



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. 12 OF 2019

IN THE MATTER OF ARTICLES 1, 2, 3(1), 10, 19, 20, 21, 22, 27(1), (2) & (3), 28, 41(1), 47(1) & (2), 48, 53(1) & (2), 50(1), (2)(a), (g), (j), (k) and (o) & 258 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF RULE 4, 10, 11, 13 AND 20 OF THE CONSTITUTION OF KENYA (SUPERVISORY AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL (HIGH COURT PRACTICE AND PROCEDURE RULES 2013)

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27(1), (2) & (3), 28, 41(1), 47(1) AND 50(1), (2)(a) AND (o) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF RUNYENJES SENIOR PRINCIPAL MAGISTRATE'S COURT ANTI CORRUPTION CASE NO. 1 OF 2015

AND

IN THE MATTER OF DEDIAL OF RIGHT TO COUNSEL AND ADDUCE AND CHALLENGE EVIDENCE

BETWEEN

ANN WANGECHI MUGO.....1ST PETITIONER

HARAMBEE JOHN GIKINGO.....2ND PETITIONER

HENRY KATISO KAWINZI.....3RD PETITIONER

SMITH GIKUNDA GITURU.....4TH PETITIONER

RICHARD NYAIYO ONDIEKI.....5TH PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTION.....1ST RESPONDENT

SENIOR PRINCIPAL

MAGISTRATE'S COURT RUNYENJES.....2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT

J U D G M E N T

A. Introduction

1. Vide an Amended petition dated 25/04/2019 the petitioners prayed for the following orders:

1) A declaration that the acts of the 2nd Respondent proceeding with the hearing of Runyenjes SPM Anti-Corruption Case No. 1 of 2015 on 14th to 15th February 2019 and on 25th to 27th February 2019 was in breach of the petitioners' constitutional rights under Article 27 (1) (2) and (3), 28 and 50(1), 50(2)(a)(g)(h)(k) and (j) of the Constitution and such proceedings are null and void for all intent and purposes.

2) A declaration that the said proceeding are in breach of the petitioner's constitutional rights as enshrined in articles 27 (1) (2) and (3), 28 50(1), 50(2)(a)(g)(h)(k) and (j) of the Constitution

*3) An order directing that **Runyenjes Senior Principal Magistrate's Court Anti-corruption Case No. 1 of 2015** be re-opened for purposes of the Petitioners adducing and challenging in their defense*

4) An order of judicial review in the nature of certiorari to bring to this court and quash the proceedings of 14th to 15th February 2019 and 25th February 2019 to 27th March 2019 and quashing the same.

2. The petitioners' case was that they were accused persons in Runyenjes Senior Magistrate's Court Anti-Corruption Case No.1 of 2015 wherein the prosecution called six (6) witnesses and proceeded to close their case. All the accused persons were put on their defence and defence case fixed on 14th and 15th February, 2019. When the case came for defence hearing on 14/02/2019. Mr. Nzioka for the 3rd accused applied for adjournment on grounds that the 3rd accused was unwell. He cited fair hearing under Article 50 of the Constitution based on the absence of his client. The court declined to allow adjournment and directed that the case would proceed with the defence of the accused persons who were present. The defence of the 2nd and 4th accused was heard on that particular day.

3. On 25/02/2019, the counsels for the petitioners were absent for further defence hearing. The petitioners told the court their advocates were not present and that they were engaged in other courts namely Makueni Law Courts, Makueni High Court and others that were not named. Its notable that one of the advocates absent from court gave the numbers of the cases they were attending to in the said courts for the record of the court.

4. The petitioners allege that when the dates for hearing of the defence cases were taken, their counsels had indicated that they were not available on those dates but the trial magistrate did not capture the same in the court proceedings. It was further argued that the petitioners could not say anything in the absence of their advocates and forcing them to proceed with their defence cases, the 2nd respondent's action to proceed with the case amounts to denial of their constitutional rights to challenge the evidence of the prosecution as guaranteed in Article 50(2)(k) of the Constitution. It is pursuant to this argument that the petitioners claimed violation of their rights under Article 50(2).

5. The Amended petition was supported by the separate affidavits of the petitioners wherein they reiterated the averments in the petition that they were not given their right of hearing under Article 50(2) of the Constitution.

6. The petition was opposed by the 1st respondent vide a replying affidavit sworn by Leah Mati who deposed that the petitioners had not demonstrated that their rights had been violated as the 1st petitioner were afforded an opportunity to defend themselves but chose to remain silent; that the 2nd petitioner was also accorded a chance to defend himself and called witnesses before filing written submissions; the 3rd, 4th and 5th petitioners were all represented by advocates throughout the defence hearing. It was further submitted that right to a fair hearing was not absolute if in the trial court's view, the petitioners are able to make out a defense and that the instant application is an attempt to obstruct and interfere with the 2nd Respondent's mandate. That the Anti-corruption criminal case in question was heard by a competent court and there was no evidence of bias or unfairness and as such the petition was frivolous and an abuse of the court process.

B. Submission by the parties

7. The petitioner generally submitted that her rights under article 50 (2) (g) and 50 (2) (k) of the Constitution despite her having informed the trial court of the absence of her advocate on the date in issue (25.02.2019). Reliance was made on the case of **Johnstone O. Onyango & Another –vs- Republic (2019) eKLR** and **Joseph Ndungu Kagiri –vs- Republic (2016) eKLR**. The 3rd, 4th and 5th Respondents submitted to the effect that the conduct of proceedings on 14th – 15th February and 25th February 2019 was in violation of their right under article 27 and 50 of the Constitution. Reliance was made on **Joseph Ndungu Kagiri –vs- Republic (supra)**. The 2nd petitioner submitted to that respect to and relied on **Joseph Ndungu Kagiri –vs- Republic (supra)**. He further submitted that failure to the effect that failure by the court to enquire as to whether the accused persons were ready to proceed notwithstanding the absence of their advocate fell short of the requirements of article 3(1) of the Constitution as for the duty to respect, uphold and defend the constitution and reliance to that respect was made on **James Otieno Kamunge –vs- Republic (2009) eKLR**.

8. Ms. Mati for the respondent in her submissions reiterated the contents of her replying affidavit to the effect that the petitioners were afforded a fair hearing and that right to have an advocate is not absolute provided the court fairly dealt with the applications for adjournment.

C. Issues for Determination

9. This petition challenges the acts of the 2nd respondent in the proceeding relating to the hearing of the defence case on 14th to 15th February

2019 and 25th to 27th February 2019 alleging breach of the petitioners' constitutional rights under Article 27 (1) (2) and (3), 28 and 50(1)(a) (g)(h)(k) and (j) of the Constitution. The issues for determination are whether the acts of the 2nd respondent violated the rights of the petitioner in regard to Articles 27, 28, 50(1) and (2) of the Constitution.

i. Background facts

10. It is noted that only five (5) accused persons out of eight (8) Runyenjes SPM Anti-Corruption Case No. 1 of 2015, filed this petition. The five(5) follow in this order the petitioners are the 5th, 1st, 2nd, 3rd and 4th accused persons in the said case herein being the 1st, 2nd, 3rd, 4th and 5th petitioners.

11. Due to the facts of this petition, it is important that the background facts of this case be stated at this stage. The plea in this case was taken on 18/02/2015 about one (1) year since the first appearance in court of some of the accused persons. The case of the prosecution commenced on 23/06/2016 and was closed on 27/06/2017. The defence case was then fixed for hearing and on the said date, the defence made an application to terminate the proceedings relying on the **Court of Appeal Case no. 102 of 2016 Eng. Michael Sistu Mwaura Vs EACC, DPP, AG, and National Police Service (NPS)**. The trial court gave its ruling on 5/12/2017 dismissing the application.

12. The defence took the matter to the High Court which upheld the magistrate's ruling in its ruling delivered on 15/11/2018 declining to terminate the criminal proceedings. An appeal was filed in the Court of Appeal in Civil Appeal No. 11 of 2018. The appeal was dismissed with instructions that the trial before the 2nd Respondent the Senior Principal Magistrate Runyenjes Anti-Corruption case must proceed for hearing and concluded without further delay.

13. This petition was filed on 18/04/2020 after the defence case had been closed and the case slated for judgment on 29/04/2019. The petitioners obtained preservative orders to maintain the status quo pending the hearing and determination of this petition.

14. The ruling for adjournment made and delivered on 14/02/2019 was precipitated by the absence of the 3rd petitioner in court on that day. His advocate Mr. Nzioka applied for adjournment on grounds that his client was unwell and was on bend rest. It was said that the 3rd petitioner was on bed rest and medical treatment notes were produced. The prosecution opposed adjournment on grounds that the court ought to proceed with the defences of the other accused persons and put the defence of the 3rd petitioner on hold.

15. The trial court in its ruling observed that the medical records showed that the petitioner had elevated blood pressure but there was no comparative indications or even any drugs prescribed by the doctor. The court then gave a brief history of the delay in the trial caused by continuous adjournments by the accused persons. The defence alone had dragged for 19 months since the accused persons were put on their defences. The court emphasized on the need for expeditious disposal of anti-corruption cases which by their very nature require to be fast-tracked by hearing on day to day basis.

16. The court further stated that the 3rd petitioner had failed to attend court earlier and a warrant of arrest had been issued and later lifted after he gave an explanation in court. The trial magistrate further stated that she was on transfer and having extensively dealt with the case, she was desirous of concluding the said case expeditiously. The court finally ruled that the case proceeds in the absence of the 3rd petitioner who was absent since the other seven (7) accused persons were present and ready to proceed. The case then proceeded with two defence witnesses testifying and were duly re-examined by the advocate for the 3rd petitioner as required by the law. This was on 14th and 15th February 2019.

17. On 25/02/2019, all the accused persons were present in court being the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th accused persons and who include the petitioners herein. All the accused persons except the 6th accused applied for adjournment giving similar reasons that their advocates were engaged in other courts on that day. The prosecution opposed all the applications on grounds that the particulars of the relevant courts and cases were not given; that the advocates were present when the dates for hearing were given; that the case had delayed due to the defence applications for adjournment. The prosecution also argued that there was dire need to conclude the trial due to its nature being an anti-corruption case.

18. The court in its ruling cited a host of previous adjournments granted on an application by the defence and referred to the court rulings that expressed concern on delays caused by the defence in the trial. The court noted that the hearing dates for the defence case were taken in presence of all the defence counsels who had taken time in court to confirm that the dates were available in their diaries. The court declined to grant adjournment and proceeded to take the defence of several accused persons including the 3rd and 4th petitioners.

19. The 3rd petitioner said he had given his defence earlier and was only coming for re-examination while the 4th petitioner said he was unable to give his defence because his advocate was not in court. The defence case then proceeded for the next two days but with the 4th and 5th accused persons opting to say nothing. These are the 1st and 5th petitioners herein.

D. Analysis of the Law and Evidence

20. In relation to **Article 27 (1), (2) and (3) and 28**, it provides: -

“27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural

and social spheres.”

21. Article 28 on the other hand provides that: -

“Every person has inherent dignity and the right to have that dignity respected and protected.”

22. It is now an established principle of law that anyone who petitions a court to grant a relief for violation of a right or fundamental freedom, must plead in a precise manner the constitutional provisions said to have been violated or infringed, the manner of infringement and the jurisdictional basis for it. This was stated in the case of Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154 where the Court stated: -

“ if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important(if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

23. This principle was emphasized by the Court of Appeal in Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR, where it stated that: -

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

24. Articles 27 of the constitution provides :-

Equality and freedom from discrimination. Every person is equal before the law and has the right to equal protection and equal benefit of the law. A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause

25. Article 50 of the Constitution of Kenya embodies the principle of natural justice which provides that every accused person has a right to a fair trial. ... The parties in court have a right under the Kenyan Constitution to a fair hearing before an impartial court, which reaches its decision on the basis of law alone.

26. The petitioners herein only cited Article 27(1), (2) and (3) and 28 of the Constitution but did not make any attempt to explain how and in what manner their rights were violated. I therefore have no material before me to interrogate the alleged violation.

27. In relation to Article 50(1) and 50(2)(a)(g)(h)(k) and (j), the petitioners' case was that the failure by the trial court to adjourn the defence hearing, amounted to a breach of their rights under the said provisions. It is worth pointing out the said Article 50 has two facets – fair hearing under Article 50(1) and fair trial under Article 50(2) of the Constitution. In respect to the right to fair hearing, *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 and impartial tribunal or body.* This Article speaks to the right to access a court of law that is independent and impartial which provided for under Article 48 of the Constitution.

28. The right to a fair trial is one of the rights which is inalienable as provided under Article 25 (c) of the Constitution. As such when an accused alleges a violation of right to fair trial the court must do a thorough enquiry to determine whether indeed the right has been violated. The rights allegedly violated under Article 50(2) (right to a fair trial) are: the right to be presumed innocent until the contrary is proved; to choose and be represented by, an advocate, and to be informed of this right promptly; 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; to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence and to adduce and challenge evidence. The petitioners deposed that these rights were violated and their contestation being the fact that the court as it proceeded in the absence of their advocates.

29. It is noted that the petitioners did not plead as to how their rights under articles 50(2)(a) and (j) were violated and as relying on the dictum in Anarita Karimi Njeru v Republic (supra) and Mumo Matemo v Trusted Society of Human Rights alliance (supra), applies that the alleged violation under the said articles has not been established. It is not in dispute that the criminal case giving rise to this petition was at the defence stage with the prosecution having closed its case and as such, there is no way the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence cannot have been violated. These rights in my view had been spent during the earlier part of the trial.

30. It is noted that the petitioners herein were all represented by advocates throughout the trial. The right to have an advocate assigned to the accused person by the State and at its expense, if substantial injustice would otherwise result, and to be informed of this right promptly under article 50(2)(h) cannot therefore be said to have been violated as the said rights were never available to the petitioners. The right to legal representation to an accused person by the State and at the State's expense crystallizes when substantial injustice would otherwise result as was held in the case of David Macharia Njoroge vs. Republic (2011) eKLR and Karisa Chengo & 2 Others vs. Republic Criminal Appeal Nos. 44, 45 and 76 of 2014. The petitioners were all represented by advocates hired by them from the date of plea to the close of the trial and as such the right to legal representation by the state was not available.

31. As for rights under Article 50(2)(g) and 50(2)(k), that were allegedly violated, to wit right to choose, and be represented by, an advocate,

and to be informed of this right promptly and right to adduce and challenge evidence, this court will interrogate the proceedings of the trial court during the relevant dates that are the bases of this petition.

32. On 14/02/2019, the coram indicates that all the accused persons were present in court save for the 4th Petitioner herein. However, Mr. Nzioki for the 3rd and 4th petitioners applied for adjournment on the basis that the 3rd petitioner was unwell. He invoked Article 50(2) of the Constitution in that the court ought not to proceed in the absence of his client. However, the court declined to allow the application and in doing so noted that many times the matter had been adjourned and that all the other accused persons were ready to proceed save for the 3rd petitioner. The adjournment was declined and the matter proceeded in relation to the other accused persons who were present including the petitioners herein. The learned magistrate explained that her decision to decline the application for adjournment was in the interest of justice in furtherance of guarding the right to fair trial of the other accused persons under Article 50 which guarantees fair and expeditious determination of matters.

33. The record shows that it was only the 3rd petitioner was absent on 14/02/2019 while all the other four and three accused persons not in this petition were present in court as well as their advocates. The 3rd petitioner's advocate was present and he did cross-examine the defence witnesses who testified on the material day. It cannot be said that the petitioners were denied their rights to choose, and be represented by, an advocate, and to be informed of this right promptly under Article 50(2)(g) as well the right to adduce and challenge evidence under Article 50(2)(k). These rights had been spent since the trial was at an advanced stage.

34. In declining adjournment, the 2nd respondent exempted the 3rd petitioner from giving his defence on that particular day which portrayed fairness and impartiality the part of the court. The other accused persons who were ready to proceed were directed to do so despite the absence of the 3rd petitioner. As I have stated earlier, Mr. Nzioki counsel for the 3rd petitioner re-examined the defence witnesses who gave evidence on that day. This being the position, I find that the 3rd petitioner who was given an opportunity to give his defence on the next hearing date has not demonstrated that his constitutional rights to a fair hearing were violated.

35. On 25/02/2019 none of the petitioners' advocates was present and the petitioners applied for adjournments giving reasons as to why the said advocates were not in court. However, the trial court declined the application to adjourn the case which proceeded for hearing with some of the petitioners indicating to the court that they would not testify as their advocates were absent.

36. The petitioners relied on the case of **Joseph Ndungu Kagiri v Republic [2016] eKLR** -

“In criminal trials, the quest for a shorter process isn't necessarily better. Issues or evidence which matters can be missed. Procedures designed to safeguard rights can be truncated and can lead to unfair trials, subsequent appeals and more costs and waste of valuable time as we have experienced in this matter. The effect is that such hurried trials are "Not so efficient after all." Accused persons may be prevented from properly exercising their rights to put their case, a position entrenched in our criminal justice system, long upheld by common law and enshrined in Article 50 of our constitution.”

37. The trial court in declining the adjournment cited delay of the defence case that had taken more than two years due to several adjournments instigated by the defence. She also emphasized that the advocates were present during the fixing of the dates and confirmed availability. All the accused persons except the 6th accused were not represented in court on the material day. It is important to note that the 6th accused and his advocate Mr. B. G. Kariuki were present and ready to proceed. The trial magistrate noted that the defence was to blame for the delay and indicated her desire to conclude the defence case without further delay. This was within the noble duty of the court to ensure expeditious disposal of cases.

38. It is noted that the trial magistrate proceeded very well with the case from inception demonstrating her commitment to the principle of expeditious disposal of cases and heard the case from day to day where it was possible to do so. The 2nd respondent's industrious nature in executing her duties as a judicial officer is notable from her rulings on applications for adjournments which I must say is commendable.

39. It is not in dispute that as the magistrate said in her rulings indirectly pointed to a deliberate plot by the defence to delay the case for reasons that did not convince the court that there was sufficient cause for adjournment to be granted. Indeed, the trial magistrate stated that several applications and petitions filed in superior courts were designed to delay the trial. One of the said applications found its way to the Court of Appeal in **Criminal Appeal No. 11 of 2018 at Nyeri Harambee John Gikingo Vs DPP** whereas the Court of Appeal expressed itself on the need for expeditious disposal of cases relying on Article 50(2)(c) regarding the right to begin the trial and conclude it without reasonable delay.

40. The Court of Appeal also expressed itself on the element of public interest being of paramount consideration in criminal trials and especially in anti-corruption cases like the one facing the petitioners herein. The said appeal had challenged the ruling of the High Court in its refusal to stay proceedings in this same case that has remained pending for over seven (7) years.

41. With that background, I proceed to determine whether the rights of the petitioners were violated by the 2nd respondent in declining to allow adjournment on application by the petitioners whose advocates were absent on 25/02/2020.

42. It is trite law that the discretion to grant or refuse adjournments is within the ambit of the trial court. It must be borne in mind that an application for adjournment must be supported by reasons that sufficiently explain the absence of an accused person or his advocate in court on the day under review. It is trite law that trial court is under no obligation to grant an adjournment if it is not convinced that the application is supported by good and credible reasons. The constitutional rights of all the accused persons in the case must be taken into consideration in granting or refusal of adjournment. A situation where one or two accused persons are likely to delay the trial of the rest by frequent adjournments that are not justified must be avoided at all costs.

43. The 1st petitioner depones in her affidavit that when the defence case was fixed for hearing, her advocate had indicated that he would be engaged before the High Court and courts of equal status in matters whose dates were fixed prior to 15/02/2019. In his submissions, the counsel Mr. Gikonyo told the court that the defence counsels had indicated their unavailability on 25/02/2019 to 01/03/2019 to the court when fixing the dates but the court did not record their objections. The 2nd petitioner made a similar allegation. These two petitioners and their advocates did not give the dates they had indicated before the court to be available or convenient to them. Why was this information not included in this important petition?

44. The trial magistrate in declining to grant the application for adjournment on 25/02/2019 said that the hearing dates were taken in presence of all the accused persons and their advocates. The practice in courts is that before a date is taken, the parties present and especially advocates must confirm availability of the dates proposed by the court. The court will normally give an indication from its diary of the available dates and let the counsels confirm from their diaries which dates they will be available. It is on record that all the petitioners and their advocates were present on the date the hearing dates for further defence case were taken.

45. I find no reason to doubt the record of the trial court and the fact that the dates for the defence case were agreed on by the accused persons and their advocates. The allegations by the 1st and 2nd petitioner that their advocates said they were not available on the proposed dates are not supported by the record. If the petitioner's version was correct, their advocates would have raised the issue on the spot. The allegation was raised in their affidavits long after the defence case had proceeded and closed and a date for judgment set. I find no basis in these allegations against the 2nd respondent and conclude that the same were designed after the close of the entire case for purpose of filing this petition whose end result was to cause further delay of the trial.

46. I find the absence of advocates for the five (5) petitioners who were present at the time of fixing the hearing dates a very interesting coincidence. It is incredible that all of the counsels on record for the petitioners were engaged in other courts having taken the dates that were convenient to them in open court. It was submitted that these advocates were in superior courts but the record of the court for the 25/02/2019 does not support this submission.

This is what the petitioners said:-

1st Petitioner – *My advocate is in other courts*

2nd Petitioner – *My advocate is in High court matter*

3rd Petitioner – *My advocate is in Makueni Law courts*

4th Petitioner- *My advocate is in the High Court at Makueni and MPs*

5th Petitioner – *My advocate is in other matters*

47. The record shows that the defence case proceeded for three days from 25/02/2019. Even assuming that the counsels were unable to attend court on the first day. It would be expected in this noble profession that one or two counsels would have shown up the following day to check on the fate of their clients cases. Was there a common design to delay this case? After the 2nd respondent explained the right of defence to them, the petitioners whose advocates were absent opted to say nothing in defence. This is still an option under Section 211 of the Criminal Procedure Code which is a right an accused person is entitled to in defence.

48. The petitioners opted to say nothing in defence. I am aware that this is still an option under Section 211 of the Criminal Procedure Code and it is a right to which an accused person is entitled to. In determining whether the petitioner's rights of fair trial and fair hearing were violated, the court has to take into consideration all the circumstances surrounding the actions of the 2nd respondent during the trial as well as those of the defence.. The defence argued that the 2nd respondent conducted a rushed trial which led to the violation of the petitioner's rights. The record shows that several adjournments had be allowed before the matters herein arose. The conduct of the defence in its entirety on 25/02/2019 does not portray good faith on their part. The trial court in declining to grant adjournment gave reasoned ruling that brings out the history of delay which may have been designed for reasons not known to the court but which existed and was a cause of concern to the trial court.

49. In **F U M v Republic [2015] eKLR**, the Court of Appeal (P.N. Waki, R. Nambuye and P.O Kiage JJs) while agreeing with the decision of trial court to deny the Appellant an

adjournment held as thus: -

“Is there substance in the appellant’s criticism against the learned judge that she improperly denied him an adjournment thereby scuttling his chance to mount a defence? We respectfully disagree. An accused person is of course entitled to apply for an adjournment, but the grant of it is not automatic. It is at the discretion of the court, to be exercised upon principle and reason. The Criminal Procedure Code provides for adjournments of proceedings at the High Court in the following terms;

“S 283(1) If, from the absence of witnesses or any other reasonable cause to be recorded on the proceedings, the court considers it necessary or advisableto adjourn a trial the court may from time to time adjourn it on such terms as it thinks fit for such a time as it considers reasonable.....”

50. The mere fact that the trial magistrate said she was going on transfer is evidence of her commitment to expedite the trial but it does not

support the petitioners' arguments of a hurried trial. A trial that had been pending for a period of five (5) years due to frequent adjournments by the defence cannot be said to have been rushed. In my considered view the petitioners were not prevented from properly exercising their rights under the Constitution by the 2nd respondent's refusal to grant adjournment.

51. This is not a case where the trial magistrate just decided to proceed in the absence of the counsels for the sake of it. I am convinced that the reasons for declining adjournment by the 2nd respondent on 25/02/2019 were well grounded and do not amount to violation of the petitioners' constitutional rights under Article 50(2) of the Constitution. As such, I find that the petitioners have failed to establish violation of any rights by the 2nd respondent under the articles under review.

52. I find no merit in this petition and dismiss it accordingly.

53. Each party to meet their own costs.

54. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF NOVEMBER, 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Mati for 1st Respondent

Ms. Njenga for Siro for 2nd, 3rd

Mr. Kibue for 2nd Petitioner and holding brief for Mr. W. Gikonyo for 1st petitioner and holding brief for Mr. Nzioki for 3rd, 4th, 5th Petitioners