REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CONSTITUTIONAL PETITION NO. 5 OF 2013

IN THE MATTER OF: ARTICLES 22, 23, 157, 258 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS IN ARTICLES 25, 27 AND 50 OF THE CONSTITUTION OF KENYA

BETWEEN

SUSAN MBOO NG'ANG'A…….....…..……APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL…....….....…...…...1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS……....…2ND RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION…….3RD RESPONDENT

JUDGMENT

On the 27th August, 2009 the petitioner was arraigned before the **Chief Magistrates' Court at Nyeri in Criminal Case No. 13 of 2009** in which she was charged with corruption related offences. A copy of the charge sheet exhibited to her affidavit sworn in support of the application she filed in the trial court to stay the criminal proceedings against her shows that she was charged with two counts; the first of these counts is that of corruptly soliciting for a benefit contrary to **section 39(3)** as read with **section 48(1)** of the **Anti-Corruption & Economic Crimes Act No. 3 of 2003 (herein "the ACECA").** The particulars upon which this count was based were that on the 18th day of August, 2009, at Githiga Assistant Chief's office, in Githiga sub-location within Githunguri District, Central Province, being a person employed by a public body, to wit, the Office of the President in Provincial Administration, as an Assistant Chief of Githiga sub-location, corruptly solicited for a benefit of Kshs 3,000/= from Joshua Ngotho Ngigi as an inducement, to release the single business permit No. 2009/11611, serial No. 3782 that she had confiscated from the hotel of Joshua Ngotho Ngigi, a matter in which the said public body was concerned.

In the second count, the petitioner was charged with the offence of corruptly receiving a benefit contrary to **section 39(3) (a)** as read with **section 48 (1)** of the **ACECA**. According to the particulars of the offence, on 21st day of August, 2009, at Githiga Assistant Chief's office, in Githiga sub-location within

Githunguri District of Central Province, being a person employed by a public body, to wit, the Office of the President in Provincial Administration, as an Assistant Chief of Githiga Sub-location, corruptly received a benefit of Kshs 3,000/= from Joshua Ngotho Ngigi through William Kimani Thuku, as an inducement, to release the Single Business Permit No. 2009/11611, serial No. 3782 that she had confiscated from the hotel of Joshua Ngotho Ngigi, a matter in which the said public body was concerned.

In the alternative to this second count, the petitioner was charged with the offence of abuse of office contrary to **section 46** as read with **section 48** of the **ACECA** the particulars being that on 21st day of August 2009, at Githiga Assistant Chief's office, in Githiga sublocation within Githunguri District of Central Province, being a person employed by a public body, to wit, the Office of the President in Provincial Administration, as an Assistant Chief of Githiga sublocation, used her office to improperly confer a benefit on herself by corruptly receiving **Kshs 3,000/=** from Joshua Ngotho Ngigi through William Kimani Thuku, as an inducement to release the single business permit No. 2009/11611, serial No. 3782 that she had confiscated from the hotel of Joshua Ngotho Ngigi a matter in which the public body was concerned.

The record of the proceedings in the Chief Magistrate's Court shows that the petitioner initially pleaded to the first count only and entered a plea of not guilty on 7th September, 2009; however, on 13th May, 2010 the charge was amended to include the second count and the alternative thereof. As was the case with the original count the petitioner entered a plea of not guilty to the amended charge.

It appears that sometimes either in June or July, 2014, the prosecution closed its case after calling 9 witnesses. Subsequently, counsel for the petitioner filed written submissions and urged the court to acquit her; the prosecution did not make any submissions on whether it had made out a case sufficient enough to call upon the petitioner to defend herself.

Although it is not so clear from the proceedings, it has been indicated in the 3rd respondent's replying affidavit sworn by one Rosecallen Githinji that on 10th August, 2011 the court ruled that the petitioner had a case to answer and was therefore put on her defence. Before the case could proceed further, the then trial magistrate, the late Hon. Lady Justice S. Muketi was elevated to the High Court as a judge and perhaps it is for this reason that counsel for the petitioner asked the court to commence the trial *de novo* when the case was mentioned before it on 14th February, 2013. Responding to that point, the prosecutor informed the court that if the trial was to begin afresh, then it would be difficult marshalling some of the state witnesses because at least one of them was deceased while the other had left the employment of the complainant commission.

In her ruling delivered in court on 18th March, 2013, the learned magistrate directed the case to begin *de novo*; she also held that except for the deceased witness whose evidence would be retained on record in the subsequent proceedings, the prosecution was to recall the rest of witnesses who had testified and in the event that any of them could not, for one reason or another, be traced the court would make an appropriate order at that stage.

On the same date that the court delivered its ruling, the petitioner lodged a miscellaneous application dated 15th March, 2013 in the trial court seeking, amongst other prayers, an order that the arrest, detention and institution of the charges and proceedings against her were irregular, illegal, null and void. She also sought for termination of the proceedings and for the acquittal of the charges against her. The court dismissed the application on 23rd July, 2013 and ruled that it will proceed to try the petitioner.

Upon dismissal of her application by the magistrates' court, the petitioner opted to lodge this petition in this court; it was filed on 5th September, 2013. In the petition, the petitioner has now sought for the following orders:-

1. A declaration that the rights of the petitioner under **article 27(1)** of the **Constitution** to equality before the law and the right to equal protection and benefit before the law have been breached.

2. A declaration that the rights of the petitioner under **article 47 (1)** of the **Constitution** to a fair administrative action have been violated.

3. A declaration that the arrest, detention, charges and criminal proceedings preferred and being pursued against the petitioner in Nyeri Chief Magistrates' court, **Anti-Corruption Case No. 13 of 2009** was and is ultra vires **section 35** of the **Anti- Corruption and Economic Crimes Act, No. 3 of 2003** so as to render the same illegal, null and void *ab initio*.

4. An order of judicial review of certiorari removing into this court and quash the entire proceedings as commenced and instituted against the petitioner in **Nyeri Chief Magistrates' court Anti-Corruption Case No. 19 of 2009 Republic versus Susan Mboo Ng'ang'a.**

5. An order that the petitioner is entitled to compensation under **article 23(e)** of the **Constitution** to a tune of Kenya Shillings Two Million payable by the respondents jointly and severally.

6. An order that the respondents shall jointly and severally bear the costs of this petition.

7. Any other relief or orders that this Honourable Court shall deem just, fit and appropriate to grant in favour of the petitioner.

Parties agreed and directions were issued to the effect that the petition be disposed of by way of written submissions; accordingly they filed and exchanged amongst themselves their respective submissions.

The cornerstone of the petitioner's petition, as far as I understand her, is that she was charged without the requisite recommendation for such prosecution by the then Kenya Anti-Corruption Commission (KACC) to the Attorney General who only could give his consent to prosecute after considering the investigation report by the KACC. In the absence of such a report or a recommendation by the KACC and without the consent to prosecute by the Attorney General, it is the petitioner's opinion that her trial was illegal, fundamentally flawed and an abuse of the criminal process and in particular, it is in contravention of **section 35** of the **Anti-Corruption** and **Economic Crimes Act, 2003** and **articles 27(1), 47(1) and 50** of the Constitution.

To prop her case, the petitioner's counsel heavily relied on several decisions the most prominent of which, in my view, is the Court of Appeal decision in **Civil Appeal No. 331 of 2010**, **Nicholas Muriuki Kangangi versus The Hon. Attorney General** in which **section 35** of the **ACECA** was considered alongside **sections 36** and **37** of the Act.

One of the issues in that appeal was that under **section 35(1)** and **(2)** of the Act KACC was mandatorily required to make and submit a report of its investigations to the Attorney General with a recommendation to prosecute or not to prosecute the appellant of corruption offences or an economic crime. The appellant contended that without this report her purported prosecution by KACC through Kilimani Police Station was null and void.

In its decision the Court of Appeal agreed with the appellant and concluded that, bearing these particular provisions in mind, prosecution of any person for corruption and economic crimes under the Act must be preceded by a report by the KACC to the Attorney General of the former's investigations into those offences with recommendations to the latter to prosecute or not to prosecute.

The court found ***"…it was KACC who arrested the appellant and took him to Kilimani Police Station. The charge sheet itself shows the complainant, as "REPUBLIC OF KENYA THRO' KAA. So the true prosecutor was really KACC."*** Having established that the KACC was the prosecutor, the court held that prosecution of offences under the Act was not within the functions for which the KACC was established to perform under **section 7** of the **Act** and to the extent it did so, its acts were ***ultra vires*** the Act.

Counsel for the Attorney-General in that appeal urged that the question whether a report with the requisite recommendations had been submitted to the Attorney-General for his consideration was an issue between

the Attorney-General and the Commission. The court overruled him but, interestingly, took it on the KACC that it cannot ignore the procedure and argue that compliance with that procedure is a matter between it and the Attorney-General!

With that the Court of Appeal allowed the appeal and terminated the charges against the appellant and noted that, ***"…the termination, however, does not prevent KACC from complying with the provisions of the Act and reinstituting the charges should it be deemed necessary."*** Of note here is the realisation by the Court of Appeal that though the appeal had been allowed, the KACC, and not the Attorney-General, could reinstitute the charges against the appellant.

This decision was cited with approval by the same court, differently constituted, in **Criminal Appeal No. 48 of 2008, Esther Theuri Waruiru & Another Versus Republic** where the court went further to compare **Section 12** of the repealed **Prevention of Corruption Act, Cap 65** which required the consent of the Attorney-General before any prosecution under that Act with **Section 35** of the **Anti-Corruption & Economic Crimes Act, 2003** requiring investigation reports to be made to the Attorney-General. The Court held that the two provisions are, in effect, similar and for this reason it concluded:-

> **"*That power*** (that is, the Attorney General's power under **Section 12** of the **Prevention of Corruption Act, Cap 65)** ***appears to have been retained when the Anti-Corruption and Economic Crimes Act was enacted. The powers of KACC to prosecute any person or group of persons was subject to the direction of the Attorney-General, hence the requirement under Section 35 of that Act, which a report of any investigation be made to the Attorney General with certain recommendations."***

The appellants whose conviction of the offence of receiving a bribe contrary to **section 39(3) (a)** as read with **section 48(1)** of the **ACECA** had been upheld by the High Court were acquitted of that charge; their conviction was quashed and sentences set aside by the Court of Appeal principally because **section 35** of the **ACECA** had not been complied with. The court held that there was no evidence that a report and recommendations had been made to the Attorney General and the nature of recommendations the latter may have made.

In a recent decision I delivered in **Miscellaneous Criminal Application No. 20 of 2014, Stephen Mburu Ndiba versus Ethics & Anti-Corruption Commission** and the **Director of Public Prosecutions** where the same issues of compliance with **section 35** of the ACECA and the initiation of charges and prosecution of offences under that Act emerged, I had occasion to examine this latter decision of the Court of Appeal relatively at length.

In that decision I considered the Constitution and several other provisions in the **ACECA** itself which, in my view, ought to be considered whenever a question of interpretation or the import of **section 35** of **ACECA** is in issue; it was and it is still my thinking that had these provisions of the law been brought to the attention of the Court of Appeal, it would probably have reached different conclusions in its decisions in the two appeals and for this particular reason I have had to distinguish these decisions whenever I have been called upon to interpret **section 35** of the **ACECA**. The particular provisions that have largely influenced my decision and which, as noted ought to have been brought to the attention of the Court of Appeal, are **articles 157(6) (b), 157(9)** and **157(12)** of the **Constitution, sections 23(3) and 32** of the **ACECA** and Part III of **Police Act Cap 84 (repealed)**. It is appropriate at this point to consider them in detail to appreciate my point.

Article 157(6) (b) of the **Constitution** states:-

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

I understand this constitutional provision to mean that criminal proceedings can legitimately be commenced by persons or authorities other than the Director of Public Prosecutions; these authorities would, in my view, include the then KACC which has now been succeeded by the Ethics and Anti-Corruption Commission. It may be recalled that in the **Nicholas Muriuki Kangangi case (supra)** the Court of Appeal itself appreciated that the Commission could reinstitute the criminal charges against the appellant and though it never made any reference to the Constitution, its statement appears to be consistent with **article 157(6) (b)** of the Constitution.

Where a legislative instrument is necessary, **article 157 (12)** of the Constitution empowers the legislature to enact legislation conferring powers of prosecution on authorities other than the Director of Public Prosecutions. I would suppose that as far as the KACC and its successor, the Ethics & Anti-Corruption Commission are concerned, such legislation, conferring powers of prosecution, can be found in **section 32** of the ACECA. That section provides as follows:-

> ***Without prejudice to the generality of section 23(3), the Director and an investigator shall have power to arrest any person for and charge them with an offence, and to detain them for the purpose of an investigation, to the like extent as a police officer.***

Section 32 specifies particular powers that the Director and an investigator are clothed with; **section 23(3)** which has been referred to in this provision gives general powers exercisable by the director and his investigators. This section states:-

> **23. Investigators**
>
> ***(1) The Director or a person authorized by the Director may conduct an investigation on behalf of the Commission.***
>
> ***(2) Except as otherwise provided by this Part, the powers conferred on the Commission by this Part may be exercised, for the purposes of an investigation, by the Director or an investigator.***
>
> ***(3) For the purposes of an investigation, the Director and an investigator shall have the powers, privileges and immunities of a police officer in addition to any other powers the Director or investigator has under this Part.***
>
> ***(4) The provisions of the Criminal Procedure Code (Cap. 75), the Evidence Act (Cap. 80), the Police Act (Cap. 84) and any other law conferring on the police the powers, privileges and immunities necessary for the detection, prevention and investigation of offences relating to corruption and economic crime shall, so far as they are not inconsistent with the provisions of this Act or any other law, apply to the Director and an investigator as if reference in those provisions to a police officer included reference to the Director or an investigator.***

Section 23 (3) of the Act is clear that amongst the powers the Director or an investigator may exercise are police powers stipulated in **Part III** of the **Police Act Cap 84** (now repealed). These powers include investigation of crimes, which in these case are restricted to corruption and economic crimes, apprehension of the offenders and arraignment of such offenders in court.

Although **section 32** of ACECA preceded the Constitution of Kenya, 2010 and therefore cannot, strictly speaking, be said to have been enacted pursuant to **article 157(12)** of the Constitution, it is not in dispute that prior to the promulgation of the Constitution, individuals and a host of public authorities could institute and prosecute criminal cases against any person without any reference to the Director of Public Prosecutions or to the Attorney General before him. As I noted in my decision in ***Stephen Mburu Ndiba case*** **(supra) article 157 (12)** of the Constitution is , in my humble view, a recognition by the Constitution of the existing state of law at the time it was promulgated and also a realization that, in the interest of the public and in order for authorities such as the Anti-Corruption Commission to execute their functions effectively, or for such other like reasons, it is necessary that persons or authorities other than the Director of Public Prosecutions should exercise prosecutorial powers.

As noted, these constitutional and statutory provisions were not considered in the two Court of Appeal decisions on the question at hand; I am minded that the cases out of which the decisions arose were initiated prior to the promulgation to the Constitution of Kenya 2010 but the decisions were delivered fairly long after the Constitution came into force. For instance, the judgment in ***Nicholas Muriuki Kangangi case*** **(supra) was delivered in 29th July, 2011** while that of ***Esther Theuri Waruiru & Another case (supra)*** was delivered on 9th December, 2011. I would opine that as far as they are relevant to the interpretation of **section 35** of the **ACECA**, these constitutional provisions ought to have been brought to the attention of the Court of Appeal. At its initiation, the Constitution of Kenya, 2010 itself flashed a warning sign that any law existing at the time of its promulgation will be interpreted from the Constitution's perspective and if that law was in any way inconsistent with the Constitution, that law was invalid to the extent of inconsistency. I gather this from **section 7** of the 6th schedule to the Constitution on transitional and consequential provisions which provides:-

> ***7. Existing laws***
>
> ***(1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.***
>
> ***(2) If, with respect to any particular matter—***
>
> ***(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular State organ or public officer; and***
>
> ***(b) a provision of this Constitution that is in effect assigns responsibility for that matter to a different State organ or public officer, the provisions of this Constitution prevail to the extent of the conflict.***

Even without invoking the Constitutional provisions, **section 32** as read with section **23(3) of the ACECA** by themselves are express that the Commission through its officers can arrest and charge any person with an offence; I have said before in my earlier decision on this question that these provisions of the law cannot have been included in the Act in vain or for cosmetic or superfluous purposes and so long as they are in the statute courts are enjoined to enforce them.

The purposive interpretation of **articles 157(6) (b)** and **157(12)** of the Constitution augments, in my humble opinion, the point that there would be nothing wrong with the Anti-Corruption Commission arresting and charging any person with a corruption related offence or with an economic crime; it is not only a constitutional duty but it is the Commission's statutory duty to undertake such tasks if sections, **7, 23(3)** and **32** of Act are anything to go by.

So much was made out of **section 35** of the ACECA and the Court of Appeal in ***Esther Theuri Waruiru & Another case,*** which as noted, was cited with approval in its decision in ***Nicholas Muriuki Kangangi case*** **(supra).** The Court of Appeal was categorical in the subsequent case that **section 35** of the ACECA was similar to **section 12** of its predecessor, **the Prevention of Corruption Act Cap 65 (repealed).** It is necessary to reproduce this section here.

Section 12 of the repealed **Prevention of Corruption Act**, Chapter 65 stated:-

> ***A prosecution for an offence under this Act shall not be instituted except by or with the written consent of the Attorney General: Provided that a person charged with such an offence may be arrested, or a warrant for his arrest may be issued and executed, and he may be remanded in custody or on bail, notwithstanding that the consent of the Attorney General to the institution of a prosecution for the offence has not been obtained, but no further or other proceedings shall be taken until that consent has been obtained.***

The legislature was fairly categorical here that a prosecution under the **Prevention of Corruption Act,**

Chapter 65 must be preceded by a written consent from the Attorney General; its intention was quite clear from the outset leaving no doubt that any prosecution without the written consent from the Attorney-General would have been fatal. There is no such express provision in the **Anti-Corruption Act**. **Section 35** of the **Act** has nothing to do with the consent to prosecute any offence under the **Anti-Corruption & Economic Crimes Act, 2003** but only deals with reports to the Director of Public Prosecutions on the investigations undertaken by the Anti-Corruption Commission. Such reports shall include information on the outcome of the investigations and any action taken upon it, which would necessarily include arrest and prosecution of suspects pursuant to **Section 32** of the Anti-Corruption Act.

It must also be noted that there was no provision in the **Prevention of Corruption Act** similar to **section 32** of the **Anti-Corruption & Economic Crimes Act, 2003** and I would opine that the existence of that provision in the current anti-corruption legislation is an additional reason against any comparison between **Section 12** of the **Prevention of Corruption Act, Chapter 65** and Section **35** of the **ACECA**.

I am also persuaded that provisions such as **articles 157(6)(b), 157(12)** of the Constitution and **section 32** of the **Anti-Corruption Act** have deliberately been included in the current anti-corruption legal regime because prosecution, for instance of offences such those related to corruption is not and shouldn't be an alien concept to any anti-corruption authority; considering our country has been bogged down under the weight of this vice and there is no doubt that corruption is one single factor limiting the socio-economic development of this country, it should not surprise anyone that a body established and appropriately equipped to eradicate this vice has powers to prosecute those in our society who find this vice palatable. I have stated elsewhere that if County Governments and local authorities before them could and still prosecute people for offences like spitting on their streets or for relieving themselves in their alleys, which in my view are mundane offences, one would be excused for questioning our priorities as a nation if a body specifically established and generously funded and ideally equipped to rid our society of corruption is denied or is deemed to be deprived of what in my view is one of the most effective tools in executing its primary mandate.

I would conclude that even assuming, as the petitioner suggests, that she was arraigned in court and charged by the KACC without the consent of the Attorney-General, having regard to the legal provisions I have cited, the actions by the KACC would still be legally valid and would neither be unconstitutional nor unlawful. I would think, if for any reason the Director of Public Prosecutions is not satisfied with the Commission's actions to arrest and charge any person with a corruption offence or an economic crime, where the commission takes such an initiative, he could as well invoke article **157(6)(c)** of the Constitution and discontinue the proceedings.

The facts do not show, however, that the KACC either charged or prosecuted the petitioner and therefore the petitioner was, to some extent, founded on the wrong premise.

The charge sheet is clear on its face that it was signed by the officer in charge of Kiambu police station; the complainant is indicated in that charge sheet as "republic of Kenya through KACC"; this description of the complainant ought not to have been a source of any confusion and if such confusion existed then the subsequent proceedings should have made things much clearer. When the petitioner was arraigned in court the prosecution was led by a police officer of the rank of chief inspector of police who conducted the trial on behalf of the state until it was halted pending the determination of this petition; he was not, and it has not been suggested, that he was the Commission's employee. Four officers from the KACC three of whom were investigators testified as prosecution witnesses.

It is clear from the foregoing facts that at no point did KACC ever institute or prosecute the criminal charges; the charges were drawn and filed by the Attorney General or at his behest and he or the Director of Public Prosecutions or their agent or agents subsequently conducted the trial on behalf of the state.

Under **article 157(9)** of the **Constitution**, the Director of Public Prosecutions can delegate his powers to any of his officers; it says:-

> ***(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.

There is no doubt, and nothing has been suggested to the contrary, that officer in charge of Kiambu police station who signed the charge sheet and the chief inspector of police who prosecuted the case against the petitioner were both acting on behalf of the Attorney-General or the Director of Public Prosecutions; these two officers were in essence exercising delegated authority.

If, therefore, the Attorney-General or the Director of Public Prosecutions through their agents initiated the criminal charges against the petitioner and subsequently prosecuted the petitioner wouldn't it be a logical conclusion that if any consent was necessary, either under **section 35** of ACECA or for whatever reason, that the consent had, by their own explicit acts, been granted?

A legitimate question that would flow from this argument is, why would the KACC require a consent from either the Attorney-General or the Director of Public Prosecutions when it is clear from the record that it neither filed the criminal charge against the petitioner nor prosecuted her? Of what value would that consent be to the Commission whose only role was limited to investigation of the offences against the petitioner and whose officers could only testify as prosecution witnesses?

These questions are not far-fetched more so considering that there is no legal provision either in the constitution or in any statutory instrument for a "consent" either from the Director of Public Prosecutions or the Attorney-General before him and, in my very humble view, the obsession with the so-called "consent" is, to say the least, baseless in law.

It follows that the petitioner's petition is misconceived to the extent that she alleges that the institution of the charges against her and her subsequent trial contravened **articles 27 (1), 47(1)** and **article 50** of the Constitution and therefore her constitutional rights enshrined in those provisions were violated merely because there was no consent or approval by the Attorney-General of those charges. I have noted before in this judgment that in investigating and arresting the appellant, the Commission was acting within its enabling statute and more particularly **sections 7, 23(3) and 32** thereof; it has not been suggested that any of those provisions are unconstitutional.

The respondents urged this court to find that the petition was filed as an afterthought; considering the timing of the petition and the preceding events, they seem to have a point.

It was noted earlier in this judgment that before the petitioner lodged this petition she had successfully applied to have the case start *de novo* in February 2013. The application to start denovo, though a right to which the petitioner was entitled under **section 200(3)** of the **Criminal Procedure Code,** demonstrates something more against the petitioner's petition: it shows a tinge of *mala fides* in the petitioner's petition. At the time the application was made it was more than three years since the trial had commenced; the petitioner had taken plea and participated in the trial for all this time without any qualms and by applying for the case to start afresh she was ready to go through the same process again for reasons not related to whether recommendations had been made or approvals given. As noted also, the prosecution had closed its case and it was now set for defence hearing. It smacks of bad faith in these circumstances, after all this while, for the petitioner to turn around and fault her trial on the ground that her arrest and subsequent trial contravened her constitutional rights.

I am aware that there is no limitation period within which one can petition this court for enforcement of his or her constitutional rights whenever they have been violated or there is a threat to such violation; however, where the wrong complained of has occurred or is threatened and there is nothing standing in the way of lodging the petition to enforce the constitutional rights, the petition ought to be filed immediately or within such a reasonable time of the alleged violation or threat to the violation. What amounts to a reasonable time will of course depend on the circumstances of each particular case. In the instant case, the petition was lodged more than three years after the trial commenced, the prosecution had called nine witnesses and closed its case. Were it not for the appointment of the trial magistrate as a judge of the High Court, the case would have proceeded to defence hearing. And despite the advanced stage of the proceedings, the petitioner had been granted her wish and the case was set to start *de novo*. In these

circumstances, I would say that filing the petition more than three years after the event is outside what I would regard as reasonable time.

In the **Criminal Appeal No. 50 of 2008, Julius Kamau Mbugua versus Republic,** the Court of Appeal was confronted with this question of the time within which petitions such as the one before court should be filed; the Court upheld the decision of the superior court dismissing a constitutional petition on the ground that it was an afterthought having been brought two years late and after the prosecution had closed its case. The Court held that there is no reason to vindicate the right of one who allows the gradual trial process to run its course without objection or complaint and then seek to assert his constitutional right at its culmination. The court quoted Hardie Boys, J. in **Martin versus Tauranga District Court (1995) 2LRC 788** at page 805 where he said:-

> ***I see no reason to vindicate the right of one who allows the process to run its full course without objection or complaint and then asserts the right only at its culmination. The international jurisprudence teaches us that there is no obligation on the accused person to hasten the trial; that is the obligation of the state. Nonetheless I do not think that a person should be entitled to plead undue delay unless he or she has taken such earlier opportunity as there may have been to protest at the delay up to that point. For then realistic anticipatory remedies can be provided.***

Although the contravention alleged in that case was related to the delay in the trial, the rationale behind that decision cuts across all petitions where contravention of constitutional rights is alleged; I understand the principal to be that those rights must be asserted at the earliest opportunity possible and not at a later or advanced stage of the trial. Indeed after considering numerous decisions on this question one of the principals that the Court of Appeal came up with as a guide in filing petitions to enforce fundamental rights was that:-

> ***Although the procedure for raising a violation of the right varies from one jurisdiction to the other, the violation of the right should be raised at the earliest possible stage in the proceedings to enable the court to give an effective remedy otherwise the right may be defeated by the doctrine of waiver where applicable.***

The final question is the question of damages. Having come to the conclusion that the petitioner's constitutional rights have not been violated as alleged or at all, the petitioner is not entitled to any of the declarations or orders sought including an order for damages. I need not say anything more on this question.

For the reasons I have stated I would dismiss the petition and direct that the trial against the petitioner commences *de novo* as sought by the petitioner herself. In this regard I would invoke the decision in Nicholas Murungi Kangangi case where though the Court of Appeal upheld the appellant's contentions it declined to acquit him on the basis that the charges against him had not been determined on merit and the KACC could still reinstitute the charges against him.

This should be consistent with the petitioner's application to have the case start *de novo*. I note that on 14th December, 2009 the Director of Public Prosecutions concurred with the recommendations of KACC that the petitioner be prosecuted for the offences with which she was charged. When the case commences afresh, as the petitioner wanted, it means that it will commence after the recommendations have been made and the approval or consent or whatever name one may want to give the Attorney-General's concurrence has been given. That would imply the argument that the petitioner is charged and tried without the recommendations or approval or consent, if at all they are necessary, would thereby be self-defeatist. Parties will bear their own costs. Orders accordingly.

Dated, signed and delivered in court this 31st July, 2015

Ngaah Jairus

JUDGE