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INTERNATIONAL DECISIONS

EDITED BY HARLAN COHEN

Supreme Court of Kenya—constitutionality of the mandatory death penalty—definition of life imprisonment—right to fair trial—right to human dignity—right to equal protection—international and comparative law

FRANCIS KARIOKO MURUATETU V. REPUBLIC. Pet. No. 15 & 16/2015. *At* http://kenyalaw.org/caselaw/cases/view/145193.
Supreme Court of Kenya, December 14, 2017.

The decision of the Supreme Court of Kenya (Court) in *Francis Karioko Muruatetu and Another v. Republic* (*Muruatetu*), finding the mandatory nature of the death penalty unconstitutional, represents not only a victory for human rights in Africa but also the transformative capacity of contemporary constitutions in Africa and the growing assertiveness of African judiciaries.[1] In the judgment, the Court held that the mandatory death penalty is "out of sync with the progressive Bill of Rights" in Kenya's 2010 Constitution (para. 64) and an affront to the rule of law. The Court also relied on global death penalty jurisprudence to find the mandatory death sentence "harsh, unjust and unfair" (para. 48). Consequently, the Court mandated that all trial courts conduct a pre-sentencing hearing to determine whether the death penalty is deserved. The Court's judgment could spell the end of the mandatory death penalty in Kenya after almost 120 years on the statute books.

The petitioners, Francis Muruatetu and Wilson Thirimbu (Petitioners), were convicted of the offense of murder and sentenced to death by the High Court, in accordance with Section 204 of the Penal Code, Chapter 63 of the Laws of Kenya (Penal Code).[2] Their sentences were automatically commuted to life imprisonment by a presidential order, which decreed that all prisoners on death row would serve a life sentence.[3] After their appeals were dismissed by the Court of Appeal, they appealed their sentences to the Supreme Court. At the time of that appeal, the Petitioners had served seventeen years of their indefinite prison term. Their main contention was that both the mandatory death sentence imposed upon them and its

[1] *See, e.g.*, JAMES THUO GATHII, THE CONTESTED EMPOWERMENT OF KENYA'S JUDICIARY, 2010–2015: A HISTORICAL INSTITUTIONAL ANALYSIS (2016).

[2] The trial and conviction at the High Court were concluded under Kenya's 1963 Independence Constitution. The Independence Constitution was repealed on August 27, 2010 when the country's current Constitution was promulgated after years of failed constitutional reform attempts. The Petitioners' appeal to the Supreme Court, and its resulting decision discussed here, were decided under the 2010 Constitution.

[3] *Kibaki Saves 4000 Prisoners from Hangman's Noose*, STANDARD DIGITAL (Aug. 4, 2009), *at* https://www.standardmedia.co.ke/business/article/1144020722/kibaki-saves-4000-prisoners-from-hangman-s-noose.

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subsequent commutation to life imprisonment were unconstitutional. Joining the petition were six amici curiae: the attorney general of the Republic of Kenya and five human rights organizations: 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.

The Petitioners argued that the mandatory death sentence, predetermined by the legislature, undermined the judiciary's discretion in sentencing offenders and violated their right to a fair trial under Article 50 of Kenya's 2010 Constitution. The Petitioners further contended that the mandatory nature of the penalty violated Article 50(2)(q) of the Constitution, which entitles any person convicted to appeal to (including a second appeal) or apply for review by a higher court. The mandatory death penalty, they argued, limited them to appealing only their conviction. They supported this argument with reference to Section 261 of Kenya's Criminal Procedure Code, which specifically limits second appeals to convictions, suggesting that, on their first appeal, their sentences should have been reviewable as well. Finally, Petitioners argued that the mandatory death sentence violated their right to personal dignity under Article 28 of the 2010 Constitution, by specifying a blanket penalty for all persons convicted of murder, notwithstanding that each alleged offender is an individual with unique circumstances.

Regarding commutation of their death sentences to life imprisonment, the Petitioners asserted that the life sentences were equally unconstitutional because they arose from the unconstitutional mandatory death penalty. They alleged that only a legally valid sentence could be commuted by a presidential order.

To support their case, the Petitioners relied on decisions from a number of jurisdictions—national, regional, and international. The Petitioners relied heavily on the decision of the Kenyan Court of Appeal in *Mutiso v. Republic* (*Mutiso*),[4] which held that Section 204 of the Penal Code was unconstitutional to the extent that it prescribes the death penalty as the only sentence for the crime of murder. The Petitioners also asked the Supreme Court to overturn a subsequent Court of Appeal decision, *Mwaura v. Republic* (*Mwaura*),[5] in which a five-judge bench of the Court of Appeal overruled *Mutiso*. The Director of Public Prosecutions (DPP), representing the state, supported the Petitioners' arguments. The DPP conceded that while the death penalty itself was legal under Article 26 of the 2010 Constitution, its mandatory application under Section 204 unconstitutionally curtailed judicial discretion in sentencing, thus undermining the principle of separation of powers. The DPP also conceded that failing to consider mitigating factors violated the right to a fair trial under Article 50 of the Constitution.

Regionally, the Petitioners relied on the Ugandan Supreme Court decision, *Kigula v. Attorney General* (*Kigula*)[6] and the decision of the Constitutional Court of Malawi, *Kafantayeni & 5 others v. the Attorney General* (*Kafantayeni*),[7] both of which found that a mandatory death sentence violated the offenders' right to a fair trial. Internationally, the Petitioners found support in the Judicial Committee of the Privy Council's decision in

[4] Mutiso v. Republic C.A., Crim. App. No. 17 of 2008, Judgment (Kenya Ct. of App. Feb. 29, 2008) (Kenya).

[5] Mwaura v. Republic C.A., Crim. App. No. 5 of 2008, Judgment (Kenya Ct. of App. Feb. 21, 2008) (Kenya).

[6] Kigula v. Attorney General, S.C. Const. Pet. No. 3 (Uganda Sup. Ct. 2006) (Uganda).

[7] Kafantayeni v. the Attorney General, S.C. Const. Case No. 12 (Malawi High Ct. 2005) (Malawi).

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Patrick Reyes v. the Queen[8] that a similar punishment for all offenders violated their personal dignity. This argument was buttressed by U.S. Supreme Court decisions in *Woodson v. North Carolina*,[9] and *Robertson v. Louisiana*,[10] and an Indian Supreme Court decision, *Mithu v. State of Punjab*,[11] which held that a mandatory sentence is arbitrary and oppressive because it fails to consider the circumstances of each offender.

With regard to remedies, the Petitioners sought a declaration that the mandatory death penalty and the subsequent indeterminate life sentence are unconstitutional, and an order that their life sentences be set aside and that they be set free, given definite prison terms, or alternatively, that their cases be remitted to the trial court for a fresh sentencing hearing. The Petitioners also sought compensatory damages for the seventeen years of "unconstitutional detention" while on death row (para. 13) and an award of damages to all convicts serving this unconstitutional prison term.

The amici curiae, with the exception of the attorney general (AG), echoed the submissions of the Petitioners, adding that the mandatory nature of the death sentence violated international law and customs which form part of the laws of Kenya under Article 2(5) and (6)[12] of the Constitution.

The AG opposed the petition, arguing that the Petitioners' sentences had been imposed under the prior Constitution, which expressly recognized the mandatory death penalty as legal.[13] The AG argued that the 2010 Constitution could not apply retroactively, and that since the Petitioners' sentences had been commuted to life imprisonment, there was no legal basis for challenging their death sentences. The Supreme Court began its analysis by affirming the application of the 2010 Constitution. The Court observed that "the Bill of Rights applies to all law and binds all state organs and all persons" (Article 20(1)) (para. 64); that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the state (Article 19(1)); that all persons have inherent dignity and the right to have that dignity protected (Article 28); that it is the duty of the state to ensure access to justice for all (Article 48); and that all persons are entitled to a fair trial (Article 50), a right that is non-derogable. The Court also noted that Article 2(6) of the Constitution expressly makes ratified treaties part of Kenyan law (para. 93) and, as such, affirmed the application of Article 14 of the International Covenant on Civil and Political Rights (ICCPR) on the right to a fair hearing. The Court also took note of the UN Commission on Human Rights Resolution 2005/59, which recommended the abolition of the mandatory death sentence.

Applying these principles, the Court held that the mandatory nature of the death penalty provided for in Section 204 of the Penal Code was unconstitutional. The Court emphasized that the right of a convicted person to argue mitigating circumstances is part of their right to a fair trial, finding that "the fact that mitigation is not expressly mentioned as a right in the

[8] Reyes v. the Queen, App. No. 64 of 2001 (Belize Ct. of App. Mar. 11, 2002) (Belize).

[9] Woodson v. North Carolina, 428 U.S. 280 (1976).

[10] Robertson v. Louisiana, 431 U.S. 633 (1977).

[11] Mithu v. State of Punjab, 2 SCR 690 (1983).

[12] Article 2(5) of the Constitution provides that the general rules of international law shall form part of the laws of Kenya while Article 2(6) incorporates treaties ratified by Kenya into Kenyan law.

[13] Section 71(1) of the repealed constitution states that: "No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law of Kenya of which he has been convicted."

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Constitution does not deprive it of its necessity and essence in the fair trial process" (para. 46). This reasoning was the basis for a number of the Court's determinations. First, the Court found that the mandatory nature of the death sentence deprives judges of their discretion to determine an appropriate sentence and makes mitigation a futile exercise, in that mitigating circumstances are not taken into account when passing a sentence. Here, the Court affirmed *Mutiso* and overruled *Mwaura*. It also relied on the U.S. Supreme Court in *Woodson* and the UK Privy Council in *Reyes*, holding these decisions to be of "persuasive" value (para. 50). Second, the Court found that failure to take an offender's mitigating circumstances into account fails to consider the differing culpability of murderers and thus violates an offender's right to dignity under Article 28 of the Constitution. Third, the Court held that Section 204 violates Article 50(2)(q) (the right of a convicted person to appeal or seek review by a higher court), by denying convicted persons the right to appeal their sentences. Here, the Court was persuaded by a similar finding of the Inter-American Commission on Human Rights in *Edwards v. The Bahamas*.[14] The statute also treated persons convicted under Section 204 differently than persons convicted under other sections of the Penal Code that do not impose a mandatory sentence, which the Court found to be a violation of the right to equal protection and benefit of the law under Article 27 of the 2010 Constitution and Article 26 of the ICCPR. Last, the Court held that the mandatory nature of the death penalty imposed an unfair, unreasonable, and unjust procedure for termination of life, which was an affront to the rule of law. While the Court thus determined that Section 204 was unconstitutional to the extent that it provides for a mandatory death sentence, it also concluded that the death penalty remains legal as a discretionary maximum punishment, for as long as it remains in the Penal Code.

Recognizing that its holding would repeal provisions of the judiciary's Sentencing Policy Guidelines 2016, which following *Mwaura* created an obligation to impose the death sentence for all capital offenses, the Supreme Court set guidelines for consideration of mitigating factors by lower courts in resentencing hearings of murder cases. Factors to consider include:

> (a) the 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; [as well as] (h) any other factor that the Court considers relevant. (Para. 71)

The Court declined to consider the constitutionality of the indeterminate life sentence, holding that the Petitioners had not adequately canvassed the issue. It also declined to set a definite number of years which would constitute "life imprisonment." Instead, the Court remitted the matter back to the trial court for sentencing and, in addition, recommended that the AG 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. (Para. 96)

[14] Edwards v. The Bahamas, Report No. 48/01 (Inter-Am. Comm'n H.R. Apr. 4, 2001).

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In anticipation of an influx of similar appeals and resentencing cases, the Court directed the attorney general, the director of public prosecutions, and other relevant offices to prepare a review of the judgment and establish a framework to deal with these cases. The Court also directed that the judgment be presented to the National Assembly, the Senate, the Kenya Law Reform Commission (KLRC), and the AG "for any necessary amendments, formulation and enactment of statute law" to give effect to the judgment (para. 112(d)). In response, the AG set up a Taskforce Committee to implement this decision made up of representatives from the Office of the DPP, the National Crime Research Center, the judiciary, the Power of Mercy Advisory Committee, the KLRC, Parliament, the KNCHR, the Ministry of Interior, and the Office of Attorney General and Department of Justice.[15]

* * * *

Among the many decisions around the world outlawing the mandatory death penalty, the *Muruatetu* decision stands out for its expansive reasoning and for its contextual significance, both in Kenya and Africa more broadly.[16]

Locally, the case resolved the uncertainty facing lower courts in applying the decisions of the Court of Appeal in the *Mutiso* and *Mwaura* cases. The Supreme Court affirmed *Mutiso* and expanded it by opening the door for sentence rehearings of all similar cases. It also mandated pre-sentencing hearings in future cases, effectively changing the law and practice from the bench.

The Supreme Court emphasized the importance of breathing life into the 2010 Constitution by applying a generous and purposive interpretation of the Bill of Rights. The Court expanded the rationale for abolishing the mandatory nature of the death penalty by applying core principles in the Bill of Rights; its reasoning goes beyond the fair trial, right to personal dignity, and the judicial discretion arguments that it canvassed in earlier cases, including *Kigula*, *Woodson*, and *Reyes*.

While the Supreme Court's main focus was on Kenya's 2010 Constitution, its expansive reasoning drew on principles found in foreign jurisprudence and international conventions such as the ICCPR. While there has been limited consensus from lower courts on the hierarchical rank of international law within the Kenyan legal system, international law has often been applied to fill gaps where national law is silent or insufficient. In this case, however, Article 2(5) and 2(6) of the Constitution facilitate the direct application of international law, providing a guiding framework for abolishing inhumane sentences and for grounding the "right to mitigate" in the Constitution.

The decision also demonstrates the innovativeness and resilience of a young Supreme Court.[17] Rather than making a more traditional declaratory judgment, the Court imposed a structural interdict and set guidelines to be followed by lower courts to ensure implementation of its decision. In this instance, the guidelines with regard to mitigating factors are

[15] *See* Department of Public Communications, Office of the Attorney General and Department of Justice, *Taskforce on Death Penalty Commences Assignment* (Mar. 7, 2018), *at* http://www.statelaw.go.ke/task-force-on-death-penalty-commences-assignment.

[16] *See* Andrew Novak, The Death Penalty in Africa: Foundations and Future Prospects (2014) (tracing the introduction and significance of the death penalty in Sub-Saharan Africa, from the colonial period to the era of democratization).

[17] The Supreme Court of Kenya was established by the 2010 Constitution.

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"geared to promoting consistency and transparency in sentencing hearings. They are also aimed at promoting public understanding of the sentencing process" (para. 72). Although the Court mentions that the guidelines are not mandatory, subordinate courts (magistrates' courts in this case) are strictly bound. The Court further issued a directive to the AG, DPP, and relevant agencies to review the judgment and prepare a detailed framework for dealing with similar sentencing rehearing cases, and to give a progress report at the end of twelve months.[18]

The immediate implication of this decision is that judges and magistrates now have discretion in applying the death penalty in respect of the offenses of murder, treason, and robbery with violence,[19] and will be required to conduct sentencing hearings to determine the appropriate sentence in each case. The death penalty will thus only be meted out in the most deserving cases. It is expected that many prisoners will petition for resentencing, thus significantly reducing the number of convicts on death row.

Nevertheless, the Supreme Court missed the opportunity to answer several fundamental legal questions. For example, it declined to consider the constitutionality of indefinite life imprisonment. Relying heavily on a High Court decision, *Wangui v. Republic*,[20] and on decisions from the European Court of Human Rights,[21] the Supreme Court determined that it was the province of the legislature rather than the judiciary to define a life sentence or the number of years served before eligibility for parole. Nonetheless, the Court remarked, in dictum, that a life sentence need not mean a prisoner's natural life, but could be computed on the basis of a minimum or maximum time set by a judicial officer (para. 95). The Court also declined to consider the constitutionality of Section 46 of the Prisons Act, which excludes prisoners serving life sentences from being considered for remission, because it was raised only by amici curiae, who had no legal standing to raise issues not otherwise addressed in the petition.

In addition, the Court clarified that its decision did not consider the constitutionality of capital punishment; subsequent challenges to the death penalty at the Court of Appeal have so far been unsuccessful. In *Okungu v. Republic*,[22] for example, the Petitioners challenged the constitutionality of Penal Code Sections 204, 296(2), and 297(2), which prescribe the death sentence for the offenses of murder, attempted robbery with violence, and robbery with violence. Applying *Muruatetu*, the Court of Appeal held that "Sections 296(2) and 297(2) are

[18] Although a task force committee was put in place in March 2018, as of the time of this review, no amendment, or bill has been introduced in Parliament for purposes of amending or repealing Section 204 of the Penal Code.

[19] Although *Muruatetu* specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that impose a mandatory death sentence, including treason, robbery with violence, and attempted robbery with violence. In a subsequent decision, Okungu v. Republic C.A., Crim App. No. 56 of 2013, Judgment (Kenya Ct. of App. Jan. 28, 2013) (Kenya), the Court of Appeal, relying on *Muruatetu*, held Sections 296(2) and 297(2) of the Penal Code, which impose the mandatory death sentence for the offenses of robbery with violence and attempted robbery with violence, unconstitutional.

[20] Wangui v. Republic H.C., Crim. Case No. 35 of 2012, Ruling (Kenya High Ct. Sept. 24, 2014) (Kenya).

[21] Kafkaris v. Cyprus, App. No. 21906/04, Judgment (Eur. Ct. H.R. Feb. 12, 2008); Vinter v. The United Kingdom, App. Nos. 66069/09, 130/10, 3896/10, Judgment (Eur. Ct. H.R. Jan. 17, 2002); László Magyar v. Hungary, App. No. 73593/10, Judgment (Eur. Ct. H.R. May 20, 2014) (examining different national sentencing regimes in light of Article 3 of the European Convention on Human Rights, which prohibits torture and cruel, inhuman, and degrading treatment or punishment).

[22] Okungu, *supra* note 19.

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not inconsistent with the Constitution as the Supreme Court did not outlaw the death penalty."[23]

A vestige of its colonial past, Kenya's mandatory death penalty stretched back almost 120 years. In *Muruatetu*, the Supreme Court displayed its readiness to move beyond the colonial laws that have stifled legislative and jurisprudential progress in many African countries. It also demonstrated its boldness in bringing about legal reforms by invoking international and foreign comparative law to promote constitutional values. While it left the constitutionality of the death penalty itself for a future case, the Court suggested it might be open to such challenges. Courts, legislatures, and constitutional reformers in other African countries will certainly take note.

JACQUELENE MWANGI
Harvard Law School
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African Court of Human and Peoples' Rights—African Charter on Human and Peoples' Rights—right to defense—freedom of expression—right to a fair trial—right to presumption of innocence

INGABIRE VICTOIRE UMUHOZA V. THE REPUBLIC OF RWANDA. App. No. 003/2014. *At* http://en.african-court.org/index.php/56-pending-cases-details.
African Court of Human and Peoples' Rights, November 24, 2017.

In its landmark November 24, 2017 judgment in *Ingabire Victoire Umuhoza v. The Republic of Rwanda,* the African Court on Human and Peoples' Rights (ACtHPR) or Court) held that certain aspects of the right to a fair trial (presumption of innocence and illegal searches) and the right to freedom of expression under the African Charter on Human and Peoples' Rights (Banjul Charter) and the International Covenant on Civil and Political Rights (ICCPR) had been violated by the Republic of Rwanda (Respondent State). In its final orders, however, the Court rejected the applicant's prayer for immediate release and deferred its decision on other forms of reparation. The judgment has broad implications on how African states protect and respect the rights to a fair trial and freedom of expression. The case also offers some vital lessons on state backlash towards human rights litigation and African states' compliance with decisions of international courts (ICs).

Ms. Ingabire Victoire Umuhoza, the applicant in this case (Applicant), was the leader of a Rwandan political party, the *Forces Democratiques Unifiees* (FDU Inkingi), since 2000, and in that capacity, issued numerous statements criticizing the government. On January 16, 2010, Ms. Umuhoza returned to Rwanda after seventeen years abroad to officially register the party and participate in the upcoming general elections (paras. 5–6). Upon her arrival, the Applicant visited the Genocide Memorial in Kigali. There, she gave a speech lamenting the lack of recognition for the Hutus who perished during the genocide and severely

[23] Okungu, *supra* note 19, para. 9.

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