



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

ANTI-CORRUPTION AND ECONOMIC CRIMES DIVISION

PETITION NO. 30 OF 2019

IN THE MATTER OF ARTICLE 22(1), 23 AND 24 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 3(1), 10, 19, 20, 21, 27(1) AND 2, 28, 29, 31, 35(2), 38, 47(1), 49(f, g, h) AND 50(1), 2(a) & (4) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF NAIROBI CHIEF MAGISTRATE'S COURT ANTICORRUPTION CRIMINAL CASE NO. 8 OF 2019
REPUBLIC v. DR. EVANS ODHIAMBO KIDERO & OTHERS**

BETWEEN

DR. EVANS ODHIAMBO KIDERO PETITIONER

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION 1ST RESPONDENT

DIRECTOR OF CRIMINAL PROSECUTIONS 2ND RESPONDENT

CHIEF MAGISTRATE'S COURT MILIMANI

ANTI-CORRUPTION COURT 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

AND

WACHIRA, MBURU, MWANGI

& COMPANY ADVOCATES 1ST INTERESTED PARTY

GEORGE WAINAINA NJOGU 2ND INTERESTED PARTY

JOHN NDIRANGU KARIUKI 3RD INTERESTED PARTY

PAUL MUTUNGA MUTUNGI 4TH INTERESTED PARTY

MANASSEH KARANJA KEPHA 5TH INTERESTED PARTY

PHILOMENA KAVINYA NZUKI 6TH INTERESTED PARTY

NG'ANG'A MUNGAI NG'ANG'A	7 TH INTERESTED PARTY
CHARITY MURINGO NDIRITU	8 TH INTERESTED PARTY
PETERSON ANDREW NJIRU	9 TH INTERESTED PARTY
EKAYA ALUMASI GHONZOUR	10 TH INTERESTED PARTY
JAMES MIMI MBUGUA	11 TH INTERESTED PARTY
ELIZABETH WANJIRU NDERITU	12 TH INTERESTED PARTY
ALICE NJERI MUNDIA ALIAS MUNDIAA	13 TH INTERESTED PARTY
HANNAH MUTHONI KARIUKI	14 TH INTERESTED PARTY
JOHN NGARI WAINAINA	15 TH INTERESTED PARTY
THE CUPS LIMITED	16 TH INTERESTED PARTY

RULING

1. Through a Petition dated 10th day of September 2019 and filed on 16th September 2019, **Evans Odhiambo Kidero** former Governor Nairobi City County herein referred to as the Petitioner, moved this court against the **Ethics and Anti-Corruption Commission** (hereinafter the 1st respondent), **Director of Public Prosecutions** (hereinafter the 2nd respondent), **Chief Magistrate's Court Milimani** (hereinafter the 3rd Respondent) and the **Hon. The Attorney General** (hereinafter the "4th respondent) plus 16 Interested Parties seeking the following reliefs:

a. **This Petition be certified as urgent and set down for hearing on an urgent basis.**

b. **A conservatory order be and is hereby issued staying the proceedings in Anti-Corruption Criminal Case No. 8 of 2019, Republic -vs- Dr. Evans Odhiambo Kidero & 15 Others pending the hearing and determination of this Petition.**

c. **A declaration be and is hereby issued that the 1st and 2nd Respondents have threatened, contravened and/or violated the Petitioner's rights and fundamental freedoms guaranteed under articles 27(1) and (2), 28, 29, 31(a, b, c), 35(2), 47(1), 49(f, h), 50(1), (2)(a) and 50(4) of the Constitution.**

d. **A declaration be and is hereby issued that the institution, maintenance and conduct of Anti-Corruption Criminal Case No. 8 of 2019 Republic –vs- Dr. Evans Odhiambo Kidero & 15 Others is unconstitutional, discriminatory, malicious, oppressive, vexatious, an abuse of the process of the court and therefore unlawful, null and void *ab initio*.**

e. **A declaration be and is hereby issued that the institution, maintenance and conduct of Anti-Corruption Criminal Case No. 8 of 2019 Republic –vs- Dr. Evans Odhiambo Kidero & 15 Others in specific relation to the Petitioner is unconstitutional, discriminatory, malicious, oppressive, vexatious, an abuse of the process of the court and therefore unlawful, null and void *ab initio*.**

f. **A declaration be and is hereby made that the arrest and detention of the Petitioner between 26th April 2019 and 30th April 2019 was capricious, arbitrary, an abuse of power, legal process and discretion, unjustifiable and was otherwise unlawful, illegal and/or unconstitutional.**

g. **A declaration be and is hereby made that the arrest and detention of any person in police custody other than for a reason permitted by law and for any period than is reasonably necessary; or where it can be demonstrated that there was no reason to keep the person in custody is illegal and unconstitutional.**

h. **A declaration be and is hereby made that the publication and circulation of the press statements dated 26th April 2019 and 25th April 2019 by the 1st and 2nd respondents respectively was unprofessional, reckless, prejudicial, unlawful and contravened the right of the petitioner guaranteed under Article 50(2)(a) of the Constitution.**

i. **A declaration be and is hereby made that the 1st and 2nd Respondents have acted recklessly, carelessly, negligently, unprofessionally and have recklessly, carelessly, negligently, unprofessionally and unnecessarily threatened, violated and infringed upon the Petitioner's right and fundamental freedoms guaranteed under Article 28, 29 (a, c, d, f) and 50(2)(a).**

j. **A declaration be and is hereby made that any public officer who abuses his/her power; acts unreasonably, recklessly, carelessly, unprofessionally, without due regard to the bill of rights whilst executing or carrying out an official function or duty is liable to be surcharged personally for any damages arising therefrom and/or subject to sanctions.**

k. A declaration be and is hereby made that the order and/or warrant dated 19th January 2016 made and/or obtained in Makadara Chief Magistrate's Court Misc. Criminal Application No. 38 of 2016 to investigate the Petitioner's bank account no. 068000004475 in Family Bank was made and obtained unlawfully and/or illegally.

l. An order be and is hereby made quashing the order and/or warrant dated 19th January 2016 obtained in Makadara Chief Magistrate's Court Misc. Criminal Application No. 38 of 2016 in relation to the Petitioner's bank account No. 068000004475 in Family Bank.

m. An order of certiorari be and is hereby issued to remove into the High Court and quash the decision(s) of the 1st and 2nd Respondents made on or about 25th and/or 26th April 2019 to bring, charge and institute criminal proceedings against the Petitioner in Anti-Corruption Criminal Case No. 8 of 2019 Republic -vs- Dr. Evans Odhiambo Kidero & 15 Others.

n. An order of certiorari be and is hereby issued to remove into the High Court and quash the charges contained in Charge Sheet dated 29/4/2019 Police Case No. 148/5/2019 brought against the Petitioner in the said charge sheet in Anti-Corruption Criminal Case No. 8 of 2019 – Republic -vs- Dr. Evans Odhiambo Kidero & 15 Others.

o. An order of prohibition be and is hereby issued against all the respondents jointly and severally prohibiting any of them from carrying on and/or proceeding with Anti-Corruption Criminal Case No. 8 of 2019 – Republic -vs- Dr. Evans Odhiambo Kidero & 15 Others in relation to the Petitioner.

p. An order of prohibition be and is hereby issued against all the respondents jointly and severally prohibiting any of them from reopening or purporting to reopen, bringing, instigating, instituting, carrying out and/or proceeding with any criminal proceedings or charges in connection with the payment of legal fees to the firm of Wachira Mburu & Company Advocates on account of Milimani Commercial HCCC No. 875 of 2011.

q. An order of prohibition be and is hereby issued directed to all the respondents jointly and severally prohibiting any of them from reopening or purporting to reopen, bringing, instigating, instituting, carrying out and/or proceeding with any criminal proceedings or charges in connection with the payment of legal fees to the firm of Wachira Mburu & Company Advocates on account of Milimani Commercial HCCC No. 875 of 2011 in relation to the petitioner.

r. The 1st and 2nd respondents be and are hereby ordered jointly or severally to pay the Petitioner damages in the sum of Kenya Shillings Two Hundred Million (Kshs.200,000,000.00) for the violation of the Petitioner's rights and fundamental freedoms; and for the Petitioner's unlawful arrest, detention, false imprisonment, intimidation, hindrance, malicious prosecution, pain, anguish, suffering, torture, cruel inhuman and degrading treatment and harassment.

s. The costs of this Petition be provided for.

t. Any other and/or further orders the Honourable Court deems just and fit to grant and/or may commend themselves in the course of hearing of the Petition.

2. The application is premised upon grounds, facts and the particulars set out on the face of it and a supporting affidavit sworn on the 12th September 2019 by the applicant/petitioner. The genesis of this Petition is the investigation and eventual prosecution of the Petitioner before the Milimani Anti-corruption Court vide ACC No. 8 of 2019 in which he was charged with various charges relating to corruption. Among the charges preferred are: conspiracy to commit an offence contrary to Section 47(a) (3) as read with Section 48 of the Anticorruption and Economic Crimes Act (ACECA); unlawful acquisition of public property contrary to Section 45(1) (a) as read with Section 48 of ACECA; dealing with suspect property contrary to section 47(2) (a) as read with Section 47(1) and 48(1) of the (ACECA); and money laundering.

3. The Petitioner went further to give a detailed background of the facts leading to the investigation and finally his prosecution. Brief facts as stated in the Petition are that, on 16th December 2010, Kyavee Holdings Limited filed a suit against Nairobi City Council at Milimani Commercial Court being HCCC No. 875 of 2010 seeking general damages at 3Billion for loss of profit in respect of IR. 209/8254 which had been leased to them by The City Council on 31st December 1996 but later allocated to a 3rd party who developed it to their detriment.

4. That on 17th February 2011 the City Council instructed the law firm of Wachira Mburu and Co. Advocates for legal representation who then sought to have the suit struck out for being an abuse of the court process. Consequently, the suit was withdrawn and the firm of Wachira Mburu served the Council with a legal fee note of Kshs. 131,754,383.00 for legal services rendered. Upon examination, the Director legal services City Council directed City Council Treasurer to pay Wachira Mburu Advocates legal fees to the tune of Kshs. 68,761,000/-.

5. That on 7th January 2014, a sum of 58Million was paid to the said law firm. On 25th August 2017, Kenya Revenue Authority commenced investigations regarding the above payment and consequently EACC came on board and carried out further investigations culminating to the arrest and prosecution of the petitioner together with the 16 interested persons.

6. It is on the basis of timelines that the petitioner claims that the suit is malicious, absurd and brought in bad faith as the events giving rise to the charges took place before 2013 when he had not joined nor worked with City Council as Governor or employee. He denied playing any role in giving Wachira Mburu instructions for legal services; participating in paying the said firm and that, there was no proof that he benefited Kshs.14,400,000.00 from the said legal firm.

7. That the arrest and prosecution amounts to; abuse of discretion, power, and legal process and that it is malicious and oppressive. That the

1st and 2nd respondent in preferring the charges lacked impartiality and consistency; acted capriciously and discriminatory. That the petitioner was never served nor asked to give his side of the story hence selective justice thus contravening express statutory provisions on fair administrative action and natural justice. That the 1st and 2nd respondents acted in breach of Sections 26, 27 and 28 of ACECA.

8. After perusing the Petition, the matter was certified urgent originally before the Constitutional Division. It was later transferred to the Anti-Corruption Division by consent owing to the nature of the proceedings involving corruption related issues.

9. Before the respondents could file any response, the Petitioner once again lodged a Notice of Motion dated 10th October 2019 and filed on 10th October 2019 seeking orders that:

(a) This application be certified urgent.

(b) An order be and is hereby made that the Petition dated 10th September 2019 raises substantial questions of law under Article 165(3)(b) and (d) of the Constitution of Kenya

(c) The Petition dated 10th September 2019 be and is hereby referred to the Chief Justice for the empanelment of an uneven number of judges being not less than three (3) to hear it.

10. The application is anchored on the grounds stated on the face of it and the affidavit in support thereof sworn on 8th October 2019 by the applicant. The applicant went further to state that the case was tainted with malice, partiality, brought in bad faith and irrational. He set out substantial questions of law for determination as follows;

(a) Whether an advocate client relationship can found criminal liability against a person who is not a party to that relationship and more fundamentally, where there is no dispute either by advocate or the client, in that regard.

(b) Whether the evidence and information obtained without notice to the person under investigation and or without a court order as required by Sections 26, 27, 28, 29 and 30 of the Anti-Corruption and Economic Crimes Act, can be used to mount a criminal case against such a person.

(c) Whether a criminal case can be mounted under the Anti-Corruption and Economic Crimes Act, on the basis of investigations done and completed without offering the accused person an opportunity to shed light on the investigations and possibly present exculpatory evidence.

(d) Whether the charge sheet read to a suspect at the police station ought to be the same charge sheet formally registered in court and what is the recourse to be taken when the said charge sheet differ; and

(e) Whether Section 58 of the Anti-Corruption and Economic Crimes Act contravenes Article 50(2)(a) of the Constitution in so far as it places the burden of proving that an act was done corruptly upon an accused person, whereas it is trite law that the burden of proof also lies with the prosecution.

11. In response to the application, the 1st respondent filed grounds of opposition stating;

1) That the Petition does not raise a substantial question of law as contemplated under Article 165(4) of the Constitution of Kenya 2010 for the Petition to be referred to the Chief Justice to empanel a bench of an uneven number of judges to hear the Petition.

2) The Petitioner has not met the criteria for determining certification under the provisions of Article 165(4) of the Constitution of Kenya 2010 as settled in the various judicial pronouncements.

3) That the issues referred in the Petition do not constitute novel and/or complex issues.

4) That the issues in the Petition are not of general public importance as to bring forth issues of public interest.

12. On their part, the 2nd respondent also filed grounds of opposition urging;

(1) That the application lacks merit and is generally incompetent.

(2) That the factual and legal basis on which the application is premised are general, vague and ambiguous and lack specificity as to what the substantial question of law is.

(3) That the application does not raise any substantial question of law warranting the empanelment of an uneven bench of the court.

(4) That the application is a clear attempt by the appellant to further delay the hearing and determination of the petition

(5) That the application is one that is best fit for a forthwith dismissal.

Submissions

13. On submission, S.C Mr. Orengo, S.C Professor Ojienda, Mr. Havi and J. Soweto jointly appearing for the applicant/petitioner basically reiterated the grounds contained in the affidavit in support of the application and the facts and particulars outlined in support of the Petition. Mr. Orengo urged that the issues cited raise pure and quite fundamental questions of law which warrants empanelment of at least a three judge bench to determine more particularly, the constitutionality of Section 58 of ACECA viz-a-viz Article 50(2)(a) of the Constitution regarding the presumption of innocence of an accused person before proven guilty which is a non-derogable right on fair trial.

14. Learned counsel submitted that the applicant cannot be held responsible for events or acts or omissions that arose before he joined the County Government and therefore the law cannot apply retrospectively. In support of that submission, counsel invited the court to consider various authorities cited where courts laid out principles taken into account before a court can refer a petition to the Chief Justice for empanelment of a three or five judge bench. Among the authorities cited are; **Okiya Omutata Okoiti & Another versus Anne Waiguru, the Cabinet Secretary, Devolution and Planning and 3 Others [2015] eKLR, Republic versus Public Service Commission and Keriako Tobiko, Ex Parte Nelson Havi [2017]eKLR, Philomena Mbete Mwilu –vs- Director Public Prosecution & 4 Others [2018]eKLR and Director of Public Prosecutions –vs- Tom Ojienda t/a Prof. Tom Ojienda & Associates & 3 Others [2019]eKLR** in which both courts determined what constitutes a substantial question of law as defined by the Indian Supreme Court in the case of **Chunilal V. Mehta V. The Century Spinning And Manufacturing Co. AIR 1962 SC 1314** where the court held;

“a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law.”

15. On their part, the 1st respondent filed their submissions on 11th December 2019 although erroneously titled 2nd respondent's skeleton submissions thus challenging the application. M/s Ngethe appearing for the 1st respondent submitted that the application does not meet the threshold set out for determination before certifying a matter as raising a substantial question of law to warrant referral to the Chief Justice. Counsel referred the court to the decision in the case of **Martin Nyaga and Others –vs- Speaker County Assembly of Embu & 4 Others and Amicus [2014] eKLR** where the court articulated the factors and or principles for consideration as;

i. Whether the matter is complex

ii. Whether it raises a novel point;

iii. whether the matter by itself requires a substantial amount of time to be disposed of;

iv. The effect of the prayer sought and,

v. The petition and the level of public interest generated by the petition.

16. The court was further referred to more decisions where similar principles were considered inter alia; **Amos Kiumo & 2 Others -vs- Cabinet Secretary Ministry of Interior and Coordination of National Government & 3 Others [2014] eKLR, Okiya Omutatah Okoiti -vs- Independent Electoral and Boundaries Commission & 3 Others [2016]eKLR.**

17. Regarding whether the matter was complex, counsel submitted in the negative. M/s Ngethe submitted that the issue of information being obtained without or before notice as required under Section 26, 27, 28, 29 and 30 of ACECA is a matter for the trial court to determine on the admissibility of evidence and therefore not a complex issue. Concerning the issue whether the discrepancy between the charge sheet disclosed in the police station and the one read before court is a complex issue, counsel opined that it is all about the propriety of a charge sheet which is properly within the remit of the trial court to determine.

18. As to what constitutes a substantial question of law, counsel also made reference to **Sir. Chunilal vs Mehta** case above quoted by the applicant and **Delmonte Kenya Ltd, County Government of Murang'a & 2 Others [2016] eKLR**. M/s Ngethe further submitted that Section 58 has been considered in several case law hence not a novel issue any more.

19. On their part, the 2nd respondent through Mr. Owiti merely associated themselves with the submissions of the 1st respondent.

20. In their rejoinder, the applicant through Ms. Soweto submitted that the divergent views on the constitutionality of Section 58 of ACECA connotes that the issue is not settled. That it brings into question the right to be silent and therefore presumed innocent in accordance with Article 50(2)(a) of the Constitution. She contended that the interpretation of Section 58 has not been fully and conclusively determined.

Determination:

21. I have considered the Petition herein, application thereof, responses thereto and submissions by counsel for the respective parties. The only issue for determination is whether the issues framed constitute substantial questions of law, raises novel points and or complex issues to warrant certification to the Chief Justice to constitute a three Judge bench. This court's authority has been invoked pursuant to Articles 165 (3 and 4) of the Constitution seeking to certify the petition herein as raising a substantial question of law which calls for an uneven number of judges not less than three to determine.

22. Article 165 (3) provides:

“Subject to clause 5, the High Court shall have;

- (a) Unlimited original jurisdiction in criminal and civil matters.**
- (b) Jurisdiction to determine the question whether a right or fundamental freedom in the bill of rights has been denied, violated, infringed or threatened;**
- (c) ...**
- (d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of;**
 - (i) The question whether any law is inconsistent with or in contravention of this Constitution.**
 - (ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with or in contravention of this constitution.**
 - (iii) Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**
 - (iv) A question relating to conflict of laws under Article 191; and**
- (e) Any other jurisdiction, original or appellate, conferred on it by legislation.**

23. Sub Article 4 goes further to provide that;

- (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.**

24. What then constitutes a substantial question of law to warrant empanelment of a three Judge bench? There is no express statutory or constitutional provision defining that terminology. However, from the Kenyan precedence (jurisprudence), a common approach seems to have adopted the definition articulated in the persuasive case of **Chunilal V. Mehta V The Century Spinning And Manufacturing Co. AIR 1962 SC 1314 [supra]**.

25. Similar position was held in the case of **County Government of Meru V. Ethics and Anti-Corruption Commission [2014]eKLR** where the court held that;

- (i) The grant of a certificate under Article 165(4) of the Constitution is an exception rather than the rule.**
- (ii) The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weighty one or one that raises a novel issue of law or fact or even one that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet it is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.**
- (iii) Public interest may be considered but is not necessarily a decisive factor. It is in the nature of petitions filed to enforce the provisions of the Constitution to be matters of public interest generally.**

26. It is trite that certification of a matter as constituting a substantial question of law is a matter of discretion and consideration of merits of each case to be determined judiciously by the court seized of the matter. It is not automatic that once an application has been made the same must be certified and referred to the Chief Justice. The issue at hand must be determined with extreme caution not to abuse the provision thereby clogging the justice system with unnecessary benches being constituted thus wasting the precious judicial time on matters which a single judge can sufficiently determine. See **Harrison Kinyanjui –vs- Attorney General and Another [2012]eKLR Petition No. 78 of 2011** where the court had this to say;

“...the court must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation. In other words, each case must be determined on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court.”

27. What is the rationale behind constitution of a three judge bench vis a vis a single judge from within the same jurisdictional hierarchy? Although a bench of three is constituted from a concurrent jurisdiction enjoyed by a single judge within the same level, it is reasonably expected to be rich with wide contribution and a variety of jurisprudential thought as compared to a single judge (see **Harrison Kinyanjui V. Attorney General [supra]**).

Also see **Okiya Omutatah Okoiti and Another –vs- Anne Waiguru [supra]** where the court stated that:

“Mr. Ngatia correctly pointed out that no party is entitled to have leave on every petition so certified as raising a substantial question of law. It is the court that will identify the issues which in its view raises substantial question of law.”

28. In the instant case, the applicant has framed four issues for consideration. The court must be satisfied whether they are substantial questions of law, raises novel points of law or complex issues which have not been canvassed before and conclusively determined.

29. The first issue raised is, whether an advocate client relationship can found criminal liability more particularly where there is a dispute between the Advocate and client. This is not a complex issue which has not been litigated upon in our court system. It does not raise any novel or complex issue to determine.

30. Concerning whether evidence and information obtained without notice to a person under investigation and or without a court order as required under section 26, 27, 28, 29 and 30 of ACECA can be used to mount criminal charges, the same has been deliberated before in **Director of Public Prosecutions v Prof. Tom Ojienda t/a Prof. Tom Ojienda & Associates & three Others (2019)eKLR** case where the court of appeal addressed those specific provisions and made a finding. With the rich jurisprudence in the three judge bench of the court of appeal, I do not see any necessity in recommending constitution of a three Judge to determine the same when a higher bench has already pronounced itself.

31. As to whether criminal charges can be mounted within the Anti-Corruption and Economic Crimes Act on the basis of investigations done and completed without affording the accused person a chance to shed light on the same, the same issues and principles were articulated in Professor Ojienda case. In any event, I do not find it to be a complex issue calling for a three judge bench.

32. Touching on the discrepancy between the charge sheet read to the Petitioner and the one eventually presented in court, this is a simple issue which is not complex for a single Judge to determine. The court is properly seized of the capability to determine on what entails a proper charge sheet and its compliance with the standard and specific requirement. I do not find anything in this issue to justify certification for a three (3) Judge bench.

33. As to whether Section 58 of ACECA is unconstitutional, one will have to consider what Section 58 states viz a viz Article 50. Article 50(1) of the Constitution provides that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent or impartial tribunal or body. Article 50(2) goes further to provide that an accused person has the right to a fair trial, which includes, being presumed innocent until the contrary is proved.

34. Section 58 of ACECA provides that:

“If a person is accused of an offence under Part V an element of which is that an act was done corruptly and the accused person is proved to have done that act the person shall be presumed to have done that act corruptly unless the contrary is proved.”

35. According to the petitioner, he has been subjected to public ridicule and trial based on misleading public statements made by the 1st respondent leading to the inference that the petitioner is guilty.

36. The issue regarding unconstitutionality of Section 58 of the Constitution viz a viz Article 50(2) has been canvassed before in a number of courts and in my opinion a conclusive decision arrived at. In the case of **Christopher Ndarathi Murungaru V. Kenya Anticorruption Commission & Another [2006]eKLR** the court in detail deliberated on the constitutionality of Sections 26, 28 and 58 against Sections 70, 74, 76, 77(2) and 77(7) and 84(1)(2) of the 1963 of the old Constitution which was replaced with the current constitution. The issue on the principle of innocence before proved guilty was adequately addressed against Section 58 of ACECA.

37. In particular, at page 53 – 54 holding No. IX, the three judge bench held that;

“... The presumption of a corrupt act under Section 58 of the Act is not a shift of the burden of proof. The presumption of a corrupt act is reached upon proof, by the prosecution and again, that presumption applies at the trial, not the investigation. We therefore hold that the said Section does not offend either Section 77 (2)(a) or Section 77(7) of the Constitution.”

38. Similar position was held in **Thuita Mwangi & 2 Others V. Ethics and Anti-Corruption Commission & 3 Others [2013]eKLR** where Majanja J. Considered the constitutionality of Section 58 of ACECA and held as follows:-

“I must emphasize that, sight must not be lost that the burden of proof still rests with the prosecution, and it will be up to it to prove the elements of that offence including convincing the court that such an act was done corruptly. I therefore do not read any unconstitutionality on this section.”

39. In my humble view the substantial question of law underlying Section 58 against Article 50(2) the equivalent of Section 77 of the old Constitution is no longer a virgin area to require another three (3) Judge bench to interrogate.

40. Having said as above, and without delving onto the merits of the Petition, I am inclined to agree with the respondents that the petition herein does not meet the threshold to warrant certification of the same to the Chief Justice to constitute a three (3) judge bench. To that extent, the application is dismissed and hearing of the Petition shall proceed before a single Judge for hearing and determination.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF JANUARY, 2020.

.....

J. N. ONYIEGO

JUDGE