

"(1) The Bill of Rights applies to all law and binds all state organs and all persons.

(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."

[36] Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. Article 48 mandates the State to ensure justice for all persons.

[37] The rights of an accused person to a fair trial is provided for under Article 50 (2) of the Constitution. That right is absolute as it is one of the rights which cannot be limited pursuant to Article 25(c) of the Constitution. Article 50 (1) and (2) of the Constitution provides:

" (1) Every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.

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

.....

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

[38] Kenya is a signatory to the ***International Covenant on Civil and Political Rights (ICCPR)*** since May 1972. The ICCPR makes the following provisions under Article 14:

"1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law..."

[39] The United Nations Commission on Human Rights has recommended the abolition of the death sentence as a mandatory sentence in ***Human Rights Resolution 2005/59: "The Question of the Death Penalty"*** dated 20 April 2005, E/CN.4/RES/2005/59. It 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.'

[40] These constitutional provisions and those of the ICCPR bring to the fore a number of principles. Firstly, the rights and fundamental freedoms belong to each individual. Secondly, the bill of rights applies to all law and binds all persons. Thirdly, all persons have inherent dignity which must be respected and protected. Fourthly, the State must ensure access to justice to all. Fifthly, every person is entitled to a fair hearing and lastly, the right to a fair trial is non-derogable. For Section 204 of the Penal Code to stand, it must be in accord with these provisions.

[41] It is evident that the trial process does not stop at convicting the accused. There is no doubt in our minds that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too.

[42] Pursuant to Sections 216 and 329 of the Criminal Procedure Code, Chapter 75, Laws of Kenya, mitigation is a part of the trial process. Section 216 provides:

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 to be passed or made.

Section 329 of the Criminal Procedure Code provides:

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.

[43] Therefore, from a reading of these Sections, it is without doubt that the Court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is not lost on us that these provisions are couched in permissive terms. However, the Court of Appeal has consistently reiterated on the need for noting down mitigating factors. Not only because they might affect the sentence but also for futuristic endeavors such as when the appeal is placed before another body for clemency.

[44] In ***Sango Mohamed Sango & another v Republic*** Criminal Appeal No. 1 of 2013 [2015] eKLR , ***Makhandia, Ouko, M'inoti JJA*** observed that although Sections 216 and 329 of the Criminal Procedure Code were couched in permissive terms, the Appellate Court has held over time that it is imperative for the trial court to afford an accused person an opportunity to mitigate and the trial court should record the mitigation factors. This applied even when accused persons had been convicted of offences where the prescribed sentence was death. The Appellate Court noted that the mitigating circumstances would be relevant if the matter went on appeal or before a clemency board or with regards to the age of the offender or pregnancy in the case of women convicts. Similar decisions can be seen in ***Henry Katap Kipkeu v. Republic,*** CR. APP. NO. 295 OF 2008 and ***Dorcas Jebet Ketter & Another v. R,*** CR. APP. NO. 10 OF 2012.

[45] To our minds, what Section 204 the Penal Code is essentially saying to a convict is that he or she cannot be heard on why, in all the circumstances of his or her case, the death sentence should not be imposed on him or her, or that even if he or she is heard, it is only for the purposes of the record as at that time of mitigation because the court has to impose the death sentence nonetheless, as illustrated by the foregoing Court of Appeal decisions. Try as we might, we cannot decipher the possible rationale for this provision. We think that a person facing the death sentence is most deserving to be heard in mitigation because of the finality of the sentence.

[46] We are of the view that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the Constitution does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the Constitution are not exhaustive.

[47] Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

[49] With regard to murder convicts, mitigation is an important facet of fair trial. In ***Woodson*** as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.

[50] We consider ***Reyes*** and ***Woodson*** persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the Constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.

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

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'overpunishing' the convict.

[54] A fair trial has many facets, and includes mitigation and, the right to appeal or apply for review by a higher Court as prescribed by law. Counsel for the petitioners and *amici curiae* both urged that the mandatory death sentence denied the petitioners enjoyment of their rights under Article 50 (2) (q) of the Constitution. On this issue, we are persuaded by the decision in ***Edwards v The Bahamas*** (Report No. 48/01, 4th April 2001) which was decided by the Inter-American Commission on Human Rights. In that matter, Michael Edwards was convicted of murder and a mandatory death sentence imposed on him.

[55] He petitioned the Inter-American Commission on Human Rights. He challenged the mandatory death penalty on the basis, *inter alia,* that his rights to equality before the law and a fair trial enshrined in the American Declaration of the Rights and Duties of Man had been violated. The Commission held at paragraph 137:

" ...Moreover, by reason of its compulsory and automatic application, a mandatory death sentence cannot be the subject of review by a higher court. Once a mandatory sentence is imposed, all that remains for a higher court to review is whether the defendant was found guilty of the crime for which the sentence is mandated."

[56] We are therefore, in agreement with the petitioners and amici *curiae* that Section 204 violates Article 50 (2) (q) of the Constitution as convicts under it are denied the right to have their sentence reviewed by a higher Court – their appeal is in essence limited to conviction only. There is no opportunity for a reviewing higher court to consider whether the death sentence was an appropriate punishment in the circumstances of the particular offense or offender. This also leads us to find that the right to justice is also fettered. Article 48 of the Constitution on access to justice provides that:

"The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."

[57] The scope of access to justice as enshrined in Article 48 is very wide. Courts are enjoined to administer justice in accordance with the principles laid down under Article 159 of the Constitution. Thus, with regards to access to justice and fair hearing, the State through the courts, ensures that all persons are able to ventilate their disputes. Access to justice includes the right to a fair trial. If a trial is unfair, one cannot be said to have accessed justice. In this respect, when a murder convict's sentence cannot be reviewed by a higher court he is denied access to justice which cannot be justified in light of Article 48 of the Constitution.

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

[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of

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

Violation of Article 27 of the Constitution

[60] Another aspect of the mandatory sentence in Section 204 that we have grappled with is its discriminate nature; discriminate in the sense that the mandatory sentence gives differential treatment to a convict under that Section, distinct from the kind of treatment accorded to a convict under a Section that does not impose a mandatory sentence.

[61] Article 27 of the Constitution sets out non-discrimination provisions in the following terms:

27.(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

Article 26 of the ***ICCPR*** provides:

26. All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[62] In the Ugandan case of ***Kigula*** (ab0ve), Susan Kigula and her maid were arrested, charged with the offence of murder of Susan's husband, convicted of the same, and sentenced to death. Just like in Kenya, a conviction of murder attracted the mandatory death sentence. In the matter, the respondents (Susan Kigula and all the 417 inmates on death row at the time) challenged the constitutionality of the death sentence as well as the mandatory death sentence. They urged that the mandatory death sentence was unconstitutional as it denied the convicted person the right to appeal against the sentence, thereby denying them the right of equality before the law and the right to fair hearing as provided for in the Constitution. They succeeded on both aspects. The Supreme Court held that allowing offenders in all other cases other than those accused of murder to mitigate, breached the right of equality before and under the law. We are greatly persuaded by that decision.

[63] Article 27 of the Constitution provides for equality and freedom from discrimination since every person is equal before the law and has the right to equal protection and equal benefit of the law. Convicts sentenced pursuant to Section 204 are not accorded equal treatment to convicts who are sentenced under other Sections of the Penal Code that do not mandate a death sentence. Refusing or denying a convict facing the death sentence, to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation is clearly unjustifiable discrimination and unfair. This is repugnant to the principle of equality before the law. Accordingly, Section 204 of the Penal Code violates Article 27 of the Constitution as well.

[64] Having laid bare the brutal reality of the mandatory nature of the sentence under Section 204 of the Penal Code, it becomes crystal clear that that Section is out of sync with the progressive Bill of Rights

enshrined in our Constitution specifically; Articles 25 (c), 27, 28, 48 and 50 (1) and (2)(q). That Section therefore cannot stand, particularly, in light of Article 19 (3) (a) of the Constitution which provides that the rights and fundamental freedoms in the Bill of Rights belong to each and every individual and are not granted by the State, and in light of Article 20 (1) and (2) which provide that: *(1) The Bill of Rights applies to all law and binds all state organs and all persons and (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.* In light of these provisions therefore, the timing of the constitutional challenge to Section 204 of the Penal Code is propitious and will succeed.

[65] A generous and purposive interpretation is to be given to constitutional provisions that protect human rights. This Court must give life and meaning to the Bill of Rights enshrined in the Constitution. It is trite that the Constitution is the Supreme law, and all legislation must conform with it.

[66] It is not in dispute that Article 26 (3) of the Constitution permits the deprivation of life within the confines of the law. We are unconvinced that the wording of that Article permits the mandatory death sentence. The pronouncement of a death sentence upon conviction is therefore permissible only if there has been a fair trial, which is a non-derogable right. A fair hearing as enshrined in Article 50 (1) of the Constitution must be read to mean a hearing of both sides. A murder convict whose mitigation circumstances cannot be taken into account due to the mandatory nature of the death sentence cannot be said to have been accorded a fair hearing.

[67] It is to be noted that the mandatory nature of the death sentence provided for under Section 204 of the Penal Code long predates any international agreements for the protection of Human Rights. Notably too, as contended by counsel for the petitioners, the respondents and the five *amici curiae*, it is indeed a colonial relic that has no place in Kenya today. Whereas it is the duty of Parliament to make laws, it is the duty of this Court to evaluate, without fear or favour, whether the laws passed by Parliament contravene the Constitution.

[68] Once again we agree and affirm the statement by the Court of appeal in ***Mutiso*** at paragraph 14 that:

As will be seen shortly, and indeed it is axiomatic, human society is constantly evolving and therefore the law, which all civilized societies must live under, must evolve in tandem. A law that is caught up in a time warp would soon find itself irrelevant and would be swept into the dustbins of history. (Emphasis is ours).

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

Sentencing Policy Guidelines: A way forward.

[70] In 2016, the Judiciary of Kenya published Sentencing Policy Guidelines which gives an analysis on the mandatory death penalty as follows:

Situational Analysis

6.4 Whilst the law still recognizes the death penalty as a mandatory punishment in respect to the offences aforementioned, the last execution took place in 1986.

6.5 Following the decision in the case of Godfrey Ngotho Mutiso v. Republic, which found the mandatory death sentence to be unconstitutional, there have been divergent views with some courts imposing custodial sentences for offences attracting the death penalty and others adhering to the mandatory terms of the statutes. Subsequently, the Court of Appeal in the case of Joseph Njuguna Mwaura and Others v. Republic, emphasised that courts do not have discretion in respect to offences which attract a mandatory death sentence.

Policy Directions

6.7 In the absence of law reform or the reversing of the decision in Joseph Njuguna Mwaura and Others v. Republic, the court must impose the death sentence in respect to capital offences in accordance with the law.

6.8 To curb the indeterminate imprisonment at the President's pleasure, the court's recommendation to the President pursuant to section 25 (3) of the Penal Code should include the requirement for a review of the case after a fixed period.

[71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

(a) age of the offender;

(b) being a first offender;

(c) whether the offender pleaded guilty;

(d) character and record of the offender;

(e) commission of the offence in response to gender-based violence;

(f) remorsefulness of the offender;

(g) the possibility of reform and social re-adaptation of the offender;

(h) any other factor that the Court considers relevant.

[72] We wish to make it very clear that these guidelines in no way replace judicial discretion. They are advisory and not mandatory. They are geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process. This notwithstanding, we are obligated to point out here that paragraph 25 of the 2016 Judiciary Sentencing Policy Guidelines states that:

25. GUIDELINE JUDGMENTS

25.1 Where there are guideline judgments, that is, decisions from the superior courts on a sentencing principle, the subordinate courts are bound by it. It is the duty of the court to keep abreast with the guideline judgments pronounced. Equally, it is the duty of the prosecutor and defence counsel to inform the court of existing guideline judgments on an issue before it.

a) Whether the indeterminate life sentence should be declared unconstitutional"

[73] Counsel for the 1st Petitioner raised two issues with regard to the 'indeterminate' or 'indefinite' life sentence, as follows: whether the indeterminate nature of a life sentence is unconstitutional and whether this Court should fix a definite number of years of imprisonment, subject to remission rules, which will constitute life imprisonment. We will address the two questions separately.

[74] The 1st petitioner submitted that the indeterminate life sentence is contrary to Articles 28 (right to dignity) and 29 (d) and (f) of the Constitution (protection from physical or psychological torture and protection from cruel, inhuman and degrading treatment or punishment) and it also does not provide the prisoner with an avenue for review of the sentence. The 2nd petitioner has argued that the indeterminate life sentence which is devoid of judicial input is contrary to Article 50 of the Constitution, which provides for the right to a fair trial. The respondent, the DPP, did not provide substantive submissions on this question.

[75] On the other hand, counsel for the *amici curiae* urged the Court not to determine '*the constitutionality of any aspect of life imprisonment'*, as it has not as yet been canvassed in the High Court or the Court of Appeal. He also argued that because of the complexity of the issue, the Court should avoid pre-judging any future challenge. In the event that the Court chose to determine this issue, he argued that a lack of provision in legislation for remission or parole for persons serving life imprisonment is contrary to amongst other sections, Article 27 of the Constitution (discrimination).

[76] We have perused and analyzed the Petition and the written submissions and it is clear that the petitioners have not sufficiently argued and illustrated the particulars of why the indeterminate life sentence should be declared unconstitutional. Indeed, counsel for the 1st petitioner upon being asked by the Court to elaborate on this issue was not able to provide adequate submissions. A critical issue such as this, where legislation is to be examined is deserving of the reasoned and well-thought arguments of the petitioners, the Director of Public Prosecution and other interested parties or *amicus curiae* and input of the High Court and the Court of Appeal. This will allow this Court to benefit from the reasoning of these superior Courts and the parties will not be disadvantaged by this Court's holding which will in effect make this Court a court of first and last instance. It is therefore our view that the submissions made did not canvass the issue to our satisfaction. Consequently we will not make a determination on it.

[77] Similarly we note that counsel for the *amici curiae* asked this Court to declare Section 46 of the Prisons Act, Chapter 90 of the Laws of Kenya (Prisons Act) unconstitutional because it excludes prisoners serving life sentences from being considered for remission. We wish to restate our finding in an earlier ruling dated 28th January 2016, in ***Francis Karioki Muruatetu & another v. Republic & 5 others*** Petition No. 6 of 2016; [2016] eKLR where the Court limited the role and function of the *amici curiae* as follows:

"[43] … Any interested party or amicus curiae who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed. Further, such issues are matters relating to the interpretation of the Constitution, and we cannot allow them to be canvassed in this Court for the first time, as though it was a Court of first instance. We recognize the hierarchy of the Courts in Kenya, and their competence to resolve these constitutional questions…."

[78] Based on the above pronouncement, we will not delve into the issue of the unconstitutionality of Section 46 of the Prisons Act because none of the primary parties to the dispute have raised it. This issue has also not been properly canvassed at the High Court and Court of Appeal. We reaffirm this

Court's decision in ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others, Supreme Court Petition No. 2 of 2012, [2012] eKLR***, where this Court declined to assume jurisdiction and address issues that have not gone through the hierarchy of courts.

c) Whether this Court should fix a definite number of years of imprisonment, subject to remission rules, which will constitute life imprisonment"

[79] Counsel for the 1st Petitioner submitted that the petitioners are serving an indefinite life sentence and *invited the Court to fix a definite number of years to constitute a life sentence* even though counsel admitted that ordinarily this is a legislative function. He urged that other countries usually enact legislation that provides for the different time periods in a life sentence, which the prisoner must serve before review or parole. In the alternative, the 1st petitioner prays that this Court remits the trial record to the High Court to undertake a sentence hearing for the purpose of determining an appropriate definite sentence.

[80] The Attorney-General submitted that a life sentence ought not be equated to the natural life of the convicted person and a judge should be accorded the opportunity to set a date when parole could be considered.

[81] Counsel for the *amici curiae* argued that in effect, the petitioners are challenging the irreducible life sentences, where the offender has no prospect of release on parole or remission. He urged that globally, in a majority of countries that have life sentences they provide a degree of 'tailoring to fit': either the Court has some discretion as to whether to impose a life sentence at all, or there are procedures that allow for a review of the prisoner's case.

[82] We have looked at foreign case law from the European Court of Human Rights, and legislation from the United Kingdom in which the indeterminate life sentence has been examined, in order to draw valuable lessons.

[83] In the case of ***Kafkaris v. Cyprus (Application No. 21906/04)***, the European Court of Human Rights had to determine whether the applicant's mandatory life sentence was an irreducible sentence and contrary to Article 3 of the European Convention of Human Rights. This provision provides that *"no one shall be subjected to torture or to inhuman or degrading treatment or punishment"*. The Court found that there was no violation of Article 3 because although prospects of release of prisoners serving life sentences in Cyprus was limited, it did not mean it was irreducible. It also held that:

"98. In determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release…. The Court has held, for instance, in a number of cases that, where detention was subject to review for the purposes of parole after the expiry of the minimum term for serving the life sentence, it could not be said that the life prisoners in question had been deprived of any hope of release …. The Court has found that this is the case even in the absence of a minimum term of unconditional imprisonment and even when the possibility of parole for prisoners serving a life sentence is limited …. It follows that a life sentence does not become "irreducible" by the mere fact that in practice it may be served in full. It is enough for the purposes of Article 3 that a life sentence is de jure and de facto reducible."

[84] In the case of ***Vinter and others v. the United Kingdom (Applications nos. 66069/09, 130/10 and 3896/10)*** three applicants who served the whole life sentence in the United Kingdom challenged whether the whole life sentence which only accorded them a release at the discretion of the justice

secretary on compassionate grounds such as a terminal illness was compatible with Article 3 of the European Convention on Human Rights. The Court held that the sentences against the three applicants were incompatible with Article 3 because the Criminal Justice Act of 2003 was unclear as to the review mechanism provided by the justice secretary and the earlier set review by the Minister after the prisoner serving a life sentence served 25 years was removed in the 2003 Act. The Court further held that"

"111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.

112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment

…

120. However, the Court would emphasise that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing (see paragraphs 104 and 105 above), it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. This being said, the Court would also observe that the comparative and international law materials before it shows clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter ….” (Emphasis added.)

[85] The European Court of Human Rights also issued an order against Hungary in the case of ***László Magyar v. Hungary Application No. 73593/10*** in which it held that Hungary should reform its legislation dealing with life sentences. In the 2014 decision, the Court held that—

"71. The present case discloses a systemic problem which may give rise to similar applications. The nature of the violation found under Article 3 of the Convention suggests that for the proper execution of the present judgment the respondent State would be required to put in place a reform, preferably by means of legislation, of the system of review of whole life sentences. The mechanism of such a review should guarantee the examination in every particular case of whether continued detention is justified on legitimate penological grounds and should enable whole life prisoners to foresee, with some degree of precision, what they must do to be considered for release and under what conditions.

72. … The mere fact that a life sentence may eventually be served in full, does not make it contrary to Article 3 of the Convention. Accordingly, review of whole life sentences must not necessarily lead to the release of the prisoner in question."

[86] In light of the above decision, Hungary introduced a new legislation in 2015 in which it afforded a mandatory pardon procedure for prisoners serving life sentences after they had served a 40 year term. However, the 40 year term was challenged for being contrary to Article 3 in the case of ***T.P and A.T v Hungary (Applications Nos. 37871/14 and 73986/14)***. In that case, the Court held that the 40 year term before review of whole life sentences was too long and a violation of Article 3.

[87] In the United Kingdom, the Criminal Justice Act, 2003 provides for guidelines for sentencing those serving different categories of life imprisonment. It is noteworthy that the Act has not scrapped the whole-life sentence and it is only handed down to those who have committed heinous crimes.

[88] Unlike some of the cases mentioned above, the life imprisonment sentence has not been defined under Kenyan law (see the Kenya Judiciary Sentencing Guidelines, 2016 at paragraph 23.10, page 51). It is assumed that the life sentence means the number of years of the prisoner's natural life, in that it ceases upon his or her death.

[89] In order to determine whether this Court can fix a definite number of years to constitute a life sentence, we first turn to the provisions on the rights of detained persons as enshrined under Article 51 of the Constitution, which reads:.

"51. (1) A person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.

(3) Parliament shall enact legislation that—

(a) provides for the humane treatment of persons detained, held in custody or imprisoned; and

(b) takes into account the relevant international human rights instruments."

[90] It is clear from this provision that it is the Legislature, and not the Judiciary, that is tasked with providing a legal framework for the rights and treatment of convicted persons. This premise was also attested to by the High Court in the case of ***Jackson Maina Wangui & Another v. Republic Criminal No. 35 of 2012; [2014] eKLR (Jackson Wangui)*****,** where the Court held at paragraph 72 and 76 that—

"As submitted by the petitioner, however, what amounts to life imprisonment is unclear in our circumstances. It is not, however, for the court to determine what should amount to a life sentence; whether one's natural life or a term of years. In our view, that is also the province of the legislature.

76. …. As to what amounts to life imprisonment, that is a matter for the legislative branch of government. It is not for the courts to determine for the people what should be a sufficient term of years for a person who has committed an offence that society finds reprehensible to serve."

[91] Comparative foreign case law has also shown that the possibility of review of life sentences and the fixing of minimum terms to serve a life sentence before parole or review, is intrinsically linked with the

objectives of sentencing. In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in ***Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR,*** where the High Court held that the objectives include: "*deterrence, rehabilitation, accountability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim."*

[92] The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

"Sentences are imposed to meet the following objectives:

1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct."

The sentencing policy states at paragraph 4.2 that when carrying out sentencing all these objectives are geared to in totality, though in some instances some of the sentences may be in conflict.

[93] In addition, and in accordance with Article 2(6) of the Constitution, ***"any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"***. In 1972, Kenya ratified the International Covenant on Civil and Political Rights of 1966, and for that reason, the Covenant forms part of Kenyan law. Article 10(3) of the Covenant stipulates that—*"[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."*

[94] We recognize that although the Judiciary released elaborate and comprehensive Sentencing Policy Guidelines in 2016, there are no specific provisions for the sentence of life imprisonment, because it is an indeterminate sentence. Nevertheless, we are in agreement with the High Court decision in ***Jackson Wangui***, supra, which found that it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.

[95] We also acknowledge that in Kenya and internationally, sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners. We find the comparative jurisprudence with regard to the indeterminate life sentence is compelling. We find that a life sentence should not necessarily mean the natural life of the prisoner; it could also mean a certain minimum or maximum time to be set by the

relevant judicial officer along established parameters of criminal responsibility, retribution, rehabilitation and recidivism.

[96] We therefore recommend that Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing.

[97] We are of the view that such proposed legislation will enable us to comply with Articles 2(6) of the Constitution which states that any treaty or convention ratified by Kenya shall form part of the law of Kenya.

d) Whether any remedies accrue to the petitioners"

[98] The petitioners submitted that upon declaring mandatory death sentence unconstitutional the Court should order for a sentencing as opposed to a re-sentencing as they would in effect have been imprisoned illegally for seventeen years. Further, they contended that re-sentencing would not be fair as they had been in custody way too long and that they deserved compensation.

[99] The respondent was of the view that it was premature and un-procedural at this stage to award damages as the only time the Court can consider if the petitioners were unlawfully held in custody or prison is after the re-hearing. It was the respondent's case that the award for damages is a civil claim that demands a separate and distinct hearing.

[100] The *amici curiae* urged the most appropriate remedy was a sentencing hearing by the High Court since there had never been a valid sentence passed in the petitioners' case. They urged that the Court could set guidelines for the sentencing before magistrates and superior Courts while awaiting Parliament to formulate the guidelines.

[101] The Attorney General stated that the prayer that the petitioners be taken to the High Court for retrial sentencing should be declined. He submitted that the petitioners had sufficient recourse for pardon, substitution or remission of punishment under Article 133 of the Constitution. He urged the Court to refrain from supervising a re-sentencing and instead task him to form legislative framework to address the same.

[102] We find that both petitioners are deserving of a remedy as they were denied a fair trial - a right that accrued to them under to the previous Constitution, and to which they are still entitled under the present Constitution. We have looked at comparative case law to give us guidance as to how this should be done.

[103] In ***Reyes,*** the Privy Council when dealing with the unconstitutionality of the mandatory death penalty held that:

"**The case should be remitted to the Supreme Court of Belize in order that a judge of that court may pass appropriate sentence on the appellant having heard or received such evidence and submissions as may be presented and made.*"***

[104] Similarly, upon finding the mandatory death sentence was unconstitutional, the Supreme Court of Uganda in ***Kigula*** proceeded to make the following orders:

"1. For those respondents whose sentences were already confirmed by the highest court, their petitions for mercy under art 121 of the Constitution must be processed and determined within three years from the date of confirmation of the sentence. Where after three years no decision has been made by the executive, the death sentence shall be deemed commuted to imprisonment for life without remission.

2. For those respondents whose sentences arose from the mandatory sentence provisions and are still pending before an appellate court, their cases shall be remitted to the High Court for them to be heard only on mitigation of sentence, and the High Court may pass such sentence as it deems fit under the law."

[105] Article 121 of the Uganda Constitution (similar to Article 133 of the Kenya Constitutions) provides:

"(1) There shall be an Advisory Committee on the Prerogative of Mercy which shall consist of—

(a) the Attorney General who shall be the chairperson; and

(b) six prominent citizens of Uganda appointed by the President.

(2) …

(3) ….

(4) The President may, on the advice of the committee—

(a) grant to any person convicted of an offence a pardon either free or subject to lawful conditions;

(b) grant to a person a respite, either indefinite or for a specified period, from the execution of punishment imposed on him or her for an offence;

(c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; or

(d) remit the whole or part of a punishment imposed on a person or of a penalty or forfeiture otherwise due to Government on account of any offence.

(5) Where a person is sentenced to death for an offence, a written report of the case from the trial judge or judges or person presiding over the court or tribunal, together with such other information derived from the record of the case or elsewhere as may be necessary, shall be submitted to the Advisory Committee on the Prerogative of Mercy.

(6) A reference in this article to conviction or imposition of a punishment, sentence or forfeiture includes conviction or imposition of a punishment, penalty, sentence or forfeiture by a court martial or other military tribunal except a field court martial."

[106] In essence, the Ugandan Supreme Court's approach was that: for those respondents whose cases were still pending or had not been finalized by the highest Court, they were to be remitted back to the High Court to rehear the case on sentencing. For those who had exhausted all avenues of appeal or concluded their matters they would rely upon the power of mercy under Article 121 of the Constitution of

Uganda for reprieve. The Court further set a three year timeline for the Advisory Committee on the Prerogative of Mercy to perform its duty failure of which the mandatory death sentence is automatically converted to life imprisonment.

[107] In Malawi, the Constitutional Court in the case of ***Kafantayeni*** held that**:**

"We make a consequential order of remedy under s 46(3) of the Constitution for each of the plaintiffs to be brought once more before the High Court for a judge to pass such individual sentence on the individual offender as may be appropriate, having heard or received such evidence or submissions as may be presented or made to the judge in regard to the individual offender and the circumstances of the offence." [Emphasis added]

[108] The Malawi Court took a similar approach as the Ugandan Supreme Court. It remitted the cases back to the High Court for proper sentencing on the basis that the High Court is better placed to give an appropriate sentence having heard the mitigating factors.

[109] Here in Kenya, in the case of ***Mutiso,*** the Court of Appeal stated [para 38]:

"In all the circumstances of this case, the order that commends itself to us is to remit the case to the superior court with the direction that the court records the prosecution's as well as the appellant's submissions before deciding on the sentence that befits the appellant."

[110] We agree with the reasoning of the Courts in the authorities cited and the submissions of the 1st petitioner, the DPP and the *amici curiae*. Comparative jurisprudence is persuasive and we see no need to deviate from the already established practice. The facts in this case are similar to what has been decided in other jurisdictions. Remitting the matter back to the High Court for the appropriate sentence seems to be the practice adopted where the mandatory death penalty has been declared unconstitutional. We therefore hold that the appropriate remedy for the petitioners in this case is to remit this matter to the High Court for sentencing.

[111] It is prudent for the same Court that heard this matter to consider and evaluate mitigating submissions and evaluate the appropriate sentence befitting the offence committed by the petitioners. *For the avoidance of doubt, the sentencing re-hearing we have allowed, applies only for the two petitioners herein*. In the meantime, existing or intending Petitioners with similar cases ought not approach the Supreme Court directly but await appropriate guidelines for disposal of the same. The Attorney General is directed to urgently set up a framework to deal with sentence re-hearing of cases relating to the mandatory nature of the death sentence - which is similar to that of the petitioners in this case.

G. Orders

[112]Accordingly, with regards to the claims of the petitioners in this case, the Court makes the following Orders:

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

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

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

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

DATED and **DELIVERED** at **NAIROBI** this **14th Day of December, 2017.**

……. …….

D. K. MARAGA **P.M. MWILU**

CHIEF JUSTICE & PRESIDENT **DEPUTY CHIEF JUSTICE &**

OF THE SUPREME COURT **VICE-PRESIDENT OF**

THE SUPREME COURT

…… **……**

J.B OJWANG **S.C WANJALA**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

……..… ……

N.S. NDUNGU **I. LENAOLA**

JUSTICE OF THE SUPREME COURT **JUSTICE OF THE SUPREME COURT**

I certify that this is a true

copy of the original

REGISTRAR

SUPREME COURT OF KENYA