REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome, CJ & P; Mwilu, DCJ & VP; Ibrahim, Njoki & Ouko, SCJJ)

PETITION NO. E030 OF 2023

-BETWEEN-

GODDRICK SIMIYU WANGA..... APPELLANT

-AND-

REPUBLIC .....RESPONDENT

(Being an appeal from the Judgment of the Court of Appeal (Gatembu, Nyamweya & Lesiit, JJ. A.) delivered on 17th March, 2023 in Criminal Appeal No. 15 of 2020)

Representation:

Mr. Timothy Bryant for the Appellant
(Bryant's Law Advocates LLP)

Ms. Fredah Mwanza for the Respondent
(Office of the Director of Public Prosecutions)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This appeal challenges the decision of the Court of Appeal upholding the conviction and a sentence of 30 years imprisonment of the appellant, Goddrick Simiyu Wanga, on two counts of robbery with violence.

B. BACKGROUND

[2] The appellant together with 7 others were tried, convicted, and sentenced before the Senior Principal Magistrate Court at Kilifi with two counts of the offence of robbery with violence. The prosecution presented evidence to the effect that on 4th December 2013 at Bofa area in Kilifi County, the appellant and his confederates, while armed with a dangerous weapon, namely a pistol, robbed Yul Wenger (PW1) and his wife, Heike Wenger (PW2) of personal effects valued in total at Kshs. 12,300,000/- and that immediately before the time of such robbery, threatened to use personal violence against their victims.

In this judgment, we shall mainly be concerned with the appellant, as the rest of the persons convicted with him have not appealed to this Court.

C. LITIGATION HISTORY

i) Before the Principal Magistrates' Court

[3] The case against the appellant and his co-accused persons was built upon the question of their identification, the doctrine of recent possession as proof of their involvement and circumstantial evidence.

[4] On the whole, the trial court in a judgment delivered on 6th December 2017 was satisfied, on the basis of the evidence of *identification*, the *doctrine of recent possession* and *circumstantial evidence*, that the charges were proved beyond reasonable doubt. Consequently, the appellant and those found guilty with him were convicted and sentenced to death.

ii) Before the High Court

[5] Aggrieved, the appellant and those convicted appealed to the High Court challenging both the conviction and sentence. They contended that the death sentence was illegal; that their conviction was based on a defective charge; that the evidence presented by the prosecution was contradictory; that in failing to recall

PW1 upon application by the appellant the trial court committed a grave error; that the appellant's defence was not considered; that the court erroneously relied on dock identification; and that the items allegedly recovered from the appellant were never identified in court.

[6] The High Court *(Nyakundi, J.)* in a judgment rendered on 5th March 2020 framed three issues for determination: *whether the evidence was capable of supporting the conviction of the appellants; whether the element of identification was proved by the prosecution beyond reasonable doubt;* and *the importance and correlation of the doctrine of recent possession and call data to uphold the conviction of each of the appellants*.

[7] *On the sufficiency of evidence*, the learned Judge agreed with the trial court that there was ample evidence linking the appellant and the other convicted persons with the robbery; that apart from direct evidence of identification together with circumstantial evidence based on the doctrine of recent possession, positive identification of the items stolen from the complainants provided proof of the appellant's involvement in the robbery; and that the appellant's defence did not displace the prosecution's evidence placing him at the scene of robbery.

[8] Based on the foregoing, the first appellate court concluded that there was no error of law or principle committed by the trial court in its finding that the prosecution had presented proof beyond reasonable doubt that the convicted persons committed the offence of robbery as charged. Consequently, the appeal against their convictions was dismissed. The death sentence was however set aside and substituted with a custodial sentence of 30 years imprisonment ostensibly on the authority of our decision in the case of ***Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae)*** (Petition 15 & 16 of 2015 (Consolidated)) [2017] KESC 2 (KLR) ***(Muruatetu Case)***.

iii) Before the Court of Appeal

[9] Once again aggrieved by this outcome, the appellant and four others moved the Court of Appeal by instituting separate appeals. The appellant filed ***Civil Appeal No. 15 of 2020***. However, we note, as did the second appellate court, that many of the grounds raised were not pleaded and canvassed in the High Court and could therefore not be the subject of arguments in a second appeal. The two main grounds based on questions of law were, *whether the High Court failed to re-examine and re-evaluate the evidence on record thereby reaching a wrong conclusion*; and *whether the High Court improperly failed to find that the sentence imposed was manifestly excessive and harsh.*

[10] In a judgment, the subject of this third appeal, delivered on 17th March 2023, the Court of Appeal *(Gatembu, Nyamweya & Lesiit, JJ. A),* identified the following key issues for determination. On the *propriety of a charge*, the court held that the charge was properly framed.

[11] On whether *the charges were duplex*, the court observed that the charge sheet bore elaborate particulars of the offence of robbery with violence, and there was no record of any confusion on the part of the convicted persons, who pleaded not guilty to the two counts of robbery with violence, cross-examined the witnesses on the evidence presented on the circumstances of the said robbery, and presented their defence. In addition, the convicted persons did not raise any grounds or complaint on appeal to the High Court regarding the duplexity of the charges. While the Court of Appeal agreed that there may have been multiplicity, and in certain instances defects in some of the counts, it noted that the defects were not serious enough or so prejudicial as to vitiate the entire trial.

[12] On the application of the *doctrine of recent possession*, the court observed that the evidence adduced in the trial met the test of the doctrine; that some of the items stolen from the complainant and his wife were shortly after the robbery

recovered from some of the convicts; that the complainants were able to positively identify them; and that the convicted persons did not provide any explanation as to how the items came to be in their possession within a span of under 2 months of the robbery. The court therefore found no basis to disturb the findings of the trial court and High Court, and accordingly dismissed the appeal in its entirety.

[13] On the *sentence imposed*, the court noted that under Section 361(1)(a) of the Criminal Procedure Code, the severity of a sentence is a matter of fact and therefore outside the scope of a second appeal. Although the court acknowledged the clarification by this Court in the ***Muruatetu Case*** that its finding on the mandatory nature of the death sentence only applied to murder convictions, it observed that the 30 years sentence imposed by the High Court as a substitute for the death sentence meted out by the trial court was lenient and it chose not to disturb it.

[14] Ultimately, the court upheld the conviction of the appellant and some of the convicts and the sentence of 30 years imprisonment was affirmed.

iii) Before the Supreme Court

[15] Undeterred, the appellant, now alone without his co-convicts, has filed the instant third appeal challenging the decision of the Court of Appeal on the following summarized grounds; that the learned Judges of Appeal erred by:

a. *Accepting without question or analysis that the trial was conducted in a manner that was consistent with the Constitution and failing to make a finding that the trial court violated the appellant's right to a fair trial under Article 50 of the Constitution which violation was exacerbated by the High Court on first appeal;*
b. *Failing to properly consider and analyse the issues raised in the submissions of counsel for the appellant on appeal, in violation of Article*

14(3)(d) of the International Covenant on Civil and Political Rights as read together with Article 2(5) and (6) of the Constitution;

c. *Failing to comply with the fundamental duty to observe, respect, protect and fulfil the rights and fundamental freedoms in the Bill of Rights as required by Article 21(a) of the Constitution (sic) and breaching its obligation to abide by the rule of law in accordance with Article 10(2)(a) of the Constitution and Article 6(d) of the Treaty for the Establishment of the East African Community; and,*
d. *Failing to uphold the Kenyan common law finding of unconstitutionality of Section 296(2) of the Penal Code per the decision in* ***Joseph Kaberia Kahinga & 11 others vs. Attorney General*** *[2016] eKLR.*

[16] Accordingly, the appellant seeks the following reliefs:

a) *A declaration that the appellant's constitutional rights to fair trial under Article 50 of the Constitution, including the right to a fair appeal, held consistent with the rule of law in accordance with Article 10(2)(a) of the Constitution, Article 6(d) of the Treaty for the Establishment of the East African Community and Article 14(3)(d) of the International Covenant on Civil and Political Rights were violated by the Kenyan state and its agents, in particular, the police, the prosecution and the Judiciary;*
b) *Order therefore that the appeal succeeds, in effect quashing the conviction, setting aside the sentence and setting the appellant at liberty, or in the alternative, to return the matter to the Magistrate Court for a new trial conducted in accordance with the Constitution;*
c) *Order that the Judicial Service Commission pay compensation to the appellant for all of the violations of his right to fair trial (sic), which resulted in at least ten years in custody, in the amount of Kshs. 10 million.*
d) *Order that the Director of Public Prosecution be estopped from bringing and prosecuting charges under Section 296(2) of the Penal Code;*

e) Order that all police officers undergo specific training, and periodic evaluation of learning/understanding on the rights of arrested persons;

f) Order that all judicial officers and prosecutors undergo specific training, and periodic evaluation of learning/understanding on fair trial rights.

[17] In opposing the appeal, the respondent has filed a replying affidavit sworn by Fredah Mwanza, the respondent's counsel, on 30th November 2023 contending that the issues being raised for determination by this Court were not argued in the Court of Appeal. In effect, the respondent explains, by this appeal the appellant is inviting the Court to re-evaluate the evidence presented before the trial court, evaluated by the High Court and re-evaluated by the Court of Appeal, so as to make a determination based on facts and not the law.

D. PARTIES' SUBMISSIONS

i. The Appellant's submissions

[18] The plunk of the appellant's submissions dated 5th February 2024, is that his rights were violated upon his arrest and initial detention; during his trial and both on first and second appeals by the High Court and the Court of Appeal respectively. Elaborating further on these alleged violations, the appellant submits under the following 4 headings:

[19] On *the fundamental right to counsel*, the appellant has cited Article 49(1) of the Constitution, the UN Basic Principles on the Role of Lawyers and UN Guidelines on Access to Legal Aid , Sections 57 and 60 of the National Police Service as well as Section 25A of the Evidence Act in support of the assertion that at the time of his arrest, his rights under Article 49 of the Constitution were not protected; that the police violated his rights by failing to warn him of his right to remain silent; his right to communicate with counsel; and the right not to make any confession or admission that could incriminate him.

[20] As regards *the fundamental right to challenge evidence*, the appellant cites Article 50(2)(k) of the Constitution and Sections 144(3) and 146 of the Evidence Act to argue that the evidence levelled against him was not admissible, particularly the data from Safaricom which placed him at the crime scene. The appellant also relies on the cases of ***Moses Ngichu Kariuki vs. Republic*** [2009] eKLR, ***Mark Oiruri Mose vs. Republic*** [2013] eKLR, ***Lerai vs. Republic*** [2023] KECA 752 (KLR) on the right to recall a witness for cross-examination as an integral part of the right to a fair hearing, contending that PW1's evidence was never subjected to cross-examination by the appellant.

[21] On the *obligation to exclude evidence obtained in violation of the Bill of Rights*, the appellant submits that both international and domestic laws permit the exclusion of evidence obtained in violation of the law. Moreover, he posits that Section 175 of the Evidence Act makes it clear that improper admission of evidence is a ground for reversal of a decision, contending that the evidence of the search and recovery of a phone and notebook from the hotel where he was staying was unlawful.

[22] Finally, on *the appropriate and effective remedies*, the appellant urges this Court to grant appropriate relief pursuant to Article 23(3) of the Constitution. Given the length of time he has spent in prison, he argues that an order of retrial would be prejudicial and even occasion an injustice to him. The appellant therefore prays that the appeal be allowed.

[23] In his oral highlight of the submissions before us, learned counsel for the appellant confirmed at the outset that the appellant's case before this Court is that his right to a fair trial as guaranteed by Articles 49 and 50 of the Constitution and all the other cited Articles was violated. Counsel conceded that indeed the questions whose answers are sought in this appeal are being raised for the first time in this Court but was quick to explain that the issues in question being

constitutional in nature, they could be raised at any stage, at the trial, on the first, second or even third appeal.

ii. The Respondent's submissions

[24] In opposing the appeal the respondent filed written submissions dated 19th February 2024 arguing that the appellant had failed to demonstrate the manner in which the two superior courts below violated his constitutional rights under Articles 10(2)(a) and 50(1), (2) & (4) of the Constitution and Article 14(3)(d) of the International Convention on Civil and Political Rights; and that the appellant having failed to raise these issues before either the High Court or the Court of Appeal he was estopped from raising them for the first time before this Court. To support this argument, the respondent cites the holding of this Court in ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others*** [2014] eKLR to the effect that in order to qualify for the invocation of Article 163(4)(a) of the Constitution, the constitutional issue involved must have been the central theme of constitutional controversy in the courts below; and that the applicant must demonstrate how the Court of Appeal misinterpreted or misapplied the constitutional provision in question.

[25] Without prejudice to the foregoing argument, the respondent asserts that it should be apparent from the record that the appellant was physically present during his trial; was represented by counsel who cross-examined the witnesses; was accorded an opportunity to defend himself; and the respondent complied with the provisions of Article 50(2)(j) of the Constitution by availing the witness statements to the appellant before the presentation of the prosecution's case. Therefore, no material has been placed before the Court to show how Article 49(1) of the Constitution was violated by any of the courts below and in what way the appellant was prejudiced.

[26] Secondly, it is the respondent's contention that what the appellant has presented before this Court is a deviation from what was pleaded before and determined by the courts below. The argument about violations of Articles 50(1) and (2) of the Constitution were not issues before both the first and second appellate courts and therefore cannot be the subject for determination by this Court, in accordance with the Court's *ratio decidendi* in ***Okiya Omtatah Okoiti vs. Central Bank of Kenya*** [2019] eKLR.

[27] Thirdly, the respondent reiterates that what the appellant has presented to this Court camouflaged as a case of violations of his rights under Article 50 of the Constitution are in fact, factual arguments on issues of evidence and procedure; that in effect the essence of the appeal is to invite the Court to re-evaluate afresh the evidence on record in order to make a different finding from those of the courts below and that the Court has no such jurisdiction.

[28] Finally, the respondent has asked the Court to reject the appellant's further invitation to be persuaded by the decision of the High Court in the case of ***Joseph Kaberia & 11 others vs. Attorney General*** (*supra*), that death sentence for the offence of robbery with violence under Section 296(2) of the Penal Code is inconsistent with the Constitution. According to the respondent, this question has now been firmly settled by this Court in ***Muruatetu & another vs. Republic; Katiba Institute & 4 others (Amicus Curiae);*** (Petition 15 & 16 of 2015), [2021] KESC 31 (KLR) ***(Muruatetu Directions)***.

[29] Accordingly, the respondent has urged the Court to dismiss the appeal, uphold the conviction of the appellant, set aside the imprisonment sentence of 30 years and reinstate the lawful death sentence in accordance with Section 296(2) of the Penal Code.

E. ISSUES FOR DETERMINATION

[30] From our consideration of the pleadings, the findings of the trial court, the two superior courts below, and the submissions by counsel, we consider the following two issues capable of disposing this appeal.

i) Whether this Court has jurisdiction to hear and determine the appeal; and if the Court has jurisdiction, then;

ii) Whether the appellant's rights under Articles 49 and 50 of the Constitution were violated as claimed by him in the petition.

F. ANALYSIS AND DETERMINATION

Jurisdiction of the Supreme Court

[31] We start by observing that the appellant in bringing the petition has not specified under what provision of the Constitution his case is anchored. The Petition is filed pursuant to "**Supreme Court Rule 39(1)**" *(sic)* which provides for the Form of Petition of an appeal. It is only at paragraph 14 of the written submissions that the appellant states that, *"... this Honourable Court is obligated to exercise its jurisdiction under Article 163(4)(a) to correct and remedy these failures by the criminal justice system to apply the Constitution..."*. It is from this statement that we guess that the appeal has been brought pursuant to Article 163(4)(a) of the Constitution. In a long line of cases, we have repeatedly cautioned advocates and litigants who desire to come to this Court that, given the specialized nature of this Court's jurisdiction the correct law under which the jurisdiction is sought must be specifically invoked and stated. Though this should be clear, it however bears restating what we said in the ***Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone*** [2013] eKLR, and reiterated in ***Nasra Ibrahim***

Ibren vs. Independent Electoral and Boundaries Commission & 2 others [2018] eKLR as follows;

> ***"It is trite law that a Court of law has to be moved under the correct provisions of the law." In this Court, this is not an idle requirement but has its rationale anchored in the 'specialized' nature of the jurisdiction of the Supreme Court as provided in Article 163(3) of the Constitution. Appeals to this Court from the Court of Appeal are therefore not as a matter of course as the Supreme Court was not established as another tier of court in the judicial hierarchy. Not every appeal from the Court of Appeal is also appealable to this Court."***

[32] Since the two avenues of the appellate jurisdiction of this Court under Article 163(4)(a) and (b) of the Constitution are distinct, either as of right" on the constitutional issues; or on "matters of general public importance," respectively, counsel or a litigant is under strict obligation to categorize his or her case, indicating the constitutional or legal category under which he or she is moving the Court. For this reason, it has become a matter of practice, for the Court to independently satisfy itself that an appeal is properly lodged and that it has jurisdiction before it can entertain it.

[33] In the instant appeal, the respondent in its replying affidavit contends that the violations of Article 50(1) and (2) of the Constitution were not issues before both the first and second appellate courts and therefore cannot be presented before this Court for determination for the first time. For his part, the appellant urges that this appeal is premised on Article 163(4) (a) of the Constitution and raises issues that revolve around the interpretation and application of Articles 49, 50 (1) and (2) of the Constitution and specifically regarding the violations of the appellant's constitutional rights. Moreover, the appellant argues that despite these issues

being raised for the first time before this Court, by their very nature, being constitutional, nothing stops this Court, an apex court from entertaining and determining such questions.

[34] It is necessary to restate that, to admit an appeal under Article 163 (4)(a) of the Constitution, the following principles apply, in so far as they are relevant to this appeal:

i. On the issue of jurisdiction, we stated in ***Aviation & Allied Workers Union Kenya vs. Kenya Airways & Others***; SC Application No. 50 of 2014; [2015] eKLR that where a court's jurisdiction is objected to by any party to the proceedings, such an objection must be dealt with *in limine* as a preliminary issue, before the meritorious determination of any cause, even where the objection has been argued in the appeal itself, we may add.

ii. In ***Samuel Kamau Macharia vs. Kenya Commercial Bank Limited & 2 others,*** SC Application No 2 of 2011; [2012] eKLR, we explained that a court's jurisdiction flows from either the Constitution or legislation or both; and that a court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the Constitution or law.

iii. Under Article 165(3)(d) of the Constitution, the High Court has original jurisdiction to hear any question respecting the interpretation of the Constitution. The Supreme Court in its appellate jurisdiction under Article 163(3), subject to clauses (4) and (5) and Article 163(4) (a) is the final Court on matters involving the interpretation and application of the Constitution arising from the decision of the Court of Appeal. See ***In the Matter of the Interim Independent Electoral Commission (Applicant)*** (Constitutional Application 2 of 2011) [2011] KESC 1 (KLR).

iv. Article 163 (4) of the Constitution is not a thoroughfare for all intended appeals from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the

Constitution or those that can be said to involve matters of general public importance will be entertained by the Supreme Court. It is not the mere allegation in pleadings by a party that clothes this Court with jurisdiction. See ***Lawrence Nduttu & 6000 Others vs. Kenya Breweries Ltd & Another,*** SC Petition No. 3 of 2012; [2012] eKLR, ***Samuel Kamau Macharia and Another vs. Kenya Commercial Bank and 2 Others***, SC Application No. 2 of 2011; [2012] eKLR, among many other decisions.

v. The appeal must originate from a decision of the Court of Appeal in which the question of interpretation or application of the Constitution was at play. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163(4)(a).

vi. However, in the case of ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others***, SC Petition No. 2 of 2014; [2014] eKLR, it was clarified that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant should demonstrate is that the Court's reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation or application.

vii. In addition, a party must indicate to this Court in specific terms, the issue requiring the interpretation or application of the Constitution and must signal the perceived difficulty or impropriety with the Appellate Court's decision. See ***Zebedeo John Opore vs. Independent Electoral and Boundaries Commission & 2 Others*** [2018] eKLR.

viii. The Supreme Court retains the discretion to determine what matter is appealable to it under Article 163(4)(a), always bearing in mind that such a matter must be founded on cogent issues of constitutional controversy to

warrant its input. See ***Gladys Wanjiru Munyi vs. Diana Wanjiru Munyi*** [2015] eKLR.

[35] Now, applying these principles to the instant appeal, it should be noted that the appellant was successfully prosecuted for the offence of robbery with violence and accordingly sentenced to death. His conviction was upheld by the High Court but the death sentence was set aside and substituted with a custodial sentence of 30 years imprisonment. On a second appeal to the Court of Appeal, the appellant's conviction was upheld and the substituted sentence affirmed. The conviction of the appellant by the trial court as upheld by the High Court and the Court of Appeal was based on identification and on circumstantial evidence premised on the doctrine of recent possession. Given the nature of the pleadings and proceedings before the trial court and on the other hand, the decisions of the two superior courts below, we cannot, in our assessment of the law say that the issues concerned the application or interpretation of the Constitution. Rather, it was an ordinary case of robbery with violence, argued as such on facts. We reiterate, as conceded before us by the appellant, that the allegations of constitutional controversy are being canvassed for the first time before this Court.

[36] The appellant having properly identified precisely the relevant Articles of the Constitution which in his view were violated by the respondent, he was, in addition, expected to convince us that the subject of this appeal was the same issues in controversy and around which both the High Court and the Court of Appeal based their respective decisions. The decision being challenged in this appeal had nothing to do with the interpretation or application of Articles 49 and 50 of the Constitution. The appellant has not demonstrated that the Court of Appeal's reasoning, and its conclusions took a trajectory of constitutional interpretation or application. The appellant has attempted to morph his case from an everyday trial for the offence of robbery with violence to one of violation of his constitutional rights. In our considered view, this appeal, is nothing but an effort to take a second

bite at the cherry. It presents neither exceptional circumstances nor an opportunity for the Court to provide interpretive guidance on the Constitution.

[37] For the aforementioned reasons, we reach the inescapable conclusion that the appellant has not satisfied the structures enunciated by the cases enumerated above, hence the Court lacks jurisdiction to determine the appeal. It fails and accordingly we down our tools at this stage. This is the same position we held, after hearing similar arguments, in ***Elvis Opee Ndayara vs. Republic,*** SC Criminal Appeal No.11 of 2016 (unreported) where we stated as follows:

> "***[19] Having read the Petition before us, the submissions by parties and having orally heard the appellant and Mr. Omirera for the Respondent, we have no doubt in our minds that whereas the Appellant has clothed his Petition with the constitutional garb and invoked Articles 25, 27 and 47 of the Constitution, the Appeal is no more than a further Appeal from the Court of Appeal on matters of fact. Indeed the Appellant, while re-litigating matters already dismissed by the two appellate Courts, has also introduced new matters before us such as the alleged infringement of his Article 25 rights by the Court of Appeal.***" [Our Emphasis]

[38] But even as we down our tools, we consider it paramount to restate the following for the sake of posterity and the development of jurisprudence, in terms of this Court's past decisions on similar cases. In this appeal, we have observed that the High Court substituted the death sentence with a custodial sentence of 30 years imprisonment ostensibly on the authority of our decision in the ***Muruatetu Case***. This sentence was later affirmed by the Court of Appeal on second appeal, despite the court acknowledging our decision in the ***Muruatetu Case*** that the mandatory nature of the death sentence only applied to murder convictions and did not extend to robbery with violence.

[39] In terms of Article 163(7) of the Constitution, we expect all Superior and Subordinate Courts, without exception to follow the noticeably clear guidelines issued in the ***Muruatetu Directions***, where we elucidated in the passage below what was intended to be the *ratio decidendi* in the ***Muruatetu Case***:

> ***"In the meantime, it is public knowledge, and taking judicial notice, we do agree with the observations of both Mr. Hassan and Mr Ochiel, that while the report of the Task Force appointed by the Attorney General was awaited, courts below us have embarked on their own interpretation of this decision, applying it to cases relating to section 296(2) of the Penal Code, and others under the Sexual Offences Act, presumably assuming that the decision by this court in this particular matter was equally applicable to other statutes prescribing mandatory or minimum sentences. We state that this implication or assumption of applicability was never contemplated at all, in the context of our decision."*** [Our Emphasis]

We say no more, save to recapitulate that our decision in the ***Muruatetu Case*** did not generally invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act, or any other statute. The decision in the ***Muruatetu Case*** applies only with respect to the mandatory nature of the death sentence under Sections 203 and 204 of the Penal Code and no parallel ought to be drawn beyond that statement.

H. FINAL ORDERS

[40] Consequently, upon our conclusion above, we order that:

i) The Petition dated 15th November 2023 is hereby dismissed.

ii) There shall be no orders as to costs.

iii) We hereby direct that the sum of Kshs. 6,000 deposited as security for costs upon lodging of this appeal be refunded to the depositor.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **2nd** Day of **August, 2024.**

.....
M.K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
P.M. MWILU
DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original.

REGISTRAR
SUPREME COURT OF KENYA