



**Lotwari v Director of Public Prosecutions & 2 others; Waweru  
(Interested Party) (Petition E450 of 2023) [2025] KEHC 12739 (KLR)  
(Constitutional and Human Rights) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEHC 12739 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E450 OF 2023  
LN MUGAMBI, J  
SEPTEMBER 18, 2025**

**BETWEEN**

**EMMAUEL KENYAMEI LOTWARI ..... PETITIONER**

**AND**

**DIRECTOR OF PUBLIC PROSECUTIONS ..... 1<sup>ST</sup> RESPONDENT**

**CHIEF MAGISTRATE COURT AT NAIROBI ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**WAWERU GICHO WAWERU ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The Petition dated 14<sup>th</sup> November 2023, is supported by the Petitioner's affidavit in support of even date and further affidavit dated 12<sup>th</sup> June 2024.
2. The Petitioner's complaint is that the criminal proceedings and trial in Nairobi MCCR No. 1788 of 2017, Republic Vs Waweru Gichiro Waweru and Emmanuel Kenyamei Lotwari has continually been subjected to calculated delays by the Respondents which is a blatant violation of the Petitioner's right to a fair hearing under Article 50 of the *Constitution* and violation of his rights under Articles 10, 47, 48, 232 and 236 of the *Constitution*. The Petitioner thus seeks the following reliefs:
  - a. A declaration that the decision made by the Respondents of intermittently prosecuting him in Nairobi MCCR No. 1788 of 2017, Republic Vs Waweru Gicho Waweru & Emmanuel



Kenyamei Lotwari, for over 6 years without presenting any witness to tender evidence against the Petitioner is unconstitutional and therefore unlawful on account of violation of Articles 10, 47, 48, 50, 232 and 236 of the Constitution hence null and void ab initio.

- b. A declaration that the Criminal Proceedings in Nairobi MCCR No. 1788 of 2017, Republic Vs Waweru Gichiro Waweru and Emmanuel Kenyamei Lotwari, and the continued tactical delays of the trial therein have been conducted in a manner that is a blatant violation of the Petitioner's right to a fair hearing.
- c. An order of Certiorari be issued to bring into this Court for purposes of being quashed and/or terminated the proceedings in Nairobi MCCR No. 1788 of 2017, Republic Vs Waweru Gichiro Waweru and Emmanuel Kenyamei Lotwari for being in contravention of Articles 10, 47, 48 and 50 of the Constitution and this Court be pleased to acquit the accused persons therein.
- d. This Court be pleased to issue an order of prohibition, permanently prohibiting the Respondents herein from further proceedings to hear Nairobi Chief Magistrate's Criminal Case No. 1788 of 2017 on the hearing dates scheduled for 15<sup>th</sup> November, 2023 and any other subsequent date and by way of a permanent injunction restraining and/or prohibiting the Respondents, their officers, staff, agents, servants, and/or any other persons acting at their behest howsoever from conducting any further proceedings in the matter.
- e. The Court be pleased to order for compensation and general damages to issue for violation of the Petitioner's rights and an inquiry into quantum be undertaken.
- f. The Petitioner be paid costs of this Petition.

### **Petitioner's Case**

3. The Petitioner depones that he is the 2<sup>nd</sup> accused person in the impugned criminal case. Prior to being charged, he was an employee of Kenya Commercial Bank (KCB) where he served in the capacity of a clerical staff up until 2015 when he was transferred to Eldama Ravine as Credit Administration Manager.
4. The Petitioner avers that the impugned criminal case underwent pre-trial directions and was set for the first hearing on 30<sup>th</sup> August 2018. The matter did not proceed on this day as the defense Counsel was indisposed. The matter was as such adjourned to 3<sup>rd</sup> and 4<sup>th</sup> December 2018. It is alleged that when the matter came up on these days, it did not proceed as the parties were informed that the Court was handling matters that had commenced in 2013.
5. Considering this, a further adjournment sought and matter set for 25<sup>th</sup> March 2019. On this day, it is stated that the Hon. Magistrate was absent and in a similar fashion the matter could not proceed. Further dates in May 2019 were issued, however the matter could still not proceed as the Court was not sitting. The matter was scheduled for a mention on 6<sup>th</sup> September 2019.
6. It is stated that when the day arrived, the 1<sup>st</sup> Respondent sought an adjournment. A mention date was fixed for 10<sup>th</sup> March 2021. It is alleged that the 1<sup>st</sup> Respondent on this day was equally not ready to proceed as did not have any witnesses in Court. In addition, the 1<sup>st</sup> Respondent sought leave to amend the charge sheet having withdrawn the Interested Party's charges. This did not occur until 26<sup>th</sup> May 2021. The new charges were read to the Petitioner on 29<sup>th</sup> June 2021.
7. The Petitioner decries that when the matter came up on 21<sup>st</sup> July 2021, the 1<sup>st</sup> Respondent indicated that they were not ready to proceed, causing the Court to grant further mention dates and a hearing



later set for 9<sup>th</sup> February 2022. Additionally, he avers that the Interested Party who had remained at large was finally arrested. The 1<sup>st</sup> Respondent following this sought to consolidate the impugned criminal suit with MCCR No.E1098 of 2022 and sought more time.

8. On the hearing date, it is stated that the Interested Party sought an adjournment which was granted despite his Counsel's protest. The matter was then set for hearing on 24<sup>th</sup> and 25<sup>th</sup> October 2022. He claims that on the material day, the Court was not sitting thus matter adjourned and new hearing dates issued for 28<sup>th</sup> February and 1<sup>st</sup> March 2023 on 7<sup>th</sup> December 2022. The matter was in a similar fashion adjourned on these two dates and fixed for hearing on 26<sup>th</sup> and 27<sup>th</sup> June 2023.
9. It is averred that on the hearing dates, the 1<sup>st</sup> Respondent sought an adjournment which was allowed. The matter was also subsequently adjourned on 11<sup>th</sup> and 26<sup>th</sup> October and 15<sup>th</sup> November 2023 at the behest of the 1<sup>st</sup> Respondent. Despite the numerous continuing adjournments, it is alleged that the 1<sup>st</sup> Respondent did not submit any witnesses.
10. The Petitioner contends that the impugned criminal case continues to be adjourned now being more than 6 years with over 30 adjournments as can be confirmed from the typed proceedings of the Trial Court issued pursuant to a letter dated 13<sup>th</sup> June 2023.
11. The Petitioner claims that this is prejudicial to him as he has to travel over 500 km each time from Eldama Ravine so as to attend the proceedings. He avers that this has cost him over Ksh.100, 000 as in addition to the travel costs he has to stay at hotels in Nairobi during the set dates. He states that following the charges he also lost his job at KCB.
12. The Petitioner stresses that he has been deprived his right to be heard and be granted a fair hearing owing to the Respondents' actions and who seem intent on not proceeding with the matter thus in violation of his right under Article 50(2) of the Constitution.
13. At this juncture, the Petitioner asserts that the obvious delay before the Trial Court is a manifest abuse of the Court process which has in turn occasioned him great injustice. The Petitioner postulates that if this Court does not intervene, the Respondents' who have acted without regard for the Constitution and the Rule of law will continue to violate his rights and abdicate their mandate in law.

### **1<sup>st</sup> Respondent's Case**

14. The 1<sup>st</sup> Respondent in reply to the Petition filed grounds of opposition dated 5<sup>th</sup> March 2024 which are based on the grounds that:
  - i. The instant application together with the Petition filed herein is misconceived, bad in law and incompetent to the extent that he complains of delayed hearing of the stated criminal cases hence infringement of his constitutional right of fair hearing yet no lower court proceedings have been availed to this Court to ascertain the delay and its causes, the aspect of the delay and the infringement of the stated constitutional rights cannot be matters of speculation, it must be demonstrated to the satisfaction of the constitutional Court that indeed the infringement or a threat to the same had happened.
  - ii. The instant Petition and application is an appeal or revision of the rulings and orders of the trial court disguised as a constitutional petition. The matters raised herein are matters that the trial court had ruled on and issued directions upon hearing both sides of the case hence the directives/orders of adjournment or otherwise complained of had been issued on merit thus, the proper forum to address the Petitioner's grievances should have been through an appeal pursuant to Article 165(3)(e) or a revision pursuant to article 165(6) & (7) of the Constitution.



- iii. The Petition and the application filed herein has failed the test espoused in the celebrated case of Anarita Karimi -Versus-Republic (No.1) (1979 1 KLR 154 and as was amplified in the case of Mumu Matemtu -Versus- Trusted Society of Human Rights Alliance, Civil Appeal No.290 of 2012(2013) whereby the Court had pronounced that whenever one makes reference to a violation or an infringement of a constitutional right, the Petitioner must clearly state the right violated, by who and how the same has been violated, accordingly, the Petitioner has not precisely stated how the 1<sup>st</sup> Respondent has violated his constitutional right to fair trial.
- iv. All the aspects of a fair hearing or trial as contained under Article 50 of the Constitution as far as the Petitioner's trial is concerned has been met thus, the institution of the instant application and Petition amounts to an abuse of the court process.
- v. The instant application and Petition is misplaced and scandalous only meant to scuttle and derail the hearing of the criminal cases pending before the Magistrate's Courts against the Petitioner herein and whose intent flies in the face of the finding of the Supreme Court of Kenya in the case of Hussein Khalid And 16 others v Attorney General & 2 others [2019] eKLR whereby the Court held that there exists adequate safeguards in the criminal justice system and the Constitution to guard and cushion against any violations of the accused's rights and freedoms and the trial courts are ably equipped to address any issue(s) raised by an accused person legitimately in the course of the trial.

#### **2<sup>nd</sup> and 3<sup>rd</sup> Respondent's Case**

15. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's Grounds of Opposition to the Petition are not accessible in the Court Online Platform (CTS) and there is no physical copy in the Court file.

#### **Interested Party's Case**

16. This Party's response and submissions to the Petition are not in the Court file or Court Online Platform (CTS).

#### **Petitioner's Submissions**

17. On 12<sup>th</sup> June 2024, the Petitioner through Elvis Nanda, Weke and Company Advocates filed submissions where the following two issues were identified:
  - i. whether the Petition falls within the ambit of a constitutional petition and;
  - ii. whether the Petitioner is entitled to the reliefs sought.
18. Counsel opposing the 1<sup>st</sup> Respondent's allegations, submitted that the Petitioner had clearly outlined the alleged infringed right being his right to an expeditious trial as envisaged under Article 50(2)(e) of the Constitution. Counsel emphasized that this was evident from the Petitioner's averments on the chronology of the Trial proceedings which has dragged on for years on end at the 1<sup>st</sup> Respondent's bidding. Counsel stressed that this action displayed a flagrant disregard of the Petitioner's right under this Article.
19. Moreover, Counsel stated that the 2<sup>nd</sup> Respondent in acquiescing to the 1<sup>st</sup> Respondent's request and perpetrating the cycle of delay, had failed to uphold its duty and in blatant breach of the Article 159(2) of the Constitution that justice delayed is justice denied. On this premise and as narrated by the Petitioner in his affidavit, Counsel was certain that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had not adhered to their constitutional mandate.



20. Counsel argued in the next issue that indeed, the Petitioner was entitled to the relief sought and so urged this Court to intervene. Counsel emphasized that a trial must begin and end without unreasonable delay. Reliance was placed in *Republic v Benedict Kalorwe Kaweto*[2008]eKLR where it was held that:

“An accused person has the right under Article 50 and 159 of the *Constitution* to have the trial begin and conclude without unreasonable delay.”

21. Additional dependence was placed in *Joseph Lendrix Waswa vs Republic* (2020) eKLR and *Republic v Munch Ikigu*[2016]eKLR.

### **1<sup>st</sup> Respondent’s Submissions**

22. Senior Principal Prosecution Counsel, Kerongo Maatwa filed submissions dated 28<sup>th</sup> June 2024. On a preliminary note, Counsel submitted that Petitions filed under Article 22 as read with Article 23 of the *Constitution* are required to meet the threshold that was set out in *Anarita Karimi* (supra) and affirmed in *Mumo Matemu -Versus- Trusted Society of Human Rights Alliance*, Civil Appeal No.290 of 2012(2013) eKLR.
23. Counsel submitted that the Petitioner’s assertions of violation of his constitutional rights are unfounded as per the Trial Court proceedings, out of the 22 adjournments, the 1<sup>st</sup> Respondent had only sought to adjourn the matter twice. This is on 27<sup>th</sup> June 2023 and 26<sup>th</sup> October 2023. The Court did not seat a total of 6 times. Counsel stated that on 27<sup>th</sup> June 2023, the prosecution witnesses were in Court however the 1<sup>st</sup> Respondent was not able to proceed as some of the documents that would be relied upon had not been issued to the defense Counsel.
24. Counsel pointed out that the Petitioner was misrepresenting the facts as it can gleaned from the record that it is him and the Interested Party, who kept seeking adjournments which Counsel notes were not opposed at the time.
25. On this basis, Counsel emphasized that the Petitioner should not be heard to lament that the Respondents violated his right to fair hearing when he and his co-accused have been seeking adjournments in the case and been the source of the alleged delay. Counsel stated as such that the Petitioner had failed to show how the 1<sup>st</sup> Respondent had violated his constitutional rights in accordance with the principle in *Anarita Karimi* (supra).

### **2<sup>nd</sup> and 3<sup>rd</sup> Respondents’ Submissions**

26. These Respondents’ through Principal State Counsel, E. Makori filed submissions dated 26<sup>th</sup> July 2024. Counsel sought to discuss two issues: whether the Petition is premature in the circumstances of the case and whether the Petitioner is entitled to the reliefs sought.
27. Counsel submitted that while the Petitioner challenged the sought adjournments the same were necessary so as to allow the 2<sup>nd</sup> Respondent to discharge its constitutional mandate.
28. Furthermore, Counsel pointed out that the Petitioner had filed the instant Petition a day before the scheduled hearing date which was slated for 15<sup>th</sup> November 2023. In counsel’s view, this Petition was an intentional forethought devised at impeding the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ mandates.
29. It was additionally argued that the Petitioner’s presumptive notion that further adjournments would be granted by the 2<sup>nd</sup> Respondent is improper and implausible as the same would defeat the purpose and directive under Article 48 of the *Constitution*.



30. On this foundation, Counsel submitted that the instant Petition is premature as the criminal suit is still active and hearing of the trial is still advancing.
31. Counsel turning to the next issue argued that the actions taken by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had been done in good faith and in line with their respective mandates. Counsel urged the Court therefore to be cautious in determining this matter so as not to prejudice the criminal proceedings. Reliance was placed in Republic v Director of Public Prosecutions & 2 others Ex Parte Edwin Harold Dayan Dande & 3 others [2018] KEHC 9432 (KLR) where it was held that:
- “the power to quash criminal proceedings should only be exercised in exceptional cases where there was clear evidence of abuse of power, abuse of discretion or absence of any and obvious factual basis to mount the prosecution. Determination of the veracity of evidence against accused persons was a preserve of the trial court and the High Court’s intervention could only be invoked if there were clear constitutional violations.”
32. To that end, Counsel submitted that the orders sought were untenable for the reason that the 2<sup>nd</sup> Respondent commenced the hearing of the Criminal Trial on 15<sup>th</sup> November 2023. As such, grant of the orders sought would impede the 2<sup>nd</sup> Respondent’s mandate and defeat the ends of justice. Consequently, Counsel submitted that the Petitioner was not entitled to the sought reliefs.

### **Analysis and Determination**

33. Going by the pleadings and submissions of Counsel, I opine that the issues that arise for determination in this Petition are as follows:
- i. Whether this Petition offends the doctrine of constitutional avoidance.
  - ii. Whether the Petitioner’s constitutional rights under Articles 10, 47, 50, 48, 232 and 236 of the Constitution were violated by the Respondents.
  - iii. Whether the Petitioner is entitled to the reliefs sought.

### **Whether this Petition offends the doctrine of constitutional avoidance.**

34. The doctrine of Constitutional avoidance is invoked to bar the Court from deciding a case on constitutional grounds if the matter can be adequately resolved by application of a Statute or other established legal principles. The Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] KESC 53 (KLR) explained the principle as follows:

“(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some



other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).”

35. Equally, in *Lugo v Director of Public Prosecutions* [2022] KEHC 10574 (KLR) the Court observed as follows:

“Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of rights. Currie and de Waal opine that the principle of constitutional avoidance is of crucial importance in the application of the Bill of Rights. The author states: - When applying the Bill of Rights in a legal dispute, the principle of avoidance is of crucial importance. As we have seen, the Bill of Rights always applies in a legal dispute. It is usually capable of direct or indirect application and, in a limited number of cases, of indirect application only. The availability of direct application is qualified by the principle that the Bill of Rights should not be applied directly in a legal dispute unless it is necessary to do so.”

11. An important and critical issue arises from the above statements by Currie and de Waal. It is a fact that every legal dispute is capable of either direct or indirect application of the Bill of Rights. Every dispute is essentially a constitutional issue when one looks at it. This arises necessarily because of the principle of constitutional supremacy. One needs to be aware, however, of the singleness of the legal system. This is embodied in the fact that the supremacy of the Constitution does not detract from the usefulness of the rest of the body of law. In essence, all other laws give full expression to the ideals of the Constitution until found to be inconsistent with it.

...

The exceptions to the application of the doctrine of constitutional avoidance are: -

- i. where the constitutional violation is so clear and of direct relevance to the matter,
- ii. in the absence of an apparent alternative form of ordinary relief and
- iii. where it is found that it would be a waste of effort to seek a non-constitutional resolution of the dispute.”

36. Similarly, in *C O D & another vs Nairobi City Water & Sewerage Co. Ltd* (2015) eKLR the Court held as follows:

“14. The law above is crystal clear that where there exist sufficient and adequate mechanisms or forums to deal with a specific issue or dispute by other designated constitutional organs or under a statute, the jurisdiction of the High Court under Article 165(3)(b) of the Constitution should not be invoked until such mechanisms have been exhausted. To my mind therefore, not every litigant ought to come to court by way of a constitutional petition even where



there are no constitutional issue arising and where there are adequate remedies provided in other laws to determine such situations.

15. the *Constitution* cannot be used as a general substitute for the normal procedures. The mere allegation that a human right has been contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the High Court under Article 165 of the *Constitution*: See *Harrikissoon v A-G* [1979] 3 WLR 62. Where it is possible to decide any case or dispute, civil or criminal, without reading a constitutional issue then that is the course that should be followed. The court sitting as a constitutional court must through the doctrine of avoidance steer clear of determining such disputes as if there were constitutional questions being raised: see *S v Mhlungu*[1995] 3 SA 867 (CC) and also *Ashwander v Tennessee* 297 US 288.”

37. It is manifest that the main complaint by the Petitioner herein is the delayed completion of his criminal trial before the lower Court. He cites numerous adjournments in the case. My view is that every adjournment in a case is a judicial determination that is guided by discretion of the Presiding Officer of that Court and a challenge to such a decision can be made either procedurally under the appellate process or revisionary jurisdiction by the aggrieved party. The Criminal Procedure Code, Cap 75 provides an appropriate mechanism for challenging such decisions by the Party that is aggrieved.

38. Moreover, the aggrieved Party can have recourse to other administrative functions at their disposal including raising the matter with the Judiciary Ombudsman or directly with the Chief Justice.

39. This matter in my view is matter that is thus inappropriately before this Court.

40. In the Supreme Court of India - Writ Petition(s)(Criminal) No(s). 75/2024 Ganpat Ganatpat Petitioner(s) versus State of Uttar Pradesh Respondent(s) it was held that judicial delay is considered part of the judicial process and is thus not amenable to a challenge through a writ petition alleging breach of fundamental rights but through the relevant judicial remedies provided for in law. The bench of Justices Dipankar Datta and Augustine George Masih held:

“... If priority has not been given to the petitioner’s criminal appeal (albeit filed in 2016) by the High Court for early hearing, for whatever reason, the same is also part of the judicial process and cannot be made amenable to a challenge in a writ petition under Article 32 citing breach of Article 21...The petitioner, if he wishes to be released on bail pending the criminal appeal, cannot invoke the writ remedy but has to take recourse to an application under Section 389(1) of the Code of Criminal Procedure....”

41. It is thus evident that this Petition is misconceived and offends the doctrine of Constitutional avoidance hence cannot stand. I need not consider any other issue as this is a jurisdictional principle. I thus dismiss the Petition in its entirety. Each Party shall bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2025.**

.....

**L N MUGAMBI**

**JUDGE**

