REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO.951 OF 2018

(As Consolidated with CR. Rev. Nos.950 & 952 of 2018 and Misc. Appl. 88 of 2019)

NUSEIBA MOHAMED OSMAN.....1ST APPLICANT

MOHAMED ABDI ALI.....2ND APPLICANT

ABDIRAHMANIDRIS HASSAN.....3RD APPLICANT

SALAH MOHAMED KHALIF.....4TH APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The 1st Applicant, Nuseiba Mohamed Osman, the 2nd Applicant, Mohamed Abdi Ali, the 3rd Applicant, Abdirahmanidris Hassan and the 4th Applicant, Salah Mohamed Khalif are facing a raft of charges comprising of various offences under **The Prevention of Terrorism Act** before the Chief Magistrate's Court at Milimani Law Courts in Nairobi. When the Applicants were arraigned before the Chief Magistrate's Court, they pleaded not guilty to all the charges. The trial is pending before the Chief magistrate's Court. Seven prosecution witnesses have already testified. On 13th November 2018, the Applicants made an application before the trial court for termination of the criminal proceedings against them. In the alternative, they urged the trial court to expunge illegally obtained electronic evidence presented by the prosecution. The Applicants' case was that the electronic evidence was obtained in a manner that violated their constitutional rights. The trial magistrate in her ruling dated 30th November 2018 dismissed the Applicants' application stating that the same was premature and that the prosecution's evidence would be evaluated in totality at the close of the prosecution's case.

The Applicants were aggrieved by the trial court's ruling. The 1st, 2nd and 3rd Applicants filed their respective applications before this Court under **Section 362** of the **Criminal Procedure Code** and the fair trial articles of the **Constitution**. The 4th Applicant filed an application before this Court under **Article 22** and **165(3)(d)** of the **Constitution**. In essence, the Applicants urged this Court to review the trial magistrate's ruling. The Applications were opposed. The Respondent through Chief Inspector Leonard Bwire, filed a replying affidavit sworn on 22nd May 2019 in opposition to the application. Chief Inspector Bwire is one of the investigating officers in the present case. In his replying affidavit, he averred that the Applicants' constitutional rights were not violated in any way and that the trial court put in place measures to ensure that the Applicants' right to a fair trial was not infringed upon. He urged this Court to dismiss the Applicants' applications. The Respondent also raised a preliminary objection stating that the Applicants' applications were defective as they were not brought before this Court using the proper procedure and therefore ought to be dismissed.

The four separate applications were consolidated and heard together as one. During the hearing of the application, each party filed their respective written submission. This court also heard oral submission from Mr. Kilukumi for the 1st and 2nd Applicants, Mr. Madowo for the 3rd Applicant, Mr. Chacha for the 4th Applicant and finally Mr. Ondimu for the State. Mr. Kilukumi first addressed the preliminary objection raised by the Respondent. The Respondent asserted that the Applicants' application was in violation of the **Mutunga Rules in Legal Notice No.117 of 2013**. Mr. Kilikumu submitted that the said rules were only applicable to applications brought under **Article 22** of the **Constitution.** He asserted that the Applicants did not invoke **Article 22** of the **Constitution.** He stated that the Applicants' application sought revisionary orders and the same was brought under **Article 165** of the **Constitution** and **Section 362** of the **Criminal Procedure Code**. He averred that this Court had jurisdiction to hear and determine the Applicants' application. He was of the view that the only avenue for justice available to the Applicants was to apply for revision of the orders of the trial magistrate. He asserted that **Article 159** of the **Constitution** requires this Court to administer justice without undue regard to procedural technicalities. He maintained that whether the Applicants' application was brought by way of Petition or Notice of Motion was immaterial.

With regard to the substance of the Application, Mr. Kilukumi submitted that the Applicants' application was mainly hinged on rights of arrested persons provided under **Article 49** of the **Constitution**. He asserted that the 1st Applicant was arrested in Uganda at the Entebbe Airport. The Kenyan police took over custody of the 1st Applicant. Her phone and laptop were confiscated. The Ugandan authorities revoked her immigration documents. He asserted that PW7 testified that there were no extradition proceedings that preceded the 1st Applicant's arrest by Kenyan police. He dismissed the prosecution's claim that the 1st Applicant's arrest was ***"organized departure".*** He relied on the case of **Alliow Somo Abdi & 2 others vs Minister of State for Provincial Administration & Internal Security and 3 others [2019] eKLR** which held that removal of the Applicants in that case from Kenya to Uganda to face trial without extradition proceedings or other lawful process was in violation of their constitutional rights. He stated that by dint of **Article 2(5)** of the **Constitution**, **Rules of International Law** form part of the Kenyan laws. He asserted that the 1st Applicant was abducted and her rights under **Article 49** of the **Constitution** violated.

Mr. Kilukumi further submitted that there was a video recording of the 2nd Applicant's arrest. The 2nd Applicant's rights under **Article 49** were not explained to him when he was arrested. He averred that PW6 in his testimony admitted that the Kenyan police did not adhere to the provisions of **Article 49** when they arrested the 2nd Applicant. He pointed out that if an accused person's constitutional rights are violated, the Court has the power to terminate the criminal proceedings or prohibit admission of evidence acquired as a result of the said violation of the accused person's constitutional rights. He relied on the case of **R vs James Njuguna Nyaga [2007] eKLR** where the High Court terminated criminal proceedings before the trial magistrate's court since the accused person had been detained beyond the constitutionally provided 24 hours. He also cited the cases of **Ann Njogu & 5 Others vs R [2007] eKLR**, **Hon. Philomena Mwilu vs DPP & 3 others [2019] eKLR** and **Gerald Macharia vs R [2007] eKLR** where the High Court vitiated proceedings before the trial court on account of violation of the accused person's constitutional rights. He further submitted that the Applicants' right to a fair trial cannot be limited by dint of **Article 25** of the **Constitution**. He asserted that under **The Prevention of Terrorism Act**, the only right under **Article 49** which can be limited was the right to be brought before a Court as soon as possible as enunciated under **Article 49(1)(f)** of the **Constitution**. He stated that the Applicants were not informed of their constitutional rights when they were arrested.

With regard to the issue of illegally obtained evidence, Mr. Kilukumi urged this Court to expunge from the trial court record evidence obtained from the 1st Applicant's laptop and phone since the same was obtained illegally. He cited **Article 50(4)** of the **Constitution** which provided for exclusion of evidence obtained in a manner that violates an accused person's constitutional rights if admission of the same would render the trial unfair. He pointed out that the Applicants were not informed of the right to communicate with their advocate or their right to remain silent. He further submitted that Courts should not allow the police to obtain evidence illegally under the guise of enforcing the law. He cited the case of **Nix vs Williams [1984]** where the United States Supreme Court held that it would acquit an accused person if their constitutional rights were violated.

Mr. Kilukumi was of the view that the police ought to be deterred from infringing upon the constitutional rights of an individual. He relied on **Article 238(2)(b)** of the **Constitution** which requires the police to observe the rule of law, democracy, human rights and fundamental freedoms when discharging their duties. He asserted that the Applicants' rights to fair trial as enshrined under **Article 50(2)** of the **Constitution** were not observed by the trial court. He stated that during the trial, the court room was surrounded by officers from the Kenya Police and the Federal Bureau of Investigations (FBI). This created a hostile environment for the defence counsels to render any meaningful legal representation. He faulted the trial court for failing to accord the Applicants ample time to appoint new advocates when they requested for time to do the same. In the premises, he urged this Court to allow the Applicants' applications.

Mr. Madowo for the 3rd Applicant adopted the submission made by Mr. Kilukumi. He submitted that the 3rd Applicant was arrested on 8th September 2016 at the Registrar of Person's Office at Pumwani as he was applying for an identity card. The arrest was made after an unlawful interception of the 3rd Applicant's mobile phone which was admitted by PW2. Counsel for the 3rd Applicant averred that the interception of the 3rd Applicant's mobile phone was in violation of his right to privacy as enshrined under **Article 31** of the **Constitution**. He pointed out that by dint of **Section 36** of **The Prevention of Terrorism Act, Section 56(d)** of the **Security Laws Amendment Act** and **Section 42** of the **National Intelligence Act,** the police ought to have obtained a court order before intercepting the 3rd Applicant's mobile phone. He averred that the arrest of the 3rd Applicant and subsequent actions of the police amounted to violation of the 3rd Applicants' constitutional rights. He asserted that evidence from the electronic equipment was obtained illegally in the absence of the Applicants.

Mr. Madowo further stated that defence counsel were served with an affidavit together with annextures sworn by an FBI agent on 13th November 2011. The prosecution sought to rely on the said affidavit during the hearing scheduled for 15th November 2018. The defence counsels sought an adjournment since they needed to peruse the affidavit that contained evidence which was technical in nature. Their application was however disallowed. He submitted that the defence counsels were not accorded a chance to give the Applicants' the best possible legal representation. In addition, the 3rd Applicant was denied a chance to appoint a new counsel. He was of the opinion that from the foregoing, the criminal proceedings before the trial court ought to be quashed.

Mr. Chacha for the 4th Applicant made oral submissions to the effect that the evidence by the prosecution did not implicate the 4th Applicant in three out of the eleven counts that he is facing. He was of the view that the outcome of the revision applications by the 1st, 2nd and 3rd Applicants would affect the 4th Applicant's case. He asserted that the affidavit sworn by the FBI agent did not mention the 4th Applicant. He urged this court to make orders that will ensure the prosecution discloses all the evidence it intended to use against the 4th Applicant to enable him prepare for his defence. He further urged this Court to make orders that will see to it that the trial case is conducted in a timely manner.

The applications were opposed. Mr. Ondimu for the State submitted that the Respondent had filed a preliminary objection in respect to the 1st, 2nd and 3rd Applicants' application. He averred that the orders sought in the said applications were constitutional in nature. The Applicants had however invoked the revisionary jurisdiction of this Court. He was of the view that the orders sought in the said applications cannot be granted in an application for revision. He relied on the case of **The Speaker of the National Assembly vs James Njenga Karume [1992] eKLR** which held that where there is a clear procedure for redress of any grievance prescribed by the **Constitution** or an **Act** of **Parliament**, that procedure should be strictly followed. He asserted that the procedure for applications that are constitutional in nature is provided for under the law. He opined that the Applicants cannot use **Article 159(d)** of the **Constitution** as a safeguard for failure to follow

procedure. To that end, he cited the case of **Charles Maywa Chedotum & another vs IEBC & 2 others [2013] eKLR** which reiterated similar sentiments.

With regard to the Applicants' arrests, Learned State Counsel submitted that the **National Police Service Act** grants the police power to arrest suspects without a warrant. He added that **Section 57(1)(a)** of the said **Act** as well as **Sections 25** and **22(1)** of the **Criminal Procedure Code** allow the police to conduct a search without a warrant. He cited the case of **Mumo Mutinda vs Inspector General of Police & 4 others [2014] eKLR** where it was held that the police have the power to conduct a search without a warrant. He stated that when the 2nd Applicant was arrested, he was brought before the trial court within the required constitutional timelines. The prosecution thereafter filed an application requesting to further detain the 2nd Applicant. Upon his arrest, a search which was documented using photographs was conducted at his house. An inventory of the search which was signed by the 2nd Applicant was produced in evidence. The search was also witnessed by the Area Chief. The electronic evidence recovered during the search was forensically examined. Mr. Ondimu asserted that the 2nd Applicant's arrest and subsequent search was therefore proper and lawful.

He further submitted that there was reasonable cause to arrest the 3rd and 4th Applicants as was detailed in the Respondent's written submission. He averred that the 4th Applicant initially declined to grant the police access to his phone. He pointed out that the 1st Applicant was arrested in Uganda on 1st May 2016. She was arrested by Ugandan law enforcement agencies. Her immigration status was revoked. A letter from the Uganda Immigration Services *(marked as annexture "LB1" in Respondent's replying affidavit)* directed that the 1st Applicant be escorted in an ***"organized departure"*** to the Busia Border. She was handed over to the Kenyan Anti-Terror Police Unit. Items recovered upon her arrest were also given to the Kenyan Police. She was thereafter arraigned before the trial magistrate's court. The trial court allowed the prosecution's application to detain the 1st Applicant for an additional thirty (30) days.

Learned State Counsel averred that the East African Community Treaty formed part of the Laws of Kenya. **Article 124** of the said **Treaty** provides for regional peace and security as well as mutual assistance between the states in criminal matters and cross-border crimes. The 1st Applicant is Kenyan. He asserted that she was deported back to Kenya by the Ugandan authorities. The Respondent cannot therefore be held responsible for the actions of a foreign country. He relied on the case of **Campaign for Nuclear Disarmament vs The Prime Minister of the United Kingdom & 2 Others [2002] EWHC 2759 QB** which reiterated similar remarks. He was of the view that the action by the Ugandan government in transferring the 1st Applicant to Kenya fell under sovereign immunity. He averred that this Court therefore lacked jurisdiction to question the said **Act**. The Ugandan government voluntarily surrendered the 1st Applicant to the Kenyan authorities. He was of the opinion that the question of extradition and rendition were immaterial in the present case.

With regard to the FBI involvement in the present case, Mr. Ondimu submitted that **Article 2(5)** of the **Constitution** provides that International law ratified by Kenya forms part of the laws of Kenya. He cited the United Nations Resolution No.1373 of 2001 which encourages all nations to assist in the fight against terrorism. He asserted that **Article 9** of **The International Convention for the Suppression of the Financing of Terrorism** requires State parties to conduct necessary investigations with regard to crimes related to terrorism. He stated that **Article 4(2)(f)** of the **OAU Convention on the Prevention and Combating of Terrorism** requires State parties to take necessary steps to counter terrorism networks. He also relied on **Section 10(1)** of the **National Police Service Act** which instructs the Inspector General of Police to promote co-operation with international police agencies. He averred that in this regard, the Kenyan police conducted investigations in the present case and sought assistance of several countries including the United Kingdom, United States of America and Uganda.

Learned State Counsel further submitted that pursuant to **Section 125(1)** of the **Evidence Act**, the FBI agents are competent witnesses. He asserted that **Section 144** of the **Evidence Act** provides that it is the duty of the trial court to determine admissibility of evidence before it. He was of the view that the objection made by the Applicants in relation to the FBI agents being called as witnesses was not in good faith. He stated that security measures were put in place at the trial court in Milimani and that no one was denied access to the court including the media.

With regard to disclosure of evidence, Mr. Ondimu submitted that the same was a continuous process. He stated that the additional exhibits served on the Applicants on 13th November 2019 related to issues that had already been disclosed to the Applicants. He averred that prosecution evidence was periodically furnished to the Applicants throughout the trial process. The prosecution had earlier on served the Applicants with a preparatory note ***(Annexture LB10)*** which summarized all the evidence that the prosecution wished to rely on. He maintained that there was no element of surprise on the part of the Applicants. He was of the opinion that the action by the defence counsels in walking out of the court during the trial was discourteous to the Court and the prosecution. He dismissed the Applicants' assertion that they were denied a chance to appoint new counsel. He stated that the Applicants changed their legal representation on numerous occasions without explanation during the trial.

On the question of whether this Court ought to vitiate the trial court's proceedings, Learned State Counsel made oral submissions to the effect that a fair hearing was accorded to the Applicants by the trial court and therefore the proceedings before the trial court ought not to be terminated. He urged this Court to consider the doctrine of *ker-frisbie* in relation to exclusion of evidence before a trial court. He asserted that the length of the ruling by the trial court was non-issue as the same met the criteria of a judgment provided in law. He pointed out that the trial court's decision in dismissing the Applicants' application for adjournment was merited. In the premises therefore, he urged this court to dismiss the Applicants' applications.

In response to Mr. Ondimu's oral submission, Mr. Madowo for the 3rd Applicant averred that a ruling or judgment is required to outline the *ratio decidendi* relied upon. He stated that the Applicants' counsels made lengthy submissions during the hearing of the application before the trial court. It was his view that the ruling delivered by the trial court did not address all the issues raised by the Applicants. He stated that the FBI agents were manning the trial court's entrance at Milimani. They denied access of the court to the public and media. He asserted that the same was done in a bid to overwhelm the court and intimidate the Applicants. He maintained that the prosecution served them with technical evidence two days before the hearing date. He opined that the Applicants were not accorded ample time to peruse the evidence and prepare their defence. He stated that the prosecution indicated that investigations were conducted. However, no warrants were obtained to secure some of the evidence. The prosecution also failed to institute extradition proceedings. He averred that the Applicants were not against

the FBI assisting the Kenyan police with investigations. However, it was his view that their involvement was not undertaken in accordance with the law. He maintained that the Applicants' Constitutional rights were violated and the prosecution should not be allowed to get away with the same. He therefore urged this Court to allow the Applicants' applications as prayed.

This court has carefully considered the rival submission made by the parties to this application. There are several issues that came to the fore for determination by the court. But before delving on the issues, it is important for this court to state that as a matter of policy, this court in exercise of its supervisory jurisdiction of subordinate courts as donated by **Article 165(6)** & **(7)** of the **Constitution** and **Section 362** of the **Criminal Procedure Co**de is required to exercise the power with restraint so as not to unnecessarily disrupt and interfere with pending trials upon application being made to it challenging certain aspects of the proceedings. This court agrees with the holding by the court in **Ebrahim, R (On the application of) v. Feltham Magistrates' Court & anor [2001] EWHC Admin 130**,:

> ***"We think it helpful to restate the principles underlying the jurisdiction. The Crown is usually responsible for bringing prosecutions and, prima facie, it is the duty of a court to try persons who are charged before it with offences which it has power to try. Nonetheless the courts retain an inherent jurisdiction to restrain what they perceive to be an abuse of the process. This power is "of great constitutional importance and should be…preserved": per Lord Salmon in DPP v Humphrys [1977] AC 1 at p 46C-F. It is the policy of the courts, however, to ensure that criminal proceedings are not subject to unnecessary delays through collateral challenges, and in most cases any alleged unfairness can be cured in the trial process itself. We must therefore stress from the outset that this residual (and discretionary) power of any court to stay proceedings as an abuse of its process is one which ought to be employed in exceptional circumstances, whatever the reasons submitted for invoking it. See Attorney-General Reference (No.1 of 1990 [1992] QB 630, 634G."***

It should also be noted that to ensure that the criminal trial process is fair to an accused, the **Constitution**, the **Criminal Procedure Code** and other **Statutes** and decided cases have put in place legal safeguards in the trial process itself that protects the rights of an accused person during the entire proceedings. A court having supervisory powers, when a challenge on such proceedings before a trial court is brought before it, should not therefore proceed on the assumption that the criminal trial process itself was on the face of it or inherently unjust. In other words, the High Court exercising its supervisory powers of magistrate's court, should exercise with circumspection its powers unless it is established that the trial process that is being challenged is so antithetical to the right to fair trial as guaranteed by the **Constitution** and **Statute** that the court should have no option but to intervene.

The first issue that came to the fore for determination is whether this court has jurisdiction to entertain the application brought by the Applicants. The Respondent raised a preliminary objection to the jurisdiction of the court on the basis that the Applicants ought to have brought the application under the **Mutunga Rules** and not by way of an application for revision under **Article 165** of the **Constitution**. It was the Respondent's argument that this court should down its tools and dismiss the application on the ground that the Applicants had abused the process of the court by failing to adhere to the **Mutunga Rules**. On the other hand, the Respondents argued that theirs was an application which invoked this courts revisionary jurisdiction as provided by the **Constitution** and the **Criminal Procedure Code**. This court agrees with the Applicants that from the way the Applicants' application is framed, it was clear to this court that they are invoking this court's jurisdiction under **Article 165(6)** & **(7)** of the **Constitution** which grants this court supervisory jurisdiction over any trial before a subordinate court. The **Article 165** of the **Constitution** provides thus:

> ***"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.***
>
> ***(7) For the purpose of clause (6), the High Court make call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice."***

Section 362 of the **Criminal Procedure Code** provides thus:

> ***"The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court."***

This court therefore holds that it has jurisdiction to hear the application brought before it by the Applicants. When an accused makes application before the High Court for an appropriate relief on the ground that his constitutional right to fair trial had been infringed, this court cannot be humstrung by procedural technicalities which do not go to the root of the substantive matter in dispute. The objection raised by the Respondent lacks merit and is disallowed.

On the merits of the application, the Applicants were aggrieved by an interlocutory ruling made by the trial court on 15th November 2018 whereby the trial court allowed a witness called by the prosecution, specifically a FBI agent, to testify despite protestation by the Applicants that documentary and electronic evidence intended to be relied on by the said witness had been supplied to them two days prior to the testimony of the said witness. The Applicants complained that the evidence adduced by the said witness infringed their right to fair trial because they were not given adequate time to prepare to interrogate the said witness. In particular, the Applicants relied on **Article 50(2)(j)** of the **Constitution** that requires the State to inform, in advance, the accused the evidence that they intend to rely on. Such information should be provided to the accused within reasonable time so that the accused can have time to adequately prepare to defend himself. The Applicants argued that the trial court erred when it allowed the said witness to testify yet the Applicants had not been given sufficient time to go through the electronic and documentary evidence that they had been supplied with a couple of days prior thereto. In response, it was the prosecution's case that indeed they had supplied the Applicants with the evidence as contained in the list of evidence that had earlier been supplied to the Applicants. The prosecution explained that nothing in law barred them or prevented them from undertaking disclosure of evidence to the accused in the course of the trial provided the disclosure was within a reasonable time.

This court has evaluated the rival arguments made by the parties in regard to this issue. The requirements of **Article 50(2)(j)** of the **Constitution** are mandatory. The prosecution is required to provide accused persons with evidence that they intend to rely on during trial, in advance, so that the accused person may have adequate time to prepare for the trial. The said evidence is required to be provided within a reasonable time to enable the accused person prepare for the case. What is reasonable time depends on the circumstances of each case and the nature of the evidence to be supplied to the accused. It is the Applicants' contention that the evidence that was supplied to them was technical in nature that they required sufficient time to interrogate the same and prepare for the witness.

This court took the view that the time given to the Applicants to go through the evidence was sufficient to enable them prepare for the witness. If the adduction of the evidence, the Applicants formed the view that they needed more time to cross-examine the witness, nothing prevented them from making an appropriate application before that court for the witness to be stood down so that they could have time to question him on the specific area that they required to interrogate the evidence. It will not do for the Applicants to make broad allegations to the effect that the entire evidence is technical in nature and therefore the witness ought not to have testified. This court agrees with the trial court that some of the issues that the Applicants were raising in their said application to exclude the evidence on grounds of late disclosure of evidence are issues that go into the credibility of the evidence which the trial court will evaluate and address after the close of the prosecution's case. The said issues were therefore raised prematurely.

As regard the question whether the evidence obtained from the mobile phones of the Applicants were illegally obtained or not, this court cannot render its opinion at this stage of the proceedings as to do so will pre-empt the decision that will be rendered by the trial court. Again, the issue of admissibility of the evidence should not be confused with credibility of the evidence. After the close of the prosecution's case, the trial court will have the opportunity to evaluate the evidence adduced by the prosecution witnesses, including both documentary and electronic evidence to determine whether the evidence is prima facie as to enable the court put the Applicants to their defence. Again, this court agrees with the trial court that the issues raised by the Applicants regarding the manner in which the electronic evidence was obtained are premature and should be addressed at the appropriate stage of the trial.

As regard the circumstance under which some of the Applicants' were arrested, again, this court will not render an opinion because to do so would prejudice the trial court's jurisdiction to determine all the issues related to the trial when considering the evidence adduced before it in its entirety. This court formed the view that some of the issues raised by the Applicants, including the issue regarding the circumstances of arrest of some of the Applicants, are issues that ideally should be reserved for this court when hearing an appeal (if the Applicants were to be convicted) and not in an application for revision such as the present one.

As regard whether the Applicants' right to fair trial was infringed when the FBI agent testified in court on the particular day, this court again will refrain from rendering an opinion because the trial is still ongoing and any opinion rendered by this court may prejudice the trial court's jurisdiction to try the case.

Finally, there is an issue that this court is of the view that it is important to be addressed to protect the due and just administration of justice and the due process of the court. Some of the counsel representing the Applicants walked away from the trial court when the trial court rendered a Ruling that they did not agree with on the 15th November 2018. As officers of the court, counsel's first duty is to uphold the tenets of the **Constitution** and the principles of the **Rule of Law**. That duty includes, showing respect to the court no matter how aggrieved counsel may be with the decision that may be rendered by the court during the course of the proceedings. In any event, there is no decision of a court, other than that of the Supreme Court, that cannot be challenged on appeal. While counsel has a right to withdraw from acting for a client at any time including during trial, when counsel walks out of the court in the midst of a trial, such action will in all probability be infringing on the accused person's right to be represented by counsel as provided under **Article 50(2)(g)** of the **Constitution**. It behooves counsel to show respect to the court at all times no matter how strongly they disagree with a decision rendered by the court. Where courts are not shown respect by counsel, the administration of justice, to which counsel is an integral part of, is liable to be subjected to disrepute and ridicule. Enough said. It calls for counsel's own conscience to decide whether or not to he is a servant of the Rule of Law.

The upshot of the above reasons is that the application lodged by the Applicants lack merit and is hereby dismissed. The file trial court's file is hereby returned to the trial magistrate's court for hearing and disposal. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF OCTOBER 2019

L. KIMARU

JUDGE