



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**CONSTITUTIONAL PETITION NO. 42 OF 2019**

**IN THE MATTER OF: ARTICLES 2(1), 2(5) & (6), 3, 10, 19, 20 (1) & (2), 21 (1), 22, 23, 25 (c),**

**48, 50 (1) (6), 159 (1), 165 AND 258 (1) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF: ARTICLE 14 OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS**

**AND**

**IN THE MATTER OF: ARTICLE 7 OF THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS**

**AND**

**IN THE MATTER OF: ARTICLE 10 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS**

**AND**

**IN THE MATTER OF: RULE 4 OF THE CONSTITUTION OF KENYA (PRACTICE AND PROCEDURE RULES)**

**AND**

**IN THE MATTER OF: CRIMINAL APPEAL NUMBER 199 OF 2016, COURT OF APPEAL AT NAIROBI**

**AND**

**IN THE MATTER OF: THE CRIMINAL APPEAL NUMBER 20 OF 2012, HIGH COURT OF KENYA, MACHAKOS**

**AND**

**IN THE MATTER OF: SEXUAL OFFENCES ACT CASE NUMBER 17 OF 2011, AT KITHIMANI, PRINCIPAL  
MAGISTRATE'S COURT**

**BETWEEN**

**JWM.....1<sup>ST</sup> PETITIONER**

**THE ENYS NATIONAL COMMISSION ON HUMAN RIGHTS...2<sup>ND</sup> PETITIONER**

**AND**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONFENT**

JUDGEMENT

Petitioner's Case

1. The 1<sup>st</sup> Petitioner, **JWM**, is a male Adult of sound mind, currently incarcerated at the Kamiti Maximum Prison in Nairobi County within the Republic of Kenya. He is the accused in the subject proceedings of this retrial petition. The 1<sup>st</sup> Petitioner presents this Petition in his own capacity as a person in terms of Articles 22(1) and 258(1) of the Constitution and persons with an obligation to respect, uphold and defend the Constitution in terms of Article 3 of the Constitution;
2. The 2<sup>nd</sup> Petitioner herein is the **Kenya National Commission on Human Rights**, (KNCHR) a Constitutional Commission established pursuant to Article 59 of the Constitution of Kenya and operationalized under the Kenya National Commission on Human Rights Act (KNCHR Act), No. 14 of 2011 with its core mandate being the promotion and protection of human rights in Kenya. The 2<sup>nd</sup> Petitioner has filed this Petition pursuant to its mandate under Article 59 and Section 8 of the **Kenya National Commission on Human Rights Act**, No. 14 of 2011 and Article 249 of the constitution to enhance the realization of human rights and to protect the sovereignty of the people of Kenya and promote among others, constitutionalism, rule of law and democracy.
3. The 1<sup>st</sup> Respondent is the Honourable Attorney General of the Republic of Kenya and the Chief Government legal adviser who is enjoined in this Petition in that capacity pursuant to the provisions of Article 156(4) (b) of the Constitution of Kenya.
4. The 2<sup>nd</sup> Respondent is the Office of the Director of Public Prosecutions, an independent office established under Article 157 of the Constitution of Kenya and charged with the conduct of criminal prosecutions in Kenya. The 2<sup>nd</sup> Respondent was at all material times responsible for the prosecution of the 1<sup>st</sup> Petitioner herein.
5. The facts of this petition are largely not in dispute. According to the 1<sup>st</sup> Petitioner, who testified as PW1, he was tried and convicted of the offence of Incest contrary to section 20(1) of the **Sexual Offences Act No.3 of 2006** in Kithimani Principal Magistrate's Court Sexual Offences Case No. 17 of 2011, the particulars being that the 1<sup>st</sup> Petitioner defiled **DMW**, his biological daughter who was aged 15 years at the time. Though he pleaded not guilty, he was found guilty, convicted and sentenced to life imprisonment. Dissatisfied with the said conviction and sentence and he appealed to the High Court of Kenya at Machakos vide High Court Criminal Appeal No. 20 of 2012 which appeal was dismissed on 28<sup>th</sup> October 2014. Still not satisfied with the said decision, the Petitioner preferred a second Appeal to the Court of Appeal at Nairobi namely Court of Appeal Criminal Appeal No. 199 of 2016.
6. According to the Petitioner, during the pendency of the said second appeal, **DMW**, the alleged victim of the incest who had testified as Prosecution Witness 1 at the trial court while she was still a minor swore an affidavit retracting her evidence in Kithimani Principal Magistrate's Court S.O.A Case 17 of 2011 aforesaid, which evidence she declared as completely false and a fabrication. In recanting her aforesaid false testimony, the said **DMW** categorically stated out of her own volition and conscience that she was never defiled by the 1<sup>st</sup> Petitioner herein at all.
7. According to the petitioner, in further recanting her said testimony, the said Victim explained conscientiously that the 1<sup>st</sup> Petitioner herein never committed the crime of incest against her and the prosecution against him was totally malicious, a sham and a hoax which she regrettably cooperated with for fear of perils threatened by her mother on whom she was dependent and the friends who were helping her in this malicious enterprise. The said **DMW** has explained categorically that she was never defiled by the 1<sup>st</sup> Petitioner herein and the testimony she gave during his trial aforesaid was based on the coaching that she was given by her biological mother, **JN**, who had separated from the 1<sup>st</sup> Petitioner herein owing to marital disputes and misunderstandings. According to the Petitioner, the said affidavit of **DMW** corroborates the entire defence theory of the facts raised by the 1<sup>st</sup> Petitioner at the time of trial in Kithimani Principal Magistrate Court S.O.A Case No. 17 of 2011.
8. It was pleaded that the 1<sup>st</sup> Petitioner's second appeal aforesaid was dismissed by the Court of Appeal on 25<sup>th</sup> October 2019 on the basis that it could not take additional facts which had emerged after his first appeal on mixed facts and law, since this appeal was a second appeal only on points of law. It was therefore contended that the 1<sup>st</sup> Petitioner has therefore exhausted his appeals and has no further avenues to ventilate any plea for a re-consideration of this new and compelling piece of evidence which was not available to the 1<sup>st</sup> Petitioner during the time of his trial and first appeal. It was on this basis that the 1<sup>st</sup> Petitioner moved this court seeking an order of retrial under article 50(6) of the Constitution.
9. It was the 1<sup>st</sup> Petitioner's view that it is in the interests of justice that the new and compelling evidence be carefully and vigorously tested in a new trial as envisaged under Article 50(6) of the Constitution.
10. In support of the petition, the Petitioners called three witnesses who testified during the *viva voce* hearing on 14<sup>th</sup> July 2020. The 1<sup>st</sup> Petitioner and **DMW** testified as Petitioners' Witness (PW 1 and 2 respectively and adopted in their entirety their affidavits sworn on 11<sup>th</sup> December 2019. According to PW2, the alleged victim, **DMW** also known as **FMW**, she was the third biological child of the Petitioner/Applicant herein born on 6<sup>th</sup> May 1996. At the time of swearing the affidavit in support of the petition, she was 23 years old, independent both in spirit and mind, better endowed with a sense of right and wrong and fully responsible for her utterances, actions and decisions. According to her, her mother, **JN**, who was the 1<sup>st</sup> Petitioner's wife maliciously instigated Kithimani Principal Magistrate's Court S.O.A Case No. 17 of 2011 against the 1<sup>st</sup> Petitioner herein on her behalf as my guardian-parent as she was a minor at the time. Consequently, the 1<sup>st</sup> Petitioner herein was charged with incest contrary to section 20(1) of the **Sexual Offences Act**, No. 3 of 2006 on account of having allegedly defiled PW2. PW2 however averred that the 1<sup>st</sup> Petitioner did not ever commit the crime of incest against her,

and the prosecution against him was totally malicious, a sham and a hoax with which she regrettably cooperated for fear of perils threatened by her mother and the friends who were helping her in this malicious enterprise.

11. She disclosed that prior to his arrest and prosecution, the 1<sup>st</sup> Petitioner herein had a series of misunderstandings and a tempestuous relationship with my mother culminating in their separation in 2007 and the Appellant's subsequent re-marriage in 2008 which greatly displeased her mother. Some time in April 2011, her mother sent their elder Sister, **MM**, to collect her sister **AMW** and herself from their upcountry home at Kithimani in Machakos County to live with her in Nairobi. While staying with her mother, her mother informed her that their father the 1<sup>st</sup> Petitioner/Applicant herein had purchased two parcels of land within Kithimani area of Machakos County for themselves and his second wife respectively which the mother informed PW2 that the mother wanted to own. The mother informed her that she would use her younger sister, **AMW**, and PW2 to accuse the father of defilement and required their cooperation.

12. It was deposed that the aforesaid accusation was entirely false, and the subsequent prosecution wholly malicious and was calculated to culminate in the 1<sup>st</sup> Petitioner/Applicant's detention to pave way for the mother to sell off the aforesaid parcels of land. In order to achieve this, the mother coached her and her said younger Sister on what to say in court when called as witnesses and took her to her maternal grandmother's place in Mamba sub-location, Kithimani, Machakos County where she was further coached on what to say in court. When she appeared in court shortly before she gave my false testimony, she was taken to a small cubicle in the men's washroom where she met an armed police officer and a person she was informed was a doctor where she was instructed under threat and coercion by her Mother and the police officer to reiterate that the 1<sup>st</sup> Petitioner/Applicant herein defiled her or face unspecified consequences. Because she was a minor she did as she was told by her mother who was her guide and on whom she was by then dependent for all her needs.

13. Upon being called in as Prosecution Witness 1, during the aforesaid trial, she gave false evidence to the effect that the 1<sup>st</sup> Petitioner had defiled her as had been coached and instructed. It was her averment that she gave the aforesaid evidence involuntarily as a consequence of the said threats and coercion and based on that evidence, the Senior Resident Magistrate, Kithimani Court delivered Judgment on 24<sup>th</sup> January 2012 in which her father, the 1<sup>st</sup> Petitioner/Applicant herein, was convicted and sentenced to life imprisonment. According to her, she did not fully understand what was happening at the time including what had happened to my father, the Appellant herein and it was only later that she learnt through her elder Sister, **MM**, that her father had been imprisoned for having defiled her, a crime he never committed and was serving his jail term at Kamiti Maximum Prison.

14. PW2 deposed that the guilt for having given false testimony against her father had been tormenting me since, and she made a conscious decision as an adult to confess her lies, cost her what it may, and seek forgiveness because she is truly penitent and have been traumatized to see her father suffering while he is innocent because of the lies she told against him. After serious soul searching and reflection, she decided to apologize to the 1<sup>st</sup> Petitioner/Applicant herein for the aforesaid false testimony and visited Kamiti Maximum Prison on diverse dates in 2015 to meet and apologize to the 1<sup>st</sup> Petitioner/Applicant herein but was turned back because she did not have a National Identity card. However, during one of her visits to Kamiti Maximum Prison in 2015, she was received by a compassionate officer who saw her grief and listened to her and took her to **Mr. Henry Kisingo**, then the Officer-In-Charge of the said prison and upon explaining her problem to him, the said **Mr. Kisingo** called in the 1<sup>st</sup> Petitioner to his office where she revealed the truth to him for the first time in his presence. She later visited the Nairobi newspaper and explained what transpired before and during the trial of the 1<sup>st</sup> Petitioner and her story was published in its issue dated 10th-16th February 2017 at Page 9 of the said publication under the title "Daughter denies imprisoned dad raped her". In a further effort to reveal the truth, she contacted Citizen TV in 2018 and after hearing from herself and the 1<sup>st</sup> Petitioner, Citizen TV carried a story dubbed "Prison Diaries: Daughter Confesses Framing Father" that was aired on 17<sup>th</sup> March 2019.

15. According to PW1, the public nature of her confession has stigmatized her, alienated her from her family and lost her many friends, and it pains her to have to expose her own mother so publicly, but she knew she would be peace less until she told the full truth and sought the forgiveness of her father, the 1<sup>st</sup> Petitioner and this court for what she did as a misguided child. She expressed her readiness and willingness to attend court and state and clarify the foregoing in person.

16. **AMW**, who testified as PW 3 adopted in its entirety her affidavit sworn and notarized on 22<sup>nd</sup> June 2020.

17. According to the said affidavit, she was the 4<sup>th</sup> and last born biological child of the 1<sup>st</sup> Petitioner and at the time of the proceedings in Kithimani Principal Magistrate's Court, S.O.A Case No. 17 of 2011, she was a minor aged 10 years and testified against the 1<sup>st</sup> Petitioner herein as Prosecution Witness 2. However, at the time of swearing the affidavit in support of the petition, she was 19 years old and according to her, she was independent both in spirit and mind, better endowed with a sense of right and wrong and thus fully responsible for her utterances, actions and decisions.

18. At the time of the trial, her sister, the alleged victim of the incest was aged 15 years and also testified against the 1<sup>st</sup> Petitioner. She disclosed that prior to his arrest and prosecution, the 1<sup>st</sup> Petitioner herein had a series of misunderstandings and a tempestuous relationship with **JN**, her biological mother, culminating in their separation in 2007 and the 1<sup>st</sup> Petitioner's subsequent re-marriage in 2008 which greatly displeased her mother. Some time in April 2011, her mother sent her elder Sister, **MM**, to collect the said alleged victim, **DMW**, and herself from their upcountry home at Kithimani in Machakos County, Kenya to live with her in Nairobi and during their stay with their mother at Nairobi, their mother informed her that she would be called as a witness in court and coached her and her said elder Sister on what to say in court.

19. She deposed it was as a result of the foregoing that she testified against the 1<sup>st</sup> Petitioner in the said case. After being warned to stick to the narrative after being thoroughly coached and expressly ordered to say that she saw the 1<sup>st</sup> Petitioner defile the alleged victim. She further disclosed that she was threatened by her mother and a police officer then attached to Kithimani Police Station with unspecified dire consequences if she did not co-operate.

20. She asserted that she never at any time witnessed the 1<sup>st</sup> Petitioner herein commit the alleged incest against the alleged victim and

averred that the prosecution against him was actuated by unbridled malice on her mother's part. It was her belief that the conviction of the 1<sup>st</sup> Petitioner was based on her false testimony which she recanted in full and unambiguously. According to her, she did not fully understand what was happening at the time including what had happened to my father, the 1<sup>st</sup> Petitioner herein and that since the 1<sup>st</sup> Petitioner's conviction, she had neither seen nor contacted the 1<sup>st</sup> Petitioner. However, after serious soul searching and reflection as an adult, she decided to state the truth that she never witnessed the alleged defilement and apologize to the 1<sup>st</sup> Petitioner for the aforesaid false testimony.

21. In cross-examination, PW2 and PW3 maintained that they were coached on what to say at the 1<sup>st</sup> Petitioner's trial and maintained that they had conscientiously decided to present the accurate and true account of events at the trial aforesaid.

### **Petitioners' Submissions**

22. The Petition is founded on Article 50(6) and according to the Petitioners the following issues fall for determination:

- a) *The threshold for a re-trial under Article 50(6) of the Constitution;*
- b) *Whether (or not) the 1<sup>st</sup> Petitioner has met the threshold under Article 50 (6); and*
  - i. *Has the Petitioner exhausted his appeals as contemplated under Article 50(6) (a) of the Constitution?*
  - ii. *Should the Petitioner have appealed to the Supreme Court before filing the instant Petition?*
  - iii. *Is there new and compelling evidence?*
- c) *Whether (or not) the Petitioners are entitled to the reliefs sought*

23. The Petitioners submit that as part of the existential right to a fair trial, a convicted person who discovers new and compelling evidence that casts doubt as to the safety of his/her conviction has the right to challenge such conviction by way of seeking a re-trial. This right to petition for a re-trial, is not extinguished by his/her failure to prefer an appeal against the conviction. The Petitioners further submitted that re-trials are merited and should *ex debito justitiae* be ordered in cases where wrongful convictions have occurred or substantial evidence of innocence comes to light or simply because justice should be done when it is necessary to do so. In support of their submissions, they relied on the case of **Philiph Mueke Maingi vs. R [2017] eKLR**. According to the Petitioners, this Court appreciated the fact that despite the conduct of a fair trial, wrongful convictions can and do occur and further that even after a verdict is given, substantial evidence of innocence might be discovered. The Court made it clear that for a Petitioner to properly invoke the jurisdiction under Article 50(6) of the Constitution, he/she has to satisfy the condition therein.

24. It was submitted by the Petitioners that the threshold for a re-trial is as provided for under Article 50(6) of the Constitution and further that the High court as a custodian of justice has the inherent jurisdiction to order a re-trial to correct significant errors that happened during trial or if substantial new evidence of innocence comes to light and reliance was placed on **Tom Martins Kibisu vs. Republic [2014] eKLR** and **Patrick Macharia vs. Republic [2014] eKLR**.

25. It was the Petitioners' position that the threshold for a re-trial under Article 50 (6) of the Constitution has been satisfied. According to the Petitioners, the provisions of Article 50(6) (a) are clear and should be given their plain and ordinary meaning. The Constitution contemplates a situation where a petitioner's appeal (**if any**) has been dismissed by the highest court to which he is entitled to appeal **or in the alternative** the Petitioner did not appeal within the time stipulated in law. Accordingly, Article 50(6) presents different scenarios that include a situation whereby a Petition did not appeal to the highest court within the time stipulated in law. In this case the 1<sup>st</sup> Petitioner herein appealed to the High Court and the Court of Appeal and both appeals were dismissed. He did not appeal to the Supreme Court of Kenya within the time stipulated in law and has thus satisfied the requirements of Article 50(6) (a).

26. The Petitioners submitted that in **Jona Ngala Kilimbi vs. Republic [2016] eKLR**, a two judge bench of the High Court found that a Petitioner only required to demonstrate that he appealed and lost **or** did not appeal within the time provided in law. The Court upon interrogating the circumstances of the case was satisfied that the threshold under Article 50(6)(a) of the Constitution was met.

27. It was submitted that an appeal to the Supreme Court is not automatic in criminal cases. Since the objective of the criminal justice system is primarily to punish for crimes committed against the state, the Appellate courts in a criminal trial are primarily concerned with the safety (or otherwise) of the Appellant's conviction. The criminal justice system is not meant to address constitutional petitions, allegations of breach of the Constitution or matters of constitutional interpretation. As such, only limited appeals within the meaning of Article 163(4) of the Constitution would lie to the Supreme Court. In this regard the Petitioners relied on **Tom Martins Kibisu vs Republic [2014] eKLR** in which the Supreme Court took the view that to properly invoke its jurisdiction under Article 163(4), the matters for constitutional interpretation being referred to the Supreme Court, should have substantively been issues for determination both at the High Court and the Court of Appeal and that such matters of constitutional interpretation should have progressed through the ordinary hierarchy of the courts to the Supreme Court. The Petitioners also relied on the finding by the same Court in **Aviation & Allied Workers Union of Kenya vs. Kenya Airways Limited & 3 others [2017] eKLR** where it (the Supreme Court) cited **Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 Others, Sup.Ct. Petition No. 10 of 2013**.

28. It was submitted that in **Aviation & Allied Workers Union of Kenya (Supra)**, the Supreme Court, in determining the Preliminary Objection that had been raised challenging its jurisdiction carefully analysed the questions of contestation before the High Court and the Court of appeal. The Supreme Court was dissatisfied that the issues raised before it had not progressed from the High Court through to the Supreme Court and thus upheld a preliminary objection against its jurisdiction.

29. The Petitioners submitted that there was no question of constitutional interpretation raised at the High Court. The Memorandum of Appeal at the High Court is clear that it challenged the evidence that the trial court had relied upon to convict the 1<sup>st</sup> Petitioner herein, it never raised any question of constitutional interpretation. The only question that involved the interpretation/application of the Constitution was for the first and only time raised at the Court of Appeal, and even then, it was not the crux of the 1<sup>st</sup> Petitioner's appeal. The question of constitutional application aforesaid revolved around the supply of witness statements and the 1<sup>st</sup> Petitioner's right to a fair trial. The Petitioners further relied on Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2020] eKLR, where the Supreme Court of Kenya made a finding that where matters of constitutional interpretation/application are introduced for the first time at the Court of Appeal and do not form the substratum of the appeal/finding by the Court of Appeal, this does not confer jurisdiction (on the Supreme Court) under Article 163 (4) of the Constitution.

30. It is the Petitioners submission that the Court of Appeal delved more into evaluating the evidence against him at the trial and not the interpretation/application of Article 50 of the Constitution and that indeed, in its Judgment the Court of Appeal focused more on an evaluation of the evidence adduced during the 1<sup>st</sup> Petitioner's trial. In determining the 1<sup>st</sup> Petitioner's second appeal, the Court of Appeal observed that he never raised the question of supply of witness statements during the trial and his first appeal. The Court evaluated the proceedings before the courts aforesaid and took the view that the 1<sup>st</sup> Petitioner herein was not at all prejudiced by the failure to be supplied with witness statements. Accordingly, the Court of Appeal never delved centrally into the interpretation of Article 50 of the Constitution.

31. The Petitioners' case was that the Court of Appeal, in the circumstances was the highest court to which he was entitled to appeal and that a further appeal to the Supreme Court could not meet the threshold provided for under Article 163(4) of the Constitution since there was no certification by the Court of Appeal that the matter was of broad and general public importance and there was no question of constitutional interpretation/application that had progressed from the High Court. In any event Article 50(6) of the Constitution contemplates a situation whereby no appeal is preferred, at all and the time for any appeal to the Supreme Court has since lapsed.

32. It was submitted that the right to a fair trial under Article 50 of the Constitution entails a speedy trial. It cannot have been the drafters of the Constitution that a convicted person who discovers new and compelling evidence after trial should do nothing with such evidence and instead appeal to the High Court through to the Supreme Court and later petition the High Court for a re-trial under Article 50 (6) of the Constitution. This is exacerbated by the fact that additional evidence on appeal is not adduced as of right and a petition for a re-trial is not a further appeal.

33. It was the Petitioners' case that the complete and unequivocal recantations by **DMW** and **AMW** of their testimony (in totality) as presented during the 1<sup>st</sup> Petitioner's trial amounts to new and compelling evidence.

34. According to the Petitioners, this Court has made similar observations in various cases including Wilson Thirimba Mwangi vs. Director of Public Prosecutions [2012] eKLR, Philip Mueke Maingi vs. Republic [2017] eKLR and James Macharia Anumbi vs. Republic [2017] eKLR where the Court having considered different authorities gave the key considerations to guide the determination of "new and compelling evidence"

35. It was submitted on behalf of the Petitioners that the material time is the time of the trial. Further, the recanted testimony in this matter first came to light in 2015 and 2020 being the recantations by **DMW** and **AMW** respectively. With the recantation having occurred way after his trial and his first appeal, it is clear that the new evidence was neither used nor ever considered at the trial and during his appeals as it simply never existed at the material time. According to them, it remains the unshaken/uncontroverted testimony of **DMW** that the first time she ever mentioned to the 1<sup>st</sup> Petitioner herein that the evidence she had given against him was false and a complete fabrication was in 2015 which averments remain unchallenged.

36. It was contended that **AMW** who had testified as prosecution witness 2 at the 1<sup>st</sup> Petitioner's trial and PW 3 in the instant Petition deposes, in her Affidavit, that she never witnessed any defilement. She recanted in full her evidence as presented at the trial and made it clear that she has never met nor contacted the 1<sup>st</sup> Petitioner herein since his conviction in 2012. Her testimony was not shaken during cross-examination and was never challenged nor controverted at all despite the 2<sup>nd</sup> Respondent having been granted 14 days (on 24<sup>th</sup> June 2020) for purposes of filing any response challenging the averments therein.

37. It was submitted that even with the exercise of all due diligence, there is no way the 1<sup>st</sup> Petitioner would have had knowledge of the new evidence at the material time (during his trial). The evidence had not come to light and when he knew of it, his first appeal, that would have granted him an opportunity to seek leave of the honourable court to adduce additional evidence, had since been dismissed in 2014. The 1<sup>st</sup> Petitioner nevertheless brought the existence of the new evidence to the Court of Appeal. Unfortunately, the Court of Appeal, by way of Order issued on 14<sup>th</sup> May 2020, ruled that by virtue of Rule 29 of the Court of Appeal Rules, it could not take any additional evidence on a second appeal as such appeals are limited to points of law only.

38. The Petitioners' case was that the new evidence is compelling. The said evidence is given voluntarily and out of a desire by **DMW** (the alleged victim of the incest) and **AMW** (the purported witness to the alleged defilement) to set the record straight and clarify what actually motivated the arrest, malicious and fabricated charges and subsequent trial of the 1<sup>st</sup> Petitioner herein. The new evidence contained in the recantation aforesaid remains unchallenged despite the Respondents having had knowledge of its existence and ample opportunity to respond thereto.

39. It was submitted that the 2<sup>nd</sup> Petitioner herein in discharge of its statutory mandate conducted investigations and critically reviewed the 1<sup>st</sup> Petitioner's trial and appeals, recorded his statement and interviewed **DMW**. From its interactions with the 1<sup>st</sup> Petitioner herein and **DMW**, as well as its professional analysis of the totality of the circumstances of the instant Petition, the 2<sup>nd</sup> Petitioner herein formed the considered view that the recantation of the said **DMW** was credible and completely consistent with the actions she became of independent mind and conscience.

40. In the circumstances, the Petitioners submitted that the evidence is not only new but also believable and thus compelling. It was however submitted that to succeed for a re-trial, the new and compelling evidence need not be incontrovertible. If a Petitioner satisfies the court that a reasonable trier of fact could in the context of the entirety of the evidence accept that the Petitioner could be innocent on a balance of probabilities, a re-trial should be granted. The 1<sup>st</sup> Petitioner herein was arrested, charged, tried and convicted of incest, the alleged victim of the said defilement and key prosecution witness at his trial has since consistently recanted her testimony and unequivocally stated that she was never at any time defiled by the 1<sup>st</sup> Petitioner herein. PW3, the alleged eye witness to the said defilement has also recanted her testimony stating categorically that she never witnessed any defilement. It was therefore submitted that this new evidence not only casts doubt on the safety of his conviction but is likely to result in a different outcome if a re-trial is granted and is thus compelling.

41. It was therefore contended that in light of the recantations, the trial process was fundamentally flawed. The false and completely malicious and fabricated evidence adduced at the said trial materially misled the prosecution and the trial court into believing that the 1<sup>st</sup> Petitioner herein was guilty of the charges. It was submitted that had this evidence been available at the time of trial, the verdict would have undoubtedly been different and further that there would have been absolutely no need to charge the 1<sup>st</sup> Petitioner in the first place. As such; the evidence in question is compelling. In support of this submission the Petitioners relied on **JNN vs. Republic [2019] eKLR**, where the alleged victim of incest and key prosecution witness at the Petitioner's trial recanted her testimony. The said victim explained the motive of the prosecution as a land dispute and that she had been coached on what to say in court. This court considered the recanted testimony and subsequent explanation as to the motive for which it was presented as qualifying to be new and compelling evidence and proceeded to order for a retrial. The High Court ordered a retrial after the Complainant retracted her testimony stating that the Petitioner in that case had never defiled her.

42. In the circumstances, it was submitted that recantations by the PW2 and PW3 (**DMW and AMW**) amount to new and compelling evidence that warrants judicial scrutiny through a re-trial and that the threshold under Article 50(6)(b) has been met.

43. It was further submitted that the uncertainty surrounding the medical evidence relied upon during the 1<sup>st</sup> Petitioner's trial herein renders the instant petition a proper case for a re-trial. The medical report was prepared on 18<sup>th</sup> April 2011 and **DMW**, the alleged victim had visited the hospital on 20<sup>th</sup> April 2011. Benjamin Maingi who testified as PW3 at the 1<sup>st</sup> Petitioner's trial aforesaid informed the trial court that there were such inconsistencies and observed during his evidence-in-chief that "*so the medical report was done even before examination*". He further explained that the "*child had been defiled more than one month ago because her hymen had healed completely.*" It was noted that the 1<sup>st</sup> Petitioner herein was charged with allegedly defiling **DMW** aforesaid on 10<sup>th</sup> April 2011. PW3, who testified that he saw **DMW** on 27<sup>th</sup> April 2011, formed the medical/expert opinion that **DMW** had been defiled more than a month ago. PW 3, by his medical/expert opinion clearly negates any possibility of defilement on 10<sup>th</sup> April 2011 (17 days prior to his examination of the alleged Victim) as alleged in the charge sheet. It was therefore submitted that owing to the limited jurisdiction of this Court in determining a Petition for a re-trial under Article 50(6), an opportunity to properly canvass these matters at a re-trial is not only merited and but also in the interests of justice.

44. According to the Petitioners, it is trite law that where there's a violation; there's a remedy. The 1<sup>st</sup> Petitioner submitted that he has succeeded in demonstrating that his trial was based on a false, malicious and fabricated testimony and as such; a gross violation of his non-derogable right to a fair trial. The 1<sup>st</sup> Petitioner further submitted that he has satisfied the requirements for a re-trial under Article 50(6) of the Constitution and it is in the interests of justice that his request for a re-trial be granted. In the circumstances, the Court was urged to find that he is entitled to the remedies sought and proceed to grant them.

45. In support of the submissions the Petitioners relied on the decision of the Court of Appeals of Texas in **Villareal Villarreal vs. State 788 S.W.2d 672** and the decision of the Court of Appeals of Washington in **State vs. D.T.M., 78 Wash. App. 216 • 896 P.2d 108** which granted a re-trial to an Appellant who had been convicted on his own plea-of-guilty for first-degree child molestation of his Nine and half year-old step daughter. The Court allowed the Appellant to change his plea and reversed an order of the Superior Court for Garfield County denying the Appellant a re-trial after the victim recanted her allegations. The Court was urged to be persuaded by the reasoning in the cases hereinabove cited and grant the Petitioner a re-trial.

46. In conclusion, it was submitted that the Petitioners have satisfied the threshold for grant of a re-trial as provided for under Article 50(6) of the Constitution and that there is a legitimate public interest in the administration of justice that punishment should follow the commission of a crime and where wrongful convictions occur or substantial evidence of innocence is discovered, a re-trial should be ordered. According to the Petitioners, the power (which is inherent in a court's jurisdiction) to prevent abuses of its process and to control its own procedure must in appropriate cases include a power to safeguard an accused person from malicious oppression and prejudice and that the courts are empowered to fully protect the rights of accused and convicted persons and see to it that no innocent person is punished. Since there is a public interest involved in this this court, being a constitutional court and a custodian of human rights, has a sacred duty to pay particular regard to that public interest. The court was urged to exercise of its mandate under Article 165 of the Constitution to adopt a liberal and purposive interpretation that most favours the enforcement of a right or fundamental freedom and to interpret the Bill of Rights in a manner that shall promote inter alia the spirit, purport and objects of the Bill of Rights in accordance with Articles 20 (3) (b) and (4) and 259 of the Constitution. The Petitioners therefore submitted that they have satisfied the threshold for grant of a re-trial and prayed that this Court be pleased to allow the Petition herein and grant the orders sought.

47. The said orders were set out as hereunder:

- i) The Proceedings, conviction and sentence in Kithimani Principal Magistrate's S.O.A Case No. 17 of 2011 be set aside and/or quashed;**
- ii) In the alternative, this honourable court be pleased to order for a retrial of the 1<sup>st</sup> Petitioner herein;**
- iii) Any such further and/or other relief that this Honourable Court may deem fit and just to grant.**

## **2<sup>nd</sup> Respondent's Case**

48. The 2<sup>nd</sup> Respondent opposed the petition based on the following grounds:

- i) This Honorable Court lacks jurisdiction to entertain the matter as the petitioner has not exhausted the appellate processes.**
- ii) The petitioner does not have the Locus standi to bring this petition under Article 50(6) of the Constitution since he has not demonstrated that he has met the factual threshold.**
- iii) The relief sought by the petitioner is legally untenable.**

49. On behalf of the 2<sup>nd</sup> Respondent it was submitted that this court ought to make a determination of the following issues:

- i. What is the extend of the Supreme Court's Jurisdiction in criminal matters?**
- ii. What is the extent of the High Court's jurisdiction under Article 50(6) of the Constitution?**
- iii. Whether the 1<sup>st</sup> petitioner has made the threshold of Article 50(6) of the Constitution.**
- iv. Whether the relief sought can be granted.**

50. After setting out the history of the matter including the evidence and the proceedings before the trial court, the High Court and the Court of Appeal and the decisions therefor, it was submitted on behalf of the 2<sup>nd</sup> Respondent that the exercise of the judicial authority by the three courts herein namely; the Trial Court, the High Court and The Court of Appeal was made in accordance with their respective mandates as donated by the constitution and Statutory provisions; that there is an automatic right of appeal to the Supreme Court in criminal cases, which right the 1<sup>st</sup> petitioner ought to have exhausted; that the mere fact that the victim of the offence (PW1) together with her sister (PW2) recanted their respective testimonies when the matter was pending for appeal does not in itself constitute discovery of new and compelling evidence to warrant this Court assume jurisdiction and order for a fresh trail; that the mere invocation of the provisions of Article 50(6) of the Constitution does not automatically confer jurisdiction on the High Court to order for a fresh trail since Article 50(6) provides for two specific conditions that must be met before the court can assume Jurisdiction; that the law does not occupy a world of its own or operate in a vacuum but is part of large system of public decision-making process which embodies the rule of law as provided under Article 23,10,159 and 259 of the Constitution.

51. According to the 2<sup>nd</sup> Respondent, contrary to the petitioner's contestations that there is no automatic right of appeal to the Supreme Court in criminal, the 2010 Constitution of Kenya clearly provides for the jurisdiction of the Supreme Court which includes automatic right of appeal at Article 163(4)(a) and section 15(2) of the **Supreme Court Act**. It was submitted that since the promulgation of the 2010 of the Kenyan Constitution, the Supreme Court has in its relentless outputs pronounced itself on its jurisdictional boundaries regarding meaning of jurisdiction and the extent of the supreme courts' jurisdiction in criminal matters. In this regard the 2<sup>nd</sup> Respondent relied on **Nyutu Agrovet Limited vs. Airtel Kenya Limited & Another Supreme Court Petition No. 12 of 2016, Owners of Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd, [1989] eKLR, Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR, Supreme Court Petition No 7 of 2014 - Yusuf Abdalla versus Building center (K) Ltd.**

52. According to the 2<sup>nd</sup> Respondent, in **Lawrence Nditu & 600 Others vs. Kenya Breweries Limited and Another Petition 2013 No 3 of 2012 eKLR**, the Supreme Court also held that it has a constitutional duty to operate within its constitutional limits.

53. In the 2<sup>nd</sup> Respondent's view, it is clear from the foregoing pronouncements by the Supreme Court that:

- i) There is an automatic right of appeal to the Supreme Court on any matter involving the interpretation or application of the Constitution.
- ii) The Supreme Court may entertain appeals certified by itself or certified by the Court of Appeal as involving matters of general public importance or matters of monumental importance transcending a particular case.
- iii) The Supreme Court's appellate jurisdiction in criminal cases is similar to those exercised by the second appellate court under Section 361 of the Criminal Procedure Code.
- iv) The Supreme Court also is vested with inherent powers and may intervene in any matter in order stop abuse of the court process and preserve the integrity of the justice system.
- v) It is thus instructive that the petitioner's argument the Supreme Court does not exercise automatic right of appeal in criminal matters is legal fallacy.

54. As for the extent of the High Court's jurisdiction under Article 50(6) of the Constitution it was submitted that this matter raises unique facts and circumstances undoubtedly deserved the input of the Supreme Court. particularly the fact that the Court of Appeal had declined to assume jurisdiction in the petitioner's application to adduce additional evidence in respect of the complainant's sworn affidavit recanting her testimony before the trial court. This submission was based on **Peter Oduor Ngoge V. Francis Ole Kaparo and Others (2012) eKLR**. While not contesting the fact that this Court is generally conferred with Jurisdiction under Articles 22 (1)and 258, 23(1) (3) and 165(3)(b)

and Article 47 to hear and determine applications for redress of alleged denial, violation or infringement of, or threat to, a right or fundamental freedom, it was contended that on the authority of Nyutu Agrovat case (supra) and Macharia & Another vs. Kenya Commercial Bank Limited & 2 others [2012] eKLR this court lacks jurisdiction to hear and determine this petition under Articles 22 (1) and 258, 23(1) (3) and 165(3)(b) and Article 47 as contended by the petitioner since Article 50(6) of the constitution specifically confers jurisdiction the High Court upon meeting the conditions prescribe therein. In support of this submission the 2<sup>nd</sup> Respondent cited the case of Tom Martins Kibisu vs. Republic Supreme Court Petition No. 3 of 2014.

55. According to the 2<sup>nd</sup> Respondent, the Supreme Court's holding in **Kibisu's case** is clear and has undoubtedly settled the law on the interpretation and construction of what constitutes a new trial under Article 50(6) of the Constitution.

56. The 2<sup>nd</sup> Respondent however appreciated that since the promulgation of the New Constitution, different High Courts have interpreted and construed the provisions of Article 50(6) of the Constitution differently on almost similar set of fact/circumstances and produce varied outputs. In this regard reference was made to Makueni High Court Constitutional Petition No. 3 of 2018, JNN vs. Republic and James Mwaniki Kamau vs. Republic Makueni High Court MSC. Application No. 179 of 2014.

57. In the 2<sup>nd</sup> Respondent's view, the learned construction of Article 50 (6) did not accord with the provisions of Articles 20(3), 27, 159 and Article 259 of the Constitution and this Court was urged not to be bound by the holdings in the two aforementioned authorities since they are persuasive in nature and this court can interpret and construe the constitution and make its own determination as appropriate.

58. While appreciating that the **Criminal Procedure Code** that does not provide for the right of appeal to the Supreme Court in criminal matters (the third appellate court), it was argued that as discussed herein above, Article 163 (4) of the constitution and Section 15 of the **Supreme Court Act** both clearly provides for the right of appeal to the Supreme Court. While appreciating reasoning of the Supreme Court as enunciated in Aviation & Allied Worker Union of Kenya v Kenya Airways Limited & 3 other (201) eKLR, Hassan Ali Joho & Another v. Suleiman Said Shahbal & Others, Sup. Ct. Petition No. 10 of 2013, it was submitted that those principles are not applicable to the present case. According to the 2<sup>nd</sup> Respondent, the High Court after properly re-evaluated the entire case in the light of the petitioner's contestations was satisfied that the case against the appellant had been proved beyond reasonable doubt and the court did not have any reason whatsoever to interfere with the findings reached by the prosecution witnesses; consequently, the court rejected the petitioners defence and upheld the conviction.

59. As for the Court of Appeal, upon considering the petitioner's application to adduce additional evidence, they got satisfied that the court being a second appellate court did not have jurisdiction to grant the orders sought. The court went ahead and upon re-examining the entire case for both the prosecution and the defence, got satisfied that there was no basis whatsoever to interfere with the finding of the High Court.

60. It was the 2<sup>nd</sup> Respondent's case that a careful analysis of the petitioner's contestations both at High Court and the Court of Appeal clearly reveals that there is a striking similarity between the issues that were canvassed and determined by the High Court and those that were canvassed and accordingly determined by the Court of Appeal. In this regard, the 2<sup>nd</sup> Respondent cited Republic vs. Karisa Chengo (2017) eKLR as well as Gitirau Peter Munya vs. Dickson Mwenda Kithinji & others S.C Petition No. 2B of 2014 (2014) eKLR [Munya 2] and Supreme Court Petition No.11 of 2017 - Charles Maina Gitonga vs. Republic where the Supreme Court re-affirmed its position in Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others, on what constitutes an issue involving the interpretation and application of the Constitution.

61. According to the 2<sup>nd</sup> Respondent the reasoning by the two judges who heard the petition in Jonah Ngala Kilimbi v. Republic (2016) cited by the petitioner that the petitioner had exhausted the appellate processes to the highest court without any reasons, was a serious misdirection on the principles of interpretation of the Constitution at Articles 20, 50(1), 159 and 259 pertaining to what constitutes exhausting the appellate course under Article 50(6) of the Constitution.

62. It was therefore contended that the petitioner has not demonstrated that he had attempted to petition the Supreme Court but was unsuccessful. Merely stating that he has exhausted the appellate process is not enough.

63. As to whether new and compelling evidence has emerged to warrant a fresh trial, it was submitted that no evidence has placed before court to suggest that new evidence has emerged concerning the petitioner's case, to warrant this court's intervention. Fundamentally the petitioner has replicated the arguments he had raised before the Trial Court, the High Court and the Court of Appeal concerning the alleged trumped-up charges.

64. According to the 2<sup>nd</sup> Respondent, law does not occupy a world of its own or operate in a vacuum. Instead, it is part of large system of public decision-making process which embodies the rule of law as provided under Article 20, 23, 10, 159 and 259 of the Constitution. In its view, the essence of rule of law can be summed up in three points

- a) Public authorities have no power to coerce as except what the law gives them
- b) People must have a minimum of basic legal rights; but must at least include the protection from physical violence and from arbitrary interference with life, liberty and property without which social existence will could be reduced to crude context of deployment of force or anarchy.
- c) There must be access to independent judges to vindicate this right to administer criminal law and to enforce the limits of state power.

65. Based on Center for Rights and Awareness vs. John Harun Mwau and six Others it was submitted that the Court of Appeal appreciated and upheld the principles guiding the interpretation and application of the constitution as had been applied by the High Court in

that case by observing that before the High Court can embark on the interpretation and application of the Constitution, it restated the relevant provision of the interpretation of the constitution as extracted from case law as follows:

- i) That as provided by Article 259 the constitution should be interpreted in manner that promotes its purpose, values and principles, advances the rule of law, human rights and fundamental freedoms permits development of the law and contributes to good governance.
- ii) That the spirit and the tenor of the constitution must preside and permit the process of judicial interpretation and judicial discretion.
- iii) That the entire constitution to be read as an integral whole and no one particular provision destroying the other but each sustaining the other as to effectuate the greater purpose of the instrument (the harmonization principal).
- iv) Presumption against absurdity – meaning that a court should avoid a construction that produces absurd results.
- v) The presumption against unworkable or impracticable results – meaning that a court should find against a construction against unworkable or impracticable results.
- vi) Presumption against anomalous or illogical source meaning that a court should find against a construction that creates an anomaly or otherwise produces irrational or illogical results.
- vii) The principle against artificial results - meaning that a court should find against a construction that produces artificial results.
- viii) And lastly the principle that the law should serve public interest – meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise.

66. The Court was urged to apply these principles and find that there is no merit in the petitioner's case. In the 2<sup>nd</sup> Respondent's view, the hearing and determination of the petitioner's case by the three courts herein namely the Trial Court, the High Court and the Court of Appeal had fully complied with the constitutional and statutory provisions regarding a criminal trial and appellate processes and the only court that can fault these three courts is the Supreme Court in accordance with the provisions of the Constitution regarding judicial hierarchy and jurisdictional standing. To the 2<sup>nd</sup> Respondent, the petitioners' petition is incompetent, improperly before the court, incompetent and an abuse of the court process and that the same ought to be dismissed with cost.

#### **Determination**

67. I have considered the issues raised in this petition. The issues herein revolve around the application and interpretation of Article 50(6) of the Constitution, a provision which prior to the promulgation of the present Constitution did not exist in the retired Constitution.

68. The Constitution of Kenya, 2020, in my respectful view, is a reflection of the historical experience of the Kenyans particularly during the single party era. In order to put this petition in context, it is important, in my view to set out the principles that guide constitutional interpretation in matters of this nature. In this petition, what is placed on this Court's lap for determination is a decision of the Court and the manner in which it was arrived at. It is therefore a constitutional matter revolving around a judicial determination.

69. In interpreting the Constitution of Kenya, 2010, one must necessarily start from the presumption that the provisions dealing with the judiciary were meant, *inter alia*, to correct the historical deficiencies that rendered the judiciary as then constituted unable to meet the expectations that the people of the Republic of Kenya had in it. As was held in **Commissioner of Income Tax vs. Menon [1985] KLR 104; [1976-1985] EA 67**, it is one of the canons of statutory construction that a court may look into the historical setting of an Act, to ascertain the problem with which the Act in question has been designed to deal with. In **Murungaru vs. Kenya Anti-Corruption Commission & Another Nairobi HCMCA No. 54 of 2006 [2006] 2 KLR 733**, it was held that our Constitution must be interpreted within the context and social, and economic development keeping in mind the basic philosophy behind the particular provisions of the Constitution. The same view is expressed in **Matter of the Kenya National Human Rights Commission, Advisory Opinion No. 1 of 2012; [2014] eKLR**, at paragraph 26 where the Supreme Court opined that:

**“...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”**

70. It is therefore in my view that the constitutional provisions dealing with the judiciary are partly steeped in historical context.

71. It is with that historical context in mind that I will endeavour to unravel the issues raised before me. This must necessarily be so due to the fact that under Article 259(a) and (c) of the Constitution this Court is expected to interpret the Constitution in a manner that promotes its values, purposes and principles and permits the development of the law. I therefore associate ourselves with the views expressed by **Mohamed A J** in the Namibian case of **S. vs Acheson, 1991 (2) S.A. 805** (at p.813) to the effect that:

***“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a ‘mirror reflecting the national soul’; the identification of ideals***

*and...aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion.”*

72. In Re Interim Independent Election Commission, Constitutional Application 2 of 2011 [2011] eKLR, the Supreme Court of Kenya held at paragraph 86 stated as follows-

“In common with other final Courts in The Commonwealth, Kenya’s Supreme Court is not bound by its decisions, even though we must remain alive to the need for certainty in the law. The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.”

73. In Republic vs. Karisa Chengo & 2 Others [2017] KLR, it was held that:

“Constitutions are, in general, the product of economic, political, social and even religious compromises as a result of long-drawn out claims and petitions. The ultimate object always being sought, is the durable accommodation of all the people in the land hence the fact that the language, phraseology, content and spirit of any Constitution, are rooted in a historical context. Thus in constitutional interpretation, as this Court signalled in *In Re the Matter of the Interim Independent Electoral Commission*, Sup. Ct. Application No. 2 of 2011; [2011] eKLR, regard is to be paid to the legal, linguistic and philosophical context, the history, usage as well as the purpose of a particular constitutional provision, or of a right being claimed. In that case we had thus remarked [para. 86]:

“The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural, and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence in Kenya.”

[45] We have underlined the said principle in several other cases; for instance, *In the Matter of the National Land Commission*, Sup. Ct. Advisory Opinion No. 2 of 2014; [2015] eKLR, where we stated at para. 281 that:

“The Constitution is to be interpreted in a holistic manner that entails reading it alongside other provisions, and considering the historical perspective, purpose, and intent of the provisions in question.”

74. Likewise, in the case of South Dakota vs. North Carolina, 192 US 268(1940) the Supreme Court of the United States pronounced itself thus:

“It is an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument.”

75. I associate myself with the position of Mutunga, CJ & P In The Matter of The Principle of Gender Representation in The National Assembly and The Senate Advisory Opinion Application No. 2 of 2012 [2012] eKLR (SCK), where he opined that:

“Interpreting the various Articles that are in issue here is the fundamental issue in this Reference. Learned Counsels before us have suggested various methods of interpreting the Constitution that should be adopted by this Court. These methods have been used by various jurisdictions, including some prescriptions arising from Kenyan Courts, both under the repealed and current Constitutions. Fortunately, to interpret the Constitution we need not go further than its specific Articles that give us the necessary guidance into its interpretation. It is, therefore, necessary for the Court at this early opportunity to state that no prescriptions are necessary other than those that are within the Constitution itself. The Constitution is complete with its mode of its interpretation, and its various Articles achieve this collective purpose. It is in interpreting the constitution that our robust, patriotic, progressive and indigenous jurisprudence will be nurtured, grown to maturity, exported, and becomes a beacon to other progressive national, African, regional, and global jurisprudence. After all, Kenya correctly prides itself as having the most progressive constitution in the world with the most modern Bill of Rights. In my view this is the development of rich jurisprudence decreed by Section 3 of the Supreme Court Act that respects Kenya’s history and traditions and facilitates its social, economic and political growth...The Supreme Court must and shall remain the exemplary custodian of the Constitution. It is from these articles [10, 20 and 259] that the Supreme Court finds its approach to the interpretation of the Constitution. The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution. The obligation upon this Court to uphold this interpretation is provided for in Section 3 of the Supreme Court Act (Act No 7 of 2011): The object of this Act is to make further provision with respect to the operation of the Supreme Court as a court of final judicial authority to, among other things — (a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya; (b) provide authoritative and impartial interpretation of the Constitution;(c) develop rich jurisprudence that respects Kenya’s history and traditions and facilitates its social, economic and political growth; (d) enable important constitutional and other legal matters, including

matters relating to the transition from the former to the present constitutional dispensation, to be determined having due regard to the circumstances, history and cultures of the people of Kenya; (e) improve access to justice; and (f) provide for the administration of the Supreme Court and related matters. The obligation of the Supreme Court is, therefore, to cultivate progressive indigenous jurisprudence in the momentous occasions that present themselves to the Court. By indigenous jurisprudence, I do not mean insular and inward looking. The values of the Kenyan Constitution are anything but. We need to learn from other countries and from scholars like the distinguished Counsel who submitted before us in this Court. My concern, when I emphasize 'indigenous' is simply that we should grow our jurisprudence out of our own needs, without unthinking deference to that of our other jurisdictions and courts, however distinguished. This Court, and the Judiciary at large has, therefore, a great opportunity to develop a robust, indigenous, patriotic and progressive jurisprudence that will give our country direction in its democratic development. In interpreting the Constitution and developing jurisprudence, the Court will always take a purposive interpretation of the Constitution as guided by the Constitution itself. An example of such purposive interpretation of the Constitution has been articulated by the Supreme Court of Canada in *R vs. Big Drug Mart (1985)*. In paragraph 116 of the ruling, the Court states: *The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.* Furthermore, in *Minister of Home Affairs (Bermuda) vs. Fisher [1980] AC 319 (PC)*, Lord Wilberforce summarized the justification of this approach by stating that it was *'a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.* I further agree with the cited case on *S vs. Zuma (CCT5/94) (1995)*, where the Constitutional Court of South Africa agreed with these decisions and emphasized that in taking this approach, regard must be paid to the legal history, traditions and usages of the country concerned. This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself... The Attorney General advances an argument that the word 'shall' used in Article 81 (b) is not instructive on whether implementation of this obligation is immediate or progressive. He rightly states that the use of this word has been interpreted on a case-by-case basis in Kenyan courts and other jurisdictions. Article 260 of the Constitution does not see it as a word requiring interpretation. The broad approach I have given on how the provisions of the constitution are to be interpreted makes it abundantly clear that it is unwise to tie in the interpretation of this Article to a single word. It is this broad approach that is holistic that will help me determine whether either immediate or progressive realization of the right to the gender quota is envisioned. Reading Articles 81 (b), 27 (4), 27 (8) leaves me with no ambiguities as to the purpose and direction of these provisions. The ambiguity arises as it has been argued by the Attorney General, when the provisions of these Articles are read against the content of the provisions of Articles 96, 97, 98 and 177 (1) (b). The Attorney General described this situation as a conundrum, *lacunae*, inconsistency, and downright contradiction. This is definitely true if the interpretation of these provisions is a narrow one as opposed to the broad approach that is decreed by the constitution. It is true the constitution will present the courts with inconsistencies, grey areas, contradictions, vagueness, bad grammar and syntax, legal jargon, all hallmarks of a negotiated document that took decades to complete. It reflects contested terrains, vested interests that are sought to be harmonized, and a *status quo* to be mitigated. These features in our constitution should not surprise anybody, not the bench, or the bar or the academia. What cannot be denied, however, is we have a working formula, approach and guidelines to unravel these problems as we interpret the constitution. We owe that interpretative framework of its interpretation to the Constitution itself. In the case of the Supreme Court the Supreme Court Act reinforces this framework. The favourite and popular legal argument articulated by Counsel is that if the framers of the constitution intended the implementation of the two-thirds gender principle to be progressive, it would have been easy for them to so provide. This argument always needs serious scrutiny and interrogation because it is always advanced as if it is obvious that would invariably be the case. In this Reference it is reinforced by the quotation of other Articles in the constitution that clearly provide for progressive realization. In my view this argument cannot, in itself, be conclusive. Nor are the High Court authorities binding on this Court besides them also calling for further interrogation, harmonization and problematization. We need to look elsewhere to resolve this 'conundrum'. In my view we need to look at the arguments around non-discrimination and national values as decreed by the constitution; that political and civil rights demand immediate realization; and a thorough treatment of the historical, social, economic, and political basis of the two-thirds gender principle as decreed by Section 3 of the Supreme Court Act... Contrary to the position taken by NGECC, I find that there is no violation of the principle of separation of powers in the Supreme Court's rendering of this Advisory Opinion under Article 163 (6). This Court's role is clearly defined in the Constitution. There is no evidence that this apex Court in exercising its constitutional mandate in this Reference has in any way entered the constitutionally preserved mandates of the Executive and Parliament. Furthermore, I am equally persuaded of this Court's power to declare Parliament unconstitutionally constituted. It is this Court's duty to defend the Constitution, and ensure that all bodies within it are constituted constitutionally and employ all powers donated by the People to it constitutionally. I am similarly guided as the Egyptian Constitutional Court in *Anwar Subh Darwish Mustafa vs. The Chairman of the Supreme Council of the Armed Forces, Supreme Constitutional Court Case No. 20/24.*"

76. The South African Constitutional Court in [Investigating Directorate: Serious Economic Offences vs. Hyundai Motor Distributors \(Pty\) Ltd In re: Hyundai Motor Distributors \(Pty\) Ltd vs. Smit NO \[2000\] ZACC 12; 2001 \(1\) SA 545 \(CC\); 2000 \(10\) BCLR 1079 \(CC\) \(Hyundai\)](#) at para 21 held that:

“The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.”

77. Similarly, in [United Democratic Movement vs. Speaker of the National Assembly and Others \(CCT89/17\) \[2017\] ZACC 21; 2017 \(8\) BCLR 1061 \(CC\); 2017 \(5\) SA 300 \(CC\) \(22 June 2017\)](#) the same Court held that:

“The Preamble to our Constitution is a characteristically terse but profound recordal of where we come from, what aspirations we espouse and how we seek to realise them. Our public representatives are thus required never to forget the role of this vision as both the vehicle and directional points desperately needed for the successful navigation of the way towards the fulfilment of their constitutional obligations. Context, purpose, our values as well as the vision or spirit of transitioning from division, exclusion and neglect to a transformed, united and inclusive nation, led by accountable and responsive public office-bearers, must always guide us to the correct meaning of the provisions under consideration. Our entire constitutional enterprise would be best served by an approach to the provisions of our Constitution that recognises that they are inseparably interconnected. These provisions must thus be construed purposively and consistently with the entire Constitution.”

78. The Article in question in this petition is Article 50(6) of the Constitution which provides as follows:

*A person who is convicted of a criminal offence may petition the High Court for a new trial if—*

*(a) the person’s appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and*

*(b) new and compelling evidence has become available.*

79. It is clear that for one to invoke the above provision two conditions must therefore be fulfilled. The first condition is that the Petitioner’s appeal must have been dismissed by the highest court to which the Petitioner is entitled to appeal or that the Petitioner did not appeal within the time allowed for appeal. In my understanding the Petitioner can only exercise this right where legally he has reached the end of the road in so far as his appellate options are concerned or where he is by law barred from lodging his appeal due to effluxion of time. In other words, a person who is appealing is not entitled to exercise his right under the above provision. I associate myself with the holding in Jona Ngala Kilimbi vs. Republic [2016] eKLR, where the Court rendered itself as follows:

“In so far as there is no evidence that the applicant ever appealed against the Judgment on appeal dated by M.Odero J, we are of the view that we could conveniently treat this petition as one falling under Article 50(6)...we say so noting that one is entitled to invoke the provision provided his appeal to the last ultimate court has been dismissed or he never filed an appeal within time. Having taken the position that no appeal was filed to the court of appeal, the 1<sup>st</sup> prerequisite under Article 50(6) 1 a has thus been met.”

80. Similarly, in Tom Martins Kibisu vs. Republic [2014] eKLR the Supreme Court of Kenya observed that:

“Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and, as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for fresh trial....The window of opportunity for such a new trial is subject to two conditions. First, a person must have exhausted the course of appeal, to the highest court with jurisdiction to try the matter. Secondly, there must be ‘new and compelling evidence’.”

81. It is however important to note that the Article talks about *the highest court to which the person is entitled to appeal* as opposed to the highest appellate court in the land. To understand this provision one must take into account the provisions of Article 259(1) of the Constitution which enacts as follows:

*(1) This Constitution shall be interpreted in a manner that—*

*(a) promotes its purposes, values and principles;*

*(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;*

*(c) permits the development of the law; and*

*(d) contributes to good governance.*

82. Therefore, as was held by a majority in Njoya & 6 Others vs. Attorney General & Others (No. 2) [2004] 1 KLR 261; [2004] 1 EA 194; [2008] 2 KLR, quite unlike an Act of Parliament, which is subordinate, the Constitution should be given a broad, liberal and purposive interpretation to give effect to its fundamental values and principles. That purposive approach as explained by the Supreme Court In the Matter of the Principle of Gender Representation in the National Assembly and The Senate Advisory Opinion Application No. 2 of 2012, would take into account the agonized history attending Kenya’s constitutional reform.

83. In order to live up to that spirit the interpretation of the phrase “*the highest court to which the person is entitled to appeal*” must similarly be broad in order to achieve the constitutional objective of advancing the rule of law, and the human rights and fundamental freedoms in the Bill of Rights permitting the development of the law.

84. The 2<sup>nd</sup> Respondent however argues that contrary to the petitioner’s contestations that there is no automatic right of appeal to the Supreme Court in criminal cases, the 2010 Constitution of Kenya clearly provides for the jurisdiction of the Supreme Court which includes automatic right of appeal at Article 163(4)(a) and section 15(2) of the Supreme Court Act. Article 163(4)(a) provides as hereunder:

*(4) Appeals shall lie from the Court of Appeal to the Supreme Court—*

*(a) as of right in any case involving the interpretation or application of this Constitution.*

85. Section 15 of the *Supreme Court Act*, on its part provides that:

*(1) Appeals to the Supreme Court shall be heard only with the leave of the Court.*

*(2) Subsection (1) shall not apply to appeals from the Court of Appeal in respect of matters relating to the interpretation or application of the Constitution.*

86. These provisions have been interpreted by the Supreme Court in a number of decisions.

87. In Lawrence Nditu & 600 Others vs. Kenya Breweries Limited and Another Petition 2013 No 3 of 2012 eKLR, the Supreme Court held that it has a constitutional duty to operate within its constitutional limits by stating at paras 27 and 28 that:

***“This article must be seen to be laying down the principle that not all intended appeals lie from the Court of Appeal to the Supreme Court. Only those appeals arising from cases involving the interpretation or application of the constitution can be entertained by the supreme court...Towards this end, it is not the mere allegation in leadings by a party that clothes an appeal with the attributes of the constitutional interpretation or application...the appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the constitution. In other words, an appellant must be challenging the interpretation or application of the constitution which the court of appeal used to dispose of the matter in that forum. Such a party must be faulting the court of appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the constitution, it cannot support a further appeal to the supreme court under the provisions of article 163[4] (a).”*** [Emphasis provided].

88. Similar position was adopted in Hassan Joho & Others Application No. 2 of 2011, Hassan Joho & others vs. Suleiman Said Shahbal (unreported Supreme Court Appeal No 10 of 2013) where the Supreme Court held at para 37 that:

***“In light of the foregoing, the test remains, to evaluate the jurisdictional standing of this court in handling this appeal, is whether the appeal raises a question of constitutional interpretation or application, and whether the same has been canvassed in the superior courts and has progressed through the normal appellate mechanism so as to reach this court by way of an appeal, as contemplated under article 163(4)(a) of the constitution...”***

89. In the above decisions the Supreme Court was clear in its mind that not all intended appeals lie from the Court of Appeal to the Supreme Court and that for a matter to fall under the said provision for the purposes of an appeal, the appeal must arise from cases involving the interpretation or application of the Constitution and the appeal must originate from a Court of Appeal case where issues of contestation revolved around the interpretation or application of the Constitution. What it means is that the avenue to the Supreme Court on appeal is not open-ended. It only entertains appeals, firstly where the matter involves the interpretation or application of the Constitution and secondly, that very question must be one that originated from the Court of Appeal. In other words, the very subject of the appeal must have been the subject before the Court of Appeal so that what is being faulted before the Supreme Court is the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Otherwise, the issue would not be supported under the provisions of article 163[4](a) of the Constitution. That position comes clearly from the holding of the Supreme Court in Gitirau Peter Munya vs. Dickson Mwenda Kithinji & others S.C Petition No. 2B of 2014 (2014) eKLR [Munya 2] where the Court held that:

- a. a court’s jurisdiction is regulated by the Constitution, by statute law, and by the principles laid out in judicial precedent.
- b. the chain of court in the constitutional set up have professional competence to adjudicate upon dispute coming up before them, and only cardinal issues of law or jurisprudential moments deserve the further input of supreme court
- c. the lower courts determination of the issues of appeal must have taken a trajectory of constitutional application or interpretation of the course to merit hearing before the supreme court.
- d. an appeal with the ambit of Article 163(4) (a) is to one founded on cogent of constitutional controversy.

90. That decision was affirmed by the same Court in Supreme Court Petition No.11 of 2017 - Charles Maina Gitonga vs. Republic where it was held at para 69 that:

***“The import of the Court’s statement in the Ngoge Case is that where specific constitutional provisions cannot be identified as having formed the gist of the cause at the Court of Appeal, the very least an appellant would demonstrate is that the Court’s reasoning, and the conclusions which led to the determination of the issue, put in context, can properly be said to have taken a trajectory of constitutional interpretation of application.”***

91. For a matter to fall within the ambit of Article 163(4)(a) of the Constitution, its substance must revolve around the interpretation or application of the Constitution. The denial of an application for adjournment for example, to an extent may be termed as a denial of the right to be heard. However, such an issue cannot be extrapolated to an issue revolving around the interpretation or application of the Constitution. That is my understanding of the holding in Stanley Mombo Amuti vs. Kenya Anti-Corruption Commission [2020] eKLR, where the Supreme Court of Kenya made a finding that where matters of constitutional interpretation/application are introduced for the first time at the

Court of Appeal and do not form the substratum of the appeal/finding by the Court of Appeal, this does not confer jurisdiction (on the Supreme Court) under Article 163(4) of the Constitution by observing that:

**“reference to Articles 40 and 50 of the Constitution were introduced by the Appellant at the Court of Appeal and even then, peripherally so. The Court of Appeal thereafter rendered itself in passing only and the bulk of its Judgment was saved to an evaluation of the evidence on record in the context of Sections 26 and 55 of ACECA and not the Constitution per se...the mere reference to the rich generality of constitutional principle as the Court of Appeal did in the present case, is not a sufficient ground to invoke Article 163(4) (a).”**

92. This is also my understanding of the decision of the same Court in Nyutu Agrovet Limited vs. Airtel Kenya Limited & Another Supreme Court Petition No. 12 of 2016 where it expressed itself as hereunder:

**“Is jurisdiction therefore synonymous with a right of appeal" In other words, does Article 164(3) grant a litigant a right of appeal to the Court of Appeal" Nyutu urges that Article 164(3) indeed grants such a right of appeal. We disagree. As urged by Airtel, this provision does not confer a right of appeal to any litigant. It only particularizes the confines of the powers of the Court of Appeal by delimiting the extent to which a litigant can approach it. In this case, the appellate Court only has powers to hear matters arising from the High Court or any other defined Court or Tribunal. There is thus no direct access to the Court of Appeal by all and sundry. As such, Article 164(3) defines the extent of the powers of the Court of Appeal but does not grant a litigant an unfettered access to the Court of Appeal”.**

**“[34] With regard to a right of appeal, our position is that such right can either be conferred by the Constitution or a Statute. For example, under Article 50(2)(q), a person who has been convicted of a criminal offence has a right to appeal or apply for review to a higher court as prescribed by the law. Further, with regard to disqualification from being a Member of Parliament or County Assembly (Articles 99(3) and 199(3), respectively), a person is not disqualified until all possibilities of appeal or review of the relevant sentence or decision have been exhausted. Our statutes have also provided for circumstances when an appeal may be specifically preferred to the Court of Appeal or any other Court. For example, Section 39(3) of the Arbitration Act provides circumstances when an appeal may lie to the Court of Appeal.”**

93. What that holding states is that the Court of Appeal only hears appeals from the High Court or any other defined Court or Tribunal and nowhere else. In other words, it deals with the forum from which an appeal to the Court of Appeal may lie. It does not prescribe what matters are actually appealable to the Court of Appeal.

94. The 2<sup>nd</sup> Respondent has however contended that the Supreme Court may entertain an appeal in the exercise of its inherent powers. This submission is based on Republic vs. Ahmed Abolfathi Mohammed & Other (2019) Supreme Court Criminal Application No.2 of 2018, where the Supreme Court held that:

**“[30] Justice cuts both ways. In both civil and criminal cases, the court has to be fair to all the parties before it. It follows that in this criminal matter, the right to a fair trial under Article 50(1) of the Constitution demands of this this Court even-handed treatment of both the applicant and the respondents. The applicant has been allowed to come before us under Article 163(4)(b) as read with Section 348A of the Criminal Procedure Code. Are we to turn it away on the respondents’ contention that there is no provision in our law bestowing us with jurisdiction to grant stay of an acquittal order and hold the acquitted person(s) in custody pending the hearing of the appeal against their acquittal" We think not. To do that will, with respect, be a dereliction of our constitutional obligation under Articles 20, 50(1), 163(3)(b) and 259 of the Constitution”**

**“[31] As a matter of public policy, this Court, and indeed any other court, cannot and should not exercise its jurisdiction or act in vain. To enable it stamp its authority and deliver on its constitutional mandate in any matter properly before it and to uphold both parties’ right to a fair trial under Article 50(1) as well as ensure that its processes are not abused, scuttled or negated by any mischievous or nefarious conduct, we find and hold that this Court has inherent jurisdiction, not expressly conferred by the Constitution or any statute, but accruing to it by its existential nature as a court of law duly constituted to administer justice, to issue any orders to ensure that the ends of justice in any particular case are met. In the circumstances, we find and hold that this Court has inherent jurisdiction to grant the orders of stay sought in this application if merited.”**

95. Reliance was similarly placed on Republic vs. Ahmed Abolfathi Mohammed & Other (2019) eKLR, where the Supreme Court while extrapolating on the provisions of section 361 CPC stated:

**“62, in that regard, in the case of Gatirau Peter Munya c. Dickson Mwenda Kithinji & 2 other, while dealing with Section 85A of the Election Act which limits appeals in election disputes to a matter of law only in more or less the same way Section 361 (1) (a) of the Criminal Procedure Code limits second appeals in criminal cases to consideration of points of law only, this court defined what points of law are. It stated that the limitation to matters of law only does not mean that an appellate court “has to shut its eyes to the evidence on record”. It added that “where the appellant claims that ....(the conclusions of the trial court) were based on “no evidence”, or that the conclusions were not supported by the established facts or evidence on record, or that the conclusions were “so preserve”, or so illegal, that no reasonable tribunal would arrive at the same” it is a point of law for the appellate court to have a panoramic view of the evidence on record and determine if the conclusions of the trial court are in tandem with that evidence.**

**“(67) The appellant has faulted the Court of Appeal on this findings and urged us to overturn its decision and restore those of the trial and High Court, given the restriction imposed on the second (and by implication the third appellate court) by Section 361 of the Criminal Procedure Code, to what extent should we engage with the evidence on record”.**

**“(68) as stated in the Munya case (suprs) this Court should not “re-examine the probative value of the evidence tendered at the trial court, or ....calibrate any such evidence, especially calling into question the credibility of witnesses. “The Concise Oxford English Dictionary defines the term “calibrate” to mean “correlate the readings of (an instrument) with those of a standard in order to check the instrument’s accuracy, (or) adjust (experimental results) to take external factors into account or to allow comparison with other data. “It is clear from this definition that what the Munya authority forbade is a re-examination of evidence with a view to reconsidering its probative value. That is different from a consideration of the record to determine if the trial court’s conclusions are in tandem with the evidence on record.**

**(69) In this case, our duty therefore, like that of the second appellate court, is to determine whether or not the conclusions of the trial court that the respondents were in possession of the RDX explosive that was recovered from the Mombasa Golf Club golf course are in tandem with the evidence on record. Since we are a three appellate court and as the appellant has challenged the findings of the second appellate court, it follows that our consideration of this issue should in the same vein determine if the Court of Appeal’s decision is grounded on the evidence on record. In other words, we should determine which of the three lower courts, decision is in tandem with the evidence on record.”**

96. With due respect to the 2<sup>nd</sup> Respondent, the above findings do not support its submissions. To my mind and if I understand the Supreme Court’s position correctly, the Court’s inherent jurisdiction is not a substitute for the jurisdiction conferred upon the Court under the Constitution or by statute. The Court’s inherent jurisdiction is a reserve upon which the Court draws to ensure the ends of justice are met and to prevent abuse of its process in a matter in which it has jurisdiction. As was held in **Industrial & Commercial Development Corporation vs. Otachi [1977] KLR 101; [1976-80] 1 KLR 529**, section 3A is not a panacea for all ills. It was therefore held in **Elephant Soap Factory Ltd vs. Nahashon Mwangi & Sons Nairobi HCCC No. 913 of 1971** that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its inherent powers. Similarly, it is my view that where the Court has been deprived of jurisdiction it will not draw upon its reserve under the inherent jurisdiction to confer upon itself such non-existent jurisdiction.

97. In this case, the Petitioner appealed to the High Court. That a first appeal may be determined on either fact or law or both law and fact is not in doubt. Therefore, in determining whether or not there exist new and compelling evidence the Court may have to delve into both law and facts.

98. Though there was an allusion to the fact that the evidence was inconsistent and that the case was a frame up staged by the mother of the complainant due to existing grudge, it is my view that that complainant cannot be said to be substantially the same as where it is found that the evidence was obtained by coercion. It is one thing to lie to the Court and another to say something that one has been coerced into saying. Lying connotes some mental capacity by the speaker to make a decision in a particular direction while coercion means that the speaker has no control whatsoever over what he states. What we have in this petition is not that PW2 and PW3 herein lied before the trial court but that what they said was not their own but that they were in fact a mouthpiece for a person for a liar. It is my finding that before the High Court there was no question of constitutional interpretation raised and that the appeal only challenged the evidence that the trial court had relied upon to convict the 1<sup>st</sup> Petitioner.

99. As regards the appeal to the Court of Appeal, it is however trite law as restated in **Chemagong -vs- Republic (1984) KLR 213** at page 219 that:

**“A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence.”**

100. The issue whether or not PW2 and PW3 were coerced were matters of fact. As rightly appreciated by the 2<sup>nd</sup> Respondent, the learned Judges of Appeal upon considering the petitioner’s application to adduce additional evidence, were satisfied that the court being a second appellate court did not have jurisdiction to grant the orders sought. The Court having declined, and rightly so in my view, to admit the new evidence, it cannot now be said that the veracity of that evidence for the purposes of Article 50(6) of the Constitution was considered for the simple reason that the said Court could not deal with such a matter.

101. It therefore follows that where the Petitioner’s petition under Article 50(6) of the Constitution is based on new and compelling factual evidence which has become available it would not advance the rule of law ***and the human rights and fundamental freedoms in the Bill of Rights*** or develop the law as required under Article 259(1) to argue, as the Respondent herein seems to do, that a Petitioner whose right of appeal is restricted only to law ought to have exhausted all his appellate options. Such a person is clearly barred from arguing that he has a new and compelling factual evidence in a second or subsequently appeal. In my view and I find, based on the decision of the Court of Appeal in respect of the 1<sup>st</sup> Petitioner’s appeal that a person who is relying on the ground of existence of new and compelling factual evidence must for the purposes of Article 50(6) of the Constitution be deemed to have had his appeal ***“dismissed by the highest court to which the person is entitled to appeal”*** once his first appeal has been dismissed. In other words, the highest court to which he is entitled to appeal on matters of facts is the first appellate court and no further unless the Court of Appeal grants him leave to adduced fresh or additional evidence. Having been denied an application to adduce fresh evidence, it is clear that he had reached a dead end in so far as he could adduce new evidence. The position was appreciated in **James Mwaniki Kamau vs. Republic Makeni High Court MSC. Application No. 179 of 2014** where the it was held that:

**“(41). A perusal of the record reveals that the petitioner was originally tried and convicted in Machakos CM’S Criminal case No. 5043 of 2014. He appealed to the High Court in Machakos Criminal Appeal No. 67 of 2006. The appeal was dismissed. He further appealed to the Court of Appeal in Nairobi Criminal Appeal No. 407 of 2017. The appeal was also dismissed. From the foregoing, it is clear that the petitioner has appealed to the highest Court to which a person is entitled to appeal hence satisfying the first limb of Article 50 (6).”**

102. Based on that finding, I hold that the Petitioner herein has successfully surmounted the first hurdle. He has proved that his appeal has

been dismissed by the highest court to which he is entitled to appeal.

103. That now brings me to the second limb of Article 50(6) of the Constitution. Has the Petitioner satisfied the Court that new and compelling evidence has become available?

104. It is important to understand the background of this provision. As was opined by **Mutunga, CJ** in **Speaker of the Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR**, it is essential to paint a historical canvas that helps to illuminate the discourse, and the resultant determination of the question at hand. The history of this country is replete with situations where people particularly human rights activists, proponents and crusaders were apprehended and detained incommunicado only for them to find themselves before courts of law at very unholy hours of the day or night having been literally dragged from the dungeons where they were kept in solitary confinement under very inhuman conditions in very pathetic bodily and mental states for the charges to be read out to them. It was said that despite the fact that those charges were invariably trumped up but due to the vegetative conditions in which the said persons were presented before the court, they invariably sang guilty pleas even before the charges were read out. See (**KHRC, 'Independence without Freedom: The Legitimation of Repressive Laws and Practices in Kenya'** in **Kivutha Kibwana (ed), Reading in Constitutional Law and Politics in Africa (Faculty of Law UON 1998) 113, 136; Amnesty International, Kenya: Torture, Political Detention and Unfair Trials (1987)**). For use of torture in Kenya, see generally **William Mbaya, 'Criminal Justice in Kenya: Role of the Judiciary in Safeguarding the Pre-Trial Rights of Suspects,'** in **Kivutha Kibwana (ed), Reading in Constitutional Law and Politics in Africa (Faculty of Law UON 998) 298**.

105. In my view this must have been one of the circumstances which informed the enactment of Article 50(6) of the Constitution. It was a realisation of the fact that in the past innocent people were placed in circumstances under which they literally came to Court singing guilty pleas as if they were chanting pre-rehearsed prayers to charges without caring whether they were true or not notwithstanding the consequences of such pleas. To my mind it is cases such as these that **Mutunga, CJ** had in mind in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR (SCK)** when he expressed himself as hereunder:

**“I do not know how many cases in our judicial system will go down in the annals of history as a reflection of gross injustice, meted out in the very temple of justice...This matter before us also reflects the impunity of the judiciary, and the unacceptable face of the jurisprudence...that had become the handmaiden of gross injustice. It is apposite to recall the unfortunate details of this injustice, that will forever remain a glaring stain on our justice system.”**

106. Accordingly, the said Article was meant to deal with the past historical injustices and to also remedy future violations of the rights and liberties of Kenyans. Article 50(6), in my view, provides a window of opportunity and places a future obligation upon this Court to address historical or traditional injustices that may have been encountered or visited upon a particular segment of the people of Kenya under the guise of judicial pronouncements. It is my considered view that the Bill of Rights is a “Never Again” Chapter wherein the Kenyans wanted to bury the yesteryears human rights violations and immunize themselves from the possibility of such recurrences and to provide opportunity for the victims to seek redress. The chapter of “*uta-do*” attitude must therefore be forever closed and the keys to its doors thrown into abyss. Those keys must never be retrieved with a view to reopening the torture chambers of the yesteryears and filling them up with those whose only “crime” is to say “No” to a ruthless regime.

107. What then should the High Court sitting as a Constitutional Court do when material has been placed on its lap which clearly reveal that injustice was perpetrated to a subject in a past trial based either on clearly fabricated evidence or that certain important material was deliberately or otherwise not disclosed at the original trial and which could not have been discovered by the subject and which, had it been disclosed or not fabricated would have led to a different finding in the original trial? Should a court of justice turn a blind eye, block its ears to such circumstances and in effect bury its head in the sand by simply washing its hands the Pontius Pilate route and satisfy itself by handing over the subject to the Prison authorities to continue serving an otherwise unlawful or unjust sentence where clearly there is new and compelling evidence disclosed?

108. In my view, to do so would amount to the Court while undertaking its constitutional mandate of protecting the rights of the subjects, abetting and being an accomplice to the transgressions of the Bill of Rights by perpetuating a violation of the rights of the subject. When the subjects come before us wailing that they have suffered an injustice at the hands of any of the state organs be it the Executive, the Legislature or even the Judiciary and the Constitution and the Law gives us the power to correct the wrong, we are obligated to seize the opportunity and ensure that justice is not only done but is also seen to have been done. It does not do justice to abdicate our mandate when we have what it takes under the Constitution and the Law to restore to a person his or her liberty wrongly deprived of him or her. Justice must therefore be conducted in a manner that is not only fair and impartial but is seen to be fair and impartial.

109. Under Article 19(4)(b) of the Constitution, in interpreting the Bill of Rights, this Court is enjoined to *inter alia* promote the spirit, purport and objects of the Bill of Rights.

110. Where credible, new and compelling evidence is placed before this Court which show that a person may have suffered injustice as a result of concocted evidence, this court would be shirking from its duty placed on it by the people of this Republic vide the Constitution of ensuring that justice is rendered to the people. The Court would have let the people and the country down if despite glaring injustice meted at the people, it declined to rise to the occasion and correct a patent decision arrived at from concocted and contrived evidence simply because the fresh matters which were not available during the trial were never made known to the trial court. I therefore associate myself with the position adopted in **Nakusa vs. Tororei & 2 Others (No. 2) Nairobi HCEP No. 4 of 2003 [2008] 2 KLR (EP) 565 (HCK)** where the Court held that:

**“The matter before us is of considerable importance. The High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system... In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony***

*Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: “The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time.”...In our role as “sentinels” of fundamental rights and freedoms of the citizen which are founded on laissez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent “sentinels” of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right... In the case of *Patel vs. Attorney General [1968] ZLR 99* the Zambian High Court opined that the Court should lean on the construction that favoured the applicant rather than that which favoured the state. In the American case of *Gran vs. US 77 LLaw Ed 212* cited in *Patel vs. Attorney General* (supra) it was held that “the provisions of the Bill of Rights are to be broadly construed” so that they may be protected against gradual encroachment that seeks to deprive them of their effectiveness.”

111. Speaking for myself, I would not countenance an argument which perpetuates an injustice when such injustice is driven home to me after the parties are afforded an opportunity of being heard. I am inclined to adopt the position in the case of *Philiph Mueke Maingi vs. R [2017] eKLR* that:

“fundamentally, the objective of the CJS is that after a fair trial there should be a true verdict. So far as humanly possible there should be no wrongful convictions, and where they occur or if new evidence emerges which undermines the safety of a conviction, they will be quashed and re-trial may be ordered...in my view, the architect of article 50 of the Constitution is that after a criminal trial ends in a conviction, the defendant can file a motion for a new trial only after the conditions stipulated in article 50 (6) are satisfied. The High courts can grant an order or re-trial – though rarely - to correct significant errors that happened during trial or if substantial new evidence of innocence comes to light.”

112. I echo the views expressed by the Court of Appeal in *Murai vs. Wainaina (No 4) [1982] KLR 38* that:

“A static system of justice cannot be efficient. Benjamin Disraeli said change is inevitable. In a progressive country change is constant. Justice is a living, moving force. The role of the judiciary is to keep the law marching in time with the trumpets of progress. We do not want to have a wilted legal system in this country. We want a legal system for the common will.”

113. However, Article 50(6) of the Constitution provides that the Court can only act thereunder where new and compelling evidence has become available. In *Tom Martins Kibisu vs. Republic Supreme Court Petition No. 3 of 2014* the Supreme Court pronounced itself as follows regarding that issue:

“[41] Article 50 is an extensive constitutional provision that guarantees the right to a fair hearing and, as part of that right, it offers to persons convicted of certain criminal offences another opportunity to petition the High Court for a fresh trial. Such a trial entails a re-constitution of the High Court forum, to admit the charges, and conduct a re-hearing, based on the new evidence. The window of opportunity for such a new trial is subject to two conditions. First, a person must have exhausted the course of appeal, to the highest Court with jurisdiction to try the matter. Secondly, there must be ‘new and compelling evidence’.

“[42] We are in agreement with the Court of Appeal that under Article 50(6), “*new evidence*” means “*evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been availed at the trial*”; and “*compelling evidence*” implies “*evidence that would have been admissible at the trial, of high probative value and capable of belief, and which, if adduced at the trial would probably have led to a different verdict.*” A Court considering whether evidence is new and compelling for a given case, must ascertain that it is, *prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered, or the sentence passed against an accused person*”. [Emphasis added].

114. In *James Macharia Anumbi vs. Republic [2017] eKLR*, the Court identified the key considerations to guide the determination of “new and compelling evidence” as follows:-

1. *The evidence is newly discovered and the petitioner did not know about it prior to, or during the trial;*
2. *The evidence must be material and not merely cumulative;*
3. *The petitioners failure to learn about the evidence before the verdict was not because of lack of diligence; and*
4. *The new evidence is significant enough that it would likely result in a different outcome if a new trial is granted.*

115. In this case, PW2 and PW3 testified on oath that their evidence, which was the basis upon which the 1<sup>st</sup> Petitioner was convicted, was extracted through coercion and threats by their mother with the assistance of the police. They were forced to testify against the 1<sup>st</sup> Petitioner in order to obtain a conviction of the 1<sup>st</sup> Petitioner in order to pave way for their mother to access a property. The revelation that they were so coerced only became available to the 1<sup>st</sup> Petitioner when the matter was before the Court of Appeal which rightly in my view, declined to entertain the same. In other words, the issue the subject of this Petition was not available to the 1<sup>st</sup> Petitioner both at the time of the hearing and at the time of the first appeal to the High Court which were the only forum at which such facts could have been considered. There was no way the 1<sup>st</sup> Petitioner could have discovered that PW2 and PW3 herein were coerced and threatened by their mother and the police to say

what they did till the time when the door to the adduction of that evidence had been locked in his face. The facts of this case are not too dissimilar to those in the case of JNN vs. Republic [2019] eKLR, where the alleged victim of incest and key prosecution witness at the Petitioner's trial recanted her testimony. The said victim explained the motive of the prosecution as a land dispute and that she had been coached on what to say in court. This court considered the recanted testimony and subsequent explanation as to the motive for which it was presented as qualifying to be new and compelling evidence and proceeded to order for a retrial. The High Court ordered a retrial after the Complainant retracted her testimony stating that the Petitioner in that case had never defiled her.

116. I agree with the position adopted by the Court of Appeals of Texas in Villareal Villarreal vs. State 788 S.W.2d 672 that:

**“the general rule is that a new trial should be granted where a witness has testified to material inculpatory facts against the accused and after the verdict, but before the motion for a new trial has been acted upon, makes an affidavit that he testified falsely.”**

117. Similar facts to this case existed in the Court of Appeals of Washington in State vs. D.T.M., 78 Wash. App. 216 • 896 P.2d 108 where a re-trial was ordered.

118. In this case injustice is not only glaring but appears to be also smiling in defiance of justice. To paraphrase Nyamu, J (as he then was) in Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443, where justice is denied the gates of hell open wide to give way to frustrations, despondency, dejection, desolation and hopelessness. People are then driven to have no faith in the rule of law and resort to other means illegal or otherwise to mete out what in their view meets the ends of justice. Justice is not a cloistered virtue and where justice is not only done but is also seen to have been done, the sons and daughters of the land dance and sing, and the angels of heaven sing and dance and heaven and earth embrace. In other words, nothing should be done in the name of justice which would strike a reasonable man as unjust.

119. Spouses and couples ought to remember that their children are not their properties. While they have legal parental obligations over them and in African set up the children have moral obligations to take care of their parents, parents have no right to treat their children as “scud missiles” or “patriots” against each other as a means of domestic warfare. They should learn to fight their own wars and battles without involving or seeking the support of their children particularly where the children are minors. To do so is not only unlawful but is also immoral.

120. Having considered the facts of this petition, I find it merited. I find that the petitioners have proved that the 1<sup>st</sup> Petitioner's appeal has been dismissed by the highest court to which he was entitled to appeal, and that was the Court of Appeal. He has proved to my satisfaction that the evidence that PW2 and PW3 in this petition were coerced, was not available at the time of trial and that despite exercise of due diligence, the same could not have been availed at the trial. Therefore, he has proved he has new evidence as contemplated under Article 50(6) of the Constitution. In addition, the evidence of the fabricated testimony based on coercion would have been admissible at the trial. It was evidence of high probative value and capable of belief since it comes from the alleged victim of the offence who at the time of her testimony was a minor under the influence of her mother. Since the conviction of the 1<sup>st</sup> Petitioner was substantially based on the evidence of PW2 and PW3, I am satisfied that had the present facts been known to the trial court, it would probably have led to a different verdict. I am satisfied that the facts as placed before this Court ascertain that it is, *prima facie*, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered and the sentence passed against the 1<sup>st</sup> Petitioner. In effect the Petitioners have proved that the said new evidence is also compelling evidence which has become available pursuant to Article 50(6) of the Constitution.

121. Before concluding the matter, I take this opportunity to express my appreciation to counsel who appeared in this petition for their well-researched submissions. If I have not referred to all the submissions made and the decisions referred to me, it is not out of lack of appreciation for the industry.

122. In the premises, I find merit in this Petition.

123. Accordingly the orders which commend themselves to me and which I hereby make are as follows:

**i) The Proceedings, conviction and sentence in Kithimani Principal Magistrate's S.O.A Case No. 17 of 2011 and the subsequent decisions upholding the same are hereby quashed and/or set aside;**

**ii) Pursuant to the provisions of Article 50(6) of the Constitution which only permit for an order of retrial as opposed to an acquittal, I hereby direct that a new trial be undertaken should the Director of Public Prosecution deem it viable in the circumstances of this case;**

**iii) Considering the public interest issues involved, there will be no order as to costs.**

124. Judgement accordingly

**Signed and Dated and Delivered at Machakos this 16<sup>th</sup> day of December, 2020.**

**G V ODUNGA**

**JUDGE**

**In the presence of:**

**Mr Maweu for the 1<sup>st</sup> Petitioner who is in attendance online**

**Mr Kamau for the 2<sup>nd</sup> Petitioner**

**Mr Ngetich for Miss Njeru the 2<sup>nd</sup> Respondent**

**CA Geoffrey**