

Speech

Developing jurisprudence or creating chaos? Reflections on the decisions of the Court of Appeal of Kenya on selected topical areas of law

*Elisha Z Ongoya**

Introduction

The President of the Court of Appeal (CoA), Mr Justice William Ouko, and the distinguished justices of the CoA of Kenya present, it is my pleasure and indeed an honour to address you on this occasion.

Normally, I address you in my capacity as an advocate of the High Court of Kenya, passionately advancing sectarian interests of the litigants who instruct me to appear before you. Today I appear before you, without any prior reflections on the partisan interests of clients. It is a different and unique experience.

As a teacher of legal theory and the philosophy of law, I am cognisant of the fact that there is no such thing as value-neutral knowledge. All knowledge is value-laden, influenced by the multifarious inarticulate major premises deriving from our inescapable ideological baggage.

However, on occasions such as this, it behoves all people of good sense and logic to endeavour to be objective in their views. Occasions such as these, call upon us to question our own assumptions. We are required to turn our version of logic upside down, inside out, in a critical and evaluative sense. The purpose of all these is to establish a broad spectrum of objectivity that informs the ideas being presented.

* Advocate of the High Court of Kenya and Senior Lecturer in the Department of Public Law, Kabarak University Law School. The author acknowledges and appreciates the research input of the following intellectual behemoths: Walter Ochieng Khobe, Scola Kayugira, Melissa Ng'ania, Shadrack Mwinzi and Julie Matoke Kemunto. A presentation made to judges of the Court of Appeal on the sidelines of their special sitting at Kisumu on 2 August 2019.

The terms of reference

The letter inviting me for this engagement by the President of the CoA drew my attention to the subject areas of our discussion. That is normal but crucial to academic research, writing and presentation—delineation of the boundaries of the subject. However, that letter had more. The President of the CoA, in the introductory paragraph of the said invitation letter wrote as follows:

The Court of Appeal is in many instances the final court in many cases. This scenario, therefore, presents an opportunity for the court to develop jurisprudence based on a common interpretation of the law. I deliberately underscore the latter sentence.

In this regard, it has been found necessary to have an internal system in which judges can review their decisions to shape and develop jurisprudence and avoid contradictory decisions. It is in this respect that the court wishes to engage with you to assist in this process of introspection by presenting to the judges a paper on the following topical issues.

The President of the CoA, then listed the following three areas for consideration:

- (a) General conflict or divergence of opinions, if any, between different benches of the CoA on the same or similar cases;
- (b) Whether the decision of the Supreme Court of Kenya in *Francis Karioko Muruatetu and Wilson Thirumbu Mwangi v Republic and 5 others*¹ is applicable to offences under the Sexual Offences Act (SOA)²; and
- (c) Whether the Environment and Land Court (ELC) has jurisdiction in mortgages and charges and the jurisprudence developed around this area.

The closing paragraph of the letter had the following punchline:

We hope that through this process, we can enhance coherence and predictability of decisions emanating from the CoA leading to a robust and harmonious jurisprudence.

The foregoing content helps me develop what we call in pedagogical engagements, *expected learning outcomes*. The expected learning outcomes are that at the end of the exercise, the distinguished judges of the CoA of Kenya should be able to:

- (a) Recognise the divergence of opinion in similar cases in the different CoA benches;
- (b) Recognise the impact of such conflicts on the authority of the CoA and other users of its jurisprudence;

¹ *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, Petition No 15 & 16 2015 (Consolidated).

² *Sexual Offences Act* (Act No 3 of 2006).

- (c) Determine whether the decision of the Supreme Court, *Francis Karioko Muruatetu and Wilson Thirumbu Mwangi v Republic and 5 others*,³ applies to offences under the SOA; and
- (d) Determine whether the ELC has jurisdiction over matters concerning mortgages and charges.

More critically, however, the framing of the President of the CoA letter informs me that the CoA is ready and willing to engage within and without for purposes of interrogating its jurisprudential trajectory. The declared objective of the supposed interrogation is a ‘robust and harmonious jurisprudence’. This is a positive vow. It is a worthy engagement. If bad things have been said about the Judiciary before, let a positive story now be told, that the CoA is engaging for purposes of developing a robust and harmonious jurisprudence.

The President of the CoA letter has also drawn my attention to the fact that the CoA, as the second highest court in our judicial hierarchy and the apex court in matters that neither involve an interpretation or application of the Constitution nor which are certified as raising issues of general public importance, is cognisant of its role not just as a court of justice on a case by case basis, but also as a court of jurisprudence—shaping and reshaping the law and the law’s landscape. At this juncture, my attention is drawn to the case of *Daniel Kimani Njibia v Francis Mwangi Kimani & another*,⁴ where the Supreme Court held that:

Not all decisions of the Court of Appeal are subject to appeal before this Court. One category of decisions we perceive as falling outside the set of questions appealable to this Court, is the discretionary pronouncements appurtenant to the Appellate Court’s mandate. Such discretionary decisions which originate directly from the Appellate Court, are by no means the occasion to turn this Court into a first appellate court, as that would stand in conflict with the terms of the Constitution.

Role of the courts in ‘law making’

Superior courts in any judicial system are courts of *law*, courts of *justice*, and courts of *jurisprudence*. For legal theorists, law, justice and jurisprudence are disparate, though kindred phenomena. Courts of jurisprudence do more than just interpret the law—they *impact* the trajectory of the law. They unpack the meaning, nature and character of the law. They sometimes shake the landscape of the

³ Petition No 15 & 16 of 2015 (Consolidated).

⁴ *Daniel Kimani Njibia v Francis Mwangi Kimani & another* [2015] eKLR, Supreme Court Application No 3 of 2014.

law. Let me represent what others have said about your role as judges, particularly judges of courts that set and overrule precedents. According to Pntip Dunn:⁵

Judges are “liars”. They “routinely engage in delusion”. They occupy a paradoxical position in this world, one in which their function requires them to make law, while their legitimacy depends on the fiction that they interpret law. It is a strange fiction, but it is a necessary one. The legitimacy of the judicial system requires that the rule of law be above the whims of the individual personalities who happen to occupy positions on the Supreme Court at any given time. Rather, the rule of law must be grounded in objective analysis and immutable logic, reasoning that does not change with the changing of personnel. Otherwise, there would be no reason to accept the decisions of the Court as the governing framework for our society. Judges sustain the fiction that they interpret law, but never create it, by adhering to the doctrine of *stare decisis*. *Stare decisis* states that judicial decision-making should adhere to precedent. Precedent provides a source external to the judges’ individual opinions that legitimises their reasoning, supplying ready evidence that judicial decisions are based on more than individual whim. After all, there is a certain amount of security in trusting precedent. Assuming that judges in a series of decisions have conducted independent analyses to confirm their predecessors’ views, and that such a series comprises a collective judgment, precedent should be more trustworthy than an individual judge’s opinion. But on occasion, judges depart from precedent, and when they do, the fiction of interpretation begins to fall apart. After all, when judges overrule a previous decision, they do more than disagree with that decision; they assert an individual position and reject the external substantiation of their opinion.

Martin Shapiro wrote, similarly, that:⁶

Courts, by their very nature, are institutions designed to resolve conflicts between parties. In any judicial system in which present resolutions of conflict—such as individual case decisions—have some degree of precedential weight, courts do make law, public policy, or at least public choices. Thus, one part of the paradox is that courts occasionally make public policy decisions or law. In that sense, the “rule of law”, to the extent that the concept is intended to mean that judges apply only pre-existing law, can never exist. Judges often make rules for decision of future cases and are, therefore, making law. The other side of the paradox is that precisely because all courts, including the Supreme Court, resolve conflicts between the parties before them, judges must have something to tell the loser. Presumably, courts could tell the loser: “You have lost because we, the judges, have chosen that you should lose. We have so chosen because we think society would be better off if you lost.”

Courts have decided, however, in all of the societies that have a modern judicial system, to avoid the appearance of deciding cases based on judicial whim. As Professor Merrill discussed, in all modern societies, and in all cases, judges tell the loser: “You did not lose because we the judges chose that you should lose. You lost because the law required that you

⁵ Dunn PH, ‘How judges overrule: Speech Act theory and the doctrine of *Stare Decisis*’ 113 (2) *Yale Law Journal*, 2003, 493.

⁶ Shapiro M, ‘Judges as liars’ 17 *Harvard Journal of Law & Public Policy*, 1994, 155.

should lose.” That is the answer arrived at to satisfy the losers through hundreds of years of experiments in numerous societies. This paradox means that although every court makes law in a few of its cases, judges must always deny that they make law. I neither criticise nor defend courts as an institution; I simply assert their existential position in the world. They live that paradox; they have lived it in the past and will continue to live it in the future. There is nothing we can do about it, and there is nothing they can do about it. That makes courts part of a distinctive subset of political institutions: one that must always deny that they are wielding political authority when they in fact do wield political authority. Such is the nature of courts. They must always deny their authority to make law, even when they are making law. One may call this justificatory history, but I call it lying. Courts and judges always lie. Lying is the nature of the judicial activity. One must get over the moral angst about that and quarrel instead about what law judges make, when, and how fast. Worrying about whether judges ought or ought not to lie is foolhardy. Judges necessarily lie because that is the nature of the activity they engage in.

Concerning the debate above, Robert Kagan also stated:⁷

Decisions of constitutional courts often are like volcanic eruptions, reshaping the landscape of political and administrative action, usually in small ways but occasionally in large ones... Constitutional litigation has also become a well-established form of political action... Political groups, having failed to get their way in legislatures or administrative agencies frequently ask courts to overturn legislative or administrative policies on the grounds that they violate principles inferred from constitutional provisions. Judges sometimes agree and ask governments to take remedial measures.

It is against this background that I consider our conversation here significant.

Reflections on the themes

The invitation letter, as I have stated earlier, requested me to prepare a paper on the three subject areas reproduced above. A critical look at it reveals an instruction to generate three different papers. I will endeavour to generate the said three distinct discussions merged into one presentation.

⁷ Kagan RA & Elinson G, ‘Constitutional litigation in the United States’ in Rogowski R and Gawron, T (eds), *Constitutional courts in comparison: The US Supreme Court and the German Federal Constitutional Court*, 2ed, Berghahn Books, New York/Oxford, 2016, 25-26.

The divergence of opinions in the different CoA benches on similar cases

This area of focus, at the end of my research, led me to conclude that we have uncertainty in the law in diverse areas, if the various decisions of the CoA are anything to go by. At some point I stopped and posed the question, how does meaning vary when text remains the same? Well, it may be said that words, by their very nature, are not instruments of mathematical precision. This, in my view, is not a licence for incoherence from a court of the status of the CoA in our judicial hierarchy. I desire to persuade you that your role in the legal system is to multiply order and diminish chaos. When I reflect on some of the issues I have isolated below, I suppose you will share my frustration that in many instances, we have interpreted law in a manner that has culminated in utter chaos. The conflict in opinions in different benches, and sometimes same benches, of the CoA has significant impact to the various users of jurisprudence.

To the lay people, it projects the court as not serious with its core business of clarifying the law for future use. In this way, it has real potential of making the court lose authority, stature and respect. It makes it impossible for teachers of the law to teach the law with certainty. It makes it impossible for advocates to advise their clients in their day-to-day business with authority. It embarrasses the High Court (and courts of equal status) and subordinate courts and tribunals when they must choose between one of two conflicting decisions of the CoA. It is a grave matter. It deserves a clear position on the way forward. I suggest that we engage in further research in this area to flag out the issues of concern. These are grave indictments I have presented about the CoA. Let me proceed to make out the case for the indictment. I will do so by posing a few questions and supplying responses from the various CoA decisions.

Question 1: What is the position of the CoA on the administrative law issue of whether courts' jurisdiction is limited to the legality of the decision or it extends to the merits of the decision in the face of the prescriptions of the Constitution?

The CoA in a few decisions has embraced the shift embraced by Article 47 of the Constitution that envisages that courts are to review both 'merits and legality of the decision' as well as 'process and procedure' adopted by an administrative body.

In *Suchan Investment Limited v Ministry of National Heritage & Culture*,⁸ the CoA held:

The test of proportionality leads to a 'greater intensity of review' than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision... In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

Similarly, in *Rentco East Africa Limited, Lantech Africa Limited, Toshiba Corporation Consortium v Public Procurement Administrative Review Board & another*,⁹ the CoA observed:

We alluded earlier to the permitted limit for consideration in a judicial review application of the merit of a decision of a public body. While the traditional parameters that we have considered in the previous paragraphs still apply, with the promulgation of the Constitution of Kenya, 2010 and enactment of Fair Administrative Action Act, 2015 there has been a shift in those considerations.

However, in some decisions, the CoA has failed to adhere to this new paradigm of judicial review required under Article 47 of the Constitution and the Fair Administrative Action Act. For example, in *Kenya Revenue Authority & 2 others v Darasa Investments Limited*¹⁰ the bench held:

As we have set out above, judicial review is concerned with the decision making process and not the merits of the decision in respect of which the application for judicial review is made.

Question 2: *What is the position of the CoA of Kenya on the effect of failure to obtain the consent of the Land Control Board for a controlled transaction in land?*

Differently constituted benches of the CoA have taken diametrically opposed views on the question of the effect of the failure to obtain Land Control Board consent to a transaction related to agricultural land within the time stipulated in Section 6(1) of the Land Control Act,¹¹ and whether the transaction becomes void for running afoul the requirement of the necessity to get a consent within six months of the transaction.

For instance, in *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri*,¹² the CoA sitting at Nyeri, held, inter alia, that the possession of the land

⁸ [2016] eKLR.

⁹ Civil Appeal No 24 of 2017.

¹⁰ [2018] eKLR.

¹¹ Chapter 302, Laws of Kenya.

¹² [2014] eKLR.

by purchasers was an overriding interest in favour of the purchasers and further at paragraph 20 held that:

In instant case, there was a common intention between the appellants and the respondent in relation to suit property. Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case.

The CoA stated later at paragraph 25 that:

The transaction between the parties is to the effect that the respondent created a constructive trust in favour of all persons who paid the purchase price. We are of the considered view that a constructive trust relating to land subject to the Land Control Act is enforceable.

The CoA specifically stated:

Nothing in the Land Control Act prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case. The respondent all along acted on the basis and represented that the appellants were to obtain proprietary interest in the suit property. Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.¹³

The CoA expressed itself thus:

This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrong doing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.¹⁴

The conclusion was in these terms:

The totality of our re-evaluation of the facts and applicable law in this case leads us to conclude that the Honourable Judge erred in failing to consider that the appellants were in possession of the suit property, that the respondent had created a constructive trust in favour of all individuals who had paid the purchase price for respective plots and the trial court erred in failing to note that consent of the Land Control Board is not required where a trust is created over agricultural land. We do find that the possession and occupation by the appellants of the suit property is an overriding interest attached to the said property. Based on the reasons given, we find that this appeal has merit...¹⁵

¹³ *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR, at para 20.

¹⁴ *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR, at para 26.

¹⁵ *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR, at para 29.

However, in *David Sironga Ole Tukai v Francis Arap Muge & 2 others*,¹⁶ the CoA held that the failure to obtain consent from the Land Control Board as required by Section 6(1) of the Land Control Act rendered the transactions void and unenforceable. The appellate bench sitting at Nairobi and differently constituted differed with the CoA in the *Macharia Mwangi Maina* decision for several reasons, the main one being on the application of the equitable principles to the Land Control Act. In this case, the CoA held in part:

... First and foremost, we have already stated that in our opinion granted the express unequivocal and comprehensive provisions of the Land Control Act, there is no room for the courts to import doctrine of equity in the Act. This is one simple message of Section 3 of the Judicature Act. Consequently, invocation of equitable doctrines of constructive trust and estoppel to override the provisions of the Land Control Act has, in our view, no legal foundation. We have also noted that this Court has previously held in a line of consistent decisions and in very clear terms that there was no room for application of the doctrines of equity in the Land Control Act.

Subsequently, the CoA bench sitting in Eldoret and differently constituted in *Willy Kimutai Kitilit v Michael Kibet*¹⁷ held that:

Since the current Constitution has by virtue of *Article 10(2)(b)* elevated equity as a principle of justice to a constitutional principle and requires the courts in exercising judicial authority to protect and promote that principle, amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable for lack of consent of the Land Control Board ... We are in agreement with the *Macharia Mwangi Maina* decision that the equitable doctrines of constructive trust and proprietary estoppel are applicable and enforceable to land subject to the Land Control Act, though this is subject to the circumstances of the particular case.

Question 3: *What is the position of the law, deriving from the decisions of the CoA, on whether there is a right of appeal under Section 35 of the Arbitration Act*¹⁸?

The CoA in a three-judge bench, in the case of *Kenya Shell Limited v Kobil Petroleum Limited*¹⁹, held that there was no right of appeal under Section 35 of the Arbitration Act²⁰. A similar position was held in the case of *Anne Mumbi Hinga v Victoria Njoki Gathara*.²¹ However, in the case of *Nyutu Agrovet Limited v Airtel*

¹⁶ (2014) eKLR.

¹⁷ [2018] eKLR.

¹⁸ Chapter 49, Laws of Kenya.

¹⁹ Civil Application No 57 of 2006.

²⁰ [2006] eKLR.

²¹ [2009] eKLR.

Networks Limited,²² the majority held that a right of appeal lies to the CoA under Section 35 of the Arbitration Act.

Question 4: *What is the law, deriving from the jurisprudence of the CoA, on the effect of filing a notice of appeal that does not comply strictly with the prescription of the Court of Appeal (Election Petition) Rules, 2017?*

In the cases of *Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 others*²³ and *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission & 2 others*,²⁴ two differently constituted benches of the CoA gave divergent opinions on the same issue. Justices Mohammed Warsame, Daniel Musinga and Kathurima M'inoti heard the *Owino Paul Ongili Babu v Francis Wambugu Mureithi* case. The first respondent in the matter filed an application to dismiss the appeal on the grounds that no notice of appeal was filed at the Registry of the Court under Rule 6 or service effected under Rule 7 of the Court of Appeal (Election Petition) Rules 2017. The record of appeal lodged before the CoA, therefore, did not contain a notice of appeal. Rule 6(1) of the Court of Appeal (Election Petition) Rules 2017 states that 'unless otherwise provided by statute, all election petition appeals shall be initiated by notice of appeal'.

The CoA acknowledged that the appellant did not comply with the Court of Appeal (Election Petition) Rules 2017 strictly. Rule 5 of the said rules allowed the CoA to exercise discretion in determining applications. The drafters of Rule 5 had in mind the purpose and place of Article 159(2)(d) of the Constitution, which ensures and upholds determination of disputes on merit. Again, Rule 5 gives powers to the CoA to exercise its discretion. And as we all know, discretion must not be exercised whimsically, capriciously or unreasonably. The first respondent did not suffer any prejudice since he was served with the record of appeal within the stipulated time. Consequently, the CoA declined to dismiss the appeal on this ground but heard it on its merits.

Justices Philip Waki, Fatuma Sichale and Otieno Odek, sitting at the CoA, Kisumu, heard *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission*. The Independent Electoral and Boundaries Commission (IEBC) filed an application seeking to strike out the appeal on the basis that the notice of appeal was not compliant with the Court of Appeal (Election Petition) Rules 2017. The

²² [2015] eKLR.

²³ [2018] eKLR, Nairobi, Election Petition Appeal No 18 of 2018.

²⁴ [2018] eKLR.

CoA held that the question of filing of a compliant notice of appeal was a jurisdictional issue as opposed to a procedural one.

The CoA relied on the Supreme Court ruling in the case of *IEBC v Jane Cheperenger & 2 others*,²⁵ which emphasised that without filing a notice of appeal, there can be no expressed intention to appeal. The appellate judges argued that the issue before them was not a technical defect that could be cured by the application of Article 159(2)(d) of the Constitution but rather a jurisdictional one. The CoA found that the record of appeal filed in the suit was a nullity.

The matter was appealed to the Supreme Court in *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others*,²⁶ which declined to reverse the CoA decision citing the fact that the appeal challenged the exercise of discretion and the appellant did not demonstrate how the CoA judges abused their discretion in deciding this matter. The Supreme Court held that discretionary pronouncements by the appellate court are not appealable to the Supreme Court. In making this decision, the Supreme Court took note of its role in giving direction especially where the CoA has issued conflicting decisions.

What do we do with the conflicting CoA decisions?

The problem with the conflicting decisions of the CoA is not unique to Kenya. English courts have encountered similar problems. When co-ordinate benches deliver divergent opinions, conflict arises in the lower courts on what precedent to follow. The *locus classicus* on the subject matter is the case of *Young v Bristol Aeroplane Company Limited*,²⁷ where the CoA outlined three exceptions to the *stare decisis* rule in determining which decision to follow when the CoA has made divergent opinions on the same subject matter. The first exception is that a court is entitled to determine which of the two conflicting decisions it will follow. Second, a court is not bound to follow its own precedent where a court superior to it delivers conflicting positions. Finally, a court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incurium*.

It is apparent that the CoA has the freedom of choice on which decision to follow. In *Miles v Jarvis*,²⁸ Justice Salmond held that:

²⁵ [2015] eKLR.

²⁶ [2019] eKLR.

²⁷ [1944] 1KB 718 CA.

²⁸ [1883] 24 Ch D 633.

Whenever a relevant prior decision is not mentioned in a judgment, it is assumed that the court acts in ignorance or forgetfulness of it. If the new decision is conflicting with the old, it is assumed that the decision was given *per incurium* and it is not binding to the later court. It is in the interests of justice that the courts should follow its previous decisions whenever possible and then let the losing party vindicate their position on appeal.

The possible solution to dealing with conflicting and divergent decision of the CoA is by referring a matter to a larger bench.²⁹ Where a court is facing two conflicting decisions, the matter is then referred to a larger bench to handle the matter. Lower courts are then bound to follow the decision of the larger bench. Lower courts could also opt to follow the earlier decision and assume that the second decision was given *per incurium*.³⁰

As captured by the letter inviting me to this session, I reiterate the need to have an internal system in which judges can review their decisions to shape and develop jurisprudence and avoid contradictory decisions.

I suggest that the administration of the CoA commissions a full study on the full scope of conflicting decisions on the various areas of law. This is in tandem with the introspective and self-assessing spirit of the CoA. Based on the outcome of the study, a systematic approach should be taken that involves:

- (a) Deliberately certifying subsequent decisions as raising general questions of public importance for purposes of giving the Supreme Court an opportunity to finally streamline the law.
- (b) Constituting larger benches of the court in subsequent appeals raising similar questions to give the court an opportunity to streamline the law.
- (c) Backroom conversations among judges, their law clerks/researchers on the state of the law.

Whether the decision of the Supreme Court in Francis Karioko Muruatetu and Wilson Thirumbu Mwangi v the Republic and 5 others is applicable to offences under the SOA

The case was an appeal from the CoA where the petitioners were arraigned before the High Court for the offence of murder and sentenced to death as

²⁹ Rao VN, 'Conflicting decisions of co-ordinate benches: Problems and some solutions' 32 (1) *Journal of the Indian Law Institute*, 1990, 49-67 available at <https://www.jstor.org/stable/43951299?seq=1#metadata_info_tab_contents> accessed on 9 March 2020.

³⁰ Rao VN, 'Conflicting decisions of co-ordinate benches: Problems and some solutions', 49-67.

decreed in Section 204 of the Penal Code. Aggrieved by the decision, the petitioners filed separate suits which were consolidated.³¹ The main issues for determination in this case were:-

- (a) Whether the mandatory 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 the CoA can and should define the parameters of a life sentence; and
- (d) What remedies, if any, accrue to the petitioners.

In determining the issues, the judges held that Section 204 of the Penal Code deprives the Supreme Court of the judicial discretion in a matter of life and death. Such a law can only be granted as harsh, unjust and unfair. The mandatory nature deprives courts their legitimate jurisdiction to exercise discretion in appropriate cases. Further, the dignity of a person is ignored if the death sentence is imposed without granting the individual a chance to mitigate. The failure to look at mitigating factors, personal history, and circumstances make the punishment disproportionate to the accused.

Furthermore, Section 204 of the Penal Code violates Article 50(2)(q) of the Constitution because it denies a person the right to have their sentence reviewed by a higher court. Their appeal is limited to the conviction only. The Supreme Court held that Section 204 of the Penal Code is inconsistent with the Constitution and invalid to the extent that it provides for mandatory death sentence for murder. The Supreme Court insisted that the decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment.

In determining whether indeterminate life sentences should be declared unconstitutional, the Supreme Court directed the Attorney General and Parliament to commence an inquiry and develop legislation on what constitutes a life sentence. The legislation could include a minimum number of years served before a prisoner is considered for parole or remission. The Supreme Court ordered the matter for remission to the High Court for sentencing.

The SOA does not provide for death penalty. It, however, provides for minimum sentences for the offences of rape, attempted rape, and, defilement,

³¹ Petition No 15 & 16 of 2015 (Consolidated).

which carry the harshest punishments—and if a person is found liable, the sentences may be enhanced to life imprisonment. Arguably, to the extent that the SOA provides for minimum mandatory sentences that take away the discretion of the trial court, the above Supreme Court decision applies to sexual offences.

The SOA sets out the offences of defilement,³² attempted defilement,³³ gang rape,³⁴ among others, that have definitive sentences ranging from imprisonment for life, imprisonment for a term not less than 10 years, among others. The provisions impose a mandatory sentence and hence, even after hearing mitigating factors during sentencing, the hands of the court are tied and the court cannot exercise its discretion but to convict an accused person as per the provisions of the law. Courts have interrogated this factor and basing on the decision of the Supreme Court, have interpreted that the provisions of the SOA, which provide definite sentences, deprive the trial court the opportunity to listen and interrogate mitigating factors before passing a sentence and, therefore, are unconstitutional.

*Jared Koita Injiri v Republic*³⁵ is a CoA decision on the question of the death sentence. Based on the decision in *Francis Karioko Muruatetu & another v Republic*, the CoA took the view that:

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 an inappropriate case. Where a court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right.

In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) of the SOA, and when the reasoning of the Supreme Court case was applied to this provision, it too was considered unconstitutional on the same basis.

The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant

³² Section 8, *Sexual Offences Act* (Act No 3 of 2006).

³³ Section 9, *Sexual Offences Act* (Act No 3 of 2006).

³⁴ Section 10, *Sexual Offences Act* (Act No 3 of 2006).

³⁵ [2019] eKLR.

could be in jeopardy. However, due to the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic*, the CoA set aside the sentence of life imposed and substituted it with a sentence of 30 years from the date of sentence by the trial court.

In *Evans Wanjala Wanyonyi v Republic*,³⁶ the COA held:

24. On the enhanced 20-year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This court in *Christopher Ochieng v R* [2018] eKLR Kisumu Criminal Appeal No 202 of 2011 and in *Jared Koita Injiri v R*, Kisumu Criminal Appeal No 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This court noted that the Supreme Court in *Francis Karioko Muruatetu & another v Republic* SC Petition No 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the aforestated Supreme Court decision, this court in *Christopher Ochieng v R* (supra) stated:

“In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ... Needless to say, pursuant to the Supreme Court’s decision in *Francis Karioko Muruatetu & another v Republic* (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years’ imprisonment from the date of sentence by the trial court.”

25. In this appeal, guided by the merits of the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* (supra) and persuaded by the decisions of this court in *Christopher Ochieng v R* (supra) and *Jared Koita Injiri v R*, Kisumu Criminal Appeal No 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20-year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20-year term of imprisonment meted upon the appellant. We substitute the 20-year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015.

³⁶ [2019] eKLR.

Whether the ELC has jurisdiction over mortgages and charges

Article 162(2)(b) of the Constitution requires Parliament to establish courts of the same status as the High Court to hear and determine disputes relating to the use and occupation of and title to land. Article 162(3) requires Parliament to determine the jurisdictions of the courts established under Article 162(2). Article 260 states that unless the context otherwise requires, land includes: a) the surface of the earth and the subsurface rock, b) any body of water on or under the surface, c) marine waters in the territorial sea and exclusive economic zone, d) natural resources completely contained on or under the surface, and (e) the air space above the surface.

Article 260 borrows heavily from the common law doctrine of *cujus est solum, eius est usque ad coelum et ad inferos*, which translates to whoever owns the soil it is theirs all the way to the heaven and down to hell. The *cujus* doctrine limits land use to necessary and ordinary use and enjoyment of the land and structures upon it. The ninth edition of the Black's Law Dictionary defines the word 'use' as:

The application or employment of something; especially a long-continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession or employment that is merely temporary or occasional.

The Land Use Policy adopted by the Ministry of Lands and Physical Planning defines land use as:³⁷

The activities to which land is subjected to and is often determined by; economic returns, socio-cultural practices, ecological zones and public policies. In the context of this policy, land use is defined as the economic and cultural activities practiced on the land.

In determining whether an activity constitutes land use, one must determine whether the activity is subjected for the purposes of economic returns, social-economic practices, ecological zones, and public practices. The CoA in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others*³⁸ held that, 'to the law therefore, land use entails the application or employment of the surface of the land and/or the air above it and/or the ground below it according to the purpose for which that land is adapted.'

³⁷ Ministry of Lands and Physical Planning, *Sessional Paper No 1 of 2017 on National Land Use Policy*, October 2017, at para 2.4.1.

³⁸ [2017] eKLR.

Section 2 of the Land Act³⁹ defines a charge as:

An interest in land securing the payment of money or money's worth or the fulfilment of any condition, and includes a subcharge and the instrument creating a charge, including –

- (a) an informal charge, which is a written and witnessed undertaking, the clear intention of which is to charge the chargor's land with the repayment of money or money's worth obtained from the chargee; and
- (b) a customary charge which is a type of informal charge whose undertaking has been observed by a group of people over an indefinite period and considered as legal and binding to such people.

A charge creates an interest in land to secure the payment of money or money's worth. This interest in land is limited by the payment of the amount advanced under the loan. The creation of an interest in land under the charge has nothing to do with the use of land for the purposes of economic returns, social-economic practices, ecological zones and public practices. The relationship created by the registration of a charge is only meant to secure the payment of the amount secured by the charge.

In the case of *Samtley v Wilde*,⁴⁰ Lord Nathaniel Lindley defined a mortgage as a disposition of some interest in land or other property as a security for the payment of a debt on the discharge of some other obligation for which it is given. In simple terms a mortgage is a conveyance of land as a security for the payment of a debt or the discharge of some other obligation. Similarly, a mortgage creates an interest that has nothing to do with the use of the land. Section 13(2)(d) of the Environment and Land Court Act⁴¹ provides that in exercise of its jurisdiction under Article 162(2)(d) of the Constitution, the court shall have power to hear and determine disputes relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land.

The CoA in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others*⁴² held that:

The jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court's jurisdiction to deal with disputes connected to “use” of land as discussed herein above. Such contracts, in our view, ought to be incidental to the “use” of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.

³⁹ [Act No 6 of 2012].

⁴⁰ [1889]2CH 474.

⁴¹ Chapter 12A Laws of Kenya.

⁴² [2017] eKLR.

In *Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates*,⁴³ the CoA reiterated the decision held in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna* by holding that in determining whether the ELC has jurisdiction over a matter, the court ought to look at the dominant issue in the dispute and whether that issue relates to the environment and the use and occupation of, and title to, land.

The jurisdiction of the ELC established under Section 13 of the ELC Act deals with disputes arising from the use of land. Charges and mortgages are not incidental to the use of land as such the ELC does not have jurisdiction to handle disputes relating to charges and mortgages.

Relatedly, Justice Silas Munyao in the decision of the ELC sitting at Nakuru in *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited and John Kiguthi Kimani Kibe*,⁴⁴ held thus:

I do not think that the Court of Appeal was holding the position that once the Environment and Land Court (ELC) sees the word “charge” mentioned in any pleadings, then the ELC should down its tools, for if that were the case, this would conflict with what the Constitution under Article 162(2)(b), and Parliament under Section 13 of the Environment and Land Court Act No 19 of 2011, have prescribed as being the jurisdiction of the ELC. This would also go contrary to the Supreme Court decision in the case of *R v Karisa Chengo & 2 others* (2017) eKLR where the Supreme Court stated as follows at paragraph 51 of its decision: “...In this instance, the jurisdiction of the specialised courts is prescribed by Parliament, through the said enactment of legislation relating, respectively, to the ELC and ELRC.”

Conclusion

In conclusion, distinguished judges, it has been an honour talking to you. Part of my observations and verdicts in the analytical aspects of the paper have been rather unflattering—perhaps harsh. That is what we do in the academy. But I guess, they are only but that part of the labour pains we have submitted ourselves to in the birth of a new jurisprudential trajectory for the CoA—a coherent and predictable jurisprudence. Thank you so much for granting me audience. I rest my case.

⁴³ [2019] eKLR.

⁴⁴ [2018] eKLR, Nakuru, ELC No 296 of 2013. ELRC means Employment and Labour Relations Court.