REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 321 OF 2013

BETWEEN

MUSILI MWENDWA.....PETITIONER

AND

THE ATTORNEY GENERAL.....1st RESPONDENT

THE INSPECTOR GENERAL.....2nd RESPONDENT

CORPORAL COLMAN KORI.....3rd RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS.....4th RESPONDENT

JUDGMENT

Introduction

1. The Petition brings into focus once again questions of an arrested person's as well as accused person's rights. It is the Petitioner's contention that the Petitioner's rights as guaranteed under Articles 29, 47, 49 (1) and 50 of the Constitution were violated.

2. The Petitioner sought various declaratory and compensatory reliefs besides costs. All the Respondents opposed the Petition.

Background facts

3. The facts are largely not in dispute and may be shortly stated as follows.

4. The Petitioner together with one Maria Mukiri (hereinafter " the Petitioner's co-accused") were arrested on 27 and 26 February 2011 respectively. The Petitioner was arrested after he went to inquire why his co-accused had been arrested. They were later arraigned in court on 10 March 2011 and charged with the offence of robbery with violence. They went through a trial. The trial lasted some one year and eight months. All the while the Petitioner and his co-accused were in custody. They never posted bail as they were granted none. When eventually they were granted bail they were not able to post it. The terms were too onerous they said and despite a subsequent revision they still were unable to post bail. The

Petitioner and his co-accused were eventually acquitted. The Petitioner was acquitted on 5 December 2012 . The Petitioner's co-accused had earlier been acquitted on 17 August 2012. She later met her demise on the eve of Christmas in 2014.

Petitioner's case and evidence

5. The Petitioner's case is detailed in the affidavit in support of the Petition and as advanced during the oral hearing.

6. It is the Petitioner's case that the criminal charges filed against the Petitioner and his co-accused in Criminal Case No. 1111 of 2011 were trumped up and were further never properly investigated by the 2nd and 3rd Respondents.

7. The Petitioner further contends that his arrest was unlawful and illegal as was his continued detention for over one year and eight months. The Petitioner stated that at the time of his arrest no reasons were advanced for the arrest and further that he was denied bail, all contrary to the provisions of Article 49 of the Constitution. In consequence, the Petitioner contends that his arrest was arbitrary and without any reasonable ground. Further, the Petitioner contends that the 2nd and 3rd Respondents violated the Petitioner's rights under Article 49(1) of the Constitution in not informing the Petitioner of the reasons for his arrest and also detaining him for more than twenty four hours before arraigning him in court.

8. It is further contended by the Petitioner that the 2nd and 4th Respondents acted in violation of the Petitioner's fair trial rights in not causing the alleged crimes to be investigated properly and in further instituting criminal proceedings against both the Petitioner and his co-accused without sufficient evidence.

9. Finally, it is also the Petitioner's case that his rights to fair trial under Article 50(2) of the Constitution and in particular the right to have the trial begin and conclude without unreasonable delay was violated. In this regard, the Petitioner faulted the 4th Respondent for consistently adjourning the case. The adjournments the Petitioner contends occasioned the unnecessary delay.

10. The Petitioner seeks to compel the 4th Respondent to prosecute the 3rd Respondent. The Petitioner also seeks declarations that his rights were violated and additionally the Petitioner seeks damages for his prosecution.

1st 2nd and 3rd Respondents' case

11. It is the 1st, 2nd and 3rd Respondent's case that the Petition is incompetent for lack of precision in the drafting. Additionally the said Respondents contend that there is no sufficient evidence to prove any violation of the Petitioner's rights.

12. Further, the 1st 2nd and 3rd Respondents also contend that the Petitioner and his co-accused were taken through the due process and a court judgment duly rendered which judgment could only be challenged through an appeal or by way of review but could not be used to lay a basis for constitutional litigation.

13. The 1st, 2nd and 3rd Respondents finally contend that the denial of bail to the Petitioner was in the discretion of the trial court and cannot be used by the Petitioner to lay a basis for a constitutional petition when no application for review was ever made.

4th Respondent's case

14. The 4th Respondent's case may be retrieved largely from the Replying Affidavit of Gitonga Muranga sworn and filed in court on 8 March 2016.

15. The 4th Respondent states that the Petitioner and his co-accused were only charged with the offence of robbery with violence after a review of the evidence and the investigations file revealed that there was sufficient evidence to have the Petitioner and his co-accused prosecuted. It is contended that this position was vindicated by the trial court which found that as against the Petitioner, there was a prima facie case.

16. The 4th Respondent additionally denies that this court has jurisdiction to determine a malicious prosecution case while stating that there was no malice in the Petitioner's prosecution and further that the due process was observed and the Petitioner and his co-accused afforded all the fair trial processes. The 4th Respondent also states that all the adjournments granted were at the discretion of the trial court and the same cannot be attributed to the 4th Respondent and then faulted.

17. Finally, the 4th Respondent contends that the independence of the office of the Director of Public Prosecutions does not allow it to be dictated or directed by any person or authority in the execution of its prosecutorial powers including who to charge or prosecute.

Arguments in court

18. The Petitioner's case was urged by Mr. James Kironji while the 1st, 2nd and 3rd Respondents' case was argued by Mr. Thande Kuria. Ms Kihara presented the 4th Respondent's case.

Petitioner's submissions

19. Mr. Kironji challenged and faulted the trial process in criminal case No.1111 of 2011 stating that the Police Service had no basis for arresting and recommending the prosecution of the Petitioner and his co – accused with the offence of robbery with violence. According to Mr. Kironji there was no reasonable basis to believe the complainant's story in the first place. The Petitioner's counsel in this regard relied on the case of **O'hara *vs* Chief Constable of the Royal Ulster Constabulary [1997]A.C 286** where the House of Lords held that there ought always to exist reasonable grounds for forming suspicion prior to any arrest of a suspect being effected. Counsel added that the police effecting the arrest must believe the complainant's story.

20. Counsel then submitted that there was clear and undisputed evidence that the Petitioner's rights guaranteed under Article 49 had been violated as the Petitioner was never informed of the reasons for his arrest , secondly the Petitioenr was held for more than twenty four hours before being arraigned in court and thirdly the Petitioner was never released on bail. Counsel referred the court to the cae of **Christie *vs* Leachinsky [1947] AC 573** for the proposition that the omission to tell a person who is arrested at the time of his arrest with what offence he was being arrested was not a mere irregularity. Additionally, counsel also made reference to the case of **R. *vs* Mian [2004] SCC 54** where the Supreme Court of Canada held that a delay of 22 minutes before informing an arrestee of the reasons for his arrest amounted to a violation of his rights.

21. With regard to the 24 hour rule under Article 49 of the Constitution, Mr. Kironji refrred to the case of **Salim Kofia Chivui *vs.* Resident Magistrate Butali Law Courts & Another [2014]eKLR** as well as **Michael Freemantle *vs.* Jamaica (HRC No 625 of 1995)**, a Human Rights Committee decision. In both cases it was held that the failure to produce an arrestee before the court within 24 hours constituted a violation of his rights.

22. Mr. Kironji then looped the failure to produce the Petitioner and his co-accused before the court within 24 hours with the lack of proper investigations before arrest and indeed the lack of any case against the Petitioner and his co-accused. Counsel submitted that the only reason for the delay was because no proper investigations had been conducted and that there was no evidence against the Petitioner and his co-accused. On this counsel submitted that the Respondents had all to be faulted for breaching the Petitioner's fair trial rights and also violating Article 157(11) of the Constitution.

23. Counsel for the Petitioner finally submitted that the Petitioner's right to an expeditious trial was also

violated by reason of the many adjournments sought by the 4th Respondent and allowed by the trial court. This it was contended led to the Petitioner's unnecessary and continued detention. Counsel referred to the case of **R. *vs.* Lord Advocate [2003] 2 L.R.C 51** where it was held that unreasonable delay is one which is excessive, inordinate and unacceptable.

24. Mr. Kironji concluded by asking for damages in the amount of Kshs. 25,000,000/= as well as an order directed at the 4th Respondent to investigate and prosecute the 3rd Respondent.

1st, 2nd and 3rd Respondents' Submissions

25. Mr. Kuria, on behalf of the 1st 2nd and 3rd Respondents, submitted that the Petition was lacking in basic formal competency whilst making reference to the repeatedly cited case of **Anarita Karimi Njeru *vs.* Republic [1976-80] KLR 1272** . Counsel stated that the Petitioner had failed to plead his case with reasonable precision and that additionally the violations had not been particularized. Counsel then submitted that the Petitioner had failed to prove his case in all angles but that instead the evidence showed that the Petitioner had been prosecuted of a cognizable offence and later acquitted by a competent court.

26. Mr. Kuria further submitted that the evidence from the court proceedings in criminal case No. 111 of 2011 showed that both the Petitioner and the prosecution applied for adjournments and the Petitioner was ultimately granted bail when he applied for the same. In these respects, counsel stated, the Respondents could not be faulted for any delay in the trial. Finally, Mr Kuria submitted that the Petitioner's recourse lay in a civil suit for malicious prosecution and not a constitutional petition for violations of his rights.

4th Respondent's submissions

27. Ms. Kihara urged the case on behalf of the 4th Respondent and firstly submitted that the 4th Respondent had properly exercised his discretion after having reviewed and analyzed the evidence compiled by the 2nd Respondent and further determined the sufficiency of the evidence.

28. It was also the 4th Respondent's submission that the Petitioner never sought bail in the first instance and that the decision as to whether or not to grant bail lay with the trial court and not with the 4th Respondent.

29. Ms. Kihara submitted that the record of the proceedings before the trial court revealed that there had been no unreasonable delay as the adjournments had similarly been occasioned by the Petitioner and his co-accused. For completeness, counsel referred to Article 157 of the Constitution and submitted that the independence of the office of the Director of Public Prosecutions ought not be interfered with by the court directing it who to investigate and to prosecute.

Discussion and Determinations

Issues

30. Three issues emerge for determination from the pleadings and the submissions made by counsel. They may be stated as follows.

31. First, is the Petition formally competent? Secondly, has the court the jurisdiction to hear and determine the Petition. Thirdly, were the rights or freedoms of the Petitioner as guaranteed by the Constitution violated? Additionally, is the issue as to whether the Petitioner is entitled to the reliefs sought?

Competency of the Petition

32. In **Anarita Karimi Njeru *vs.* Republic [1976-80] KLR 1272**, the principle that a person who alleges a violation of his constitutional rights and freedom must plead such allegation with a degree of precision

was laid out. The court was clear that the alleged violations must be particularized in a reasonably precise manner and further also that the specific provisions of the Constitution which availed the violated rights had to be stated as was the manner of violation and extent thereof.

33. This principle of the law has been reiterated and followed severally: see **Mumo Matemu *vs.*Trusted Society of Human Rights Alliance & 5 others [2013]eKLR**. In **Meme *vs.* Republic [2004]eKLR** the court stated as follows:

> ***"Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed."***

34. The rationale of the principle, as I understand it, is to ensure that both the respondent as well as the court understand and appreciate the case they are faced with. The respondent must be able to prepare his defence, if any, while the court must be able to appreciate with little difficulty the dispute it is set to adjudicate. Where therefore thje pleadings lack reasonable precision, the Petition will be declined summarily: see **Mumo Matemu *vs.* Trusted Society of Human Rights Alliance & 5 others (supra)** and also **Samson Otieno Bala t/a Missam Enterprises *vs.* Kenya Bureau of Standard & 4 others[2015]eKLR**.

35. The court must however not be in a hurry to strike out constitutional petitions merely for want of formal competence. Caution ought to be exercised before invoking the powers to dismiss the petition summarily it being noted that the realm of constitutional litigation is forever novel. Thus in **Nation Media Group Ltd *vs.* Attorney General [2007]1 EA** 261, the court observed thus:

> ***"A Constitutional court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice…<u>As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite appropriate sections of the law under pinning the application, the application ought to proceed to substantive hearing…</u>"***(emphasis)

36. The same sentiments were also expressed by the Court of Appeal in **Peter M. Kariuki –v- Attorney General [2014]eKLR** . The rule in **Anarita Karimi Njeru *vs* Republic (supra)** ought not be applied hook line and sinker. It is not about absolute precision. If a party and, a priori, the court is able to painlessly identify the complainants case, then the matter ought to be determined substantively and on its merits.

37. I have perused the Petition as well as the accompanying affidavits. The drafting , no doubt, was wordy. The Petitioner however identified the offended provisions of the Constitution. They were Articles 29, 47, 49, 50 and 157. The Petitioner tied Articles29, 49 and 50 together. The Petitioner also tied Articles 47 and 157 together. Then in a rather prolix manner the Petitioner sought to show his grievances. I am satisfied that any reasonable by-stander reading through the pleadings and placing the relevant constitutional provisions next to the same would easily and painlessly identify the claim the Respondents faced as well as the Petitioner's grievances.

38. I need not re-emphasize the importance of pleading a case with precision. Where however the pleadings have little room for speculation regarding the rights or freedoms sought to be enforced by the Petitioner then the court ought not invoke the rather draconian and harsh jurisdiction of striking out claims without venturing into the merits. I am satisfied that in the instant case the threshold set out in **Anarita Karimi Njeru's case** as to reasonable precision has been met.

39. I consequently decline to accede to the Respondents' plea that the Petition ought to be disposed of summarily.

A question of jurisdiction

40. Mr Kuria Thande, advocating for the 1st 2nd and 3rd Respondents, also contended that the court lacked the requisite jurisdiction to entertain the instant petition. Mr Kuria specifically contended that the Petitioner ought to have filed an ordinary civil suit for damages in malicious prosecution. There was muted support for this position by the 4th Respondent.

41. I must first point out that the Petitioner's claim is not just pegged on wrongful or malicious prosecution. That may only be a limb of the claim when the Petitioner states that the Respondents did not properly investigate the complaint and further that there was never adequate evidence to cause the Petitioner to be prosecuted.

42. The Petition was brought under Articles 20, 22 and 23 of the Constitution. The Petitioner mainly claims that his rights and freedoms as guaranteed under the Bill of Rights were violated. Article 20 of the Constitution is clear that the Bill of Rights applies to all law and binds all state organs and all persons. The Respondents are not excluded. Article 22 of the Constitution on the other hand grants unfettered right to every person to institute court proceedings claiming that a right or freedom has been denied ,violated or infringed. The Petitioner is one such person. Then Article 23 of the Constitution donates to this court the jurisdiction to hear and determine applications for the redress of a denial or violation or infringement of a right or fundamental freedom in the Bill of Rights.

43. The Petitioner herein has not only complained that the Respondents acted in violation of Article 157 of the Constitution. The Petitioner also claimed that his freedom guaranteed under Article 29 was violated or infringed upon. Likewise, the Petitioner also contended that his rights enshrined under Article 49 had been violated at the time of his arrest and thereafter for another thirteen days. Finally, the Petitioner also complained that his trial took an unnecessarily long period contrary to the provisions of Article 50(2)(e) of the Constitution which advocates and guarantees expeditious trials.

44. The Petitioner's counsel sought to deny that the claim is for malicious prosecution. In claiming damages and further contending insufficiency of evidence, the Petitioner's claim is akin to a malicious prosecution claim. Malice may not have been expressly pleaded but when the Petitioner contends that the complainant had promised to fix the Petitioner and the Petitioner's co-accused, then one is minded to state that the Petitioner's claim in one respect is for malicious prosecution.

45. The Petition evidently raises both constitutional claims and also,in a rather subtle manner, the civil claim for malicious prosecution. The court evidently has the requisite remit to determine the former claims. The latter claim ought ordinarily be lodged in the civil jurisdiction of this court by way of a plaint. However, noting that the court has unlimited jurisdiction, would it be in the interest of justice to now adopt a separationalistic approach and determine that this court may not deal with the claim in malicious or, as Mr Kironji was minded to state, wrongful prosecution?

46. A similar scenario played out in the case of **C.O.M *vs.* Standard Group Limited & Another HCCP No 192 of 2011[2013]eKLR**. The court faced with the question as to what an adjudicating tribunal or forum ought to do when faced with scenarios where a party may ventilate one part of the claim elsewhere stated as follows:

> ***[15]…However, whereas I subscribe to and generally hold the same view, I am also mindful of the edict that each case must be looked at in its specific and unique circumstances. If for example, the Respondent had raised the issue at the preliminary stage, I would have made the necessary orders. Having now allowed the parties to proceed to full trial, then it is important that the Court should deal with the issues raised in the wide context of its unlimited original jurisdiction under Article 165(3) of the Constitution and for the ends of justice to be seen to have been met, notwithstanding that the matter should ordinarily have been filed in the High Court under its civil jurisdiction although constitutional questions have also been raised.***
>
> ***In saying so, I am guided by the Court of Appeal decision in Rashid Odhiambo Aloggoh & 245***

Others vs Haco Industries Ltd, Civil Appeal No.110 of 2001, where the Court dealt with an appeal in which the High Court had refused to deal with the issues because there were other lawful avenues through which the Appellant could ventilate them. The Court stated as follows;

> ***"...with respect to the learned judges of the High Court, they erred in holding that the Appellants had other lawful avenues in which they could go to ventilate their grievances.***
>
> ***What should the Constitutional Court have done? In our respective view, it should have considered whether or not the allegations made by the Appellants were true. It appears that the parties were prepared to have the factual issues which they raised to be determined on Affidavit evidence.***
>
> ***We do not know how the Constitutional Court would have gone about this, but since this was an Originating Summons, some assistance could have been derived from the provisions of Order 36 Rule 10(1) of the Civil Procedure Rules which allow the Affidavits to be treated as pleadings and there after the parties allowed to give viva voce evidence from which the Court would be able to make up its mind on which side of the divide the truth lays. The burden of Court, would have been on the Appellant to show the Court that the facts on which they based their claim were true. If the Court had found that the facts as put forward by the Appellant were not true, then that would have been the end of the matter...But if the Court found that the facts were as stated by the Appellants, the Court would have to move to the next stage namely, do the proved or admitted facts constitutes or amount to violation or contravention of the Constitution? In determining that issue, the Could would be entitled to consider the various statutory provisions relied on by the Appellants … the facts, if they were to be found to be as stated by the Appellants, amount to or constitute a contravention of Sections 73, 74, 80 of the Constitution as contended by the Appellants … then in that event the Court would move to the last stage, namely the remedy of remedies to which the Appellants would be entitled to ..."*** (Emphasis added)

47. I would adopt a similar approach. It would be inappropriate to separate the Petitioner's claim at this stage or strike it out. It would be tantamount to perverting the course of justice to so act.

48. I have the requisite jurisdiction to entertain and determine the Petition in its entirety as the Petition is properly before the court.

Violations of constitutional rights and freedoms

49. I now proceed to determine whether the Petitioner has established his claim to the requisite standard.

50. The law is clear that a party who alleges that his fundamental rights and freedoms have been violated, denied or infringed has the evidential burden of proving that the rights have been violated: see **Anarita Karimi Njeru *vs.* Republic (supra)** as well as the Evidence Act (Cap 80) at sections 105-112 generally. See also **Matiba *vs.*Attorney General [1990] KLR 666** and **Githunguri Dairy Farmers Cooperative Society Limited *vs.* Attorney General & Others [2016]eKLR.** It is thus for the Petitioner to avail sufficient evidence to establish that his rights or freedoms have been violated . The proof is on a balance of probabilities.

Violation of Articles 29,49 and 50

51. The Petitioner contended that his security and freedom of person was unlawfully and illegally curtailed and violated when following his arrest as well as that of his co-accused on 27 February 2011 he was kept in custody without reason for a period of thirteen days before being arraigned in court on 10 March 2011. The Petitioner contended that this was in violation of Article 29 and 49(1)(f) of the Constitution.

52. Subsequent to his arraignment in court, the Petitioner contended that he was denied bail and continued

to remain in custody as he awaited trial and as the trial also proceeded until 5 December 2012 when he was finally acquitted. The Petitioner contends that there was unreasonable delay in the commencement and conclusion of his trial and that in consequence the provisions of Article 50(2)(e) of the Constitution was violated. The result, in the Petitioner's view, was that his right to freedom and security of person guaranteed under Article 29 of the Constitution was also violated.

53. Article 29 of the Constitution, in so far as is relevant , provides as follows:

> ***29. Every person has the right to freedom and security of the person, which includes the right not to be-***
>
> ***(a) deprived of freedom arbitrarily or without just cause***
>
> ***(b)…..***

54. Article 49 of the Constitution on the other hand guarantees the rights of an arrested person. The Article has indexed the rights and freedoms of arrested person as distinguished from an accused person is entitled to. In summary, an arrested person has the right to certain minimal information. He must be informed at the time of his arrest and in a language that he understands; the reasons for his arrest, the right to remain silent and the consequences of such silence. Besides, he also has the right to remain silent, to communicate with an advocate and not to be compelled to make any confession. Then he has the right to be expeditiously arraigned in court if charges are to be preferred and to be released on bond or bail whether he is charged with an offence or not.

55. Article 49 supplements Article 29(a). The latter ensures the protection of the physical integrity of the individual. A person is by the Constitution guaranteed physical liberty unless with just cause. For a person to be deprived of his right to freedom, the reasons for such deprivation must be acceptable . Even where the reasons are satisfactory or acceptable, the procedure for such deprivation must not be arbitrary but must be procedurally fair. In the end, it may be summarily stated in my view that physical freedom ought not to be deprived without the due process of law which encompasses the appropriate reasons being advanced and appropriate procedure being followed.

56. Article 49 of the Constitution in one way or the other seeks to provide the appropriate procedure especially when dealing with difficult situations where deprivation of freedom inevitably has to when crime is being fought by the relevant authorities. Police and prosecutors work may be hampered where deprivation is absolutely prohibited and thus in a democratic society, Article 49 seeks to ameliorate the consequences of such deprivation besides shaping the course of the criminal justice system.

57. A closer reading of Article 29(a) of the Constitution would appear to reveal that when a person complains that the rights protected thereunder have been violated then two questions are up to be answered. First is whether there has been a denial of physical freedom. Secondly, is whether there is good cause for such deprivation and whether due process has been followed: see **De Lange *vs.* Smuts NO [1998] 3 SA 785 (CC)**.

58. In the instant case, the deprivation of freedom complained of is two-fold.

59. Firstly, the Petitioner complains that his freedom of person was denied when he was detained in police custody for 13 days without any reason following his arrest. Secondly, the Petitioner alleges that he was detained in custody for over one and a half years without being granted bail. The Petitioner also contends that there was not only a violation of Article 29(a) but also of Article 49(1)(a) as well as 49(f) & (g). The import of Article 49 provisions need not be repeated herein.

60. It is not in controversy that the Petitioner was in custody from 27 February 2011 until 5 December 2012 when he was acquitted by the trial court. It is also particularly not in controversy that the Petitioner was after his arrest not brought to court until 10 March 2011. The Petitioner's physical liberty and integrity was no doubt denied. It was not arbitrary however because a complaint had been lodged and the

police service had to perform its constitutional and statutory compulsion of investigating crime and ensuring the prosecution of those suspected to be criminally culpable by arresting such persons.

61. Article 49(1)(f) of the Constitution however only allows the Police service to hold in custody persons suspected of being criminally culpable for a period of not more than twenty four hours before bringing them before a court. Once the twenty four hours have passed , the further detention of the arrested person becomes unconstitutional unless, in accordance with Article 49(1)(g), the arrested person is charged in court or informed by the court, not any other person, of the reasons for his or her continued detention. If there is no formal charge or if s/he is not brought before the court then s/he must be released.

62. The Petitioner was not brought before the court before the expiration of 24 hours. This was in violation of Article 49(1)(f) of the Constitution.

63. The Petitioner's continued detention after the expiry of 24 hours following his arrest on 27 February 2011 was unconstitutional. It amounted to and was indeed a violation of the petitioner's right to freedom and security of person. It also amounted to a violation of the Petitioner's rights as an arrested person. The onus was on the Respondents once it was established that the twenty four hour period was exceeded to show that there was just cause in the continued detention of the Petitioner. The Respondents did not discharge this onus. There was no just cause at all to justify the Petitioner's continued detention after 28 February 2011.

Of bail and trial courts

64. The Petitioner also complained that his freedom and liberty of person was denied for more than one and a half years as he was never granted bail.

65. The Petitioner was placed under judicial authority on 10 March 2011. The record of proceedings before the trial court reflect that the Petitioner and his co-accused were unrepresented. The record also reveals that even though the Petitioner was formally charged he never secured his release from custody through a bail application. Indeed bail was only applied for through a letter addressed by the Petitioner's co-accused on 14 May 2012. The court then granted the Petitioner and his co-accused bail on terms. They were to be released on a bond of Kshs. 50,000/= with a similar surety. The Petitioner and his co-accused however were unable to post bail. Even when the bail terms were revised on 8 June 2012 to Kshs 40,000/=, the Petitioner was still unable to raise the same.

66. The Respondents have contended that the issue of bail and bond was one solely within the jurisdiction of the trial court and beyond the Respondents' control. The Respondents claim that they cannot be faulted.

67. In the case of **Hon. Senator Johnstone Muthama & 8 others *vs.* Inspector General of Police & 2 Others HCCP No. 2 of 2016[2016]eKLR** the court stated that the issue of bail or bond is one of judgment and not discretion. The court also expressed the view that the granting of bond is the judicial norm, not to be departed from whimsically, when it held as follows:

> ***"I would first point out that a decision on whether or not to grant bail, in my view, is not a matter of discretion which implies a choice between two or more equal and proper courses. It is a matter of judgment as to whether departure from the right to bail which is the norm is justified in any instance where it is opposed***."

68. I would stand by such statements of principle. The issuance of bail or bond is one of the core premises of Article 49 of the Constitution. It guarantees the arrested as well as an accused person the age old principle of fair trial, that one is presumed innocent until the contrary is proved.

69. Before August 2010, offences punishable by death were not bailable: see Section 72 of the retired Constitution. Article 49(1)(h) of the Constitution however now provides that an arrested person has the right " *to be released on bond or bail,on reasonable conditions, pending a charge or trial, unless there*

are compelling reasons not to be released."

70. In my understanding, an arrested and detained person has a right to be released on bail automatically unless there are compelling reasons for his continued detention. The narrative should be that the trial court should prompt the release unless satisfied by the State that there is good reason not to grant the bail. The trial court will prompt such release by informing the arrested and accused person of the right to be released on bail or bond. It is not the arrested or accused person to persuade the trial court to release him on bail or bond, but for the State to convince the trial court otherwise and for the trial court to exercise its judgment.

71. Where therefore the trial court fails to act and prompt the release on bail, the trial court as an organ of the State must be deemed to have failed in promoting and advancing human rights and any continued detention of a person for an unnecessarily long period as the same trial court conducts proceedings would lead to a plausible inference that the accused person's right to freedom of person and dignity has been violated. In my view, the constitutional duty is on the State to ensure that the rights under the Bill of Rights are enjoyed and this includes where appropriate and at virtually no cost, prompting such enjoyment. Trial courts, in this regard, ought to be in the forefront prompting accused persons to bail especially where there is no legal representation.

72. In the instant case, the trial court was muted in its approach to bail. So too were the Respondents. The trial lasted over one and a half years. In my view, and as is evident when bail was finally extended , the Petitioner ought not have been held in custody all that time.

A delayed trial

73. The Petitioner also complained that his rights under Article 50(2)(e) of the constitution were violated. According to the Petitioner his trial was never commenced nor concluded without unreasonable delay. The Petitioner attributed the delay to the numerous adjournments by the 4th Respondent and the trial court. Conversely, the Respondents attributed the delay to the Petitioner and his co-accused.

74. The record reveals that the Petitioner first appeared in court on 10 March 2011 and the plea was taken. The trial was then fixed for 23 March, 2011 but then adjourned to 20 May, 2011 as witness statements had not been supplied to the Petitioner and his co-accused. On 20 May, 2011 both parties had sought to adjourn the trial as they were not ready. Then on 27 June, 2011 another adjournment was sought by the Petitioner. Even though the prosecution was ready, it turned out that the Petitioner had not been supplied with witness statements. On 7 September 2011, another application for adjournment by the prosecution was allowed. The Petitioner and his co-accused were then also not ready. Then on 18th October 2011 when the trial had been rescheduled, the court adjourned on its own notice. One month later the prosecution sought and was granted an adjournment on 15 November 2011. The Petitioner on 15 November 2011 sought a "near date".

75. In the new year, the court adjourned the case once on 1 February, 2012, without any reason being assigned and the prosecution subsequently sought an adjournment which was granted despite the Petitioners forceful protests and objections. That was on 28 February 2012. The court granted the prosecution a "last adjournment". Then on both 2 April 2012 and 28 May, 2012, the court adjourned the trial without assigning any reasons. The prosecution on both instances was ready. Finally on 8 June 2012 when the prosecution sought to adjourn the case as the complainant was absent, the Petitioner now represented by counsel again protested and objected. The trial Magistrate Court made a ruling and stated thus

> "***I have considered that this is an old case. I have considered that both sides have contributed and more so the prosecutor. Last time this matter came to court the complainant was in court but due to pressure of work the matter could not take off. The complainant at that point showed the interest in prosecuting this case. The accused have been in custody for too long. I shall grant the complainant the benefit of doubt for today, grant the adjournment and order that the matter proceeds expeditiously within 14 days precisely on 20/6/12"***

76. The trial finally commence on 20 June, 2012 and after three other adjournments, two by the Prosecution and one by the Petitioner, concluded on 8 October 2012. By then the Petitioner's co-accused had been acquitted under section 210 of the Criminal Procedure Code (Cap 75) as a prima facie case, in the trial Magistrate's finding, had not been established. Judgment which led to the Petitioner's acquittal was rendered on 8 December 2012.

77. The State is responsible for bringing an accused person to trial expeditiously as well as for provision of facilities and staff to see to it that an accused person is tried within a reasonable time: see **R *vs.* Askov [1990] 2 SCR 119(SCC)**.

78. There should be no institutional inertia before the beginning of the trial and once the trial commences any glacial motion should be avoided. A reasonably speedy trial ensures that a person maintains his liberty and security of person. It also ensures that a person is quickly freed from the stigma that accompanies criminal charges. Finally, a trial devoid of slow motion ensures that the merits of both the defence and prosecution's case is not prejudiced or compromised through lost or misplaced evidence memory or otherwise.

79. From the affidavit evidence availed including the record of proceedings before the trial court, it is evident that the trial did not begin without unreasonable delay. The prosecution was guilty in various instances of the delay. The Petitioner as well applied for adjournment on various occasions, even when the prosecution was ready. The trial court as well adjourned the matter on its own motion. I am unable to blame the Respondents solely for the delay. There is certainly also no doubt that the delay potentially weakened both the prosecution's case as well as the accused's case given that the evidence was pegged on the single eye witness' account. No single side may claim to have been solely prejudiced.

80. The trial itself did not last long. It was after commencement concluded within a reasonable period of time. It took approximately three months.

81. Weighing holistically all the factors of the case and reviewing the trial court proceedings, and further being cognizant of the various systemic factors which follow our criminal justice system including the work-load of individual trial officers. I am unable to lay fault on the trial court or magistrate as I had been asked to do by Mr. Kironji. There is no clear evidence that there was any individual dereliction of duty on the part of the trial court or the trial magistrate. I am also not prepared, once gain on the footing of all the facts and factors related to this case, to find and accept that the prosecution was to blame for the delay. In the circumstances, I return the verdict that there whilst there was unreasonable delay in commencing the trial the same was concluded within a reasonable time. The delay in commencement of the trial is not however attributable to any of the parties singularly. Rather all contributed to it as did other systemic factors.

82. I do not therefore agree that the Petitioners right under Article 50(2)(e) of the Constitution was violated.

A case of malicious prosecution

83. The Petitioner has not expressly pleaded malicious prosecution. However, the plea that the criminal case No. 1111/2011 against the Petitioner and another was terminated in their favour and further that the petitioners prosecution should not have been restricted as there was no probable cause the Respondents having failed to properly investigate the complaint and finally the claim by the petitioner that the complainant had promised to fix "the petitioner all point to claim in

84. The essential elements of a case of malicious prosecution to be proven are now well settled. They may be itemized as follows:-

(i) The claimant must show that he was prosecuted by the Respondent.

(ii) That the pleadings were terminated in the claimants favour.

(iii) That the proceedings were also instituted without reasonable cause.

(iv) The Respondent instituted the proceedings maliciously and

(v) That the claimant suffered loss and damage as a result.

For a more detailed exposition see: **Bullen & Leake & Jacobs Precedents and Pleadings 16th Edition Paragraph 2-12** and also the case of **Murunga Vs. Attorney General [1979] KLR 138.**

85. For the claimant to succeed, the first four essential elements must be proven. Thus in **Mbowa *vs*. East Mengo District Administration [1972] EA 352**, the court of Appeal stated as follows:-

> ***"….the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action"***

86. The Petitioner has alleged that there was no reasonable cause for his as well as his co-accused's prosecution. He sought to demonstrate this by their acquittal. He also sought to demonstrate this by the fact of his having been detained for nearly two weeks before being arraigned in court and formally charged. Additionally, he sought to demonstrate lack of probable cause by the failure of the Respondents to inform him of the reasons for his arrest. The Respondents deny the Petitioner's claim and state that the evidence available pointed to the petitioner being criminally culpable.

87. In **Broad *vs*. Han [1939]5 Bing (N.C) 722, 725**, Tindal C. J. states as follows:

> ***"There must be reasonable cause such as would operate on the mind of a discreet man. There must also be probable cause such as would operate on the mind of a reasonable man, at all events such as would operate on the mind of the party making the change."***

88. The reasonable and probable cause is a question of law and fact followed by appropriate inference. It must exist in the mind of the person investigating the prosecution. In this case, the prosecution pursuant to the constitutional mandate was instigated by the 4th Respondent. The investigations were however prompted by the complainant and undertaken by the 2nd respondent.

89. The 4th Respondent, like the 2nd Respondent is under a duty to investigate crime and prosecute those deemed culpable. The 4th Respondent must however not act whimsically. It can and must only act where there is a foundational basis for any prosecution. Where the 4th Respondent has all the facts fairly did before him and gives his fiat, it ought not be said that there is absent reasonable and proper cause. The 4th Respondent's mandate ought not be unnecessarily interfered with or unnecessarily superintended. The same would also apply to the 2nd Respondent who has a constitutional and statutory mandate to investigate crime. Where however the prosecution obviously lacks the requisite foundational basis then the court must not hesitate to step in and fault the 2nd and 4th Respondents: see **R *vs.* Attorney General *Ex P.* Kipngeno Arap Ngeny HC Civil application No. 406 of 2001**

90. I have read the record before the trial court. The Petitioner was acquitted having been put on his defence. His co-accused was acquitted for want of a prima facie case under section 210 of the Criminal Procedure Code.

91. It is true that any state organ exercising prosecutorial powers must act with sufficient diligence to ensure that prior to instituting any criminal proceedings there reasonable aspects by way of adequate evidence to point to a person culpability: see ***Ex P* Kipngeno Arap Ngeny (supra)** .

92. In **Gaokibegwe *vs*. Mokokong & Another (2009) BWHC 77** the Botswana High Court pointed out that:

> **"[43] …** ***While a prosecutor is not expected to have tested every possible relevant fact before he***

takes action, where he has ample opportunity to investigate whether there was any justification for the charge and has failed to make any investigation, his failure renders any prosecution undertaken by him as one made without reasonable grounds."

"[48] A public prosecutor, whether he appears in the customary court or elsewhere, acts on behalf of the Director of Public Prosecutions under delegated powers. He has a solemn duty to fully consider the material placed before him before deciding to institute a prosecution, and to call for further investigation if this is necessary. His decision is made in accordance with powers conferred under the Constitution, and is a weighty decision, which will have serious consequences for the accused person. It subjects him to the public scrutiny of a criminal trial and to a degree of social stigma, even if he is ultimately acquitted. It is a decision not to be taken lightly, and certainly not to obtain resolution of civil disputes between citizens. In my judgment a prosecutor who recklessly proceeds with a prosecution without reading the docket, or in the face of clear evidence that there is no case to answer, does so without reasonable and probable cause, and is open to a claim for malicious prosecution." (Emphasis added)

93. The Respondents have pointed out that they considered the evidence and that in exercise of his discretion, the 4th Respondent decided that there was enough evidence to merit the Petitioners prosecution.

94. I have perused the record of proceedings before the trial court. I have also perused the witness statements. It is clear that the 2nd Respondent received a complaint. The 2nd Respondent's officers then determined that there was a genuine complaint. The 2nd Respondents officers opted to investigate a crime recognized by law. They did. They genuinely believed the Petitioner and his co-accused to be culpable. At trial the trial magistrate thought the offence had not been proven beyond reasonable doubt as against the Petitioner. The complainant who testified had failed to positively identify the Petitioner. I cannot see how that finding may be faulted.

95. I cannot also see how the Respondents can be stated to have acted with malice simply because of the acquittals handed to the Petitioner and his co-accused. The mere fact of acquittal is not enough to lead to a conclusion that the Respondents acted improperly or shoddily investigated the complaint. All the relevant evidence must be considered including the fact that the trial magistrate found that there was a prima facie case made against the Petitioner.

96. I conclude that the Petitioner has not established that the criminal proceedings were commenced with malice. I also conclude that the totality of the facts and circumstances of the case would vindicate the Respondents when they state that they acted in good faith in investigating the complaint and ultimately instituting the criminal proceedings. There appears to have existed reasonable and proper cause in the eyes of the Respondents to commence the prosecution.I cannot find any material or evidence upon which I may state that there were improper investigations or that the petitioner was maliciously prosecuted.

Remedies

97. The Petitioner has sought various remedies. In my view, the remedies are not to extend to any wrongs or violations fetched upon the Petitioner's co-accused who is now deceased. A part from stating without any substantive proof that the co-accused was his wife, the Petitioner did not claim to sue on behalf of the deceased's estate.

98. The Petitioner sought an order for mandamus to cause the 4th Respondent to prosecute the 3rd Respondent for neglect of office under section 128 of the Penal Code. The core of the complaint against the 3rd Respondent is that the 3rd Respondent failed to conduct proper investigations. The Petitioner did not however place any material before me to establish that the 3rd Respondent acted in derelict of his duties. Besides, I take cognizance of the fact that the 3rd Respondent is an officer with the Kenya Police Service.

99. There is evidence before the court that the Petitioner wrote various letters to the 3rd Respondent's superiors, including the 2nd Respondent, complaining about the 3rd Respondent's conduct. The response to the complaints as contained in the letter of 10th February, 2015 absolved the 3rd Respondent.

100. My view is that the complaints were directed to the wrong person or organ. The Petitioner and his counsel ought to have lodged the complaints with the Independent Policing Oversight Authority vide section 24 of the Independent Policing Oversight Authority Act (Cap 88). As it were, there is no material or basis upon which I may direct the 4th Respondent to positively act by way of an order of mandamus notwithstanding the provisions of Article 157 of the Constitution.

Summary of findings

101. I conclude that the Petitioner has partially succeeded in his claim. In summary my findings on the isolated issues are as follows.

102. On the issue of the competence of the petition, I find that the petition was drafted with adequate precision and clarity to help point out the case the Respondents faced and which court was to determine.

103. On the issue of jurisdiction, I find that even though the Petitioner's claim was partially akin to a claim in malicious prosecution, this courts unlimited jurisdiction under Article 165 enjoined it to entertain the claim in view of the fact that the Petition also raised constitutional issues and questions.

104. On the issue as to whether the Petitioners rights under Article 29 and 49 were violated, I find that the Petitioner's rights were violated by virtue of the Respondents' failure to place the petitioner under judicial authority within 24 hours following the Petitioner's arrest. Additionally, I find that failure of the trial court and trial magistrates, over a period of 14 months to prompt the Petitioner to his bail or bond rights led to a violation of the petitioners rights under Article 29(a).The trial court as a state organ ought to have acted in accordance with the provisions of Article 21 and prompted the bail/bond rights and in so doing observe respect promote and protect the rights and freedoms under the Bill of Rights.

105. On the issue as to whether the Petitioner's rights under Article 50(2)(e) of the Constitution were violated, I find that the Petitioners right to have his trial begin without delay was violated but that the trial once it commenced was concluded without any delay which could be attributed to either the State or the 4th Respondent. The delay in the commencement of the trial was however contributed to equally by both the Petitioner as well as the Respondents.

106. On the issue as to whether the 2nd and 4th Respondents acted in dereliction of and in abuse of their mandates to investigate crime and prosecute offenders, I find that there is no evidence to show such inaction or action and further that there was in the totality of the circumstances reasonable and proper cause to prosecute the Petitioner.

107. Finally, on the issue as to whether the 4th Respondent ought to be ordered to investigate and prosecute the 3rd Respondent, I find that the Petitioner has not exhausted the proper channels for complaints prompting investigations against officers serving in the police service. The starting point is the Independent Policing Oversight Authority and no evidence has been availed to show that the said Authority was moved by the Petitioner.

Reliefs

108. The Petitioner has sought damages besides various declarations. There is need to determine what would be the appropriate relief.

109. I have found that the Petitioner was unlawfully confined for a period of over 13 days following his arrest. I have also found that the petitioner's right to bail and bond were never prompted or effected when there was no objection or compelling reason.

110. State agents and organs ought to always act with a view of promoting constitutionalism. Slips in their actions may lead to total prejudice and losses. A person liberty once denied may be beyond monetary compensation. The court however must always do its best to try and make good. This is not however a case where exemplary damages may be justified as there is no clear cut evidence of arbitrary action on the part of the Respondents. The Petitioner sought the sum of Kshs.25,000, 000/=. That is exorbitant and is not justified. I will award damages however to vindicate the Petitioner's constitutional rights.

111. Weighing all factors as well as the circumstances of this case, I make the following orders:-

(a) There shall issue a declaration that the detention of the Petitioner for a period longer than 24 hours by the 2nd Respondent's officers without being arraigned in court was unlawful, illegal and unconstitutional for being in violation of the Petitioner's fundamental freedoms and rights under Articles 49 and 29 of the Constitution.

(b) The Petitioner is hereby awarded a global amount in the sum of Kshs.1,500,000/= as damages to be paid by the 1st and 2nd Respondents for the violation of the Petitioner's constitutional rights .

(c) The Petitioner will also get costs of the Petition.

112. Decree accordingly.

Dated, signed and delivered at Nairobi this 19th day August, 2016

J.L.ONGUTO

JUDGE