



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A.C. Mrima, J.)

CONSTITUTIONAL PETITION NO. E385 OF 2020

SHERIA MTAANI NA SHADRACK WAMBUI.....PETITIONER

-VERSUS-

OFFICE OF THE CHIEF JUSTICE.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

-AND-

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST INTERESTED PARTY

KENYA MAGISTRATES AND JUDGES ASSOCIATION.....2ND INTERESTED PARTY

JUDGMENT

Introduction:

1. The Petitioner is a Non-Governmental Organization whose twin objective is to aid vulnerable members of public access justice through advocacy and to protect individual and collective rights of persons living in Nairobi slum areas.
2. Through an application filed under certificate of urgency, the Petitioner sought interim conservatory orders staying the prosecution, hearing and the determination of all criminal proceedings of unrepresented person(s) accused of sexual offences that attract the maximum sentence of imprisonment for life for offences under the Sexual Offences Act pending the hearing of the main Petition.
3. Contemporaneously with the application, the Petitioner filed the main Petition. It is supported by the Affidavit of one *Dorcas Mwae*. The Petitioner enjoined the Chief Justice of the Republic of Kenya and the Hon. Attorney General as the Respondents. The Director of Public Prosecutions and the Kenya Magistrates and Judges Association are enjoined as interested parties.

The Petition:

4. The Petition is anchored on *Article 2, 3, 10, 19(2) 20, 22, 23, 25, 27, 28, and 50(2)(h)* of the Constitution.
5. The Petitioner is aggrieved by the plight of persons convicted for offences under *Sections 3(3), 4, 5(2), 8(2), 10, 20 and 26* of the Sexual Offences Act. According to the Petitioner, such persons face life imprisonment without the possibility of remission despite behaviour change and good conduct and yet they are not accorded legal representation.
6. It is its case, and the Petitioner contends, that the harsh nature of the punishment as prescribed above, makes it necessary that care and circumspection be exercised during the trial process in order to avoid procedural or substantive error in the trial process that would occasion

substantial injustice to such accused persons.

7. The Petitioner draws the Court's attention to the data compiled by the Office of the Director of Public Prosecutions for the financial years 2017/2018, 2018/2019 and 2019/2020 which indicate that about 86.62% of cases reported and prosecuted in various Courts in Kenya relate to sexual offences.

8. The Petitioner is aggrieved that as a result of lack of legal representation, the report indicates that 12 persons pleaded guilty for the offence of rape, 1 for the offence of attempted rape, 110 for the charge of defilement, 1 for gang rape, 21 for the offence of incest and 12 for the offence of sexual assault.

9. While referring to the Court of Appeal decision in **Rodgers Wafula Baraza -vs- The Republic** (2019) eKLR, the Petitioner claim that the decision is an example of the many incidences where an accused person could misunderstand the nature of the charge thereby occasioning substantial injustice, a situation he contends can be averted by provision of legal representation.

10. The Petitioner posits that since sexual offences are complex cases that usually involve expert witnesses and the use of intricate terminologies as set out under Section 2 of the Sexual Offences Act, such offences are not readily comprehensible by persons not trained in law. As a result, that places the accused persons at a disadvantaged position. It is its case that the production of evidence in the nature of Medical Examination Report (P3), Post Rape Care Forms (PRC), Gender Violence Recovery Centre (GVRC) need a deeper understanding and research in the field of medicine.

11. The Petitioner further posits that lay persons cannot benefit from the defences available to them in law during trial. To that end, it made reference to the decision in **Eliud Waweru Wambui -vs- Republic** (2019) eKLR where the Court of Appeal proposed an amendment of Section 8(5) of the Sexual Offences Act by stating that it should be read disjunctively rather than conjunctively. It further posited that the developments put in place by the decision in **Martin Charo -vs- Republic** (2016) eKLR may not be readily available to an accused person with no training in law.

12. It is further the Petitioner's case that since the prosecution in such cases is comprised of persons trained in law, an unrepresented accused person faces the prospect of an imbalanced trial resulting in substantial injustice.

13. On the foregoing score, the Petitioner took issue with free representation accorded to persons accused of murder and minors in conflict with the law and not persons accused of sexual offences yet they face a maximum sentence of up to life imprisonment, a situation, it claims, unfairly discriminates against sexual offenders as there is no distinction between persons accused of murder and children in conflict with the law.

14. The Petitioner posited that there is need to change the manner in which trials of sexual offences are conducted by making it mandatory that a preliminary inquiry be done on whether or not an accused person would require legal representation by an advocate at the State's expense as per *Article 50(2)(h)* of the Constitution.

15. It argued that in order to ensure access to justice under Article 48 of the Constitution, there is need to ensure balanced trial espousing principles of fairness for sexual offenders who cannot afford legal representation whose offences attract a maximum sentence of up to life imprisonment.

16. On the foregoing arguments, the Petitioner sought the following orders: -

a. A declaration be and is hereby made that the prosecution of the persons accused of sexual offences that attract the maximum sentence of imprisonment for life, to wit offences under section 3, 4, 5, 10, 20 and 26 of the Sexual Offences Act without an Advocate of choice or an advocate assigned to them at the expense of the state would occasion substantial injustice to the accused person(s) and therefore inimical to their right to a fair trial as per Article 25(c) and their right to access justice under Article 48 of the Constitution.

b. A declaration be and is hereby made recognizing that as per Article 50(2)(h) of the Constitution, the 1st Respondent and or its officers, to wit members of the 2nd Interested party handling cases inter alia, involving persons accused of sexual offences attracting a maximum sentence for life imprisonment are under a constitutional obligation before plea is taken and matter is set down for hearing to;

i. Inform the accused/suspect that he/ she faces a serious offence that would attract a maximum sentence of imprisonment for life without the possibility of remission; and

ii. To make a preliminary inquiry on whether or not the accused person(s) would require legal representation by an advocate assigned by state and at state expense.

c. Consequently, a judicial review order of mandamus do issue compelling the 1st Respondent, either by himself or its agents to wit, the Chief Registrar to have an advocate assigned to persons accused of sexual offences that attract a maximum sentence of imprisonment for life at the expense, if they cannot afford to hire an advocate of their choice.

d. Costs of the Petition be provided with interests at Court's rate.

e. Any other order that this Court deems fit and just in the circumstances.

17. Directions were taken on 13th April 2021 and it was ordered that the Petition be dispensed with by way of written submissions. The application was subsumed in the Petition.

18. *Mr. Asuma*, Counsel, appeared for the Petitioner. In his oral highlights, Counsel reiterated the gist of the Petition as being legal aid for persons charged with sexual offences. He submitted that sexual offenders deserve legal aid due to the prospect of substantial injustice. He referred to the decision in ***Karisa Chengo -vs- Republic*** on what constitutes substantial injustice and urged the Petition to be allowed pursuant to *Article 50(2)(g)* and *(h)* of the Constitution. He also relied on the decision in *F.O.O. -vs- Republic* (2020) eKLR as well as *Migori Criminal Appeal No. 44 of 2019 N.M.T. alias Aunty -vs- R* where the Court discussed the significance of legal aid.

19. The Petitioner further submitted that the right to fair trial cannot be limited and that the right of representation is so intertwined with the right to fair trial. It contends that the Petition is an attempt to give effect to Section 43 of the Legal Aid Act.

20. Counsel urged the Court to allow the Petition a prayed.

The Responses:

21. The 1st Respondent and the Interested Parties did not participate in the proceedings.

22. The 2nd Respondent opposed the Petition. It filed Grounds of Opposition dated 13th January, 2020.

23. It is its case that the Petition did not disclose any violation of the Petitioner's alleged constitutional rights under the Articles cited. Reliance was placed on the decision in ***Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 Others*** (2013) eKLR to buttress the consequence of lack of precision in constitutional petitions.

24. It is further its case that under Article 48 of the Constitution, the State ensures access to justice to all persons regardless of the offence.

25. The 2nd Respondent posits that the Petitioner's case is already taken care of by provisions of Article 50(2)(h) of the Constitution. Further, it is argued that the Article 50 of the Constitution is not an inherent and absolute right as it can be limited by law.

26. It is also urged that it is the accused persons who are under a duty to apply for legal representation before the trial Court if they are of the view that substantial justice would occur to them. In reference to the Supreme Court in ***Republic -vs- Karisa Chengo & 2 Others*** (2017) eKLR, the 2nd Respondent argued that Courts are already called upon to consider the seriousness of the offence, severity of sentence, accused person's ability to afford legal representation, whether the accused is a minor, literacy of the accused, complexity of the charge against the accused and as such there is no need of further like orders to be made.

27. In reference to Section 36(3) of the Legal Aid Act, it is posited that legal representation is not an automatic right. It is upon an accused person to first establish that he cannot afford legal representation.

28. In its written submissions, the 2nd Respondent largely reiterated its grounds of opposition. It states that the right to legal representation is not absolute. Reliance was placed on the High Court decision in ***Stephen Odongo Nyabaya -vs- Republic*** (2020) eKLR.

29. *Mr. Marwa*, Counsel appeared for the 2nd Respondent. In his oral highlights, Counsel submitted that the issue of legal representation was settled in Supreme Court Petition No. 11 of 2017, ***Charles Maina Gitonga -vs- Republic*** (2018) eKLR where it was observed that: -

...legal representation is not an inherent right available to an accused person under Article 50 of the Constitution or any provision of the REPEALED constitution and that under section 36(3) of the Legal Aid Act No. 6 of 2016, an accused person has to first establish that he was unable to meet the expenses of his trial.

Issue for determination:

30. Having carefully read and understood the Petition, the response thereto, rival arguments and submissions, I find that there is indeed one paramount issue for determination. It is the nature and extent of legal representation permissible in law and the eligibility of persons charged with sexual offences under Sections 3,4,5,10,20 and 26 of the Sexual Offences Act to free legal representation.

Analysis and Determination

31. In order to comprehensively deal with the above issue and in view of the proximity between the right under *Article 50(2)(g)*, that is the right to choose, and be represented by an Advocate, and to be informed of this right promptly and the right under *Article 50(2)(h)* of the Constitution, that is the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly, I will look at both rights as provided for in the Constitution and the law.

32. First in the line is *Article 50(2)(g)* of the Constitution. I have previously, comprehensively, rendered myself on this issue. Since I am still of the position, I reiterate how I dealt with the issue. This is what I stated in ***Migori High Court Criminal Appeal No. 44 of 2019 N.M.T. alias Aunty vs. R***: -

11. I will start with a consideration as to whether Article 50(2)(g) of the Constitution was infringed during the trial. The said provision states as follows: -

50(2) Every accused person has the right to a fair trial, which includes the right-

(g) to choose, and be represented by an advocate, and to be informed of this right promptly.

12. In light of the foregone provision a consideration of the record is necessary. The Appellant was arraigned before the trial Court at Rongo on 04/04/2019 where she was accordingly charged. The charges were presented to the Appellant in Kiswahili language where she denied them and appropriate orders were made. The prosecution informed the plea court that it had supplied the Appellant with copies of the witness statements and a copy of the charge sheet. The court further fixed the matter for hearing on 12/04/2019. Come the hearing date the matter proceeded on where the complainant, PW1, PW2 and PW4 testified. PW5 testified later.

13. When the Appellant was placed on her defence, the court duly complied with Section 211(1) of the Criminal Procedure Code. The court also explained to the Appellant that she had the right to be represented by Counsel, to proceed alone, to give sworn evidence or unsworn evidence and to call witnesses. The court also informed the Appellant of the right to remain silent. The Appellant elected to give sworn defence without calling any witnesses.

14. That being the record the question which now begs an answer is what entails the right as provided in Article 50(2)(g) of the Constitution. The reading of the said provision avails that an accused person must be promptly informed of the right to choose to be represented by an Advocate. Since the Constitution does not define the word 'choose' I will make reference to the Tenth Edition of the Black's Law Dictionary on how the said word is defined. The said Dictionary does not expressly define the word 'choose or choice' but refers one to 'Freedom of Choice' (See page 294 thereof). At page 779 the Dictionary defines 'freedom' as follows: -

i The quality, state or condition of being free or liberated esp. the right to do what one wants without being controlled or restricted by anyone.

15. The Dictionary further defines 'Freedom of Choice' as 'the liberty embodied in the exercise of one's right'. The Second Edition of the Law Dictionary has the following to say about the 'Freedom of Choice': -

Unfettered right to do what one wants when one wants as one wants, except where it infringes or prevents another from doing what that one wants, and do so on. Also excluded is doing something that would harm one's self or another.

16. To choose hence connotes options and discretion. When one is called upon to make a choice it must mean that the person has been availed with options upon which he/she may exercise his/her discretion. The right to choose an Advocate of one's choice as embodied in Article 50(2)(g) of the Constitution therefore means that for an accused person to exercise that right he/she must be certainly told of the right to legal representation by an Advocate of one's choice and any other attendant information be availed accordingly to be able to make a choice on whether he/she requires any legal representation.

17. The right under Article 50(2)(g) of the Constitution must be distinguished from the right under Article 50(2)(h) of the Constitution given that in many instances the rights under Article 50(2)(g) and (h) of the Constitution are dealt with contemporaneously. The right under Article 50(2)(h) of the Constitution on one hand places a duty on the State to assign an Advocate to an accused person at its own expense if substantial injustice will otherwise result. The right under Article 50(2)(g) of the Constitution on the other hand deals with informing an accused person of his/her right to be represented by an Advocate of one's choice further to giving necessary information to the accused person and calling him/her to make a choice on his/her legal representation. Put differently, the right under Article 50(2)(h) of the Constitution deals with instances where the State must assign an Advocate to an accused person. Suffice to say that the right to a fair trial under Article 50 of the Constitution is among those rights that cannot be limited in any way whatsoever courtesy of Article 25 of the Constitution.

18. Courts have dealt with the need to avail such information to an accused person to enable him/her make a choice on legal representation. In Pett vs. Greyhound Racing Association (1968) 2 All ER 545 Lord Denning presented himself thus: -

It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task.

19. In South Africa in Fraser vs. ABSA Bank Limited (66/05) (2006) ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) the Constitutional Court had the following to say: -

Without the recognition of the right to legal representation in section 26(6), the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in section 35(3)(f) of the Constitution does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation....

20. In Kenya, the Supreme Court in Petition No. 5 of 2015 Republic -vs- Karisa Chengo & 2 Others [2017] eKLR while dealing with various aspects of the right to a fair hearing under Article 50 of the Constitution stated as follows: -

the right to legal representation.....under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.

21. Apart from the Constitution and the foregone judicial decisions there is The International Convention on Civil and Political Rights (ICCPR) which Kenya is a party after adopting it on 16th December 1966. Article 14(3)(d) thereof entitles an accused person of the following rights: -

To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

22. Having settled the need to inform an accused person of the right to legal representation under Article 50(2)(g) of the Constitution, the next limb of consideration must be who is under such a duty to inform the accused person of the right. The answer seems to be in one of our legislations. The Legal Aid Act No. 6 of 2016 (hereinafter referred to as 'the Act') is an Act of Parliament to give effect to Articles 19(2), 48, 50(2)(g) and (h) of the Constitution. Section 43(1)(a) of the Act which provides one of the duties of the court as follows: -

43.(1) A court before which an unrepresented accused person is presented shall-

(a) promptly inform the accused of his or her right to legal representation;

23. Still on the said subject, a South African Court in S -vs- Daniels & Another 1983(3) 275(A) at 299 G-H, while emphasizing that the duty to inform the accused person squarely lies on the court stated that: -

... the accused's rights were explained to him, must appear from the record, in such a manner as, and with sufficient particularity, to enable a judgment to be made as to the adequacy of the explanation

24. Further, another South African Court in Mphukwa v S (CA&R 360/2004) [2012] ZAECGHC 6 (16 February 2012), made reference to the comments of Goldstone J. in S v Radebe: S v Mbonani 1988(1) SA 191 (TPD), a decision which was quoted with approval by the Supreme Court of Appeal of South Africa in Ramaite -vs- The State (958/13) [2014] (26 September 2014). My Lordship Goldstone, J. stated as follows: -

...a general duty on the part of judicial officers to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place.

If there is a duty upon judicial officers to inform unrepresented accused of their legal rights, then I can conceive of no reason why the right to legal representation should not be one of them. Especially where the charge is a serious one which may merit a sentence which could be materially prejudicial to the accused, such an accused should be informed of the seriousness of the charge and of the possible consequences of a conviction. Again, depending upon the complexity of the charge, or of the legal rules relating thereto, and the seriousness thereof, an accused should not only be told of this right but he should be encouraged to exercise it. He should also be informed in appropriate cases that he is entitled to apply to the Legal Aid Board for assistance. A failure on the part of a judicial officer to do this, having regard to the circumstances of a particular case, may result in an unfair trial in which there may well be a complete failure of justice ...

25. In Kenya, Nyakundi, J. in Joseph Kiema Philip vs. Republic (2019) eKLR added his voice on the subject in the following manner: -

.....it is paramount that the record of the trial court should demonstrate that the accused was informed of his right to legal representation and whether or not in the case that he cannot afford an advocate, one may be appointed at the expense of the state. It [the court record] must show that the court did take the profile of the accused person before the trial commenced.....

26. From the foregone I believe I have said enough regarding the duty of a court to inform an accused person of the right under Article 50(2)(g) of the Constitution.

27. That now leads to the other question as to what point in time should the right be explained to the accused person.

28. Article 50(2)(g) of the Constitution dictates that the accused person must be informed of the right to legal representation promptly. In rightly answering the question Nyakundi, J. in Joseph Kiema Philip (supra) stated as follows: -

... The earliest opportunity therefore should be at the time of plea taking; the first appearance before plea is taken or at the commencement of the proceedings, that is at the first hearings... (emphasis added).

29. I must emphasize that the accused person must be informed of this right immediately he/she appears before a court on the first appearance regardless of whether the plea would be taken at that point in time or later. Of importance is the emphasis that since the court speaks through the record then the record must be as clear as possible and ought to capture the entire conversation between the court and an accused person. A court should therefore not be in a hurry to take the plea before ascertaining that it has fully

complied with Article 50(2)(g) of the Constitution among others as required. Circumstances calling, a court should boldly postpone the plea-taking until satisfied that the court has fully complied with the law.

30. In this case the trial court explained the right to representation to the Appellant at defence stage. That was too far late in the day.

31. Having dealt with the various limbs of the right under Article 50(2)(g) of the Constitution and in view of the status of the record as espoused hereinabove I must return the verdict that the trial court failed to comply with the dictates of Article 50(2)(g) of the Constitution. The Appellant was hence not accorded a fair trial in line with Article 50(2)(g) of the Constitution.

32.

33.

34. Having said so, the inevitable question that now follows is: What is the effect of the derogation of the right under Article 50(2)(g) of the Constitution in the circumstances of this case?

35. There are two schools of thought on the issue. The first school fronts the position that once the derogation of the right is confirmed then the entire proceedings, judgment and sentence before the trial court are vitiated and stand null and void ab initio. The other school fronts the position that failure to inform an accused person of his/her right to legal representation does not necessarily have the effect of vitiating the proceedings in a criminal trial unless it is proved that substantial prejudice to the accused person or a miscarriage of justice was occasioned.

36. In answering the question, I will consider the wording of the Article 50(2)(g) and (h) of the Constitution. From the wording of Article 50(2)(h) the right therein is not absolute as the court must first satisfy itself that substantial injustice may result before it enforces the right. However, that is not the position under Article 50(2)(g) where the right is not qualified. Since that is what the People of Kenya wanted and so settled it in the Constitution then it remains the unwavering duty of this Court to enforce the provisions of the Constitution.

37. I therefore fully associate myself with the school which fronts the position that upon proof of derogation of the right under Article 50(2)(g) of the Constitution then the trial is rendered a nullity. Qualifying the provisions of Article 50(2)(g) of the Constitution will be tantamount to amending the Constitution through a back door, an act which this Court must frown at. It may appear like the position is harsh and is likely to fan multiple applications and appeals, but I must say that unless Courts, as custodians of justice and the Rule of Law, are prepared to enforce the Constitution as it is the intentions of the People of Kenya as expressed in the Constitution will never be realized. I therefore find and hold that the entire proceedings, judgment and sentence before the trial court are a nullity and cannot stand in law.

38. The above finding now leads me to a consideration of whether the Appellant be released or be retried. My attention is drawn to several decisions of the Court of Appeal including Samuel Wahini Nguji v. R (2012) eKLR where the Court stated as follows:

The law as regards what the Court should consider on whether or not to order retrial is now well settled. In the case of Ahmed Sumar vs. R (1964) EALR 483, the predecessor to this Court stated as concerns the issue of retrial in criminal cases as follows:

It is true that where a conviction is vitiated by a gap in the evidence or other defect for which the prosecution is to blame, the Court will not order a retrial. But where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not in our view follow that a retrial should be ordered.....In this judgment the court accepted that a retrial should not be ordered unless the Court was of the opinion that on consideration of the admissible or potentially admissible evidence a conviction might result. Each case must depend on the particular facts and circumstances of that case but an order for the retrial should only be made where the interests of justice required it and should not be ordered when it is likely to cause an injustice to an accused person

That decision was echoed in the case of Lolimo Ekimat vs. R, Criminal Appeal No. 151 of 2004 (unreported) when this Court stated as follows:

...the principle that has been accepted to courts is that each case must depend on the particular facts and circumstances of that each case but an order for the retrial should only be made where interests of justice require it.

39. The error on the record was occasioned by the trial court. I have carefully considered and reviewed the evidence on record and without going into the merits thereof, a conviction is likely if the case is properly prosecuted. The offences allegedly committed are not only very serious but also beastly and the innocent, helpless and vulnerable victim will no doubt be affected for the rest of his life.

40. The Appellant was charged in April 2019. Judgment was rendered on 17/06/2019. The Appellant has by now been incarcerated for less than a year from taking plea. That period is not inordinately long. The witnesses in the case are within the complainant's family and neighborhood and as such it will not be difficult to trace them including the Clinical Officer and the Police.

41. This Court is therefore of the considered view that the ends of justice will be served by an order of retrial instead of discharging the Appellant. In view of the above unfolding events, dealing with the other grounds of appeal will not add any value. I therefore

choose to end this discussion here.

42. Consequently, the appeal is allowed and the conviction quashed. The sentence is hereby set-aside and the Appellant will be released into police custody and be produced before any court competent to try him except Honourable R.K. Langat, SRM. This should be in the next 7 days of this judgment.

33. I will now turn to Article 50(2)(h) of the Constitution. As stated above, the right is in respect to assigning an advocate to an accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

34. In order to give effect to *inter alia* Articles 50(2)(g) and (h) of the Constitution, the **Legal Aid Act**, No. 6 of 2016 (hereinafter referred to as '**the Aid Act**') was enacted into law on 10th May, 2016. The preamble of the Aid Act states as follows: -

AN ACT of Parliament to give effect to Articles 19 (2), 48, 50 (2) (g) and (h) of the Constitution to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid, and for the funding of legal aid and for connected purposes

35. Part VII of the Aid Act provides for application for legal aid. It provides as follows in **Sections 40** and **41** thereof: -

40. (1) A person who wishes to receive legal aid, shall apply to the Service in writing.

(2) Where a person wishes to apply for legal aid the person shall apply before the final determination of the matter by a court, tribunal or any other forum to which the application relates.

(3) An application under subsection (1) shall be assessed, with respect to the applicants' eligibility for legal aid services in accordance with this Act.

41. An application for legal aid may be made by-

(a) the applicant in person;

(b) any other person authorized by the applicant in writing;

(c) any person or organization —

(i) authorized by the applicant in writing, on behalf of the applicant; or

(ii) on behalf of the applicant where the authority of the applicant cannot be reasonably obtained due to physical or mental incapacity.

36. The decision to grant legal aid rests solely with the *National Legal Aid Service* (hereinafter referred to as '**the Service**'). **Section 44(1)** of the Aid Act provides as follows: -

44. (1) On an application for legal aid, the Service may, in respect of the whole or any part of a matter, proceedings or appeal—

(a) grant legal aid to the applicant subject to such terms and conditions as the Service considers appropriate;

(b) grant legal aid to the applicant on an interim basis pending further consideration of the application; or

(c) refuse to grant legal aid to the applicant.

37. The persons eligible to receive legal aid services are set out in **Section 36(1)** of the Aid Act. They are: -

(a) a citizen of Kenya

(b) a child;

(c) a refugee under the Refugees Act;

(d) a victim of human trafficking; or

(e) an internally displaced person; or

(f) a stateless person.

38. On the procedure for determination as to whether an eligible person is entitled to legal aid, **Section 36(2), (3) and (4)** of the Aid Act

provides as follows: -

- (2) A person who is eligible to receive legal aid services under subsection (1) shall apply to the Service in the prescribed manner.
- (3) A person shall not receive legal aid services unless the Service has determined that the individual's financial resources are such that the person is eligible for the services.
- (4) Despite subsections (1), (2) and (3), the Service shall not provide legal aid services to a person unless the Service is satisfied that —
- (a) the cost of the proceedings is justifiable in the light of the expected benefits;
 - (b) resources are available to meet the cost of the legal aid services sought;
 - (c) it is appropriate to offer the services having regard to the present and future demands;
 - (d) the nature, seriousness and importance of the proceedings to the individual justify such expense;
 - (e) the claim in respect of which legal aid is sought has a probability of success;
 - (f) the conduct of the person warrants such assistance;
 - (g) the proceedings relate to a matter that is of public interest;
 - (h) the proceedings are likely to occasion the loss of any right or the person may suffer damages;
 - (i) the proceedings may involve expert cross-examination of witnesses or other complexity;
 - (j) it is in the interest of a third party that the person be represented;
 - (k) denial of legal aid would result in substantial injustice to the applicant; or
 - (1) there exists any other reasonable ground to justify the grant of legal aid.

39. I will now run through decisions of superior Courts on how the exigencies of legal representation have been appreciated.

40. In *Criminal Appeal (Application) 2 of 2014, Thomas Alugha Ndegwa v Republic* [2016] eKLR, the Court of Appeal was confronted with the question of representation of accused persons. In the case, the Appellant had been charged with the sexual offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. He was convicted and sentenced to life imprisonment by the trial Court. On appeal, the High Court upheld both the conviction and the sentence.

41. The Appellant had not been represented in the two Courts below and as such, applied for representation before the Court of Appeal.

42. In discussing the issue of legal representation in Kenya, the Learned Court of Appeal Judges tooth-combed the Constitution, the Aid Act and international instruments being the legal regime governing legal representation in Kenya. The Judges observed as hereunder: -

2. The issue for determination by this Court is whether the appellant is entitled to receive legal aid. The idea of legal aid is guaranteed by the Constitution through two key provisions. Article 48 recognises the right of access to justice for all, it provides:

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

Article 50 gives the right to a fair hearing. Article 50(2)(h) provides:

Every accused person has the right to a fair trial, which includes the right to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly. [Emphasis added]

3. While these two provisions, and more so Article 50(2)(h), are specific on legal aid, there are many other provisions of the Constitution that are relevant to the concept of legal aid. These include the value of social justice under Article 10; provisions on equality before the law under Article 27; provisions on protection of marginalised and vulnerable persons and the requirement under Article 159 that justice shall be done to all irrespective of status. The overarching notion to be derived from these provisions is that it is difficult to achieve justice where one party has to compete with the elaborate machinery and resources available to the opposite party.

4. The State established the National Legal Aid and Awareness Programme (NALEAP) in 2007 with the stated goal of creating a practical, affordable and effective legal awareness and legal aid service delivery scheme that increases access to justice for all.

5. The Government of Kenya has established a legal and institutional framework for the provision of legal aid. The Legal Aid Act, Act No. 6 of 2016, (the Act) was enacted in 2016 with a commencement date of 20th May, 2016. Its stated purposes are: to give effect to Articles 19 (2) (general provision on the Bill of Rights); 48 (right of access to justice); 50 (2) (g) and (h) (right of fair hearing) of the Constitution; to facilitate access to justice and social justice; to establish the National Legal Aid Service; to provide for legal aid and for the funding of legal aid and for connected purposes.

6. The Act establishes the 'National Legal Aid Service' (the Service) as the successor to NALEAP (s5(1) and (2)). The functions of this Service are, inter alia, to - establish and administer a national legal aid scheme that is affordable, accessible, sustainable, credible and accountable (s7(1)(a)); facilitate the representation of persons granted legal aid under the Act (s7(1)(l)); assign legal aid providers to persons granted legal aid under the Act; (s7(1)(m); and administer and manage the Legal Aid Fund (s7(1)(p)). Section 29(1) of the Act establishes the Legal Aid Fund. The fund shall consist of (s29 (2)):

moneys allocated by Parliament for the purposes of the Service; any grants, gifts, donations, loans or other endowments given to the Service; such funds as may vest in or accrue to the Service in the course of the exercise of its powers or the performance of its functions under this Act; and moneys from any other lawful source accruing to the Fund.

Section 30 of the Act provides for the 'Application of the Legal Aid Fund'. It expressly provides:

The Service may use the monies of the Fund to-defray the expenses incurred in the representation of persons granted legal aid in accordance with this Act; pay the remuneration of legal aid providers for services provided in accordance with this Act; meet the expenses incurred by legal aid providers in providing services under this Act; and meet the expenses of the operations of the Service as approved by the Board.

Section 35 of the Act provides the general principles of legal aid. The said section provides:

The Service shall provide legal aid services at the expense of the State to persons who qualify for legal aid services under this Act; the Service shall provide legal aid services in civil matters; criminal matters; children matters; constitutional matters; matters of public interest; or any other type of case or type of law that the Service may approve. Despite subsection (2), the Service shall: determine the legal needs of indigent persons and of disadvantaged communities in Kenya; establish priorities for the areas of law, types of proceedings for which it will provide legal aid services; and formulate policies for the kind of legal aid services to be provided in the different areas of law, types of cases and types of proceedings.

Section 36 of the Act, notes the persons eligible for legal aid. It provides:

A person is eligible to receive legal aid services if that person is indigent, resident in Kenya and is: a citizen of Kenya; a child; a refugee under the Refugees Act (No. 13 of 2006); a victim of human trafficking; or an internally displaced person; or a stateless person. A person who is eligible to receive legal aid services under subsection (1) shall apply to the Service in the prescribed manner. A person shall not receive legal aid services unless the Service has determined that the individual's financial resources are such that the person is eligible for the services. Despite subsections (1), (2) and (3), the Service shall not provide legal aid services to a person unless the Service is satisfied that: the cost of the proceedings is justifiable in the light of the expected benefits; ... denial of legal aid would result in substantial injustice to the applicant; or there exists any other reasonable ground to justify the grant of legal aid." Part VII of the Act contains provisions on how the application for legal aid should be done.

7. One of the transitional provisions under section 87 of the Act is that until the Board is established, the National Legal Aid and Awareness Steering Committee appointed pursuant to Gazette Notice number 11598 of 2007 and in existence immediately before the coming into force of this Act shall continue to operate as if it were the Board under this Act (S87(2)). The members of the Board of the National Legal Aid Service provided for under S 9 Legal Aid Act were appointed vide Gazette Notice Number 6512 of 19th August, 2016. The Chairperson of the Service was appointed vide Gazette Notice number 8722 of 28th October, 2016. The Board of the Legal Aid Service has therefore been established.

8. In addition to the constitutional and statutory provisions for the Government to provide legal aid, there is an international framework in place committing the Government of Kenya to provide legal aid. The Government has made commitments under various regional and international human rights instruments to enhance access to justice and provide a state funded legal aid scheme. Some of the international human rights instruments include: The International Covenant on Civil and Political Rights (ICCPR), 1996, The UN Convention on the Rights of the Child (CRC), 1989, The UN Convention on the Rights of Persons Living with Disabilities, 2007, the African Commission on Human and Peoples' Rights (ACHPR), Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003. The ACHPR Principles and Guidelines obligates states parties to ensure that an accused person has a right to legal assistance assigned to him or her in any case where the interest of justice so require and without payment by the accused if he or she does not have means to pay for it. The interests of justice in criminal matters are to be determined by considering the seriousness of the offence and the severity of the sentence.

43. In discussing the import and place of *substantial injustice*, the Learned Judges made reference to its earlier decision in **Karisa Chengo & 2 Others v. R**, Criminal Appeal Nos. 44, 45 & 76 Of 2014 where it was observed as follows: -

It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the *David Njoroge Macharia* case

(supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result and to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. **However, substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the State obligation to provide legal representation arise.**

44. The principle of equality of arms and the need to preserve it in the prosecution and defence of criminal cases was further discussed by the Court of Appeal in the above case. In doing so, reference was made to the report on African Commission in *Advocats Sans Frontiers (On behalf of Bwampanye) v. Burundi, African Commission On Human Rights, Comm. No. 213/99 (2000)* where it was observed:

...Legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case...

the right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words, be able to 'argue their cases ...on an equal footing.'

45. The Learned Appellate Judges appreciated the prejudice suffered by an unrepresented person and coined it by relying on Lord Denning's decision in **Pett v. Greyhound Racing Association**, (1968) 2 All E.R 545, where at page 549 His Lordship stated thus: -

It is not every man who has ability to defend himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task?

46. Despite the foregoing favourable findings, there exists a claw back on the right to representation. The Court of Appeal found that the right to representation is not an absolute right and there are instances where it may be limited. The Court referred to the decision in **S -vs- Halgryn** 2002, (2) Sacr 211 (SCA) where it was stated that:

Although the right to choose a legal representative is a fundamental one and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations.

47. Upon weighing the role of Courts in facilitating legal representation vis-à-vis that of the Legal Aid Service, the learned Court of Appeal Judges delimited the scope of Courts' intervention. In doing so, it made reference to the decision of the South African Supreme Court of Appeal in **Legal Aid Board -vs- The State**, (363/09) [2010] ZASCA 112 where the following was said: -

Courts should be slow to attribute a superior wisdom to themselves in respect of matters entrusted to other branches of government.

...That is not to suggest that a court is powerless in the face of an unreasonably intransigent legal aid board. After all it is the court that is burdened with the constitutional obligation of ensuring that the proceedings are conducted in accordance with notions of fairness and justice.

(emphasis added)

48. Upon considering the foregoing comparative jurisprudence, constitutional edicts under Article 50(2)(h) and provisions under the Aid Act, the Learned Judges opined that the Appellant (convicted and sentenced to life imprisonment for defilement) was eligible under Section 41 of the Aid Act to apply for legal aid. They observed that if not represented, the circumstances of the case were such that, the Appellant would suffer substantial injustice. For clarity this was their finding: -

20. In Kenya, Section 43(1) of the Legal Aid Act sets out the duties of the Court before which an unrepresented accused person is presented. Such Court is required to promptly inform the accused person of his right to legal representation; promptly inform him of his right to have an advocate assigned to him if substantial injustice is likely to result; and to inform the National Legal Aid Service to provide legal aid to the accused person.

21. In the instant application, it is clear the framework for full implementation of Article 50 (h) is now in place as required by the Constitution. Section 40 of the Act requires that a person who wishes to receive legal aid may apply to the Service in writing so long as such an application is made before the final determination of the matter by a court, tribunal or any other forum to which the application relates. In light of the constitutional and statutory provisions aforementioned, the provision of legal aid is a constitutional, legal and human right. The appellant is serving a life sentence and in the circumstances of this case, substantial injustice may result unless represented. We therefore find that the applicant, according to section 41 of the Legal Aid Act is eligible to make the application for legal aid to the Service in person or through any other person authorized by him in writing. The Service may at its discretion grant legal aid to the applicant subject to such terms and conditions, as the Service considers appropriate.

49. Flowing from the foregoing, it is evident that the constitutional requirement under Article 50(2)(h) to assign an accused person representation crystallized upon enactment of the Aid Act. However, the right is not absolute. An accused person is required to make an application to the National Legal Aid Service for consideration.

50. Having said so, it is of importance to note that before the enactment of the Aid Act, the issue of legal representation was undertaken through the National Legal Aid and Awareness Steering Committee which was appointed pursuant to Gazette Notice number 11598 of 2007. Through that Committee, the resolve that all persons charged with the offence of murder be accorded legal representation at State's expense was carried over.

51. The Aid Act does not, however, provide for compulsory legal representation of any special category of accused persons. It all rests upon the Scheme to decide on whether it will admit an accused person to legal aid on a case-by-case basis. The good news is that even with the advent of the Aid Act the decision to provide legal aid to those charged with the offences of murder and children who are in conflict with the law still stands. To me, the position is a serious demonstration of the reality of the need for universal legal aid. It is a wide step in the right direction. I will not, hence, view that position as being discriminative against accused persons who are not children in conflict with the law or those who are not charged with the offences of murder. As said, the other accused persons are perfectly covered under the Aid Act.

Conclusions and Disposition:

52. This discussion has, hence, brought to the fore several **findings** and **conclusions** on the right to legal representation in Kenya. They include, that: -

- (i) Legal representation is a qualified constitutional right;
- (ii) Any eligible person is at liberty to apply for legal representation under the Aid Act;
- (iii) A Court before whom an unrepresented accused person is arraigned is under a constitutional duty to promptly inform the accused person of the right to choose and be represented by an Advocate;
- (iv) The Court is under a further constitutional duty to promptly inform the unrepresented accused person of the right to have an Advocate assigned to that accused person by the State and at State expense if substantial injustice would otherwise result and the manner in which the accused person may access the right;
- (v) Unrepresented accused persons charged with the offence of murder and children in conflict with the law continue to be entitled to legal representation at State's expense; and,
- (vi) For the right to legal representation to be firmly embedded in Kenya, it is incumbent upon Courts to ensure that the right is promptly and sufficiently explained to the unrepresented accused persons and that any necessary assistance is accorded to such accused persons towards seeking the representation.

53. Turning back to the case at hand, suffice to state that there is a danger in granting the orders as sought for in the Petition. The danger is that the orders are too general and to a large extent usurp the role of the National Legal Aid Service as provided for in the Aid Act.

54. In the end, the Petition is hereby determined in terms of the foregoing findings and conclusions. There shall be no orders as to costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF JULY 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Asuma, Mr. Alexander Mwendwa and Mr. Shadrack Wambui,

Counsel for the Petitioner.

Mr. Marwa, Counsel instructed by the Hon. Attorney General for the 2nd Respondent.

Elizabeth Wambui – Court Assistant