REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

PETITION NO. 415 OF 2008

IN THE MATTER OF: SECTION 84(1) OF THE CONSTITUTION
IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS

AND

FREEDOMS UNDER SECTION 77(1) OF THE CONSTITUTION

BETWEEN
JOSEPH MBUI MAGARI.....PETITIONER

AND
ATTORNEY GENERAL .....1ST RESPONDENT

CHIEF MAGISTRATE'S COURT, NAIROBI .....2ND RESPONDENT

JUDGMENT

The petitioner is a retired Permanent Secretary in the Ministry of Finance. On 16th February, 2005 the petitioner and 3 others were arraigned before the Chief Magistrate's Court at Nairobi in Anti-Corruption Case No. 8 of 2005 charged withthe following offences:

1. Abuse of office contrary to Section 46 of the Anti-Corruption and Economic Crimes Act, 2003. The particulars thereof were that on 3rd December, 2003 while working as the Permanent Secretary in the Ministry of Finance, in abuse of the authority of the said office, the petitioner signed a contract on behalf of the Government of the Republic of Kenya without verifying the status of Anglo-Leasing and Finance Limited, thereby improperly conferring a benefit on Anglo-Leasing and Finance Limited.

2. Abuse of office contrary to Section 46 of the Anti-Corruption and Economic Crimes Act, 2003. The particulars of the offence were that on 3rd of December, 2003 at Treasury Building within Nairobi City of Nairobi Province, while working as the Permanent Secretary in the Ministry of Finance, the petitioner

signed a contract with Anglo-Leasing and Finance Limited, whereas the proposal on which the agreement was based was from Francois Charles Oberthur Fiduciare of France and thereby improperly conferred a benefit on Anglo-Leasing and Finance Limited.

3. Economic crime contrary to Section 45 (2) (c) of the Anti-Corruption and Economic Crimes Act, 2003. Particulars of the offence were that on 3rd December, 2003 at Treasury building within Nairobi area, while working as Permanent Secretary in the Ministry of Finance, the petitioner engaged in a project without prior planning by signing a contract on behalf of the Government of the Republic of Kenya, without verifying that provision for the project had been made in the Estimates of Expenditure approved by Parliament.

No explanation was tendered regarding the delay of approximately fifteen months between the time the offences were alleged to have been committed to the time that the charges were preferred.

The petitioner was released on bail terms upon entering a plea of not guilty to the aforesaid charges. The petitioner did raise various complaints before the trial Magistrate relating to delay before and after the plea was taken. The said case had not been finalized as at 11th July, 2008 when the petitioner filed this petition. The petitioner alleged that the delay between the date the indictment was filed and the commencement of the hearing is unreasonable and prejudicial to him. He further stated that the indictment preferred against him relates to alleged acts committed in 2003, approximately four years six months before 11th July, 2008 when he filed this petition. Given the vulgaries of human memory and eminent likelihood of retired and/or decreased potential witnesses, his right to a fair trial as envisaged by Section 77(1) of the Constitution of Kenya (now repealed), has been violated irreparably, the petitioner stated. For the said reasons, the petitioner added, the only efficacious remedy of the violation of his constitutional right is a dismissal of the charges preferred against him.
In his petition, the petitioner seeks the following declarations:

"(a) A declaration that the delay prior to filing the indictment against the petitioner was unreasonable and prejudicial to the petitioner's right to fair hearing.

(b) A declaration that the delay between filing the indictment and commencement of the hearing is unreasonable and prejudicial to the petitioner's entitlement to a trial within a reasonable time.
(c) An order to quash the indictment against the petitioner which is before the 2nd respondent in Anti-Corruption Case No. 8/2005.

(d) An order to prohibit the 2nd respondent and/or any other court subordinate to this honourable court from entertaining and/or hearing Anti-Corruption Case No. 8/2005 and/or any charges arising therefrom.

(e) Costs of and incidental to this suit."

The petitioner swore an affidavit in support of the petition. The affidavit is essentially a rehash of the issues raised in the petition.

The 1st respondent filed a replying affidavit sworn by Davis Mwambaji Farrah, a Forensic Investigator III at the Kenya Anti-Corruption Commission. Mr. Farrah is the Investigating Officer in Criminal CaseNo. 8/2005. He stated that he had been advised by Mrs. Alice Ondieki, Senior Principal State Counsel and which information he believed to be true that:

(a) The Kenya Anti-Corruption Commission extensively investigated the circumstances leading to this prosecution.
(b) During the course of such investigations, statements were taken from the petitioner during which he was informed of the pending prosecution.

(c) The Attorney General, in bringing the prosecution carefully weighed the evidence gathered during the investigations by the Kenya Anti-Corruption Commission."

Mr. Farrah added that the petitioner had not made full disclosure to this court that:

(a) He had, before the trial Magistrate in the aforesaid criminal case, moved the court invoking Sections 70, 77(1), 82(2), 84(3) and 123(8) of the Constitution of Kenya and the rules made thereunder.

(b) The aforesaid motion alongside others were extensively argued and over a period of time before they were dismissed.

(c) The petitioner's co-accused namely, Silvester Mwadime Mwaliko, consequently filed:

1. An application for leave to file an appeal out of time.

2. HCC Miscellaneous Application No. 604 of 2003 for stay of proceedings of Criminal Case No. 8 of 2005.

3. High Court Criminal Appeal No. 236 of 2006 against the trial Magistrate's ruling. After hearing the said appeal Dulu J dismissed the same on 18th May, 2007. These applications held back the criminal trial before the Chief Magistrate.

4. The petitioner's complaints as set out in declarations (a) & (b) have previously been fully argued before the Chief Magistrate and Dulu J.

The deponent denied that there had been any violation of the petitioner's constitutional right as alleged. He added that the petitioner had not appealed against the Chief Magistrate's ruling in respect of the alleged constitutional violations. Mr. Farrah further stated that the hearing of the criminal case has been held in abeyance since the filing of this petition and denied that the Attorney-General had unnecessarily delayed prosecution of the criminal case or exhibited any disinclination to prosecute the case.

The 1st respondent stated that:

(a) The petition is an abuse of the process of court as it seeks to re-agitate complaints on matters and provisions of the Constitution that had been adjudicated upon.

(b) The petitioner has not made out a case for granting declarations (a) and (b).

(c) The prosecution of the criminal case is mounted on some evidence gathered after thorough investigations by the Kenya Anti-Corruption Commission and a thorough evaluation of the same by the office of the Attorney General.

(d) The remedy of prohibition looks into the future and cannot quash a decision which has already been made. A decision to charge the petitioner has already been made and an order of prohibition is not efficacious in the circumstances.

(e) The Attorney General had not acted in excess of his authority in instituting the aforesaid criminal charges.

By way of a further affidavit sworn on 19th February, 2009 in reply to some issues raised by Mr. Farrah, the petitioner stated that it is true that he sought through counsel, to raise constitutional issues before the subordinate court but those issues were never determined by that court. It is therefore incorrect to allege that he is now seeking to re-agitate constitutional issues already adjudicated upon by subordinate court. In any event, he added, the subordinate court lacks jurisdiction to address the issues raised in the petition.

The petitioner further stated that due to factors which are attributable to the 1st respondent, Anti-Corruption Case No. 8 of 2005 has never proceeded to hearing. He attached to his affidavit a copy of the proceedings of the trial court to demonstrate the true position of the case.

The petitioner swore a further affidavit on 21st October, 2009 and stated that if Kenya Anti-Corruption Commission had extensively investigated the circumstances leading to the criminal case as alleged, the following facts could have been established:

(a) The Department of Immigration, then under the Office of the Vice President and Ministry of Home Affairs, conceived the Immigration Security and Document Control Systems Project which was much later referred to the Treasury for approval.

(b) By a memorandum dated 2nd October, 2003, he was informed by the Head, Debt Management Department of the Treasury, that various approvals were required from the Minister for Finance. He annexed thereto a copy of the memorandum marked as "JMM 1".

(c) Upon perusal of the memorandum he was satisfied that appropriate steps had been taken where upon the petitioner wrote in his own handwriting the following:

"MF (Minister for Finance). It is recommended that you approve recommendations 4.3 (i) (ii) (iii) and authorize me to sign the agreement and promissory notes."

The Minister for Finance wrote back to the petitioner "PS Approved" and dated the approval 21/11.

(d) By a letter dated 3rd October, 2003 the Minister for Finance issued a special authorization to the petitioner to execute the documents in relation to the project. The special authorization dated 3rd October, 2003 read as hereunder:

SPECIAL AUTHORIZATION
EXTERNAL LOANS AND CREDIT ACT (CHAPTER 422 LAWS OF KENYA)

SUPPLIERS SERVICES AND FINANCING CREDIT AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF KENYA ANGLO-LEASING AND FINANCE LIMITED FOR IMMIGRATION SECURITY AND DOCUMENTS CONTROL SYSTEMS PROJECT FOR THE KENYA DEPARTMENT OF IMMIGRATION

SPECIAL AUTHORIZATION

In accordance with the provision of Section 7(1) of the External Loans and Credits Act Chapter 422 of the Laws of Kenya, I, HON. DAVID MWIRARIA, Minister for the time being responsible for finance in the

Government of the Republic of Kenya, hereby authorizes, MR. JOSEPH MBUI MAGARI, PERMANENT SECRETARY, to THE TREASURY MINISTRY OF FINANCE, to sign on behalf of the Republic of Kenya, the above quoted Financial Agreement with Anglo-Leasing and Finance Limited and any documents thereof in connection with the said Supplier Services and financing credit agreement required to finance and execute the project for Immigration Security and Control Systems for the Kenya Department of Immigration, Ministry of Home Affairs and National Heritage.

MR. JOSEPH M. MAGARI signs thus ..(Signed)

(Signed)
DAVID MWIRARIA
MINISTER FOR FINANCE"

(e) The petitioner had no hand in identifying the contractor or financier or any aspect of the negotiations that were carried out. The project an undertaking by the Ministry of Home Affairs in consultation with the relevant government agencies. It is the responsibility vested upon each Ministry to identify the projects to undertake, ensure requisite steps are taken and brief Treasury if any expenditure is to be incurred from public funds.

(f) The contract documents were brought to the petitioner by the Ministry of Home Affairs having been duly executed by the accounting officer of that Ministry. The petitioner was obligated to countersign the documents in compliance with the authorization issued to him by the Minister for Finance and in obedience to the Government Contracts Act.

(g) That in executing the contract documents the petitioner was carrying out his lawful duties which he had been expressly instructed to do.

The 1st respondent swore a further replying affidavit through Kevin M. Njuguna, an Investigator employed by the Kenya Anti-Corruption Commission (hereinafter referred to as **"**KACC"). Mr. Njuguna stated that the petitioner was not entirely truthful in his further replying affidavit and had indeed misled the court. Regarding the petitioner, Mr. Njuguna stated:

"(a) He has deliberately failed to disclose that by a letter dated 5th September, 2003 addressed to him by his co-accused, Mr. S.M. Mwaliko, the then Permanent Secretary for Home Affairs, asked him to make a technical review of the proposed project. He was also requested to have his Ministry provide approval as stated.

(b) Mr. Magari in producing his exhibits "JMM1" clearly contrived deliberately misled the court as it is

incomplete and indeed tampered with. I produce herewith the complete memo dated 2nd October, 2003 marked "KMN 2" on which it will be noted that: -

(i) Mr. Magari handwritten personal note to the Minister for Finance dated 22nd November, 2003 as well as his direction to Mr. Onyonka on the 24th November, 2003 have been deleted.

(ii) The said deletion was to conceal that Mr. Magari made the recommendations to the Minister to approve the contracts as they were in order to prepare the necessary documents in the said subject contracts for his signature.

(iii) Paragraph 2.8 of the MEMO was clearly wrong as the systems provider was subsequently determined to be a phantom company.

(iv) Mr. Magari in his Further Replying Affidavit has not disclosed what his lawful duties were and the effect of his recommendation to the Minster and instructions of Mr. Onyonka."

Parties through their respective counsel filed their affidavits and list of authorities which we have carefully considered. Mr. Ngatia appeared for the petitioner while Mr. Okwach and Mr. Ouma appeared for the respondents.

In his submissions regarding the fifteen months delay between the time the offences were allegedly committed and the time the indictment was preferred, Mr. Ngatia submitted that in the absence of any explanation for the delay it may be inferred that the same was a deliberate attempt by the 1st respondent to prevent the petitioner from taking steps to prepare his defence. He cited ROBERT DEAN DICKEY vs. STATE OF FLORIDA 398 US 30, where it was held:

"Deliberate governmental delay designed to harm the accused, however, constitutes abuse of the criminal process. It lessens the deterrent value of any conviction obtained. And it very probably reduces the capacity of the accused to defend himself; unlike the prosecution he may remain unaware that charges are pending and thus fail to take steps necessary to his defence. Accordingly, some of the interests protected by the speedy trial clause can be threatened prior to arrest or indictment. Thus, it may be that for the purposes of the clause to be fully realized, it must apply to any delay in the criminal process that occurs after the government decides to prosecute and has sufficient evidence for arrest or indictment."

Mr. Ngatia further submitted that the petitioner was admitted to bail on terms, *inter alia*, that he surrenders his passport. His movement therefore continues to be restricted todate. Counsel further cited the provisions of Section 77(1) of the repealed Constitution which guarantees all persons charged with a criminal offence the right to be tried within a reasonable time. In his view, the inordinate delay is

attributable to the 1st respondent's ostensible disinclination to prosecute the criminal charges against the petitioner. As a result of the delay, the petitioner's constitutional right as aforesaid has been violated. He cited ROBERT DEAN DICKEY vs. STATE OF FLORIDA (Supra), where it was held that:

"The right to a speedy trial is not a theoretical or abstract right but one rooted in hard reality in the need to have charges promptly exposed."

The second delay which Mr. Ngatia submitted on was between the date of indictment and trial. He stated that the plea was taken on 16th February, 2005 but todate not a single witness had been called to prove the charges against the petitioner. Due to the excessive passage of time, the petitioner's ability to mount an effective defence continues to wane. He urged the court to quash the criminal charges. Counsel cited the case of SERU vs. STATE [2003] FJCA 26, where the Court of Appeal of Fiji, dealing with a similar issue as this one held as follows:

"Looking at the sum of the relevant factors discussed above, we are driven to the conclusion that in the circumstances of this case, the delay which occurred between charge and trial was unreasonable. The appeals must succeed on this ground alone. A particular feature of the delay is the time taken over the committal process, but we rely also on the total period involved between the date of charging and the conclusion of the trial."

Mr. Ngatia further submitted that from 16th February, 2005 when the charges were read to the petitioner upto 11th July, 2008 (when this petition was filed) the criminal case had been listed and/or mentioned before the trial court 54 times. All along the petitioner had complained about the delay. He cited Article 50 of the Constitution of Kenya, 2010 which guarantees an accused person the right to have any dispute resolved in a fair trial which ought to be heard and concluded without unreasonable delay. This is a right which cannot be limited, counsel submitted.

Mr. Ngatia also sought to rely on RAHEY vs. REPUBLIC [1987] 1 SCR 588, (delivered by the Supreme Court of Canada), where the accused was charged with six counts of making false returns and one of willful evasion contrary to the Income Tax Act. The crown closed its case in November 1982 and, after an adjournment, the defence made a motion for a directed verdict in December 1982. Thereafter, for a period of eleven months, 19 adjournments were initiated by the trial judge. The accused applied for an order dismissing the charges. The court granted the application holding that the delay by the judge was shocking, inordinate and unconscionable and a violation of the accused's right to be tried within a reasonable period of time. The court further held that the delay had seriously prejudiced the accused by impairing his ability to conduct his defence. The court held that the only appropriate remedy was to dismiss the charges.

It was further submitted that when the petitioner was alleged to have committed the offences aforesaid he was a Permanent Secretary and due to his status in the Public Service the charges received wide publicity and attention. Over an extended period of time he has been subjected to the vexations and vicissitudes of the pending criminal accusations. In RAHEY vs. R (Supra), it was pointed out that:

"These vexations and vicissitudes include stigmatization of the accused, loss of privacy, stress and anxiety resulting from a multitude of factors, including possible disruption of family, social life and work, legal costs and uncertainty as to the outcome of the sanction."

Mr. Ngatia further submitted that it is in the interest of the general Kenyan populace that criminal charges be heard and determined at the earliest possible opportunity. This is societal interest. In view of the delay in hearing and disposal of the aforesaid criminal case, counsel urged this court to quash the criminal charges as prayed in the petition.

Mr. Okwach for the respondents submitted that for the petitioner's prayers to be granted he has to show the specific acts of commission or omission that the respondents undertook and which caused the alleged delay. As regards the delay before the filing of the indictment, the petitioner had not deponed any fact suggesting that he was neither told nor informed of investigations, their complexity, nor that he was likely to be charged with an offence. He submitted that the Anglo-Leasing transactions referred to in the criminal charges were extremely complex and involved colossal amounts of money and the transactions involved various government departments. The Attorney General had to take reasonable time to investigate the matter thoroughly before preferring the charges against the petitioner and his co-accused.

There is no mathematical formula as to how long the Attorney-General can undertake investigations before preferring charges, counsel added. In the circumstances, the issue of delay before trial cannot be a ground for striking out the criminal charges. He added that Article 50(e) of the Constitution of Kenya, 2010 which guarantees an accused person the right to have the trial begin and concluded without unreasonable delay does not refer to delay before beginning of the trial. He added that the petitioner had not sufficiently proved that he would suffer any prejudice unless the orders sought are granted. He had not alleged that either himself or any intended witness has lost memory of the relevant events relating to the trial.

Counsel further submitted that the record of the trial court showed that from the date of plea up to 31st January, 2006 the trial court had been dealing with applications for reference to the High Court that had been made by the accused persons. It was only on 21st April, 2005 that the court adjourned the matter on the grounds that it had before it another long hearing. On 23rd May, 2005 the case was also adjourned as the court was not handling Anti-corruption matters. On all the dates when the matter was adjourned, a

satisfactory reason was given. Counsel submitted that there was no evidence whatsoever that either the prosecution or the trial court had delayed the trial for unreasonable period of time. Referring to the case of PUBLIC PROSECUTOR vs. BERNARD & OTHERS 1LRC 418, which was cited by the petitioner's counsel, Mr. Okwach submitted that the meaning of **"**reasonable time" would differ on a case to case basis due to the circumstances of each case and the local conditions of the offices responsible for the administration of criminal justice system.

It was further submitted that in the criminal case the petitioner was being represented by Mr. Muturi Kigano advocate. The petitioner through the said advocate had sought to demonstrate that under the provisions of Section 77(1) of the Constitution, there were constitutional issues that deserved determination by the High Court. Counsel had urged the trial court to make a finding to that effect. The trial Magistrate ruled that she was not satisfied that such constitutional issues had been raised and thus dismissed the petitioner's application. All the other accused had raised similar issues. Following the ruling of the trial court, one of the accused persons filed an appeal to the High Court being Criminal Appeal No. 236 of 2006 which was heard and dismissed by Dulu, J.

After the filing of this petition, although a hearing date had been fixed for the criminal trial, it was agreed by all parties that the trial be stayed pending hearing and determination of the petition.
Responding to the above submissions, Mr. Ngatia said that the petitioner made an application seeking to have the trial court refer some issues that he had raised to the High Court for determination. The request was made on 23rd May, 2005. At that time there could not have been any argument that there was unreasonable delay. However, the trial Magistrate declined to grant the petitioner's prayer. Counsel added that the record was clear that there were several adjournments granted at the instance of the prosecution.

Regarding alleged complexity of the Anglo-Leasing transactions, Mr. Ngatia submitted that the petitioner, as a Permanent Secretary to the Treasury, signed the contract on express instructions granted by the Minister for Finance. The Attorney-General had also given his opinion regarding validity of the contract and stated that it was legally sound. Counsel wondered why no accusing finger had been pointed at the Finance Minister as well as the Attorney General.

As regards delay in prosecuting the petitioner, Mr. Ngatia submitted that it was not necessary to show that the delay was deliberate. All he needed to show was that the delay was unreasonable.

Having summarized the petitioner's prayers as well as the submissions made by counsel, we are of the view that the important issues that arise for determination may be summarized as hereunder.

1. Was the delay prior to filing of the indictment against the petitioner unreasonable and prejudicial to the petitioner's right to a fair hearing?

2. Was the delay between filing the indictment and commencement of the hearing unreasonable and prejudicial to the petitioner's entitlement to a trial within a reasonable time?
3. What amounts to a fair trial?

4. Is the petitioner entitled to an order to quash the indictment against him in Anti-Corruption Case No. 8 of 2005?
5. Who should bear the costs of this suit?

This petition was filed before the Constitution of Kenya, 2010, was promulgated on 27th August, 2010. That is why it is premised on the provisions of Section 77(1) of the repealed Constitution. That section provided as hereunder:

"If a person is charged with a criminal offence, then, unless the charge is withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."
However, the petition will now be considered in light of Article 50(2) (e) which provides that:

"Every person has a right to a fair trial which includes the right to have the trial begin and conclude without reasonable delay."

There are also other provisions of the new Constitution which are relevant in the determination of this petitionas shall be alluded to in due course.

The petitioner submitted that the period of delay prior to the indictment amounted to violation of his constitutional right to a fair trial. On the other hand, the respondents submitted that the right to a fair trial does not include any time before an indictment is preferred against an accused. The petitioner was charged on 16th February, 2005 whereas the alleged offences were said to have been committed on 3rd December, 2003. There was delay for a period of 15 months in between. One may wonder as to when the government became aware that the petitioner had allegedly committed the offences as charged with. The respondents submitted that the Anglo-Leasing transactions were very complex and required thorough investigations involving various Ministries and/or governmental departments. If the petitioner had shown that the government was aware that an offence had been committed several months, say for instance, six or more, before the charges were preferred against him and that there were no reasons for such delay, we think he would be entitled to his position that the delay prior to the filing of the indictment is prejudicial to his right to a fair hearing. But that is not the case here. An act may be done today and unknown to the relevant authorities that the act amounts to a criminal offence, no action is taken against the perpetrator

thereof until after a considerable lapse of time, say for example, five years. If immediately after lapse of the said five years the Attorney-General and/or the police become cognizant of commission of the offence and commence prosecution of the person who committed the offence five years earlier, we do not think that anyone would be right to argue that the delay prior to filing of the indictment is unconstitutional. But if all along the Attorney-General was aware that a criminal offence had been committed and took no action against the person concerned then, in our view, it will be an affront to the person's constitutional right to a fair trial for the Attorney-General to proceed with the case notwithstanding the unexplained delay. In GITHUNGURI vs. REPUBLIC [1986] KLR 1, the charge was quashed because it was brought four years after the Attorney-General had decided not to prosecute the applicant.

To the extent that the petitioner herein does not state that the 1st respondent, having known that he had committed a criminal offence during the period of 15 months aforesaid, there can be no basis of making a declaration that the delay prior to filing the indictment was unreasonable and prejudicial to his right to a fair hearing.

We shall now deal with the second and third issues together. In JUMA & OTHERS vs. ATTORNEY GENERAL [2003] 2EA 461 at page 464 the court considered and interpreted the provisions of Section 77(1) of the repealed Constitution as they relate to a right to a fair hearing. Mbogholi and Kuloba JJ. held as follows:

"It is an elementary principle in our system of the administration of justice, that a fair hearing within a reasonable time, is ordinarily a judicial investigation and listening to evidence and arguments conducted impartially in accordance with the fundamental principles of justice and due process of law and of which a party has had a reasonable notice as to the time, place and issues or charges, for which he has had a reasonable opportunity to prepare, at which he is permitted to have the assistance of a lawyer of his choice as he may afford and during which he has a right to present his witnesses and evidence in his favour, a right to cross-examine his adversary's witnesses, a right to be appraised of the evidence against him in the matter so that he would be fully aware of the basis of the adverse view of him for the judgment, a right to argue that a decision be made in accordance with the law and evidence. The adjective "fair" describing the requisite hearing requires the court to ensure that every hearing or trial is reasonable, free from suspicion of bias, free from clouds of prejudice, every step is not obscure, and in whatever is done it is imperative to weigh the interest of both parties alike for both, and make an estimate of what is reciprocally just …… A fair trial, having the above minimum qualities, must be undertaken, prosecuted and concluded within reasonable time before and by an independent and impartial court established by law."

It is necessary to investigate what amounts to **"**unreasonable delay" in the context of a fair criminal

trial. In RAHEY vs. R (Supra), it was held that 19 adjournments at the instance of the trial judge amounted to inordinate and unconscionable delay and violation of an accused's right to a fair trial. The delay had also prejudiced the accused by impairing his ability to conduct his defence. In MILLS vs. R, [1986] 1SCR 863, it was held that the fundamental purpose of the right to a fair trial within a reasonable time is to secure within a specific framework the right to liberty and security of the accused of which no one will be deprived of except in accordance with the principles of fundamental justice.

Mr. Ngatia submitted that the right to a fair trial cannot be limited and he cited the provisions of Article 25 of the Constitution of Kenya, 2010. Mr. Okwach's response was that no right is absolute and any right can be limited by certain factors or considerations. While we may be inclined to agree with Mr. Okwach that no right is absolute, the provisions of Article 25 are absolutely clear that:

"Despite any other provision in this Constitution, the following rights and fundamental freedoms shall not be limited –

(a) freedom from torture and cruel, inhuman or degrading treatment or punishment;

(b) freedom from slavery or servitude;

(c) the right to a fair trial; and

(d) the right to an order of *habeas corpus*."

The purpose and intent of the aforesaid section is absolutely clear that the freedoms and rights specified therein are absolute and **"**shall not be limited" by any factor and/or consideration. Article 259(1) of the Constitution requires that the Constitution be interpreted in a manner that, *inter alia*, promotes its purposes, values and principles. Article 20(4) of the Constitution of Kenya, 2010 states that:

"In interpreting the Bill of Rights, a court, tribunal or other authority shall promote –

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and object of the Bill of Rights."

That the right to a fair trial cannot be limited is fortified by the provisions of Article 19(3) (c) which provides that the rights and fundamental freedoms in the Bill of Rights are subject only to the limitations contemplated in the Constitution. It follows therefore that if Article 25 stipulates that despite any other

provision in the Constitution the rights specified thereunder shall not be limited, the court cannot interpret the provisions of the article to infer any sort of limitation to the petitioner's right to a fair trial.
One of the petitioner's complaints is that he has not been accorded a speedy trial to which he is entitled. In the case of BARKER vs. WINGO, 407 US 514 at page 532, Powell J, on behalf of the United States Supreme Court, identified three interests which the speedy trial right was designed to protect. They are:

(i) to prevent oppressive pre-trial incarceration;

(ii) to minimize anxiety and concern of the accused; and

(iii) to limit the possibility that the defence would be impaired.

Of this, the most serious is the last one because the inability of an accused to adequately prepare his case skews the fairness of the entire system. The accused may also be prejudiced by delay which leads to the loss of defence evidence arising from death or disappearance of key defence witnesses or other forms of impairment of the defence.

In his affidavit in support of his petition, the petitioner stated that as a result of the pending criminal charges he is unable to plan his retirement or concentrate on his business. He has also been compelled to attend numerous mentions in court and his freedom of movement has also been limited.

Regarding the alleged delay from the date of filing the indictment, we have noted that the hearing could not proceed due to several factors. On 1st April, 2005 the 3rd accused, one David Lumumba Onyonka, was arguing an application and the hearing could not proceed in respect of the petitioner and the other co-accused. On 13th of April, 2005 the trial Magistrate was not available. It was fixed for mention on 18th April, 2005 but come that day, the prosecutor was not available. On 21st April, 2005 the court was unable to reach the matter and it was adjourned to 25th April, 2005 when the 3rd accused made an application for temporary release of his passport. The application was opposed by the Director of Public Prosecutions and a ruling thereon was delivered on 27th April, 2005 when the application was rejected. On 23rd May, 2005 the case was listed for hearing before the wrong court. An application was also filed on the same day seeking referral of some constitutional issues to the High Court. The application was argued on 6th September, 24th and 25th October, 2005. Submissions thereon were made on 25th October and 8th November, 2005. The ruling on the application was scheduled to be delivered on 14th November, 2005 but was adjourned severally until 31st January, 2006 when it was eventually delivered. The hearing was scheduled to commence on 24th and proceed until 28th July, 2006 but that was not to be.

On 24th July, 2006 an application for adjournment was made by counsel for the 1st accused, Silvester Mwadime Mwaliko. The application for adjournment was granted and further hearing dates given as 1st, 2nd, 3rd, 6th, 7th and 8th November, 2006. The prosecution did not occasion the non-take off of the hearing. When the petitioner came to court on 1st November, 2006, he learnt that the criminal trial against the 1st accused had been stayed by an order of the High Court. On 27th November, 2006 the petitioner sought the earliest possible hearing date and the court ordered that the matter be heard on 12th, 13th, 14th, 15th and 16th March, 2007. The record does not show what transpired on the aforesaid dates but it appears that on 31st May, 2007 the hearing was again re-scheduled to 22nd, 23rd, 24th, 25th and 26th October, 2007. Come the 23rd of October, 2007 the petitioner was in court ready for the hearing but the trial could not start because the original court file was missing. It had been called for by the High Court. The matter was set for mention on 7th November, 2007. On that day the hearing was fixed for 24th – 28th March, 2008. The hearing could not proceed on the aforesaid dates because the trial Magistrate was on leave and it was further re-scheduled to 9th, 10th, 11th, 12th and 13th June, 2008.

On 9th June, 2008 the prosecution applied for an adjournment on the ground that Mr. Okwach Advocate, the Special Prosecutor had not received some documents relating to the witness who was to testify that day. The documents were with Mrs. Dorcas Oduor, State Counsel, who had been dispatched to Mombasa on an urgent matter. The application for adjournment was granted and hearing was scheduled to start on 11th June, 2008.

On the said date the 3rd accused applied for an adjournment which was refused. The first prosecution witness was sworn but hearing did not start because the advocate for the 1st accused complained that she had not been furnished with a further statement recorded by the witness who was to testify. The trial Magistrate remarked that she was disgusted with the way in which the office of the Attorney-General and KACC were handling the case. She adjourned the hearing to 8th, 9th, 10, 11th and 12th September, 2008. The petitioner filed his petition before this court on 11th July, 2008 and as a result hearing of the criminal case has not proceeded since then.

The hearing of the petition did not commence until 19th November, 2010. The delay between the date of filing of the petition until 19th November, 2010 is also attributable to many factors. From 16th February, 2005 when plea was taken to March, 2011 is well over six (6) years.

The criteria to be used in judging the constitutionality of delay in conducting and finalizing a criminal file was considered in the case of DICKEY vs FLORIDA (Supra). The court held:

"It appears that this court has stated that the right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice ….. It appears that consideration must be given to at least three basic factors in judging the reasonableness of a particular delay; the source of the delay, the reasons for it, and whether the delay prejudiced interests protected by the speedy trial clause."

In BARKER vs WINGO (Supra), Powell J, set out four factors for consideration which are the length of the delay, the reason for the delay, the assertion by the accused of his right and the prejudice to the accused.

In DICKEY vs. FLORIDA (Supra), in dealing with the issue of prejudice to an accused due to delay in finalization of a trial, the court stated:

"Finally what is the role of prejudice in speedy trial determinations? The discharge of a defendant for denial of a speedy trial is a drastic step, justifiable only when further proceedings against him would harm the interests protected by the Speedy Trial Clause. Thus it is unlikely that a prosecution must be ended simply because the Government has delayed unnecessarily, without the agreement of the accused. The courts below, however, are divided in their conclusions regarding prejudice."

Mr. Ngatia urged this court to find that the delay in prosecution of the petitioner is unconstitutional and proceed to quash the indictment against him. We note that counsel relied heavily on American and Canadian decisions in his submissions. Whereas such decisions are persuasive they are not binding on this court. In deciding the issues before us, we must also consider the special circumstances under which our courts operate. There is no gainsaying that our courts are severely understaffed in terms of Judges and Magistrates. The Attorney-General's offices as well as the Police Force do not have sufficient number of prosecutors. That may perhaps explain why Mr. Okwach advocate was retained as a special prosecutor in this case. On a daily basis all our courts handle much more cases than they can competently deal with. It is common knowledge that the situation in the United States of America and Canada is quite different.

We have taken into consideration the 1st respondent's submission that the Anglo-Leasing transactions were very complex in nature and investigations and prosecution of the cases related thereto was not easy in the peculiar circumstances as aforesaid. Taking all the relevant issues into consideration, while we admit that there has been considerable delay in prosecution of the aforesaid criminal case, in the circumstances of this case and our courts' capacity as we have stated, we are not persuaded to hold that the delay is unreasonable and unconstitutional as to warrant grant of an order to quash the petitioner's indictment in Anti-Corruption Case No. 8 of 2005. To some extent the petitioner and his co-accused contributed to the delay when they raised constitutional issues which took long to be disposed of by the

High Court.

In view of the foregoing, we are not inclined to grant the orders sought by the petitioner and hereby dismiss the petition dated 10th July, 2008. Each party shall bear their own costs of the petition.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF MARCH, 2011.

A. MBOGHOLI MSAGHA
JUDGE

D.K. MARAGA
JUDGE

D.K. MUSINGA
JUDGE

In the presence of
Nazi & Muturi – court clerks
Mr. Ng'anga holding brief for Mr. Ngatia for the petitioner
Mr. Okwach and Mr. Ouma for the respondents