



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
NAIROBI CENTRAL REGISTRY
CONSTITUTIONAL PETITION NO 318 OF 2011

JOHN SWAKA.....PETITIONER

VERSUS

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

ATTORNEY GENERAL.....2ND RESPONDENT

**MINISTER OF JUSTICE, NATIONAL COHESION
AND CONSTITUTIONAL AFFAIRS.....3RD RESPONDENT**

JUDGMENT

Introduction

1. This petition seeks orders stopping the prosecution of all indigent persons in Kenya who are faced with prosecution for criminal offences that carry a death penalty until the state has implemented the provisions of Article 50(2)(h) of the Constitution and provided defence counsel for such indigent offenders. The basis of the petition is that the Court of Appeal, in the case of **David Njoroge Macharia –v- Republic, Crim App. No. 497 of 2007**, had ruled that in addition to situations where substantial injustice may result, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense.

2. The petition is dated 15th December 2011 and is supported by the affidavit of the petitioner sworn on the same date. It seeks compliance by the state with the requirements of Article 50(2)(h) of the Constitution as interpreted by the Court of Appeal in the aforesaid case. Until there is such compliance, the petitioner seeks an order restraining the 1st respondent from beginning or continuing with any prosecutions or charging any group members or indigent criminal suspects charged with any offences attracting a death penalty in any subordinate Court in Kenya. He also seeks an order that unless there is observable state compliance with Article 50(2)(h) as interpreted in the said case, the court should issue a declaration that if the 1st respondent believes, in exercise of his powers under Article 157(6) of the Constitution, that any particular criminal prosecution should commence or continue against an accused person charged with an offence attracting the death penalty in any subordinate court, the 1st respondent should be at liberty to institute or transfer such prosecution to the High Court.

3. The petitioner also seeks a declaration that the failure by the state to implement the provisions of Article 50(2)(h) as interpreted in the said case constitutes a continuing unlawful breach of the

Constitution by the state officers occupying the offices of the 2nd and 3rd respondents, contrary to Article 10, 21(1), 73 and 232 of the Constitution, an order of Mandamus directed to the 2nd and 3rd respondents to take measures to ensure group members are provided with legal representatives within the shortest possible period of time, an order that the respondents compile and produce in court a schedule of all group members, and for payment of monetary compensation at the rate of Kshs 400 per day to all group members who have been the subject of new or continued prosecutions with criminal charges attracting the death penalty in subordinate courts without the benefit of legal representatives after 18th March 2011, the date, according to the petitioner, of the judgment of the Court of Appeal.

4. The petition is opposed. The 1st respondent the Director of Public Prosecutions (DPP) filed grounds of opposition dated 13th March 2012 and a replying affidavit sworn on 22nd May 2012 by Ms. Terry Kahoro, the State Counsel who has conduct of this matter on behalf of the 1st respondent. The 2nd and 3rd respondents also filed grounds of opposition dated 9th March 2012 and a replying affidavit sworn on 9th March 2012 by Mr Gichira Kibara, the Acting Permanent Secretary in the 2nd respondent. The parties also filed written submissions which were highlighted before me on the 1st of October 2012.

The Petitioner's Case

5. In his affidavit in support of the petition, the petitioner states that he is the Legal Officer of CLEAR, a non-governmental organization with offices in Mombasa, Nairobi, Kisumu and Eldoret which offers legal aid and representation to poor Kenyans, especially those charged with the offence of robbery with violence contrary to section 296(2) of the Penal Code, Cap 63 Laws of Kenya, who cannot afford the services of a lawyer and who are not accorded legal representation by the state. CLEAR has offered such legal aid and representation for the last twelve years through the use of a volunteer network of advocates. The petitioner states that this petition has been filed on behalf of the interests of a group of persons (the group) consisting of all accused persons facing capital charges attracting death penalty in trials in subordinate courts and who, due to harsh economic times, are unable to afford legal representation.

6. The gist of the petitioner's case as presented by his learned Counsel, Mr. Bryant, is that the Court of Appeal in **David Njoroge Macharia v R (supra)** held that under Article 50(1) of the Constitution, persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense and had directed the Attorney General, Minister for Justice and Constitutional Affairs, the Constitutional Implementation Committee and the Law Reform Commission to take the necessary action. The petitioner, CLEAR and the group members are interested in ensuring compliance by the executive branch of government with the directions of the Court of Appeal in the case and ensuring provision of legal representation to all those charged with capital offences in subordinate courts.

7. The petitioner makes three main arguments in support of the petition. First, he argues that the provision of legal representation is essential for realization of the right to a hearing guaranteed under the Constitution. The absence of an advocate for the accused vitiates the criminal trial and makes it a nullity and void *ab initio*. The second argument relates to the availability of a pauper brief system in the High Court which the petitioner sees as providing an option for the 1st respondent: if the state cannot provide legal representation for indigent accused persons in the subordinate courts, and it must continue to charge persons with the offence of robbery with violence, then such persons should be tried in the High Court where the pauper brief system, despite its many shortcomings, is in operation.

8. The third argument advanced by the petitioner is that if the 1st respondent will continue to charge members of the group with robbery with violence contrary to section 296(2) of the Penal Code without complying with the directions of the Court of Appeal in the **David Njoroge Macharia** case, then this court should restrict the application of section 296(2) of the Penal Code to instances where there is either loss of life or actual grievous bodily harm to the victim.

9. The petitioner has relied on several international and regional treaties and authorities in support of his arguments which I shall revert to later in this judgment. He contends that, in light of the provisions of

these treaties and judicial precedents, the magistrates trying persons charged with robbery with violence violate and continue to violate the Constitution; that pending the setting up of a proper legal aid scheme which would allow suspects to have legal representation paid for by the state, the respondents should refer all death penalty cases to the High Court under sections 69 and 76 of the Criminal Procedure Code, Cap 75 Laws of Kenya; and in the event that the state is unwilling to refer robbery with violence cases to the High Court or set up the legal aid representation scheme, he seeks that the state should be barred from prosecuting robbery with violence charges until such time as the state will comply with international law and treaties as such trials in the circumstances are not trials but amount to summary executions.

The 1st Respondent's Case

10. The case for the 1st respondent is contained in the Grounds of Opposition dated 13th March 2012, the affidavit of Ms. Terry Kahoro sworn on 22nd May 2012, and the written submissions filed by the 1st respondent. The 1st respondent takes the position that this petition is premature as the constitutional provisions on the right to a fair hearing are, in accordance with the provisions of Article 261 of the Constitution, required to be implemented on the basis of statutory provisions to be enacted in four years.

11. Ms. Kahoro, Learned State Counsel, submitted that the requirement for legal representation under Article 50(2)(h) of the Constitution is subject to the provisions of Article 261(1) which provides for the enactment of legislation to govern a particular matter within the period specified in the Fifth Schedule. The Fifth Schedule provides that legislation on fair hearing is to be enacted within four years from the effective date; that consequently, there is currently no statutory or constitutional duty imposed on the 3rd respondent to provide legal representation for persons facing capital charges.

12. The 1st respondent argues further that the state in any event recognizes its constitutional duty to provide legal representation and the need to enact legislation to provide for the right to a fair hearing as guaranteed by the Constitution; that contrary to the petitioner's allegation that the respondents have failed to provide legal representation, the respondents are currently in the process of formulating the necessary policy and legal framework for realization of the rights guaranteed under Article 50 of the Constitution; that the state through the 3rd respondent has developed a Draft Legal Aid Bill and a Draft National Legal Aid and Awareness Policy, 2011 which, among other things, provides for the institutional framework to implement the Legal Aid and Awareness services.

13. The 1st respondent also contends that there is already a National Steering Committee for the National Legal Aid and Awareness Programme established under Gazette Notice No 11598 which is mandated to oversee, coordinate and monitor the overall implementation of a national Legal Aid and Awareness Programme. In addition, there is already in place a pilot programme, in which CLEAR, the petitioner's organisation, is a part, on the implementation of a legal aid and representation scheme for persons charged with capital offences such as the group represented by the petitioner. The 1st respondent submits therefore that the government is alive to the provisions of Article 50 of the Constitution and is in the process of fast tracking the development of the necessary policy, institutional and legal framework to govern the realization of the provisions of Article 50 within the stipulated period of four years.

14. The 1st respondent also took the position that to grant the orders sought in this petition would be to interfere with the constitutional mandate of the 1st respondent under Article 157 of the Constitution as his office has the constitutional duty to prosecute all criminal offences; that an attempt to stop the DPP from carrying out his mandate would result in even greater injustice in the criminal justice system; that the petition was without merit as no evidence has been adduced to show prejudice caused to members of the group.

15. On the reliefs sought by the petitioner, the 1st respondent argued that the order of Mandamus sought could not lie as, though the 1st respondent has the duty to provide legal aid, no statutory or constitutional duty has yet arisen in view of Article 261 and the Fifth Schedule to the Constitution, while with regard to the declarations sought, the 1st respondent submitted that the Court of Appeal in **David Njoroge**

Macharia-v- Republic had discussed the issue of substantial injustice and concluded that the right to legal representation was not automatic and must be decided on merit; and that the court did not give a specific directive to the 3rd respondent to implement the requirement for legal representation but recognized that enormous financial resources would be required. Consequently, the decision could not be used as the basis for seeking a declaratory order without regard to the provisions of Article 261 (1) and the Fifth Schedule to the Constitution.

16. In response to the petitioner's argument that trial of capital cases be carried out in the High Court and not in Magistrates Court, the 1st respondent termed the argument misguided and without legal basis in light of the provisions of Section 7(1) of the Criminal Procedure Code on the powers of subordinate courts to pass any sentence authorized by law for any offence triable by that court; and in any event, the court should take judicial notice of the fact that the President, acting on the advice of the Committee on the Prerogative of Mercy has now commuted the death sentences of all death row convicts to one of life imprisonment. It was therefore arguable whether the offence of robbery with violence is still a capital offence.

The 2nd and 3rd Respondents Case

17. The 2nd and 3rd respondents echo the position of the 1st respondent and contend that this petition is premature, bad in law, against public interest and an abuse of the court process. Like the 1st respondent, the 2nd and 3rd respondents argue, in the affidavit sworn by Mr. Gichira Kibara, that Article 261 of the Constitution as read with the Fifth Schedule are clear in their provisions that legislation under Articles 50 and 51 shall be enacted within four (4) years from the commencement of the Constitution, and that in any case, Parliament had power, under Article 261(2), to extend the period within which legislation should be enacted by a maximum of one year, effectively making the period within which legislation under Article 50 should be in place five years.

18. The 2nd and 3rd respondent also agree with the 1st respondent that there has been in place since 20th November 2011 a National Legal Aid and Awareness Steering Committee; that there is also a Draft National Legal Aid and Awareness Policy, and a Draft Legal Aid Bill 2010 and that the respondents are currently working with all stakeholders on a review of the Bill to align it with the Constitution.

19. The respondents also submit that they are in the process of implementing pilot projects in various parts of the country on the provision of legal aid and awareness, in collaboration with various non-state actors, and they contend therefore that the orders sought by the petitioner cannot issue against them as they are already performing their constitutional duties, and any orders barring the 1st respondent from prosecuting or continuing prosecutions against the group members will be unconstitutional and will lead to a breakdown of public order.

20. The respondents argue further that asking the court to issue orders that all matters affecting the group be transferred to the High Court is unconstitutional as it is akin to asking the court to amend the Constitution and legislation, a mandate that is vested in Parliament, and it would also be to meddle with the operations of the office of the Director of Public Prosecutions which is an independent constitutional office.

21. On the prayer for provision of all records of all persons being prosecuted for robbery with violence, the respondents contend that such records are public and available to all and sundry, and that it was not possible to provide such a record in any event as offences attracting capital punishment are committed and reported daily and continuously.

Issues for Determination

22. This petition raises a critical issue regarding the right of an accused person facing trial for an offence which carries the death penalty to be provided with legal representation by the state. From the submissions by the respondents, it is clear that they do not dispute that a person in the position of a

member of the group on whose behalf this petition has been brought is entitled to legal representation as provided for in Article 50(2)(h). What is in issue is the point at which such right coalesces, and it becomes a violation of the right for any trial to be conducted without the accused being provided with legal representation by the state. I shall deal with this issue shortly.

The Alternative Argument

23. The petition also raises, indirectly, a second important issue. While terming it an alternative argument, the petitioner submits that those charged with robbery with violence should not be sentenced to death where the acts forming the crime did not result in death; that to do otherwise is to violate the provisions of Article 6(1) of the International Covenant on Civil and Political Rights, which is binding on Kenya. This Article is in the following terms:

“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.”

24. My view of this argument is that the petitioner, while not contending that Section 296(2) of the Penal Code is unconstitutional, is indirectly asking the court to pronounce on whether or not the death penalty to which those charged with robbery with violence are liable to be sentenced can be justified and maintained in light of international and regional treaties and decisions on the issue. He is also, in effect, asking the court to make changes in the law by holding that only in cases where death has resulted should one charged with robbery with violence be sentenced to death. I think this issue can be disposed of at the outset.

25. While international covenants such as Article 6(1) of the ICCPR encourage states to do away with the death penalty, or to reserve the penalty for the most serious crimes, the people of Kenya at Article 26(3) of the Constitution still permit the death penalty ***‘to the extent authorized by this Constitution or other written law.’*** The death penalty has been provided in the Penal Code for the offence of robbery with violence, and this provision accords with the provisions of Article 26(3). As correctly argued by the 2nd and 3rd respondent, the law making authority under our Constitution is vested, under Article 94(1), in the National Assembly, and the same Constitution at Article 2(2) requires that this court exercises authority only ***‘as authorized by this Constitution.’*** I do not believe that the court can properly assume the authority of the legislature and order that the death penalty in robbery with violence cases should be imposed only in those cases where death has resulted from the acts of the accused. It remains the constitutional mandate and province of the legislature to make such amendments to the law as is necessary to provide for the circumstances under which the death penalty should be imposed in cases of robbery with violence.

The Right to Legal Representation

26. The petitioner has given an excellent analysis of international and regional treaties, as well as some authorities, on the right to legal representation. He argues that Article 2(6) of our Constitution recognises any treaties or convention ratified by Kenya to form part of the laws of Kenya, and cites Article 14 (3) (d) of the International Covenant on Civil and Political Rights (ICCPR) which obliges state parties to assign legal assistance in any case where the interests of justice so require and without payment if the accused person does not have the means to pay for it. He argues that the words 'interest of justice' used in this Article are similar to the words ***‘if substantial justice would otherwise result’*** found in Article 50(2) (h) of our Constitution. He also relies on Article 7(1) (c) of the African Charter on Human and Peoples Rights (ACPR) which provides that

‘every individual shall have the right to have his case heard. This comprises...the right to defence, including the right to be defended by counsel of his choice...’

27. He argues that notwithstanding the wording of this Article, the African Commission commented in **Avocats Sans Frontiers (on behalf of Bwampanye) v Burundi, African Commission on Human and People's Rights, Comm. No. 213/99 (2000)** that:

'...Legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case.'

28. The petitioner further relies on the recommendations of the Human Rights Committee on the issue of representation in **Carlton –v- Jamaica, 9Comm. No. 250/1987, U.N Doc. CCPR/C/39/D/250/1987 (1990)** and in **Frank Robinson –v- Jamaica Comm No. 223/1987 UN Doc. Supp. No. 40 (A/44/40) at 241 (1989)**.

29. The judicial precedents, international conventions and the comments and recommendations of various human rights bodies relied on by the petitioner were analysed and discussed at length by the Court of Appeal in the case of **David Macharia Njoroge -v- Republic** (supra), and I have not heard any of the respondents argue against the essential provisions with regard to the right to legal representation at state expense in certain circumstances. The Constitution of Kenya has also expressly provided for it, under Article 56(2)(h), by providing that the right to a fair hearing includes the right of an accused person;

'to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly; (Emphasis added.)

30. This provision is in accord with the state's obligation under Articles 14(3) (d) of ICCPR and Article 7(1) (c) of the ACHPR, and its implementation will bring the state in accord with its international and regional obligations.

31. The petitioner has argued that by failing to provide those charged with robbery with violence with legal representation, the state is continuing to violate their rights, and to ignore the directive of the Court of Appeal in the **David Njoroge Macharia** case. A reading of the Constitution and the Court of Appeal decision in **David Njoroge Macharia**, however, indicates that while there is a recognition of the duty on the state and of the need to provide legal representation to accused persons in order to avoid substantial injustice, there is nothing that indicates that the intention is to have such representation immediately, or that all trials carried out without such representation after the 18th of March 2011 are automatically a nullity.

32. First, one observation with regard to the effective date for such trials to be considered a violation of the rights of the accused as argued by the petitioner. He has sought orders that compensation be paid to the accused at the rate of Kshs 400 per day to all group members who have been the subject of new or continued prosecutions with criminal charges attracting the death penalty in subordinate courts without the benefit of legal representation after 18th March 2011. However, the judgment availed to the court by the petitioner does not, in effect, indicate the date of delivery. It indicates that the judgment was ***'Dated and Delivered at Nairobi this 18th day of Nairobi, 2011.'*** Clearly this is an error that needed correcting, but for our purposes, it means that the only thing we are certain of is that the decision was delivered sometime in the year 2011.

33. At any rate, the respondents have submitted with regard to time that the petition is premature as the time for complying with the constitutional provisions on the right to a hearing has not yet elapsed. Such constitutional time limits are set out in Article 261 of the Constitution, which provides as follows:

(1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.

(2) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-

thirds of all the members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year.'

34. The Fifth Schedule provides a time specification of four years for enactment of legislation on the right to a hearing.

35. In response to the respondents' argument with regard to time limits, Mr. Bryant for the petitioner contends that it is only Article 50(9) which contains a requirement that legislation be enacted, and it is such legislation, pertaining to the rights of victims, that is contemplated in the Fifth Schedule to the Constitution.

36. The question that the court needs to address its mind to is whether it was the intention behind the provisions of the Constitution with regard to the right to legal representation, as interpreted by the Court of Appeal in **David Njoroge Macharia**, that such representation would be provided immediately with no legislative or institutional framework in place. Would it be reasonable to expect the state to immediately, or upon promulgation of the Constitution or, as argued by the petitioner, from the 18th of March 2011, to provide all persons charged with capital offences with legal representation?

37. I use the terms 'all persons charged with capital offences' deliberately. It is worth observing that the decision of the Court of Appeal which forms the basis of this petition includes all persons charged with offences that carry a death penalty. The Court of Appeal in **David Njoroge Macharia** first observed as follows with regard to the right conferred by Article 50:

'Article 50 sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interest of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence.'

38. The Court then went on to state as follows:

"Under the new Constitution, state funded legal representation is a right in certain instances. Article 50(1) provides that an accused shall have an advocate assigned to him by the State and at state expense if substantial injustice would otherwise result (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of Article 2(6). Therefore provisions of the ICCPR and the commentaries by the Human Right Committee may provide instances where legal aid is mandatory. We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."(Emphasis added)

39. The Court of Appeal thus expanded the constitutional requirement that legal representation be provided at state expense in cases where 'substantial injustice might otherwise result' to include all situations where an accused person is charged with an offence whose penalty is death. The implication of this, in my view, would be that not just the indigent on whose behalf this petition is brought, but all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. This would expand those who should be provided with legal aid too wide, for as the petitioner rightly recognizes, it is indigent citizens who do not have the financial resources to pay for legal representation who would suffer 'substantial injustice' if they had no legal representation.

40. Be that as it may, however, the Court of Appeal recognized the implication of its decision by the directions it gave to the Deputy Registrar of the Court of Appeal:

“Given that this judgment has major policy and financial implications for the Executive branch of the Government, we direct the Deputy Registrar of this Court to formally serve a copy of this judgment to the Hon. The Attorney General, the Hon. The Minister of Justice and Constitutional Affairs, the Constitutional Implementation Committee and the Law Reform Commission for their records and necessary action, as may be appropriate.”

41. In directing the Deputy Registrar to serve the Appeal Court’s decision on these offices and institutions ***‘for their records and necessary action, as may be appropriate’***, the Court of Appeal recognised, in my view, that there would be need to make major policy and legislative changes, and to make financial resources available, in order to put into effect the constitutional requirement that accused persons be availed legal representation in the situations where ‘substantial injustice’ would result if the accused person was undefended, and for those charged with offences that carry the death penalty.

42. This accords with the argument by the respondents, and which is also borne out by the provisions of Article 261 and the Fifth Schedule to the Constitution, that the provisions of Article 50, including Article 50(2)(h), are to be implemented within a period of between 4 and 5 years. It cannot have been the intention of the framers of the Constitution, or of the Court of Appeal, to halt all criminal prosecutions of persons charged with robbery with violence until the implementation of a scheme to provide legal representation to all persons charged with the offence of robbery with violence.

Prosecution of Robbery with Violence Cases in the High Court

43. The petitioner has asked the Court, in the event that the state will not provide the legal representation that he demands for all indigent persons charged with the offence of robbery with violence, to direct that all such offences should be heard in the High Court, and in the alternative, that the Court stops the 1st respondent from carrying out any prosecution of robbery with violence cases pending institution of a legal aid and representation scheme. There are two major hindrances to the Court issuing such directions, the first based on the Constitution and the law, the second relating to the practical implications of issuing such orders.

44. First, as correctly argued by the respondents, directing that robbery with violence cases be heard in the High Court would require a change in the law to provide that the offence of robbery with violence is tried in the High Court. The Judicature Act Chapter 8 Laws of Kenya, and the Magistrates Courts Act, Chapter 10 Laws of Kenya, spell out the jurisdiction that each Court is to exercise. The criminal jurisdiction of the Resident Magistrates’ Courts is set out at Section 4 of the Magistrates’ Courts Act as being that conferred under the Criminal Procedure Code and any other written law. Section 7(1) of the Criminal Procedure Code stipulates that a subordinate court may try and pass such sentence for any offence that it is authorized to try and pass by law. Under the First Schedule to the Criminal Procedure Code, the offence of robbery with violence shall be tried by the subordinate court of the first class presided over by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate or a Senior Resident Magistrate, and the penalty for the offence is death.

45. The petitioner argues that the respondent should refer all death penalty trials to the High Court under sections 69 and 76 of the Criminal Procedure Code. I have looked at the provisions of these two sections. Section 69 provides that;

‘The High Court may inquire into and try any offence subject to its jurisdiction at any place where it has power to hold sittings.

Section 76 provides that

(1) Whenever a doubt arises as to the court by which an offence should be tried, the court entertaining the doubt may report the circumstances to the High Court, and the High Court shall decide by which court the offence shall be inquired into or tried.

(2) Any such decision of the High Court shall be final and conclusive, except that it shall be open to an accused person to show that no court in Kenya has jurisdiction in the case.'

46. I can find no basis in the above provisions for the respondent to refer trial of robbery with violence cases to the High Court. The High Court can only try cases in which the law confers jurisdiction upon it, and there is no doubt about where jurisdiction for trial of robbery with violence cases lies. The law has provided very clearly with regard to the jurisdiction of the Magistrates' Courts to try the offence, and I agree with the submissions of the 2nd and 3rd respondents that as long as the Magistrates Courts conduct trials within the parameters established under the law, there would be no basis for interfering with their mandate.

47. More importantly, the Court would be usurping the power of the legislature, and thus acting unconstitutionally, if it purported to direct that trials of robbery with violence cases should take place in the High Court, as this would effectively be to remove jurisdiction from the Magistrates' Courts and vest it in the High Court, and only the legislature can do this.

Bar on Further Prosecutions

48. The petitioner also takes the position that, if the state is unwilling to refer robbery with violence cases to the High Court or set up the legal aid representation scheme, this court should bar the state from prosecuting such cases until such time as the state complies with its constitutional and international law obligations in this regard. The question that arises is whether this court has jurisdiction under the Constitution to order the 1st respondent not to carry out any further prosecutions pending establishment of the legal representation scheme.

49. The powers of the Director of Public Prosecution are set out in Article 157 of the Constitution. Article 157 (10) provides as follows:

'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'.

50. As this court observed in **Francis Anyango Juma -v- Director of Public Prosecutions and Another, Petition No. 160 of 2012**, the intention behind the constitutional provision is to enable the DPP to carry out his constitutional mandate without interference from any person or organ. The Court observed at paragraph 28 of its judgment as follows:

'Clearly, the intention under the Constitution was to enable the Director of Public Prosecutions to carry out his constitutional mandate without interference from any party. This court cannot direct or interfere with the exercise by the DPP of his power under the Constitution or direct him on the way he should conduct his constitutional mandate, unless there was clear evidence of violation of a party's rights under the Constitution, or violation of the Constitution itself.'

51. There are no circumstances presented before me that would entitle the court to make such a far reaching order as barring all prosecution of robbery with violence cases. Certainly, if such an order was to be made, it would be made in individual cases, on the basis of very clear and cogent evidence that 'substantial injustice' would otherwise result, and cannot be made as a blanket order in respect of all cases of robbery with violence.

52. Which leads me to the second hindrance to granting any of the orders sought by the petitioner: the practical implications, to the public interest and the rights of the members of the group themselves, of what the petitioner is asking this court to do. Stopping the 1st respondent from carrying out prosecutions until legal representation has been provided would not only be contrary to the societal interests in seeing those who have committed crimes brought to trial, but would also lead to violations of the rights of the accused persons themselves. What would be the fate, for instance, of those in custody awaiting their trials? Would they need to be released to await trial when the state provides legal representation? Would

they be released without trial? What about directing that all cases of robbery with violence be tried in the High Court? The court takes judicial notice of the fact that there are currently about 300 magistrates, yet the trial of criminal cases tends to be delayed for very many years. What would be the situation if cases of robbery with violence, which, according to the 1st respondent are very many and are brought to the courts daily, were to be sent to the High Court, with its 80 or so judges? Not only would the entire justice system grind to a halt, but many other rights of the group, including their right to expeditious justice, would be infringed.

53. The constitutional guarantees to citizens, including those in relation to the right to trial, must be read and interpreted in a realistic manner, and bearing in mind the context and circumstances of the criminal justice system in Kenya. Such guarantees must also be considered while bearing in mind the need to balance the interests of the accused, those of the victims, and the greater societal interests. My analysis of the matter before me, and bearing in mind the context within which the justice system in Kenya operates, leads me to the inescapable conclusion that it cannot be in the larger public interest to adopt any of the measures proposed by the petitioner, or to grant any of the orders that he seeks.

State Action on the Right to Legal Representation

54. The respondents have set out in their affidavits and submissions the steps they are taking and have taken to put in place the measures required to provide legal representation as required under the Constitution. These include the drafting of a Legal Aid Policy and Bill, and the rolling out of pilot projects in various parts of the country for the provision of legal representation to indigent Kenyans, projects in which the petitioner, as a member of CLEAR, is involved in. I take the view that the initial steps that the Executive has taken give an indication of its intention to implement the provisions of Article 50(2)(h). This is in keeping with the duty imposed under the Constitution, and I can see no basis for taking issue with it. Under Article 261(5), the petitioner would have the right to petition the Court if the respondents failed to comply with the time specifications in the Constitution. The Article provides that

(5) If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter.

(6) The High Court in determining a petition under clause (5) may—

(a) make a declaratory order on the matter; and

(b) transmit an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice.'

Compensation

55. The petitioner has asked that the state gives information on all the persons currently charged with the offence of robbery with violence, and that it compensates each of them at the rate of Kshs 400 per day. The basis of this demand is unclear. If it is predicated on the argument that the state has failed to implement the constitutional requirement with regard to legal representation, given my finding in that regard, then that claim has no basis.

56. The upshot of my findings above is that this petition fails and must be dismissed, but with no order as to costs.

57. I must, however, commend the petitioner for taking up this matter which is of great public interest. It brings to the fore the need to start making the constitutional guarantees to accused persons a reality, and the state must move with expedition to complete what it needs to do to put in place a legislative and institutional framework, including availing the requisite resources, to provide indigent persons charged with the offence of robbery with violence with legal representation. In the interim, the respondents, with civil society organisations such as that represented by the petitioner, must use the pilot project already in

place to identify and avail legal representation to those cases of indigent persons where, as the Constitution states, substantial injustice would otherwise result for lack of legal representation.

58. I am greatly indebted to Counsel involved in this matter for their well-researched submissions and authorities and diligent presentation of their respective cases.

Signed at Nairobi this 18th day of January, 2013

MUMBI NGUGI
JUDGE

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Dated and Delivered at Nairobi on 18th January, 2013

D. S. MAJANJA

JUDGE

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Mr. Timothy Bryant instructed by the firm of Azania Legal Consultants & Co. Advocates for the Petitioner

Ms Terry Kahoro instructed by the Attorney General for the 1st Respondent

Mr. Moimbo Momanyi instructed by the State Law Office for the 2nd and 3rd Respondent