THE REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Rawal, DCJ & V-P; Ibrahim, Ojwang, Wanjala & Njoki, SCJJ)

PETITION NO. 15 OF 2015

AS CONSOLIDATED WITH

PETITION NO. 16 OF 2015

—BETWEEN—

FRANCIS KARIOKI MURUATETU ..... 1ST PETITIONER

WILSON THIRIMBU MWANGI ..... 2ND PETITIONER

—AND—

REPUBLIC ..... RESPONDENT

—AND—

1. KENYA NATIONAL COMMISSION ON HUMAN RIGHTS
2. KENYA SECTION OF THE INTERNATIONAL COMMISSION OF JURISTS
3. LEGAL RESOURCES FOUNDATION
4. KATIBA INSTITUTE

INTERESTED PARTIES

—AND—

THE DEATH PENALTY PROJECT ..... INTENDED *AMICUS CURIAE*

*(Being applications by Kenya National Commission of Human Rights, Kenya Section of the International Commission of Jurists, Legal Resources Foundation, and Katiba Institute, to be enjoined as Interested Parties; and an application by The Death Penalty Project, to be enjoined as **Amicus Curiae**)*

RULING

I. INTRODUCTION

[1] There are three applications before the Court in which the applicants severally seek enjoinment in this matter.

[2] The First is a notice of motion application dated 22nd September, 2015 and filed on even date by the *Death Penalty Project* which seeks to be enjoined in the consolidated petitions as an *amicus curiae* and, once so admitted, to be granted leave to present both oral and written submissions. The application is premised on grounds, *inter alia,* that:

> *(i) the intended **amicus** is an institution with expertise in criminal law, constitutional law and international human rights law, in particular in relation to the death penalty; it seeks the Court's permission to be admitted in this case as **amicus** in the capacity of legal expert;*
>
> *(ii)the intended **amicus** seeks leave to assist the Court with the interpretation and application of relevant constitutional principles, international law and foreign comparative law; in particular it will address the sentencing principles and procedures that have emerged from the abolition of the mandatory death penalty in other common law jurisdictions, with a focus on Africa; it will draw on the comparative case law on appropriate remedies, as applicable, if the mandatory death penalty is found to be unconstitutional in Kenya; it will not seek to address the Court on the constitutionality of the death penalty itself, unless invited to do so;*
>
> *(iii) the intended **amicus curiae** believes its application should be granted because of its unique international expertise on the*

issue of the mandatory death penalty, and because of the exceptional importance that the determination of this case will have on criminal trial processes and sentencing in Kenya.

[3] The first application was supported by an affirmation dated 22nd September, 2015 by one *Parvais Jabbar Mbe*, the Co- Executive Director of the applicant. He affirmed the applicant's objectives as being: *to promote and protect the human rights of those individuals accused of crimes that are punishable by death and of those who have been sentenced to death; to promote the sound administration of the law; to advance education, research and training in domestic and international law (including international human rights law), and in particular the operation of the death penalty.*

[4] The Second application is dated 24th September, 2015 filed by *Katiba Institute,* seeking to be enjoined in the proceedings as an interested party. It prays that once admitted, apart from submitting written and oral arguments, it be allowed to submit any information and/or evidence it may deem important and relevant to facilitate the just disposition of this matter. The application was supported by an affidavit by Mr. Wanyoike, a director of the applicant.

[5] The third application, dated 15th September, 2015 was filed on 2nd October, 2015 and is a joint one by three applicants: *Kenya National Commission on Human Rights* (KNCHR), *Kenya Section of the International Commission of Jurists* (ICJ- Kenya), and *Legal Resources Foundation,* seeking to be enjoined as Interested Parties.

[6] The application is premised on grounds, *inter alia,* that: *these are institutions with expertise in the promotion, protection and enforcement of human rights in Kenya; they have in the past carried out research on the death penalty, and specifically on the issue whether this penalty, as contemplated*

under the Kenyan law, accords with the country's international human rights obligations; they seek to offer their expertise on the subject, and to assist the Court in arriving at a fair and objective determination of the questions in issue. This application is supported by the affidavit of Mr. Kegoro, the Executive Director of ICJ-Kenya.

II. SUBMISSIONS OF THE PARTIES

(i) 1st, 2nd and 3rd Intended Interested Parties

[7] Mr. Macharia, learned counsel for the Kenya National Commission on Human Rights, Kenya Section of the International Commission of Jurists, and Legal Resources Foundation (1st, 2nd and 3rd intended interested parties) relied on the notice of motion application dated 15th September, 2015, by which his clients sought to be admitted to party-status.

[8] He submitted that the 2nd and 3rd intended interested parties are civil society organizations which have been in operation within the country for over 20 years, and have conducted significant research on human rights issues involving international principles and standards. The 3rd intended interested party has also conducted research on prison reforms. The 1st intended interested party is a constitutional commission established by the Constitution and by statute whose primary mandate is the promotion and protection of human rights in Kenya. The three applicants are members of a caucus known as the 'Death Penalty Coalition.'

[9] Counsel urged that the 1st, 2nd and 3rd interested parties intend to advance the argument that the death penalty, in itself, is a violation of human rights to life, fair trial, and freedom from torture, cruel, inhuman or degrading treatment. He urged that the arguments of the three parties transcend the issue of mandatory

death sentence and maintain that the death sentence itself is a violation of human rights. The applicants urged that although that argument is distinct from the prayers made by the petitioners, the mandate of the 1st intended interested party is such as to require it to represent the interest of approximately 4,000 inmates who have been sentenced to death.

[10] Counsel submitted that since the decision of the Supreme Court would apply to other cases of similar facts, it would be necessary to hear the submissions of the intended interested parties. He urged further that this case presents an opportunity for the 1st intended interested party to present arguments with regard to violations of human rights to life, to fair trial, and to inhuman and degrading treatment, as regards persons convicted and sentenced to death.

[11] Counsel urged that his clients merited the status of interested parties, but not *amicus curiae,* since they have taken a distinct position – that the death penalty is unconstitutional. However, he urged that the materials brought by the applicants before the Court would be neutral in nature.

[12] Counsel urged that the intended interested parties were bringing submissions that were different from those of the current parties, in the following respects:

(i) they will encompass the history of the death penalty in Kenya; they urged that there is a wider context to the death penalty question, which has a historical dimension;
(ii) they will include the merits of the international standards relating to the death penalty;

(iii) they will incorporate the comparative jurisprudence from other jurisdictions, and perspectives from international human rights groups;
(iv) they will advance the argument that the death penalty is a violation of human rights; and
(v) they will expound on the impact of the death sentence upon persons who are incarcerated.

[13] Counsel submitted that this is the most appropriate forum at which all matters relating to the death sentence can be determined; and that no prejudice will be occasioned by a determination by this Court, at the end of the hearing, that the death penalty is unconstitutional.

[14] Counsel submitted that there would be no challenge to the factual circumstances that led to the conviction, but rather, the issue is with regard to *the sentence*. He signalled that no comments would be made by the intended interested parties as regards the circumstances of the individual petitioners.

[15] Counsel urged that the intended interested parties would not occasion any delay and they would submit themselves to any directions given by the Court in regard to their participation in the proceedings.

(ii) 4th Intended Interested Party

[16] Mr. Wanyoike, learned counsel for Katiba Institute (4thintended interested party), urged that the Institute be enjoined as an interested party. He submitted that it is a non-profit making and non-governmental organization, registered under the laws of Kenya, and dedicated to the implementation of the Kenya Constitution, including the protection of fundamental rights and freedoms. He

stated that his client had relevant expertise in constitutional law and international human rights law. His client's submissions, he said, would be on: the interpretation and application of relevant constitutional principles; current discourse under international law and foreign comparative law on the issues coming up for determination; information and statistical evidence regarding the number of people in same conditions as the petitioners; and, expert evidence regarding the death penalty, mandatory death penalty, and life imprisonment.

[17] Counsel submitted that Petition No. 15 of 2015 contests the constitutionality of the death penalty, since in paragraph 2.1 (b) the petitioner *"avers that Section 204 of the Penal Code violates Article 24(2) (c) of the Constitution . . . in limiting the right to life under Article 26 (1) in so far as it derogates from the core and essential content of the right to life."* And, in paragraph 2.1 (g) the petitioner states that *"the death penalty is a torturous, barbaric, cruel, inhuman and degrading punishment contrary to Article 28 and 29 (d) and (f) of the Constitution."* He urged that on the basis of the said statements, the petitioner was contending that the death penalty is unconstitutional and, therefore, the 1st intended interested party was in no way introducing new issues, by indicating that it would be addressing the question of unconstitutionality of the death penalty.

[18] Mr. Wanyoike submitted that the Court has inherent power to define the issues for determination, and the parties cannot qualify that discretion. He submitted further that the submissions to be advanced would be on issues that the Court needs to take into consideration even though they do not form part of the issues for determination.

[19] Counsel urge that Rule 25 of the Supreme Court Rules, 2012 does not provide an exhaustive list of the factors that the Court will take into account in

determining whether a party has demonstrated that he/she has met the criteria for enjoinment as an interested party. He submitted that the use of the phrase "include" means that the factors set out in Rule 25 are not exhaustive; he invited the Court to expand that list. He submitted that the public interests, and legal interest, are factors that the Court should include in the Rule 25 list. He urged that the petition before the Court is one of great public interest, and that the Judgment of the Court would affect those who are not party to the matter: and thus, their interest merited representation.

(iii) ***Intended*** *amicus curiae*

[20] The Death Penalty Project, in their application dated 22nd September, 2015 sought to be admitted as *amicus curiae* in this matter, and asked for an opportunity to submit written and oral arguments and other relevant information in the matter. Mr. Wanyoike holding brief for Mr. Middleton for the Death Penalty Project (intended *amicus curiae*), submitted that the applicant is an institution with expertise in criminal law, constitutional law and international human rights law, in particular in relation to the death penalty. He submitted that the institution is a non-profit making and non-governmental organization registered under the laws of England and Wales. Counsel said that the intended *amicus* was seeking to assist the Court with the interpretation and application of relevant constitutional principles, international law and comparative foreign law.

[21] Learned counsel further urged that the intended *amicus curiae* would address the sentencing principles and procedures that have emerged from the abolition of the mandatory death penalty in other common law jurisdictions, with a focus on Africa; it would draw on the comparative case law to address the issue of appropriate remedies, as applicable, if the mandatory death penalty is found to be unconstitutional in Kenya. He urged that the intended *amicus curiae* would not seek to address the Court on the constitutionality of the death penalty itself,

unless invited to do so by the Court. He prayed that the application be granted, so the Court may benefit from the unique international expertise on the issue of the mandatory death penalty, and on account of the exceptional importance which the determination of this matter will have on criminal trial processes and sentencing in Kenya.

(iv) Petitioners

[22] Mr. Ngatia, learned counsel for the 2nd petitioner, holding brief for learned counsel Mr. Kilukumi, for the 1st petitioner, contested the applications by the intended interested parties and the intended *amicus curiae*. He urged that the petitioners were convicted by the High Court on a charge of murder and, by the operation of Section 204 of the Penal Code, the sole applicable sentence was the death sentence. Therefore, he urged, the sentence was not a judicial evaluation, but rather, a predetermined penalty in a municipal statute. He further submitted that the Court of Appeal while upholding the sentence and conviction, had signalled its reservations on the propriety of preordained sentence.

[23] Counsel submitted that in the petition before the Court, the complaint was whether it is lawful for a municipal statute to determine the sentence that the Judiciary must impose, oblivious to any extenuating or mitigating circumstances. He defined the relevant issue as: whether the Judiciary can allow the Legislature to be the one to determine the sentence. He urged that the sentence is a judicial process, and not a matter falling to the remit of the Legislature. It was his submission that the sentences against the petitioners had been later commuted to life sentences, through the process of presidential pardon. However, he urged that such a state of affairs does not resolve the mischief, as there remained an indefinite life sentence, that is not defined by law.

[24] In response to the application by Katiba Institute to be enjoined as an interested party, Mr. Ngatia urged that an interested party as defined under Rule 25 of the Supreme Court Rules, 2012 is a party that stands to suffer prejudice if not enjoined. He submitted that, in his opinion, the only persons who could demonstrate such likely prejudice were those on death row, but not Katiba Institute. He buttressed his argument with the decision of this Court in ***Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others,*** Supreme Court Petition No. 12 of 2013, [2015] eKLR.He urged that there is a distinction between an interested party and an *amicus curiae,* as the quest for a particular outcome duly fell only to the parties, or interveners. He urged that for a party to fall within Rule 25, it had to be shown that there indeed is a right to litigation, and to the outcome. Mr. Ngatia submitted that Katiba Institute had failed on both scores, since it had not shown it had a right to the litigation, nor to the outcome.

[25] It was counsel's submission that there are issues that have been pleaded in the Notice of Motion of Katiba Institute, that detract from the petitioner's cause, as such issues seek to expand the petition before the Court. He cited paragraph 11 (i) of the affidavit of Mr. Wanyoike in support of the application, which states: *does the manner of execution, hanging imposed by Section 69 of the Prisons Act and the procedure under which it is carried out violate an offender's right to freedom from torture, cruel, inhuman and degrading treatment (Articles 26 and 3 of the Constitution)?— and* urged that, that question was beyond the parameters of the present petition. He further urged that the petition before the Court addressed the immediate needs of the petitioners. Counsel also urged that paragraph 11(a) introduced a new issue, that had not been pleaded in the petition.

[26] Counsel submitted that the 2nd, 3rd and 4thintended interested parties had taken the position that the death sentence, as a moral issue, should be abolished, while the petitioners were before the Court on a different agenda. He urged that the submissions proposed by the intended interested parties, to the effect that persons convicted of robbery with violence cannot afford legal representation, will confuse the issues, and prolong the agony of the petitioners.

[27] Counsel urged that there is a mix-up of conviction and sentence, which had marred the claims of the intended interested parties. He submitted that such a confusion of issues would unnecessarily enlarge the parameters of the cause. He submitted further that the fate of the applicants must rest on whether their case falls within the parameters of Rule 25 of the Supreme Court Rules, 2012 – they must show the prejudice that they will suffer unless they are enjoined. He urged that the applicants would only suffer if they were in the same, or similar position as the petitioners— which they were not.

[28] In respect of the application by the Death Penalty Project, Mr. Ngatia urged that the position they have espoused in many countries of the world, is that the death sentence is unacceptable—and that such a course is pursued as a business. He urges that such a course transcends the issues articulated in the petition; for the petitioners do not seek to have every law that prescribes the death penalty abolished, their petition being restricted to Section 204 of the Penal Code, to the extent that sentencing has been removed from the judicial hand, and passed on to Members of Parliament. He urged further that this Court, in ***Mumo Matemu,*** had been clear that applications for enjoinment as interested parties, or *amicus curiae* in criminal matters, were to be treated differently from those in civil matters.

[29] Learned counsel Mr. Kuria, for the Attorney-General, and learned counsel Mr. Chigiti, holding brief for learned counsel Mr. Nderitu, for the Director of Public Prosecutions, fully concurred with the submissions of Mr. Ngatia.

III. ANALYSIS AND DETERMINATION

[30] Upon considering the applications and the written and oral submissions of the parties, the following issues emerge for determination:

(i) whether the intended interested parties have sufficiently demonstrated that they have met the prerequisites of Rule 25 of the Supreme Court Rules, 2012 on interventions;

(ii)whether the intended ***amicus curiae*** *qualifies for enjoinment, in light of the governing principles set out in* ***Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others,*** Supreme Court Petition No. 12 of 2013, [2015] eKLR.

(a) Applications for enjoinment as Interested Parties

[31]Through two applications, four parties sought to be enjoined in this matter as interested parties. The provisions of the law for enjoinment as an interested party are found in Section 23 of the Supreme Court Act, 2011 in the following terms:

> ***"(1) Any person entitled to join as a party or liable to be joined as a party in any proceedings before the Court may, on notice to all parties, at any stage of the proceedings, apply for leave to intervene as a party.***

"(2) An application under this Rule shall contain information on—

(a) the identity of the person interested in the proceeding;

(b) a description of that person's interest in the proceeding;

(c) any prejudice that the person interested in the proceeding would suffer if the intervention were denied; and

(d) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceeding and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties".

[32] This provision of the Act is fortified by the Supreme Court Rules, 2012 which provide in Rule 25 thus:

"(1) A person may at any time in any proceedings before the Court apply for leave to be joined as an interested party.

"(2) An application under this rule shall include-

(a) a description of the interested party;

(b) any prejudice that the interested party would suffer if the intervention was denied; and

(c) the grounds or submissions to be advanced by the person interested in the proceeding, their relevance to the proceedings and the reasons for believing that the submissions will be useful to the Court and different from those of the other parties".

[33] These legal provisions have been considered by the Court in ***Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others,*** Supreme Court Petition No. 12 of 2013, [2014] eKLR (an application by the Law Society of Kenya). In this case, the Law Society of Kenya (LSK) sought to be enjoined in the proceedings as an interested party, but leave was denied. The Court observed that [paragraphs 13-15]:

> *"[13] While the Rules have a definition of who an* amicus *is, there is no definition attributed to 'Intervener' or 'Interested Party'. However, from Rule 25 above, one is allowed to apply to be enjoined any time in the course of the proceedings.*
>
> *"[14]* ***Black's Law Dictionary, 9th Edition****, defines "intervener" (at page 897) thus:*
>
> > ***"One who voluntarily enters a pending lawsuit because of a personal stake in it"***
>
> *and defines 'Interested Party' (at p.1232) thus:*
>
> > ***"A party who has a recognizable stake (and therefore standing) in a matter".***
>
> *"[15] On the other hand, an* ***amicus*** *is defined in* ***Black's Law Dictionary*** *thus:*
>
> > ***'A person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter'."***

[34] With that definition of "interested party," the Court proceeded to hold further [paragraphs 17-18]:

> *"[17] Suffice it to say that* ***while an interested party has a 'stake/interest' directly in the case,*** *an* amicus's *interest is its 'fidelity' to the law: that an informed decision is reached by the Court having taken into account all relevant laws, and entertained legal arguments and principles brought to light in the Courtroom.*
>
> *"[18] Consequently,* ***an interested party is one who has a stake in the proceedings, though he or she was not party to the cause*** *ab initio****. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause…"***

[35] This Supreme Court decision was cited by the High Court in ***Judicial Service Commission v. Speaker of The National Assembly & 8 Others****, [2014]eKLR*. The High Court also cited the definition of 'interested party' in: *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* (hereafter the "*Mutunga Rules***"**)thus:

> *"Rule* ***2*** *of the* ***Mutunga Rules*** *defines an interested party as a person or entity that has an* ***identifiable stake*** *or legal interest or duty in the proceedings before the Court, but is* ***not a party*** *to the proceedings or* ***may not be directly involved*** *in the litigation."*

[36] Once again in the said High Court matter, the LSK was denied admission as an interested party because, in the perception of the Court, it could not show an identifiable stake in the matter or in its outcome, or what prejudice it would suffer if not enjoined as a party.

[37]From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

> *One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:*
>
> *(i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.*
>
> *(ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.*
>
> *(iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.*

[38] In the applications before the Court, four parties seek to be enjoined as interested parties: Katiba Institute, KNCHR, ICJ-Kenya, and Legal Resource Foundation. Katiba Institute's case is that if admitted, its submissions will be on

the interpretation and application of relevant constitutional principles; on the current discourse under international law and comparative foreign jurisprudence on the issues under consideration; on information and/or evidence relevant to the number of people in similar circumstances to the petitioners; and on psychological studies relevant to the determination of the death penalty, mandatory death penalty, and life-imprisonment questions.

[39] Katiba Institute has framed upto sixteen questions for the Court's determination. Its counsel, Mr. Wanyoike submitted that it supported neither the petitioners nor the Director of Public Prosecutions, and that its interest in this matter was the public-interest element. Counsel submitted that in an application under Rule 25 of the Supreme Court Rules, 2012 the demonstration of an identifiable concern, was sufficient for the Court to grant admission. He urged that when determining the question of prejudice such as would be suffered by the interested party, the Court should not focus on prejudice to Katiba Institute *per se*, but prejudice to other people, and on the public interest enunciated in Articles 22 and 268 of the Constitution, which the Institute was seeking to safeguard.

[40]On the other hand, through learned counsel Mr. Macharia, KNHRC, ICJ-Kenya, and Legal Resources Foundation urge that their admission will occasion no prejudice to any party; and that on the contrary, they seek to guard against prejudice to the general public in these proceedings. They urged that their application is meritorious, as they will limit themselves to the directions of the Court.

[41]Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the

primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

[42]Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. *An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court*. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.

[43]Consequently, the issues of constitutionality of the death penalty and/or its abolition, are not issues presented by the petitioners before this Court. Any interested party or *amicus curiae* who signals that he or she intends to steer the Court towards a consideration of those 'new issues' cannot, therefore, be allowed. Further, such issues are matters relating to the interpretation of the Constitution, and we cannot allow them to be canvassed in this Court for the first time, as though it was a Court of first instance. We recognize the hierarchy of the Courts in Kenya, and their competence to resolve these constitutional questions (See ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others,*** Supreme Court Petition No. 2 of 2012, [2012] eKLR).

[44] We also note that criminal matters occupy a different platform from that of civil proceedings. Criminal proceedings directly touch on the personal fundamental rights and freedom of an individual, particularly the right to *liberty*. Consequently, just as the standard of proof is elevated in criminal matters (beyond reasonable doubt), so should the threshold for admission of interested parties be in criminal matters as compared to civil matters, where proof is on the balance of probability. Just as Mr. Ngatia urges, the Court has to guard against third parties (such as interested parties and *amici curiae*) proliferating the issues brought by the petitioners. In criminal proceedings, the accused should ordinarily be informed before hand of the case against him/her. Therefore, the Court should always guard against admitting third parties who may end up clogging the case of the petitioners in criminal matters.

[45]Parties, particularly Katiba Institute, cited Article 22 of the Constitution as allowing them to join this matter so as to protect the public interest. Article 22 provides:

> ***"(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.***
> ***"(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by –***
> ***(a) a person acting on behalf of another person who cannot act in their own name;***
> ***(b) a person acting as a member of , or in the interest of a group or class of persons;***
> ***(c) a person acting in the public interest; or***

(d) an association acting in the interest of one or more of its members".

[46]Clearly, this Article cannot be a basis for admission of an interested party to any existing proceedings, where such a party has not shown a personal stake/interest in the matter, and only seeks to champion the public interest. The said article allows a party acting on behalf of another, or of the public, to '*commence or institute'* a matter before a Court of law. Article 22 is not a formula for the admission of interested parties to any and all Court proceedings.

[47] The intended interested parties, in this case, have neither shown the personal interest they have in this matter, nor the prejudice that they will suffer if not enjoined in the matter. We therefore find the applications by the four parties to be lacking in merit.

(b) ***Application for enjoinment as*** *amicus curiae*

[48] The Death Penalty Project sought to be enjoined as *amicus curiae,* in the capacity of legal expert, and to be allowed to make submission on the basis of any other information relevant to the matter before us. It stated in its application that it will address the sentencing principles and procedures that have emerged from the abolition of the mandatory death penalty in other common law jurisdictions, with a focus on Africa. The applicant proposes to draw on the comparative case law, to address the issue of appropriate remedies, if the mandatory death penalty were found to be unconstitutional.

[49] In ***Trusted Society of Human Rights Alliance v. Mumo Matemu & 5 Others,*** Supreme Court Petition No. 12 of 2013,[2015] eKLR (an application by Katiba Institute), this Court considered the role of *amicus curiae,* and set out

the guiding principles applicable in determining an application to be enjoined in that capacity. The Court held (at paragraph 41), that:

"(i) ***An amicus brief should be limited to legal arguments.***

"(ii) ***The relationship between*** *amicus curiae****, the principal parties and the principal arguments in an appeal, and the direction of*** *amicus* ***intervention, ought to be governed by the principle of neutrality, and fidelity to the law.***

"(iii) An amicus brief ought to be made timeously, and presented within reasonable time. Dilatory filing of such briefs tends to compromise their essence as well as the terms of the Constitution's call for resolution of disputes without undue delay. The Court may therefore, and on a case- by- case basis, reject ***amicus*** *briefs that do not comply with this principle.*

"(iv) ***An amicus brief should address point(s) of law not already addressed by the parties to the suit or by other*** *amici****, so as to introduce only novel aspects of the legal issue in question that aid the development of the law.***

"(v) The Court may call upon the Attorney- General to appear as ***amicus curiae*** *in a case involving issues of great public interest. In such instances, admission of the Attorney- General is not defeated solely by the subsistence of a State interest, in a matter of public interest.*

"(vi) Where, in adversarial proceedings, parties allege that a proposed ***amicus curiae*** *is biased, or hostile towards one or more of the parties, or where the applicant, through previous conduct, appears to be partisan on an issue before the Court, the Court will consider such an objection by allowing the respective parties to be heard on the issue (see:* ***Raila Odinga & Others v. IEBC & Others;*** *S.C.*

Petition No. 5 of 2013-*Katiba Institute's application to appear as* ***amicus).***

"(vii) An ***amicus curiae*** *is not entitled to costs in litigation. In instances where the Court requests the appearance of any person or expert as* ***amicus,*** *the legal expenses may be borne by the Judiciary.*

"(viii)The Court will regulate the extent of amicus participation in proceedings, to forestall the degeneration of *amicus* ***role in to partisan role.***

"(ix) In appropriate cases and at its discretion, the Court may assign questions for ***amicus*** *research and presentation.*

"(x) An ***amicus curiae*** *shall not participate in interlocutory applications, unless called upon by the Court to address specific issues"* [emphases supplied].

[50] The Court in the foregoing case, citing *Odunga J,* in ***Justice Philip K. Tunoi &Another v. Judicial Service Commission & 2 Others***, High Court Petition No. 244 of 2014 [2014] eKLR, held (paragraph 42) as follows:

"(xi) The applicant ought to raise any perception of bias or partisanship, by documents filed, or by his submissions.

"(xii)The applicant ought to be neutral in the dispute, where the dispute is adversarial in nature.

"(xiii)The applicant ought to show that the submissions intended to be advanced will give such assistance to the Court as would otherwise not have been available. The applicant ought to draw the attention of the Court to relevant matters of law or fact which would otherwise not have been taken into account. Therefore, the applicant ought to show that there is no intention of repeating

arguments already made by the parties. And such new matter as the applicant seeks to advance, must be based on the data already laid before the Court, and not fresh evidence.

"(xiv) The applicant ought to show expertise in the field relevant to the matter in dispute, and in this regard, general expertise in law does not suffice.

"(xv) Whereas consent of the parties, to proposed ***amicus*** *role, is a factor to be taken into consideration, it is not the determining factor"* [emphasis supplied].

[51] We recognize that the applicant is an institution which has dealt with criminal law, constitutional law and international human rights, in relation to the death penalty. We also take note that the applicant wishes to restrict itself to the issues raised in the petition, and in particular the mandatory nature of the death sentence in this country.

[52] We perceive from the application and the submissions that the applicant is neutral on the dispute – a status which we expect it will maintain throughout the proceedings. It is also apparent that the applicant will restrict its submissions to the issues raised, without digressing into issues outside the petition before this Court – which position we also expect it will maintain throughout the proceedings. It is clear to us that the submissions to be advanced will be of valuable assistance to this Court; and the applicant has demonstrated expertise in the field relevant to the matter before this Court. We, therefore, find that the applicant has met the criteria set out in ***Mumo Matemu,*** on joinder of *amicus curiae.*

(c) The Court's inherent power to admit** amicus curiae **and experts

[53] This Court had the occasion to pronounce itself on its inherent power to admit *amicus curiae,* and experts in ***Mumo Matemu.*** In that matter, the Court distinguished the Kenyan jurisprudence on *amicus curiae* from foreign jurisprudence: in our jurisdiction, a party enjoined as *amicus curiae* must be neutral, with respect to the dispute before the Court; and if such party has an interest in the matter, it may be accommodated in the proceedings as an *intervener*. Conversely, in some other jurisdictions such as the United States of America and Australia, *amicus curiae* is only required to have *bona fide* interest in the matter. Therefore, it is only with extreme caution, and in exceptional cases, that this Court will apply authorities from foreign jurisdictions as regards the admission of *amicus curiae;* and only those aspects that the Court deems applicable to our circumstances, will be adopted.

[54] We would emphasize, as we did in ***Mumo Matemu,*** that *amicus* participation is a matter of privilege, rather than of right. It is also important to note that in certain circumstances, a party may fail to qualify for the status of *amicus curiae,* and at the same time fail to qualify as intervener. This, therefore, dispels the notion that an applicant wishing to be enjoined in proceedings in which he/she is not directly a party has to be enjoined as *amicus curiae* or intervener. Indeed, in some instances it would be more appropriate for an applicant not to participate in proceedings at all, especially where such applicant does not stand to be prejudiced in any way if he/she is not enjoined; or adds no value to the proceedings; or increases the likelihood of diverting the natural course of the proceedings.

[55] The Court is also at liberty to restrict the extent of involvement of *amicus curiae*. In ***Mumo Matemu,*** this Court held that the Court will regulate the

extent of *amicus* participation in proceedings, to forestall the degeneration of *amicus* role to partisan role.

[56] It must be borne in mind at all times that an application to be enjoined whether as *amicus curiae* or as interested party in criminal proceedings, is not to be treated in a manner identical to a similar application in civil proceedings. This is because the nature of criminal proceedings demands that the interests of the accused person or prisoner, as the case may be, be given due regard by the Court.

[57] Typically in criminal proceedings, a party stands to be incarcerated or to be subjected to some other form of sentence. It is with this in mind that the Court will apply more stringent measures in determining whether to admit other parties as *amicus curiae* or interested parties. The Court will admit such additional parties only if it is satisfied that their participation will not prejudice an accused person or prisoner; occasion unnecessary delay; introduce issues foreign to the proceedings; or protract the issues for determination.

[58] Mr. Wanyoike rightly urged that this Court is the ultimate determinant of justiciable causes, subject to the law. However, it is to be noted that a petition belongs to the petitioner. In these circumstances we would be inclined to allow in a criminal matter, an application for enjoinment as *amicus curiae* or interested party, only in exceptional circumstances.

[59] In light of the foregoing, and of the submissions made on behalf of the intended interested parties as to the contribution they intend to make in this matter, we are convinced that the role suitable for them in this matter is that of *amici curiae,* as opposed to interested parties. We believe that their participation will bring on board the much needed additional material on the subject of the petition; and this will aid the Court in arriving at a judicious determination.

[60] However, being mindful of the interest of the petitioners, we are inclined to restrict the participation of the said parties to the parameters of an *amicus* brief, as set out in ***Mumo Matemu;*** we would restrict their participation by limiting the time allocated to them for oral submissions, or restrict their submission to written submissions. It is our opinion that the participation of parties allowed joinder in criminal proceedings as *amici curiae,* or interveners, should not overshadow the participation of the main parties to the suit.

[61] Ordinarily, this Court will not enjoin a party in proceedings in a capacity different from that which they had sought. A party seeking to be enjoined as an interested party has to demonstrate having met the prerequisites of Rule 25 of the Supreme Court Rules, failing which they are not to be enjoined whether as interested parties or *amicus curiae*. Likewise, a party that applies to be enjoined as *amicus curiae has to* prove that they have complied with the requisite conditions set out in ***Mumo Matemu.*** An applicant should seek to be enjoined in a capacity that is suitable for him/her. It is in view of the unique, and public-interest nature of this matter, that we are inclined to enjoin those parties that sought enjoinment as interveners, in the capacity of *amici curiae;* it is not as a matter of course.

IV. ORDERS

[62] Consequently, we make the following Orders:

(i) The application by 1st intended interested party is disallowed.

(ii) The application by the 2nd, 3rd and 4th intended interest party is disallowed.

(iii) The application by the intended *amicus curiae* ***is allowed.***

(iv) The 1st, 2nd, 3rd and 4th intended interested parties are hereby enjoined as *amici curiae*.

(v) ***The parties in (iv) above shall restrict their participation to the role of*** *amicus curiae* ***as set out in Sup. Ct. Petition 12 of 2013*** *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* ***Supreme Court Petition No. 12 of 2013, [2015] eKLR.***

(vi) ***The parties in (iv) above shall limit their submissions to points of law, on issues which are live in the petitioners' pleadings, and shall not introduce extraneous matters.***

(vii) The parties in (iv) above shall make their written and oral submissions through one counsel, upon whom they shall agree among themselves, and to be placed on Court record.

(viii) The parties in (iv) above shall be treated as one party with respect to time- allocation and representation.

(ix) Parties shall bear their own respective costs.

DATED and **DELIVERED** at **NAIROBI** this 28th **Day of January, 2016.**

.....	.....
K.H. RAWAL **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT** **OF THE SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
.....	.....
J.B. OJWANG **JUSTICE OF THE SUPREME COURT**	**S. C. WANJALA** **JUSTICE OF THE SUPREME COURT**

.....

N.S. NDUNGU
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA