REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 254 OF 2014

BETWEEN

MARGARET AYUMA KATUNGU……...…….…….PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS…..…..1ST RESPONDENT

THE HON. THE ATTORNEY GENERAL……..…,…..2ND RESPONDENT

THE PRINCIPAL SECRETARY, MINISTRY

OF FOREIGN AFFAIRS…….……..……...3RD RESPONDENT

JUDGMENT

Introduction

1. The petitioner challenges her prosecution in Kenya with respect to criminal offences allegedly committed while she was working in the Kenyan High Commission in Harare, Zimbabwe. She alleges that she was interdicted on 30th November, 2010 from performing the functions of her office on allegations of theft, and was barred from leaving her duty station without any express permission of her immediate supervisor for the entire duration of the interdiction.

2. The petitioner states that she was at all times material to this petition, and still is, an employee of the Ministry of Foreign Affairs of the Government of the Republic of Kenya. She has filed the petition against the Director of Public Prosecutions (hereinafter **DPP**) whose office is established under Article 157 of the Constitution, with the mandate to institute and undertake prosecutions on behalf of the Republic; the Attorney General of the Republic of Kenya (hereinafter AG), the principal legal advisor of the national government in accordance with the provisions of Article 156 of the Constitution; and the Principal Secretary in the Ministry of Foreign Affairs of the Republic of Kenya, the petitioner's supervisor at the Ministry.

Factual Background

3. The petitioner was employed in the position of an Accountant II at the Ministry of Foreign Affairs. At

the material time from 25th September, 2005, she had been posted to the Kenyan High Commission in Harare, Zimbabwe as a Financial Attaché. On 18th October, 2010, she was accused of stealing US$10,000 through forgery from the High Commission's Bank Account No. 870022111 at Standard Bank, Harare, Zimbabwe. By then, she had been recalled to the Ministry Headquarters in Nairobi. On 30th November, 2010, she was interdicted pending investigations into the alleged theft.

4. Following the interdiction, the petitioner through her Counsel wrote letters to the DPP and the 3rd respondents at different times with regard to the interdiction. She then filed **Industrial Cause No 2142, Margaret Ayuma Katungu vs The Attorney General** challenging the interdiction on the basis that it was unlawful and she prayed that it be lifted and that she be reinstated. On 14th June 2013, the Court granted the prayers sought in the petitioner's application for conservatory orders dated 12th June 2013. It issued restraining orders temporarily restraining the AG from continuing with the interdiction pending the hearing and determination of the application in question. On 27th June, 2013, the Court reaffirmed the above orders.

5. On 17th October, 2013, the office of the AG filed an application seeking to set aside the Court orders restraining the interdictions, which orders were denied. Subsequently, on 17th January, 2014, the Ministry of Foreign Affairs and International Trade, through a Mr. L.M Waweru, wrote to the petitioner lifting the interdiction. Later, on March 28th 2014, the petitioner was suspended from employment based on the criminal charges that she was facing. The crux of the petitioner's case is that the institution of the criminal proceedings against her is a gross abuse of the court process and has resulted in a violation of her constitutional rights.

The Case for the Petitioner

6. The petitioner's case is contained in her petition dated 5th June, 2014 supported by her affidavit sworn on the same date, and her written submissions dated 8th September, 2014. Learned Senior Counsel, Mr. Nzamba Kitonga, presented her case.

7. The petitioner contends that on 30th November, 2010, she was interdicted pending investigations into the alleged theft at the Kenya High Commission in Harare, but no further action was taken against her. She alleges that between15th December, 2011 to 12th June, 2012, she wrote, through her Advocates, several letters to the 3rd respondent seeking an update on the status of the investigations or reinstatement to duty, but she did not receive any reply.

8. As a result, on 23rd November 2012, she filed at the Industrial Court in Nairobi H.C Industrial Cause No. 2142 of 2012 seeking orders of reinstatement and damages. She also filed an application on 12th June, 2013 for reinstatement to duty pending the hearing and determination of the main Cause, which orders were granted, and a subsequent attempt by the 3rd respondent through the AG to have the reinstatement order set aside was dismissed with costs.

9. The petitioner alleges that on 17th January 2014, the 3rd respondent wrote to her reinstating her to duty and informing her that the Ministry had terminated the criminal prosecution against her and "warning" her not to repeat the offence again. She contends that upon receipt of the letter, she concluded that the criminal investigations were terminated and that there would be no prosecution or proceedings of any nature against her.

10. She alleges, however, that unknown to her, the 3rd respondent had secretly and maliciously prevailed upon the Criminal Investigations Department to charge her with criminal offences relating to the same subject matter. She contends that although the offences are alleged to have been committed in Harare, Zimbabwe, she has been charged in a Kenyan Court which has no jurisdiction to entertain the criminal case in question.

11. The petitioner contends further that on 28th March, 2014, the 3rd respondent wrote to her once again suspending (not interdicting) her from duty. She contends that this action, as well as the criminal prosecution, was mala fide, prejudicial and malicious; that in sanctioning an extraneous and malicious criminal prosecution against her to subvert, undermine and defeat the orders of the Industrial Court in H.C Industrial Cause No. 2142 of 2012, the 1st respondent has violated and abused his constitutional mandate; and that the 3rd respondent has acted in excess of his authority and in abuse of office and violated the requirements of fairness and integrity under Chapter Six of the Constitution.

12. It was her case that her fundamental rights and freedoms to due process and a fair trial have been recklessly violated; and that the orders of the Industrial Court have been circumvented, trashed and trivialized, and it is for these reasons that she has filed the present petition to seek redress. She asks the Court to allow the petition and grant the following orders:

a) A Declaration that the prosecution of the petitioner in Nairobi C.M Criminal Case No. 91 of 2014, Republic vs Margaret Ayuma Katungu or in any other court for the offence charged therein is illegal, wrong, unlawful and unconstitutional.

b) A Declaration that Nairobi C.M Criminal Case No. 91 of 2014 or any other criminal case charging the petitioner with the offences therein is wrong, illegal, unlawful, unconstitutional and therefore null and void.

c) A conservatory and/or a perpetual order of injunction permanently restraining the respondents jointly and severally by themselves, their agents, servants and/or employees from prosecuting the petitioner in respect of the offences the subject matter of Nairobi C.M Criminal Case No. 91 of 2013, Republic vs Margaret Ayuma Katungu or any case relating to the offences the subject matter thereof.

d) General damages.

e) Costs of this Petition and interest thereon and (d) above from the date of judgement until full and final satisfaction of the decree herein.

f) Any other relief this Honourable Court may deem fit and just to grant.

The Case for the 1st Respondent

13. The Office of the DPP opposes the petition and has filed a replying affidavit sworn by Mr. Joseph Ngila Ndambuki, an Officer attached to CID Headquarters, Economic and Commercial Crimes Unit. The DPP also filed submissions dated 18th September, 2014, which were highlighted by Learned Counsel, Mr. Maingi.

14. In his affidavit, Mr. Ngila deponed that information from the Ministry of Foreign Affairs indicated that the petitioner's duties included handling of the Vote book, Cash book, official receipts, cash, bank transactions, preparation of vouchers and payment to merchants rendering services to the High Commission. During the handover process at the end of her Harare tour of duty in September 2010, it was discovered that she had falsified entries in the cash book, raised fictitious vouchers for payment to merchants for services not rendered, and misappropriated substantial amounts of cash. Upon investigations, it was confirmed that her conduct is of a criminal nature and with the concurrence of the DPP that sufficient evidence existed to form the basis of a charge, she was charged in **Nairobi CMCC No. 91 of 2014, Republic vs Margaret Ayuma Katungu**.

15. The 1st respondent denied that the petitioner's prosecution is malicious, instituted for extraneous purposes and in breach of her constitutional rights. It states that the charges are in respect of amounts exceeding the £USD 10,000 referred to in her Petition and her case before the Industrial Court.

16. The DPP contends that the petitioner had previously raised, in Nairobi CMCC No. 91 of 2014, the issue that the courts in Kenya lack jurisdiction to try offences committed in Harare, a contention that was dismissed by the trial Court on 11th April, 2014.

17. It is also the DPP's position that there has been no inordinate delay in bringing the charges against the petitioner as the offences were committed outside the jurisdiction in Harare, necessitating the activation of Mutual Legal Assistance of the Republic of Zimbabwe. He submits that his team of investigators have over the course of the investigations had to travel to Harare, hence the attendant delays.

The Case for the 2nd and 3rd Respondents

18. The office of the Attorney General filed grounds of opposition and written submissions both dated 6th October, 2014. Learned Counsel Mr. Sekwe presented its case. In the grounds of opposition, the AG argues that the petitioner has not demonstrated any breach of either the Constitution or the Employment Act on the part of the 3rd respondent; that she was and still is an employee of the 3rd respondent and the 3rd respondent's letter of 23rd March, 2014 rightly follows the correct and proper administrative action in terms of disciplinary measures. They also state that the petitioner was suspended from employment pending the outcome of criminal case No. CMCC 91 of 2014 in accordance with the law and the Public Service Regulations.

19. It is also the AG's contention, with respect to the challenge to the trial court's jurisdiction, that the petitioner, being aggrieved by the decision of the trial Court and having failed to appeal the said Ruling in the High Court, nor applied for its review, should not again raise the same issue as it is now res judicata. The AG also takes the position that the petition is frivolous to the extent that it purports to seek orders stopping the 1st respondent from executing his constitutional mandate which is being performed in accordance with the law.

20. In his submissions on behalf of the 2nd and 3rd respondents, Mr. Sekwe submitted that the petitioner was seeking in this petition the same orders that she has sought in Industrial Court Cause No 2142 of 2012, in which the parties are the same, with the exception of the DPP, and the petitioner was also seeking orders of re-instatement as well as to stop her prosecution in the criminal case.

21. The AG contended further that the 3rd respondent suspended the petitioner when the criminal charges were brought against her in terms of regulation G32(1) of the Code of Regulations of Civil Servants. It was also the position of the AG that the question of her having been forgiven did not arise as the letter relating to the purported forgiveness was in respect of an earlier interdiction.

22. The AG further submitted that all the issues that the petitioner was now raising in this matter had been canvassed before a competent court and a ruling delivered on 11th April 2014, which ruling has not been challenged or appealed from. Mr. Sekwe referred the Court to the decision in **Kenya Bus Services & 2 Others vs AG – Misc Civil Suit No 413 of 2005** for the proposition that an unchallenged court order cannot be the basis of a constitutional application, and the non-disclosure of material facts is sufficient to warrant dismissal of a constitutional petition. He asked the Court to dismiss the petition with costs.

Determination

23. Having considered the respective pleadings of the parties, as well as their respective submissions, oral and written, I take the view that two issues arise for determination in this matter:

> ***1. Whether the institution of criminal proceedings in Nairobi C.M Criminal Case No. 91 of 2014, against the petitioner is unlawful and unconstitutional and hence an abuse of court process.***
>
> ***2. Whether there is a violation of the petitioner's constitutional rights as alleged.***

24. The petitioner has also raised the question of the jurisdiction of Courts in Kenya to deal with criminal

offences alleged to have been committed outside the jurisdiction. I will first address myself to this question from the perspective of whether this issue is properly before me.

The Question of Jurisdiction of Courts in Kenya to try Offences Committed Outside Kenya

25. The petitioner argues that Courts in Kenya lack the jurisdiction to entertain such matters as the offences should be tried in the countries where they have been committed. She contends that where Kenyans in other countries commit offences, they are arrested, charged and prosecuted in those countries and are not brought back to their home countries for trial. It is her contention that neither in the Constitution nor in any law in Kenya is it stated that the laws of Kenya can apply to a person (whether Kenyan or not) who is alleged to have committed an offence outside the geographical jurisdiction of Kenya.

26. She further argues that sections 3 and 4 of the Magistrates Courts Act and Section 66 of the Criminal Procedure Code limit the criminal jurisdiction of the Kenyan Courts to the geographical area, that is the district, within which the offence was committed. She has also made detailed submissions with respect to the exercise of jurisdiction in respect of offences committed outside the jurisdiction.

27. The respondents submit, in opposing this limb of the petitioner's case, that she had raised the same issue in the lower Court, which issue was addressed by the lower Court and a ruling rendered on the question on 11th April, 2014. It was their case that the ruling was never appealed from, and the issue is therefore *res judicata*. The respondents relied on the decision in **Kenya Bus Services Ltd and 2 Others vs Attorney General and 2 Others Misc Civil Suit No. 413 of 2005** and submitted that this petition raises no constitutional issues, is not properly before the Court, and the prayers sought can be obtained through other avenues such as an appeal or through the High Court's revisionary powers. It is their contention therefore that this petition is ill-conceived and an abuse of the Court process, and they have relied in support on the decision in **Booth Irrigation vs Mombasa Products Ltd HCC Misc 1052 of 2004**.

28. I appreciate the very extensive submissions and authorities on this issue filed by the parties in this matter. In my view, however, this Court need not go into an examination of the question of the jurisdiction to try offences committed outside the jurisdiction. This is not an appellate court. The petitioner has not approached the Court by way of appeal. What she has done is raise the issue of jurisdiction as though it was a totally new matter that has not exercised the mind of a court before. There is clear non-disclosure on the part of the petitioner with regard to the fact that the issue of jurisdiction was canvassed fully and a ruling rendered by the Court seized of the criminal matter in its ruling dated 11th April, 2014 in **Republic vs Margaret Katungu Ayuma Criminal Case No. 91 of 2014.**

29. While conceding that the issue had been raised before the trial Court, Learned Senior Counsel, Mr. Nzamba Kitonga, argued that indeed the question of jurisdiction was raised in the lower Court, but that it was raised only on the basis of section 66 of the Magistrate's Courts Act in respect of the geographical jurisdiction of a magistrate's court, not within the broader framework of the Constitution.

30. I have read the decision of the Court in its ruling dated 11th April 2014. With regard to the issue of jurisdiction before it, the Court rendered itself as follows:

> "***Margaret Ayuma Katungu, the accused person herein, is in the 1st, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th counts charged with similar but separate and distinct offences... According to the information filed in this court, the said offences were committed by the accused between 30th September, 2009 and 20th September, 2012 when she was working as a financial attaché with the Kenyan Mission in Harare, Zimbabwe. When the matter came before me for plea taking, the learned counsel Mr. Nzamba Kitonga who was appearing for the accused raised a preliminary objection as to the jurisdiction of this court to entertain this matter...***
>
> ***He further argued that the present offence was committed in Harare and therefore it should***

follow that the complainant can only be charged in the Republic of Zimbabwe. It was also the defence counsel's submission that the Criminal Procedure Code mandates that a trial Court shall exercise jurisdiction where the offence took place and that under Article 50 of the Constitution the accused person is to be given facilities for fair trial or hearing which this court has not or cannot offer since some of the materials required may not be easily available as they may be out of this court's jurisdiction..."

31. The Court then stated as follows:

"***I have carefully analyzed, considered and weighed all the submissions and authorities on record vis-a-vis all the applicable laws. However, it should be noted that the American cases cited above are good law but only persuasive for all intents and purposes in the present case. That is also more so taking into account the ages of the cases, the jurisdictions and the emerging jurisprudence with the current technologies where the world is a global village with thousands of treaties between nations.***

From the above submissions, two questions emerge:

a) Whether a Magistrate Court in Nairobi is properly placed to adjudicate on a matter which took place outside its local jurisdiction and in this instance Harare, Zimbabwe?

b) Whether the Kenyan Mission in Harare is part of Kenya so as to enable this court to try an offence committed therein?"

32. Upon analysis and evaluation of the law and various precedents, the Learned Principal Magistrate reached the following conclusion:

"***By dint of Section 3 (2) and 4 of the Magistrate Act and Section 66 of the Criminal Procedure Code, I find that this court has jurisdiction throughout Kenya to adjudicate on any criminal matter properly placed before it. The Kenyan Constitution also guarantees an accused the right to a fair trial by informing him/her of the charge with sufficient details and granting them adequate time and facilities to prepare a defence (*[Article] *50 (2) (b) and (c)).***

Secondly, I find that attaches to Kenyan Missions abroad are persons employed in the public service and that they are immune from criminal jurisdiction of forum states. However, the same does not exempt them from the jurisdiction of Kenyan courts. That is more so when the property in issue is that of the sending state, the activities complained of took place within the embassy and the offence committed was duly recognized in the Kenyan statutes…."

33. The Learned Principal Magistrate thereafter reached the conclusion that the objection to the jurisdiction of the Court to try the accused on an offence committed within the Kenyan High Commission in Zimbabwe was unmeritorious. He dismissed it and directed the accused to submit to the process and take plea.

34. As observed earlier, the petitioner has not approached this Court by way of appeal, but raises the same issue that was addressed at length by the lower Court. In his submissions before that Court, contrary to his assertions before this Court, Mr. Kitonga did raise the issues pertaining to the Constitution, specifically Article 50 and it is unclear in what other respect the issue of jurisdiction could be raised within the framework of the Constitution.

35. In any event, the principle of res judicata contained in Section 7 of the Civil Procedure Act, particularly Explanation 4 thereof, is clear. Any issue that ought to have been raised before the lower Court with regard to jurisdiction should have been raised for determination. If it was a matter that the trial Court did not have jurisdiction to determine, then a reference could have been made to the High Court. If dissatisfied with the decision of the lower Court, the petitioner had a right of appeal or revision to the High Court. To raise the same issue of jurisdiction again as a constitutional issue is, in my view, an abuse

of the Court process.

Whether the Institution of Criminal Proceedings in Nairobi C.M Criminal Case No. 91 of 2014 against the Petitioner is Unlawful and Unconstitutional and hence an abuse of Court Process

36. The petitioner challenges her prosecution on the basis first, that there was delay in instituting the proceedings and secondly, that the 3rd respondent, in the letter lifting her interdiction, terminated the charges against her. It is therefore her contention that in the circumstances, the institution or continuation of the proceedings amounts to abuse of court process and misuse of powers by the DPP. I shall deal with these two issues in turn.

Whether there was Delay in the Institution of the criminal proceedings

37. The petitioner contends that the offence she is charged with is alleged to have been committed in 2010, while the prosecution was lodged four years later in March, 2014. She contends that there has been a four year delay, and it is her case that once a delay has been established, it is immaterial that the delay has been explained. It is also her contention that the explanation tendered does not hold as it makes some vague reference to seeking "mutual legal assistance;" that the letter from the DPP to the Government of Zimbabwe dated 21st March 2012, alleging that investigators had travelled to Harare in 2012 gives no further explanation; that there is no explanation why the investigators waited until 2012 to travel yet the offence was committed in 2010. It is her submission that Courts frown on delay since, with the passage of time, accused persons lose their evidence, witnesses die, migrate or simply disappear; and that the accused person has no idea that he or she would be prosecuted and is therefore not conscious of the need to preserve evidence.

38. It is therefore her submission that she will be prejudiced in any prosecution in future; that such prejudice is against the principles of natural justice with regard to being afforded a fair hearing; that it contravenes Article 50 of the Constitution on the right to a fair hearing without unreasonable delay and being afforded facilities to prepare a defence. According to the petitioner, she has never gone back to Harare and cannot possibly find any evidence or witnesses in her favour.

39. The DPP's response is that the delay was as a result of the initiation of the Mutual Legal Assistance mechanisms between Kenyan investigators and the competent authorities in Zimbabwe; and that in any event, a time lapse of only four years is not an unreasonable delay, and referred the Court to the decision in **Joshua Kulei vs Republic, High Court Petition No. 66 of 2012** with respect to the issue of delay**.**

40. It is also the DPP's submission that the exhibits presented to the Court consisting of witness statements, forensic reports and audit reports compiled in the investigations clearly evidence the basis of the institution of the prosecution against the petitioner.

41. The question of delay with respect to the lodging of criminal prosecutions has been addressed by our Courts in several matters. The leading case on the subject is the case of **Githunguri -v-Republic (1986) KLR 1** in which the Court stated as follows:

> "***In this instance the delay is said to have been nine years, six years and four years. The Court has not been told why these offences have been unearthed after they remained buried for so long. What caused turning up the soil! It is too long, too much of delay. The Attorney-General is not bound to tell the Court the reason but it would have made us knowledgeable if told…***
>
> ***We are of the opinion that to charge the applicant four years after it was decided by the Attorney-General of the day not to prosecute, and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the Court will be within a reasonable time as required by section 77(1). The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney-General. It was a case which***

had received notable publicity, and the matter was considered important enough to be raised in the National Assembly.

We are of the opinion that two indefeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in section 77(1) of the Constitution. This prosecution will therefore be an abuse of the process of the Court, oppressive and vexatious."

42. Similarly in the case of **Republic v Attorney General & Another Ex Parte Ngeny (2001) KLR 612** the court addressed this question and stated that:

"In the case before us, the delay was nine years. No attempt has been made to explain it. The subject matter of the charges against the Applicant is a colossal sum involving an institution that was strategic to the Government when the losses were occasioned; so why did the State not mount a prosecution immediately? Nine years is too long a delay. We cannot think anything else but that the criminal prosecution against the Applicant was motivated by some ulterior motive. It is not a fair prosecution. It was mounted quite late: Nine years after the Applicant had vacated the relevant public office alleged to have been abused. We were told, and this was not challenged, that having been out of office for that long, he does not have in his possession material to prepare his defence. This we believe. We are of the view that to allow delayed prosecutions is akin to putting a noose around the necks of individuals and then saying to them: 'Go, you may go. We shall decide your fate as and when we wish.' This is to keep the individual in fear. This does not accord with constitutional guarantees of individual rights and freedoms and is nothing more than an abuse of the process of the Court".

43. In **Joshua Kulei (supra)** a fairly recent decision, the Learned Judge addressed this question and went further to distinguish the above two decisions. He expressed his views as follows:

"[60] ***On my part, I am aware that there are no limits to the prosecution of serious criminal offences except where there are limitations imposed by statute. In so far as the time factor is concerned in the instant charges, the AG and later the DPP were at liberty to prosecute the allegations constituting a criminal offence. However, the primary question for consideration at this point is therefore whether that delay is in accord with the Petitioner's and Interested Parties constitutional guarantees…***

I am in agreement with the principles stated in the above two cases. However, I do not think that the Petitioner can benefit from the findings in those cases because firstly, Mr. Githunguri had been promised, through an official public pronouncement that he would not be prosecuted. Secondly, the Constitutional Court in that case had already held that in the circumstances, his prosecution after nine years was inordinate and thus an abuse of the Court process unless there was a discovery of important and credible evidence in that regard and that to charge him thereafter was a clear abuse of the Court process."

44. I agree with the sentiments of the Court in the **Joshua Kulei** case. The principle with regard to institution of criminal prosecutions is that there is no limitation of time. The Court seized of a matter such as is presently before me must determine, on the facts before it, whether the delay in question is unreasonable and therefore prejudicial to the accused person.

45. In the present case, the petitioner alleges that the delay of four years before her prosecution is unreasonable and a violation of her right to a fair trial. I have considered the material placed before the Court by the DPP. The witness statements were made on diverse dates between April 2011 and August 2013. A Forensic Document Examiner's Report was prepared on 28th January, 2013, and a second report

on 8th March 2013. The office of the DPP wrote to the High Commission of the Republic of Zimbabwe on 21st March, 2012 requesting for assistance in on-going investigations in the criminal matter the petitioner was facing.

46. The evidence before me indicates that the office of the DPP was undertaking investigations over the period between 2010 and the time of the institution of the criminal proceedings against the petitioner. It took the time to take witness statements from no less than five witnesses, including the High Commissioner, and to have documents examined. In my view, the respondents cannot be faulted for taking this time period to investigate the matter and place evidence before the Court. It is my finding therefore that the period of four years taken to investigate the matter was not unreasonable in the circumstances, and did not occasion any prejudice to the petitioner.

Whether the Letter lifting the Petitioner's Interdiction Amounted to Termination of the Criminal Proceedings

47. The petitioner has relied on a letter from the 3rd respondent dated 17th January, 2014 to argue that the 3rd respondent had terminated the criminal proceedings against her. She contends that any sane person would find the wording of the letter final and conclusive with respect to the termination of the prosecution against her, and relied on the decision in **Githunguri vs Republic (supra)** to submit that in that case, a letter with similar words was upheld as terminating the case in question and the prosecution could not be revived.

48. The petitioner contends that it would not be fair to then turn around and proceed with her prosecution since, at the instigation of the respondents, facilities for a defence and a fair hearing no longer exist; that she believed that there had been termination, withdrawal, forgiveness and reconciliation which is credible in terms of the Constitution. She relies on Article 159 of the Constitution which she submits supports alternative dispute resolution and relies on the decision in **Republic vs Mohamed Abdow Mohamed, H.C Criminal Case No. 86 of 2011** to submit that the Court in that case upheld reconciliation and withdrawal of the case even where the alleged offence was murder. It is her contention that it is an abuse of Article 159 to terminate or conclude a matter and then turn around to commence prosecution.

49. The position of the DPP is that the allegation by the petitioner that she was "forgiven" has no basis. First, it is not binding upon him in light of Article 157 (10) of the Constitution, and in any event, it was withdrawn by the 3rd respondent by a letter dated 28th March, 2014. This is the letter of suspension following her arrest and the institution of criminal prosecution against her. It is also the DPP's submission that the case of **Githunguri vs Republic (supra)** relied on is clearly distinguishable from the present case as the undertaking not to prosecute in that case was issued by the Attorney General, the officer then constitutionally charged with the prosecutions.

50. I have considered the letter relied on by the petitioner as constituting "forgiveness" and termination of the prosecution against her. It is dated 17th January, 2014 and is in the following terms:

> ***Mrs. Margaret Ayuma Katungu***
>
> ***Thro'***
>
> ***Principal Accountant***
>
> ***Ministry Headquarters***
>
> ***NAIROBI***
>
> ***Dear Madam,***
>
> ***RE: LIFTING OF INTERDICTION***

Further to this office letter No. MFA/1979156527A/41 dated 30th November, 2010 in which you were interdicted from performing the duties of your office, it has been decided that the interdiction be lifted with effect from the same date.

In the prevailing circumstances, you are warned against repetition of the same or similar offence in future as it may lead to more severe disciplinary action which may include dismissal from the service with loss of all terminal benefits.

Accordingly, you are required to confirm in writing within fourteen (14) days that you have read and understood the contents of this letter. In addition the Head/Accounts Division is required to confirm when you report back on duty for deployment and further instructions.

Yours Faithfully

L.M Waweru

For: PRINCIPAL SECRETARY"

51. I believe the wording of the letter is clear. It lifts the petitioner's interdiction and warns her against repetition of the offences she had been interdicted in respect of. There is no reference in the letter to the criminal prosecution, but even if there were, and the Principal Secretary purported to "forgive" the petitioner, could such alleged "forgiveness" terminate the petitioner's prosecution?

52. The Constitution expressly vests powers of prosecution and termination thereof in the Director of Public Prosecutions. It states as follows at Article 157:

(6) The Director of Public Prosecutions shall exercise State powers of prosecution and may -

(a) Institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;

(b) Take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and

(c) Subject to clause (7) and (8), discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by the Director of Public Prosecutions under paragraph (b).

(7) If the discontinuance of any proceedings under clause (6) (c) takes place after the close of the prosecution's case, the defendant shall be acquitted.

(8) The Director of Public Prosecutions may not discontinue a prosecution without the permission of the court.

(9) The powers of the Director of Public Prosecutions may be exercised in person or by subordinate officers acting in accordance with general or special instructions.

(10) The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.

(11) In exercising the powers conferred by this Article, the Director of Public Prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. (Emphasis added)

53. It is evident from the above constitutional provisions that it is only the DPP who has the powers to commence and discontinue any criminal proceedings against any person. The Principal Secretary has no power to terminate criminal proceedings even if the Court were to accept, which it does not, that the intention of the letter relied on by the petitioner was to terminate the criminal proceedings against her. In the circumstances, the decision in **Githunguri vs Republic**, in which the decision to terminate prosecution was made by the office constitutionally charged with institution and termination of criminal prosecutions, is of no assistance to the petitioner. The decision in the case of the applicant in **Githunguri** was so clear and unequivocal, and the circumstances so different from the present case, that it would take quite a bit of legal gymnastics to find a parallel between the two cases. In that case, the Court observed as follows:

> "***It is not in dispute that the present four charges were a part of 20 charges which were allegedly committed over nine years ago and were investigated about six years ago. The applicant says he was given a copy of the charges together with a copy of his cautionary statement recorded from him by the authorities. Thereafter early in 1980 the office of the Attorney-General decided not to prosecute the applicant and closed the file relating to all counts including the present four charges. The foreign currency, the subject matter of the four charges, was also ordered to be credited in Kenya currency into the applicant's bank account. The applicant says he was told in writing by the bank, and also officially of the decision of the Office of the Attorney-General not to prosecute him and files were closed. This position continued during the tenure in office of the two following Attorneys-General who succeeded the then Attorney-General. The position was reiterated during a debate in Parliament by one of the two Attorney- Generals as reported in National Assembly Reports dated June 30, 1981, and July 1st/2nd, 1981.***
>
> ***The applicant complains that the present four charges were resurrected four years later and he was charged notwithstanding all previous assurances by the police and investigation branch that he would not be prosecuted****…*
>
> ***Guided by the commentary in Sarkar and the provisions of section3(2), as prudent men which we believe justifiably ourselves to be, we hold, that where applicable, the matters mentioned in the applicant's affidavit to which he deponed from personal knowledge have been turned and established into facts. The degree of probability is so high that proceeding by the sound rule of common sense we are justified in regarding them as certainty and to act accordingly****…*
>
> ***Mr. Chunga asked us to read the statements in the National Assembly in the context of the debate, and to say that no assurance was ever given that the applicant would not be prosecuted. In our view both statements, made publicly in no less a forum than the National Assembly, constituted a positive assurance that the applicant would not be prosecuted. That is the conclusion to which the reasonable man in the market hearing those utterances would have come to. That being so the reasonable man in the market would also believe that the Attorney-General's word would be honoured. The reasonable man is the man in the market, the man on the Pangani bus or a housewife****…*" (Emphasis added)

54. In the circumstances, it is my finding, and I so hold, that the institution of the criminal proceedings against the petitioner were not in any way unlawful or a violation of her constitutional rights.

Whether there is a Violation of the Petitioner's Constitutional Rights as Alleged.

55. The final issue for consideration is whether there was a violation of the petitioner's rights in the institution of criminal proceedings against her. I have expressed my views above with respect to the petitioner's challenge of the institution of the criminal proceedings, and found that such institution was in accordance with the provisions of the Constitution. I have also not found any basis given the ruling of the Trial Court, for alleging that she will not receive a fair trial if the said trial is conducted in Kenya.

56. Her arguments with regard to the powers of the Court to summon witnesses, or her inability to access the locus of the offence in Zimbabwe, or the fact that she was redeployed to Nairobi, seem to be

postulating a novel proposition: that a person accused of committing a criminal offence should have continued access to the place where the offence was committed in order to enable her prepare her defence. The offence that she is charged with, as observed in the ruling of the trial Court cited above, was committed in the Kenyan High Commission in Zimbabwe. The witnesses, as is evident from the witness statements, are all citizens of Kenya and employees of the government of Kenya. It is difficult to see how the Court in Kenya would be unable to summon witnesses or enforce its orders during the criminal proceedings before it.

57. In the circumstances, I find no merit in the present petition. It is hereby dismissed but with no order as to costs.

Dated, Delivered and Signed at Nairobi this 15th day of April 2015

MUMBI NGUGI

JUDGE

Mr. Nzamba Kitonga instructed by the firm of Nzamba Kitonga & Co. Advocates for the petitioner.

Mr Maingi instructed for the Director of Public Prosecutions.

Mr Sekwe instructed by the State Law Office for the 2nd and 3rd respondents.