REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. 31 OF 2018

IN THE MATTER OF: THE PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOMS PRACTICE & PROCURE RULES 2013

AND

IN THE MATTER OF: THE CRIMINAL PROCEDURE CODE

1. PETER OMWENGA MWEBI

2. JOHN KEBASO ELIJAH…….……..……..…. PETITIONERS

AND

1. DIRECTOR OF PUBLIC PROSECUTIONS

2. INSPECTOR GENERAL NATIONAL POLICE SERVICE

3. THE CHIEF MAGISTRATES' COURT –NAIROBI

4. THE ATTORNEY GENERAL..... RESPONDENTS

AND

VROS PRODUCE LIMITED…….…….…..INTERESTED PARTY

JUDGMENT

1. The Petition before the Court dated 13/3/2018 prays for the following orders:

1 (a) A prohibitory order be issued to prohibit the 1st and 2nd Respondents from prosecuting or continuing with the prosecution of the Petitioners herein in Milimani Chief Magistrates Criminal Case No. 1612 of 2015, or any other criminal case on the same allegations, on account of gross violation of the Fundamental Rights of the Petitioners.

(b) A prohibitory Order to prohibit the 3rd Respondent or any other Magistrate's Court from hearing and or continuing to entertain and hear Milimani Chief Magistrates Criminal Case No. 1612 of 2015 against any of the two Petitioners herein, on account of gross violation of their Fundamental Rights as set out in the Constitution.

(c) A declaration that:

(i) The charges drawn and leveled against the Petitioners in Criminal Case No. 1612 of 2015, filed in the Chief Magistrates Court at Milimani in Nairobi against the two Petitioners herein are in breach of the provisions of Article 50(2) (b) and (c) of the Constitution.

(ii) The delayed prosecution of the two Petitioners who took plea on 24.09.2015 in Criminal Case No. 1612 of 2015, in the Chief Magistrates Court Milimani, Nairobi which has to date not been heard, is a violation of the Petitioners fundamental rights set out in Article 50(2) (e) of the Constitution.

(iii) The choice of place of trial of the two Petitioners in the Chief Magistrates Court, Milimani, Nairobi is contrary to the provisions of Section 72 of the Criminal Procedure Code, and invariably amounts to a violation of the two Petitioners' fundamental rights protected by Article 48 of the Constitution.

(iv) The conduct of the current trial Magistrate Hon. Mutuku SPM, discloses overt circumstances leading to threats of violation, and or actual violation of the two Petitioners' rights to a fair trial protected by Article 25(c) and Article 50(2) of the Constitution in equal measure.

2. A declaration that by reason of the violations set out above, the commencement, prosecution and or continued hearing/ conduct of the Chief Magistrates Criminal Case No. 1612 of 2015, are all acts that are invalid in the face of Article 2(4) of the Constitution.

3. In the alternative and without prejudice to any of the above prayers, if this prosecution is allowed by the Court to proceed, then, in that event, Orders be made that:

(i) The place of trial be any other Court within the local limits of where the land and analogous suits were filed, being at either Kilifi or Mombasa Counties.

(ii) If the prosecution has to be continued in Nairobi, then the same be before any other Magistrate other than Hon. Mutuku SPM.

(iii) At no moment at all should the 1st Respondent be allowed to introduce new charges against any of the Petitioners which had initially been withdrawn against the said two Petitioners.

4. Costs of this Petition.

2. The petition is supported by affidavit sworn by Peter Omwenga Mwebi, the 1st Petitioner herein on 13/3/2018.

Submissions on Facts and Law informing the Petition

3. Sometime in September 2015 the Petitioners were arrested from their respective places in Mombasa by officers of the 2nd Respondent, and transported by road to Nairobi for the purpose of answering to criminal charges which had been preferred against them by the 1st Respondent, in the Chief Magistrates Criminal Case No. 1612 of 2015 at Milimani, Nairobi. On the 24/9/2015 the Petitioners appeared in Court, in Nairobi and took plea on the said charges. Seven (7) counts were leveled against each of the Petitioners, which they all denied. (See a copy of this charge sheet is at Pages 1 to 4 of the exhibits to this Petition).

4. The Petitioners aver that all the alleged charges are conspiracy charges alleged to have all taken place **"at unknown place and unknown dates"**. The Petitioners aver that these charges are vague and unsubstantiated and violate their right to have clear coherent charges to which they can adequately respond.

5. The Petitioners aver that in the circumstances, it is not humanly possible to envisage fair hearing being afforded them in this matter. This is particularly so because none of the Petitioners know in advance, the place of the commission of alleged offence, for them to prepare adequately for their defence. This conduct by both the 1st and 2nd Respondents is a breach of the Constitutional safe guards of a fair trial envisaged in the Constitution. The Petitioners referred to Article 50(2) (b) and (c) which provide:

"(2) Every accused person has the right to a fair trial, which includes the right -

(b) To be informed of the charge, with sufficient details to answer it.

(c) To have adequate time and facilities to prepare a defence."

6. Petitioners aver that the charges as drawn, fall short of the requirements of Article 50(2) (b) in that they allege commission of offences, on dates which are unknown, and therefore are not specified in the charge sheet, and, places where such offences were allegedly committed are unknown. The Petitioners aver that the inevitable consequence of this omission is that the 1st Respondent has failed to frame a charge "with sufficient details" as required by law. As a consequence of that failure, it is not possible for any of the Petitioners to adequately prepare for their defence, thereby breaching a fundamental requirements of Article 50(2) (c) of the Constitution.

Taking of Plea

7. Further, the Petitioners state that although the Petitioners first took plea on the 24th September 2015, the trial did not proceed timeously, until the 28th November 2016, when they attended for hearing which had never started. On that date, they were again required to take another plea this time, in respect of a substituted charge sheet containing four counts against them, in which three other accused persons were added namely Nyameta Bichanga, Christopher Karisa and Joseph Mzungu, making a total of five accused persons. The new charges still remained vague, containing allegations of offences committed on **unknown dates**, at **unknown places** within Kenya.

8. Even then, the matter has never taken off even with the newly substituted charges. However, on the 12/10/2017, a period of over two years since the matter was taken to Court, the 1st Respondent again brought in another charge sheet to substitute for the one then in existence.

This substitution was allowed, and plea again taken from the Petitioners, for the third time. During the plea the 1st Respondent brought in two other accused persons, Stephen Machari Kimani and Dennis Chamoto Shera, making a total number of accused to be 7 (seven), and the charges remained vague.

9. On the 8th & 9th of March 2018, when the trial was scheduled to commence, the same did not happen because the 1st Respondent brought in another substitution and additional defendants, now totaling eleven (11), with the alleged offences being committed still on unknown place and dates.

10. The Petitioners aver that of particular note is Count 4 which alleges offences committed on 2nd May 1996, which is a period of 24 (twenty four) years ago. During this time the 2nd Petitioner was a law student in Mysore University in India, and was nowhere in Kenya where the offences were allegedly committed.

11. The Petitioners state that in bringing this Petition, they are not setting up defences to the charges brought against them. They only intend to show that the 1st and 2nd Respondents have unexplained ulterior motives in preferring charges against the Petitioners, which they are not ready to prosecute in Court for five years now.

12. Further, the continued substitution of charges at all times when the case is for hearing, and continued addition of other alleged suspects, has made it difficult for the Petitioners to *"adequately prepare"* for their defences, in violation of their rights under Article 50(2) (c) of the Constitution.

13. The Petitioners aver that since the 24/9/2015 when their prosecution commenced, they have made thirteen (13) attendances in Court as follows:

(i) 24/09/2015 *for taking of Plea.*

(ii) 8/10/2015 *for mention.*

(iii) 17/11/2015 *for hearing which never commenced*.

(iv) 8/02/2016 *for hearing which never started*

(v) 4/05/2016 *for hearing which never commenced.*

(vi) 11/08/2016 *for hearing, but Court was not sitting.*

(vii) 31/10/2016 *for hearing, which never began.*

(viii) 28/11/2016 *for hearing, but never proceeded.*

(ix) 13/03/2017 *for hearing, never commenced.*

(x) 8/06/2017 *for hearing, never proceeded with.*

(xi) 30/06/2017 *for hearing, which never started.*

(xii) 12/10/2017 *for hearing which never started.*

(xiii) 8/03/2018 *for hearing which was adjourned at the instance of the prosecution.*

14. Cumulatively, the Petitioners have attended Court a total of thirteen (13) occasions, but the 1st Respondent has never been willing to proceed. The Petitioners referred to Pages 20, 21, 22, 27, 28, 31, 34, 38, 39, and 43 of the petition which shows that when the case came on for hearing, it has been the 1st Respondent who has not been willing to proceed.

Violation of Fundamental Rights

15. The Petitioners aver that the conduct of the Respondents violate the provisions of **Article 50(2) (e)** which provides that:

"(2) Every accused person has the right to a fair trial, which includes the right -

(e) to have the trial begin and conclude without unreasonable delay."

The Petitioners contend that the commencement of their trial, from 24/9/2015, has been hampered and delayed by the 1st and 2nd Respondents by introducing various accused persons in the case at the times scheduled for hearing; seeking to substitute charges on many of the occasions set for hearing of the case; and never being ready to proceed with the hearing.

16. The Petitioners further state that a perusal of the charge sheet, particularly the one at Pages 11 to 16 of the exhibits will show that the allegations therein relate to land parcel number L.R. No. MN/IV/271 to 309 which are all situate within Malindi, which is in Kilifi County. Petitioners aver that they live and work in Mombasa. This is the place from where they were arrested by officers of the 2nd Respondent, for prosecution in the Chief Magistrate's Court at Nairobi. Therefore, their prosecution, if at all, should be based in Mombasa, Kilifi or Malindi. The Petitioners referred the Court to Section 72 of the Criminal Procedure Code:

> **Trial at place where act done or where consequence of offence ensues**
>
> **"72. When a person is accused of the commission of an offence by reason of anything which has been done or any consequence which has ensued, the offence may be tried by a Court within the local limits of whose jurisdiction the act has been done or the consequence has ensued."**

17. The Petitioners aver that by taking them to face trial in the Chief Magistrates Court at Nairobi the 1st and 2nd Respondents are in violation of their fundamental rights because it is prohibitively expensive for the Petitioners to travel to Nairobi and to ferry their witnesses and advocates to Nairobi and to accommodate them there.

18. The 1st Petitioner alleges that he has spent a total sum of Kshs. 137,865 in travelling expenses alone, and a sum of Kshs. 86,346.00 for accommodation and upkeep; while the 2nd Petitioner has spent a total sum of Kshs. 85,100.00 in such travels. The total sum used in such travels, without factoring accommodation and food for the 2nd Petitioner, has amounted to a sum of Ksh. 309,311.00. (See exhibits at pages 47 to 68 of petition).

19. The Petitioners referred to Article 50(a) of the Constitution which makes provision that every accused person is:

> **"(a) …..presumed innocent until the contrary is proved."**

For this reason, the Petitioners state that the criminal process should be used to secure justice and not as a tool to punish suspects. In this regard the Petitioners state that the 1st Respondent has abrogated Petitioners rights under Article 48 of constitution.

20. The Petitioners aver that by choosing to charge them in Nairobi, when they reside in Mombasa, and in view of the provisions of Section 72 of the Criminal Procedure Code cited above, the 1st and 2nd Respondents are in breach of, and fully in contravention of the provisions of Article 48 of the Constitution which provides:

> **"48. Access to justice**
>
> **The state shall ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice."**

21. Consequently, any continued prosecution of the Petitioners in Nairobi amounts to advance punishment of the Petitioners, as though they have already been adjudged guilty.

22. Further, the Petitioners aver and believe that they will not receive/get fair hearing before Hon. Mutuku SPM, who is seized of the trial for the reasons that at inception this case was handled by Hon. Oluoch SPM. Upon the trial magistrate being transferred from the station, the case was allocated to Hon. Ooko P.M. The case came up before the said Hon. Ooko P.M. on 8/6/2017, when he ordered for a mention on 30/6/2017, on which day the case was placed before Hon. Mutuku SPM, who recognized that she was not the trial Court, but who subsequently started hearing the matter under unexplained circumstances.

23. The second reason why the Petitioners question the impartiality of the present trial Court is that on March 2018, when the case came up for hearing, the 1st Respondent sought an adjournment to enable it introduce a new charge sheet for substitution. The Petitioners aver that the Court granted the same and made further orders as follows: *(See Page 45)*

> (i) The defence to be served with the intended substituted charge sheet.
>
> (ii) Case adjourned.
>
> (iii) Substitution of charge sheet and hearing on 5th & 6th April 2018.

24. To the Petitioners, the above orders mean that:

> (a) The defence has no opportunity to oppose the substitution of the charges, which it is its right to do.
>
> (b) The substitution has been granted in advance, even before the 1st Respondent applies for it, and,
>
> (c) The Petitioners will have to proceed to hearing of the case, without first considering the new charges as substituted.

25. The Petitioners are therefore apprehensive that the trial Court may not be impartial in this matter.

26. By these antecedents, the Petitioners seek to have their rights to a fair trial protected in accordance with the provisions of the Constitution. The Petitioners aver that their prosecution initiated by the 1st & 2nd Respondents, and conducted in the 3rd Respondent Court, is a violation of their Fundamental Rights enshrined in the following Articles of the Constitution, namely: 25, (c), 48, 50(2), (a) (b), (c) and (e), which all have to be redressed.

27. Petitioners aver that when they took plea for the first time on the 24.09.2015, they were facing a total of seven charges out of which four were subsequently dropped by the 1st Respondent in the later substituted charge sheets. The 1st Respondent now intends to reintroduce the same charges that it had earlier dropped. It is the contention by the Petitioners that this conduct amounts to abuse of power by the Respondents collectively, and that this Court has the duty and mandate to stop such abuse.

The 1st Respondent's Response

28. The 1st Respondent in opposition to the Petition filed Grounds of Opposition dated the 8/3/2019 stating as follows:

a. That the Petition offends Section 193A of the Criminal Procedure Code

b. That the High Court lacks forum on the allegations in the charge sheet or to determine the sufficiency of evidence in the criminal case

c. That the 1st Respondent is mandated under Article 157 of the Constitution and the ODPP Act to institute and undertake criminal proceedings against any person including the Petitioners and there is sufficient evidence to warrant the Petitioner's prosecution.

d. That advocates are not immune from prosecution when they commit criminal offences and that it is in public interest that criminal trials be heard to their logical conclusion.

The 2nd Respondent's Response

29. The 2nd Respondent opposed the Petition through its Replying affidavit sworn on the 27/4/2018 by **IP PETER KABOGO.** The deponent is an investigator and deponed that he commenced the Criminal Investigations as a result of directions issued by Angote J in Malindi ELC 171 of 2013. He avers that upon conducting his preliminary enquiry, the evidence disclosed a possible commission of an offence prompting him to forward the investigation file to the 1st Respondent, who upon perusal and analyzing of the evidence recommended the prosecution of suspects who included the Petitioners herein.

30. He deponed that the gravamen of the Petition is on amendment of the charge sheet. The said allegations are baseless as the amendments were necessitated by further arrests, addition of accused persons, and consolidation of charges that is allowed under Section 214 of the Criminal Procedure Code. Further, the nature of the criminal activities and offence included extensive web of conspiracies and forgeries.

31. The 1st Respondent's case is that the Petitioners have misled this Court on the issue of delay, reason being that, the prosecution was interfered with by the accused **Stephen Macharia Kimani's** Advocate who rushed to Malindi High Court and filed **Petition No.16 of 2015** on the 8/11/2015, sought and was granted a conservatory order to stay the prosecution of the criminal case pending hearing and determination of the Petition. The deponent states that even the trial Magistrate pointed out that the determination of the Malindi Petition 16 of 2015 had taken a long time and the same was prejudicial to the other accused persons. The said Petition No. 16 of 2015 was later on dismissed on the 12/4/2018. Therefore, the delay cannot be attributed to the 1st Respondent.

32. The 1st Respondent avers that this Court lacks jurisdiction to grant the prayers sought by the Petitioners, in light of the finding in ELC No. 171 of 2013 and Malindi Petition No. 16 of 2015 as the said Courts are of concurrent jurisdiction to this Court and they have pronounced themselves on the criminal case.

33. On jurisdiction, it is averred that the trial Court in Nairobi has the jurisdiction to entertain an Application to have the Criminal Case transferred, if the offence was committed outside its jurisdiction. However, in this instance, the principal acts of the crime were committed in Nairobi at the companies Registry; the complainant and most of his witnesses reside in Nairobi; the land department Nairobi and the companies in dispute have their registered physical addresses in Nairobi; the Petitioners have implicated the Office of the Attorney General, the document examiner is based in Nairobi; some evidence is linked to Chase Bank Nairobi and there might be evidence needed from the Principal Secretary Ministry of Lands who is based in Nairobi.

The Response by the Interested Party

34. The Interested Party opposed the Petition via its Replying Affidavit sworn on the 31/5/2018 by **John Nganga** who is described as its director. He depones that the Interested Party is the Complainant in the criminal case and therefore, the Petitioners' petition is an abuse of the Court process since the allegations of violation of their fundamental rights and freedoms in the petition are speculative, and non–factual, and that the issuance of the prayer sought would amount to an acquittal of the Petitioners, thereby assisting them to defraud the Interested Party of its property and denying it an opportunity to have its records restored at the Companies Registry.

35. The deponent further depones that the allegation of bias against the trial Court are false, made in bad faith and this Court should avoid being used by the Petitioners to scandalous the trial Court and that all matters raised in the Petition are perfectly within the jurisdiction of the of the trial Court.

36. The deponent further deponed that it has always been ready and willing to proceed with the trial and that the delay in hearing the criminal case has always been caused by the Petitioner, their co-accused and the Prosecution. Therefore, if the orders sought are granted, it will be a violation of the complainant's rights guaranteed under Article 50(9) of the Constitution as the complainant will be prejudiced and will suffer grave and irreparable injustice.

Petitioners' Reply

37. In response to the replies by the Respondents, the 1st Petitioner swore a Supplementary Affidavit dated 31/5/2018, stating that the trial Court did not appreciate that they were being inconvenienced by the continued consolidation of charges and delay of the trial, and that there was no Court order in Malindi Petition No. 16 of 2017 staying the criminal case.

38. The 1st Petitioner avers that the Court record does not reflect or disclose how **Hon. Mutuku** was allocated the criminal case; that it is not shown when or how **Hon. Ooko** who was sitting on the 12/10/2017 ceased to be the trial Court for **Hon. Mutuku** to take over the criminal case; further there is nowhere in the Court proceedings indicating that **Hon. Mutuku** was concerned with the plight of the parties, that should have caused her to take over the trial.

Submissions

39. **Mr. Buti** and **Mr. Mogaka** Learned Counsel for the 1st and 2nd Petitioners in their submissions, reiterated the issues already captured in the Petitioners' affidavits and petition. This Court need not regurgitate the same save for the submission that the charge sheet in the criminal case and all the subsequently amended charge sheets constantly referred to the offences being committed in unknown places, and in the process denying the Petitioners the opportunity to adequately defend themselves.

40. Counsel submitted that the Petitioners pay witnesses and provide them with fare to Nairobi to attend Court, a burden which is not shared by the Respondents. **Mr. Buti** further submitted that the suit ought to be declared a mistrial as the suit commenced in March 2015 and by March 2018, no single witness had testified.

41. **Mr. Isaboke** Learned Counsel for the 1st Respondent relied on their grounds of opposition filed in Court on the 11/3/2019. Counsel submitted that consolidation of files is an administrative process and when it is done by a trial Court, it should not be challenged via a Constitutional Petition. Counsel further submitted that the law allows for substitution of charges at any time before Judgment and the law does not limit how many times the DPP can substitute or amend charges and the said substitution does not require production of further documents.

42. **Mr. Ouma** Learned Counsel for the Interested Party in his submissions reiterated the content of their Replying Affidavit, and added that the Petitioners in the criminal case never objected to the substitution of the charges and only sought to take plea on the new charges on the next hearing day. Therefore, the failure to raise the objection before the trial Magistrate is fatal. Reliance was placed on the Court of Appeal case in **Reuben Nyakango Mose & Another v Republic [2013] eKLR** where it was held that failure to raise an objection in the trial Court was fatal to an Appellant's case.

43. On the issue of bias, Counsel submitted that the same ought to have been raised with the judicial officer concerned in chambers, and if the judicial officer did not recuse herself, the matter could then be escalated through an Application for recusal. **See Attorney General vs Anyang Nyongo and Others [2007]1 EA 12**.

44 **Mr. Ouma** submitted that this petition is no more than a forum shopping by the Petitioners and raises no constitutional issue worth the consideration of this Court and that the same should be dismissed with costs.

45. **Mr. Wachira** Learned Counsel for the 2nd 3rd and 4th Respondents submitted that the matters raised in the petition have not been raised in a proper forum, which in this case is the trial Court and that delay in prosecuting the criminal case was as a result of arrest of new co-accused persons. Therefore, the delay is excusable.

Determination

46. I have considered the petition, the Affidavits both in support of and in opposition to the petition and the submissions of Counsel. In my view, the following issues arise to be determined.

(i) The place to raise general complaints in a trial.

(ii) Whether prosecuting the criminal case in Nairobi violates Petitioners' right to fair trial.

(iii) Whether the many amendments and substitutions of charges, violate the right to fair trial.

(iv) Whether Trial Court was biased.

(v) Which orders to issue.

47. In a petition such as this, the Court proceeds from the point of caution in order not to prejudice the intended or pending criminal proceedings. The general rule is that the Court ought not to usurp the Constitutional mandate of the Director of Public Prosecutions to investigate and undertake prosecution in the exercise of the mandate conferred upon that office under Article 157 of the Constitution.

48. Further, the independence of the DPP is in this respect protected under **Article 157 (10)** which provides that: -

> **"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."**

49. In **Republic vs. Michael Thuo Gikaru [2014] eKLR** Korir J stated:

> **"In discharging its prosecution mandate however the DPP is required under Article 157 (11) to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. This requirement is echoed by Section 4 of the Office of the Director of Public Prosecution Act. The court has the duty to ensure that those principles are adhered to in order to preserve the integrity of proceedings before it."**

50. Similarly in **Joram Mwenda Guantai vs. The Chief Magistrate, Nairobi Civil Appeal No. 228 of 2003 [2007] 2 EA 170 ,** the Court of Appeal held:

> **"It is trite that an order of prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only in excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...Equally so, the High Court has inherent jurisdiction to grant an order of prohibition to a person charged before a subordinate court and considers himself to be a victim of oppression. If the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious, the Judge has the power to intervene and the High Court has an inherent power and the duty to secure fair treatment for all persons who are brought before the court or to a subordinate court and to prevent an abuse of the process of the court."**

51. The instances where a court may declare a prosecution improper were laid down in **Macharia & another vs. A.G. & another [2001] KLR 448** where the Court held that the Court can declare a prosecution to be improper if: -

> **a. I*t is for a purpose other than upholding the criminal law.***
>
> ***b. It is meant to bring pressure to bear upon the applicant/accused to settle a civil dispute***
>
> ***c. It is an abuse of the criminal process of the Court.***
>
> ***d. It amounts to harassment and is contrary to public policy.***
>
> ***e. It is in contravention of the applicant's Constitutional rights to freedom.***

52. Therefore, this Court is perfectly entitled in appropriate cases to interfere with the decision of the DPP to commence and proceed with prosecution. See Kuria **and others vs. A.G. [2002] 2 KLR 69** it was held as follows: -

> **i. For an application of such a nature to succeed, there is need to show how the court process is being abused or misused, there is need to indicate or show the basis upon which the rights of the appellant are under serious threat of being undermined by the criminal prosecution.**
>
> **ii. There is public interest underlying every criminal prosecution which must be jealously guarded. At the same time there are private interests of the applicant to be protected and it is therefore imperative for the court to balance considerations.**

(i) <u>The place at which to raise general complaints in a trial</u>

53. The Petitioners' case is that charges levied against them are vague and do not clearly show where the alleged offences were committed. The Petitioners aver that the substitution and amendments of the charge sheet has been occasioned many times rendering the prosecution process to delay and the said substitutions oppressive. The Petitioners further allege bias on the part of the trial Court, and lastly that the place of trial is not convenient to them and is causing them hardship and abnormal expenses. These allegations have been challenged by the Respondents who state that the matters raised by the Petitioners are a preserve of the trial Court, and should be raised in that Court. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**; the Court addressed such issues, stating that:

> **"The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…"**

54. It has been alleged that the Petitioners are facing a charges before the Magistrate's Court which charges are alleged to have been committed at unknown place and at an unknown time. Consequently, the said charges are alleged to be vague and to prejudice the Petitioners' right to a fair trial. There are well set provisions of the Criminal Procedure Code, which deal with the issue of defective charge sheets. See Sections 89(5), 137 and 214 of the Criminal Procedure Code. These are issues which must be raised with the trial Court as soon

as they occur.

55. Majanja J. in **Thuita Mwangi & 2 Others vs. Ethics and Anti-Corruption Commission & 3 Others [2013] eKLR** while faced with a similar issue, had this to say;

> **"90. The petitioners contend that there was duplicity of charges and that the charge sheets were defective. I agree with the respondents' submission that issues of competency of charge sheets are matters perfectly within the jurisdiction of the trial court. I am satisfied that matters of competence of the charge sheets are catered for under sections 89(5), 137 and 214 of the Criminal Procedure Code (Chapter 75 of the Laws of Kenya).**
>
> **91. I agree and adopt the holding of the court in William S. K. Ruto and Another v Attorney General Nairobi HCCC No. 1192 of 2005 [2010] eKLR where it stated, "The applicants only need to move the trial magistrate to strike out the charge for being incompetent or the prosecution can seek to substitute the charges. The fact that the charge is defective does not raise a Constitutional issue."**

56. Since the Petitioners have never raised the issue of the defectiveness of the charge sheet at the trial Court, this Court's finding is that the said concern should be raised before the trial Court.

57. The other issue raised by the Petitioners is that of in ordinate delay, that for more than three years the matter has been consistently adjourned by the trial Court at the behest of the 1st Respondent, thereby violating their right to fair hearing.

58. Article 50 of the Constitution provides for the right to fair trial and under Article 50(1), (e) fair trial includes the right to have the trial begin and conclude without unreasonable delay. Therefore, both the commencement and the conclusion of the trial must be conducted without an unreasonable delay. The question to be answered is whether the delay herein is inordinate and in bad faith. In **George Joshua Okungu & another vs. Chief Magistrate's Court Anti-Corruption Court at Nairobi & Another [2014] eKLR** the Court held while citing **Republic vs. Minister for Home Affairs and Others Ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 [2008] 2 EA 323 that**:

> **"It is therefore imperative that criminal investigations be conducted expeditiously and a decision made either way as soon as possible. Where prosecution is undertaken long after investigations are concluded, the fairness of the process may be brought into question where the Petitioner proves as was the case in *Githunguri vs. Republic* Case, that as a result of the long delay of commencing the prosecution, the Petitioner may not be able to adequately defend himself…**
>
> **In our view ordinarily it does not require a year after completion of investigations in such a matter for a decision to prosecute to be made. That notwithstanding, it is not mere delay in preferring the charges that would warrant the halting of the criminal proceedings. Rather, it is the effect of the delay that determines whether or not the proceedings are to be halted. In this case, there is no allegation made by the Petitioners to the effect that the delay has adversely affected their ability to defend themselves. In other words, the Petitioners have to show that the delay has contravened their legitimate expectations to fair trial."**

59. The Petitioners have alleged that the 1st and 2nd Respondents have for three years not been ready to prosecute their case since they keep introducing various accused persons in the case at the times scheduled for hearing and seeking to substitute charges in many occasions thereby by making it difficult for the Petitioners to *"adequately prepare"* their defence. The 1st Respondent has on the other hand maintained that under Section 214 of the criminal procedure code the Court can entertain applications for amendment and substitution before the close of the prosecution's case. The 2nd Respondent on its part states that the Malindi Petition No. 16 of 2015 played a part in the delayed prosecution of the criminal case. On the part of the Interested Party, it was stated that it has always been ready to proceed and that the delay was occasioned by the Petitioners and the prosecution.

60. I have considered both arguments. In my view, there appears to have been considerable delay in this matter. However, that has not cost the Petitioners ability to defend themselves because of unavailability of witnesses or the dimming of memories of witnesses. Further, the said delay was not primarily caused by the Respondents. While delay here is regrettable, it is to be noted that further delay may actually injure the Petitioners' ability to defend themselves in the trial.

(ii) Whether prosecuting the criminal case in Nairobi violates the Petitioners' right to fair trial.

61. Section 81 (1) and (2) of the Criminal Procedure Code stipulates: -

> **"(1) Whenever it is made to appear to the High Court -**
>
> **a. that a fair and impartial trial cannot be had in any criminal court subordinate thereto;**
>
> **b. that some question of law of unusual difficulty is likely to arise; or**
>
> **c. that a view of the place in or near which any offence has been committed may be required for the satisfactory trial of the offence; or**
>
> **d. that an order under this section will tend to the general convenience of the parties or witnesses; or**

e. that such an order is expedient for the ends of justice or is required by any provision of this Code, it may order -

i. --------

ii. that a particular criminal case or class of cases be transferred from a criminal court subordinate to its authority to any other criminal court of equal or superior jurisdiction.

(2) The High Court may act on the report of the lower court, or on the application of a party interested, or on its own initiative."

62. The Petitioners have stated that they reside in Mombasa and that all their witnesses reside in Mombasa. Their advocate also resides in Mombasa. Consequently, the institution of the criminal case in Nairobi has caused them, and continues to cause them immense financial burden, which is compromising their right to fair trial guaranteed under Article 50(2) of the constitution, which states that:

Article 50 (2):

"(1) …

(**2) Every accused person has the right to a fair trial, which includes the right—**

(*a*) to be presumed innocent until the contrary is proved;

(*b*) to be informed of the charge, with sufficient detail to answer it;

(*c*) to have adequate time and facilities to prepare a defence;

(*d*) to a public trial before a court established under this Constitution;

(*e*) to have the trial begin and conclude without unreasonable delay;

(*f*) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;

(*g*) to choose, and be represented by, an advocate, and to be informed of this right promptly;

(*h*) 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;

(*i*) to remain silent, and not to testify during the proceedings;

(*j*) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;

(*k*) to adduce and challenge evidence;

(*l*) to refuse to give self-incriminating evidence;

(*m*) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;

(*n*) not to be convicted for an act or omission that at the time it was committed or omitted was not—

(i) an offence in Kenya; or

(ii) a crime under international law;

(*o*) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;

(*p*) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and

(*q*) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.

63. The Petitioners have attached air tickets showing that they have incurred huge amounts of money in air transport alone, without factoring

accommodation. This is so, yet the case has been mentioned 13 times. Again, this has not factored in the fact that when the defence case begins, the Petitioners' witnesses will have to be flown to Nairobi. Going by the attached costs already incurred by the Petitioners, it is reasonable to expect that costs of the trial in Nairobi will run into millions of Kenya shillings, if one factors in the costs of ferrying and accommodating witnesses, and that of their advocates. The Petitioners therefore pray that if the Court does not stop the criminal proceedings, then the place of trial be made either in Mombasa, Kilifi or Malindi, since the subject matter of the alleged crime is in Malindi and the Petitioners live in Mombasa.

64. However, the respondent and the interested party have objected to Petitioners' prayer stating that the companies that are alleged to have defrauded the Interested Party have their registered offices in Nairobi; the records at the Company's registry were interfered with in Nairobi; the moneys arising from the alleged conspiracy and fraud were accessed in Nairobi; and that the Interested Party together with its witnesses are based in Nairobi.

65. I have carefully considered this issue. It is not in doubt that the Petitioners live and work in Mombasa. It is also not disputed that the subject matter of the criminal action is land in Kilifi. On the evidence produced before this Court it is evident that the Petitioners will incur huge amounts of money in expenses for travel and accommodation both for themselves, their counsel and their witnesses. The fact that the Petitioners have been charged does not mean that they are guilty. Neither should they incur huge expenses to defend a trial in which they are still innocent until proven guilty. **See Article 50(2) (a)** of the Constitution, which provides that every accused person is to be presumed innocent until the contrary is proved. The expense to be incurred in the trial goes to the fairness of trial or access to justice as provide under Article 48 of the Constitution:

> Article 48 -
>
> **"The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."**

66. Further, Section 72 of the Criminal Procedure Code stipulates:

> **"When a person is accused of the commission of an offence by reason of anything which has been done or if any consequence which has ensued, the offence may be tried by a court within the local limits of whose jurisdiction the thing has been done or the consequence has ensued."**

67. In my view, the charging of the Petitioners in Nairobi amounts to impeding the access to justice to the Petitioners as it involves highly prohibitive costs, expenses, and logistical inconvenience. The Respondents can still easily get their witness to any seat of trial in the Republic. After all, it is they who have charged the Petitioners with the alleged offence. The Supreme Court of India had this to say with regard to fair trial in the case of **Natasha Singh v. CB [2013] 5 SCC 741**:

> **"Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstance can a person's right to fair trial be jeopardized."**

I am persuaded that indeed it is the duty of this Court to ensure a fair trial of any suspect.

> **(iii) Whether the many amendments and substitutions to charges violate the right to fair hearing.**

68. Every accused person is entitled to be informed of the charge, with sufficient detail to answer it as stipulated under Article 50(2) (b); have adequate time and facilities to prepare a defence as stipulated under Article 50(2) (c) and to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence as provided under Article 50(2)(j) of the Constitution. With these in mind, the frequent substitution of the charges in the criminal case is likely to occasion an erosion to the concept of fair trial. The accused must be made to respond to known charges. If the same keep on changing, that terrain becomes unfair. Although the trial Court can accept substitution of charges at any time, the substitution of charges must be reasonably done to protect the right to fair trial. The manner in which substitution has so far been done in this matter is hugely prejudicial to the Petitioners. The 1st Respondent must make up its mind which charges he prefers against the Petitioners. So far the Petitioners have taken plea three (3) times on account of substituted charges. They have no way of knowing with certainty the real charges thay are facing if this substitution is allowed to go on endlessly.

69. To avoid any further doubt, it would be in derogation of the concept of fair trial to amend any further the said charges. The Petitioners were charged in 2015. Every time substitution is made the Petitioners must go back to re-plan their defences. They are suspects living in darkness, without any reasonable predictability about the charges they face. This is a clear denial of access to justice and an abuse of the process of Court.

> **(iv) Whether there was bias on the part of the trial Magistrate.**

70. The Petitioners have stated that the manner in which the criminal case ended up before the learned magistrate, **Hon. Mutuku** for hearing is suspicious and demonstrates that the Petitioners may not get a fair trial in that court.

71. Where a party has an issue with a judge or any judicial officer for that matter, the settled practice was set out by the East African Court of Justice in **Attorney General vs. Anyang' Nyong'o and Others [2007] (supra)** as follows:

> **"The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the Judge or the Judges in the presence of the opponent. The grounds for the recusal are put to the Judge or Judges who would then be given an opportunity, if sought, to respond to them. In the event of the recusal being refused by the Judge, the applicant would, if so advised, move the application in open court."**

72. Similarly, in **Eastern and Southern African Trade And Development Bank (Pta) And Another vs. Ogang (2) [2002] 1 EA 54** COMESA Court of Justice was of the view that:

> **"The right to challenge proceedings conducted in breach of the rules against bias may be lost by waiver either express or implied. There is no waiver or acquiescence unless the party entitled to object to an adjudicator's participation was made fully aware of the nature of the disqualification and had an adequate opportunity of objecting. However once those conditions are met a party will be deemed to have acquiesced in the participation of a disqualified adjudicator unless he has objected at the earliest practicable opportunity. The same principles apply where an adjudicator is subject to a statutory disqualification. In the case of statutory disqualification there appears to be a presumption that regularity cannot be conferred by waiver or acquiescence, but a party failing to take objection may be refused relief if he seeks a discretionary remedy when subsequently impugning the proceedings."**

73. For the foregoing reasons, this Court lacks the jurisdiction to stray into the allegations of bias made against the trial Court.

What reliefs are available to the Petitioners?

74. The upshot of the foregoing is that the petition fails in respect of the main prayers herein, but succeeds with respect to the alternative Prayer No. 3 as follows:

> **(i) The choice of place of trial of the Petitioners in Criminal Case No. 1612 of 2015 in the Chief Magistrates Court, Milimani, Nairobi is contrary to provision of Section 72 of Criminal Procedure Code, and violates Article 48 of the constitution. Accordingly therefore, the aforesaid Criminal Case No. 1612 of 2015 in the Chief Magistrates Court at Milimani, Nairobi is hereby moved, and or transferred, to proceed in the Chief Magistrates Court at Mombasa.**
>
> **(ii) The 1st Respondent is prohibited from making any further substitution of the charges facing the Petitioners, and shall not bring new charges, or re-introduce charges against the Petitioners which had initially been withdrawn.**

75. Parties shall bear own costs.

Orders accordingly

Dated, Signed & Delivered at Mombasa this 14th day of May, 2020.

E.K. OGOLA

JUDGE

Judgment delivered in Chambers via MS Teams in the presence of:

Mr. Kirui holding brief Mogaka for 2nd Petitioner

Mr. Makori holding brief Buti for 1st Petitioner

Ms. Ogega for Respondents

Mr. Kaunda Court Assistant