



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CONSTITUTIONAL PETITION NO. 3 OF 2016

ISAAC ROBERT MURAMBI.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS...2ND RESPONDENT

INSPECTOR GENERAL OF POLICE.....3RD RESPONDENT

BUSIA CHIEF MAGISTRATE'S COURT.....4TH RESPONDENT

JUDGEMENT

1. The Petitioner is Isaac Robert Murambi. The Attorney General (AG), the Director of Public Prosecutions (DPP), the Inspector General of Police and the Chief Magistrate's Court at Busia are the 1st, 2nd, 3rd and 4th respondents respectively.

2. The Petitioner was on 21st July, 2014, together with two others, charged in Busia Chief Magistrate's Court in Criminal Case No. 1723 of 2014 with the offence of having or conveying suspected stolen property contrary to Section 323 of the Penal Code. The particulars of the offence disclosed that on 20th July, 2014 at Benga Village, Walatsi Location within Busia County, the accused persons having been detained by Corporal Samwel Kiplebel and Corporal John Matutu in exercise of the powers conferred by Section 26 of the Criminal Procedure Code had in their possession one motor cycle registration number KMCG 614S make King Bird which was reasonably suspected to have been stolen or unlawfully obtained.

3. At the trial two witnesses testified for the prosecution upon which it closed its case. The trial Court found that the prosecution had established a *prima facie* case and placed the accused persons on their defence. Several events not relevant to this Petition took place thereafter. The Petitioner subsequently filed this Petition and the trial was stayed pending the outcome of this Petition.

4. The Petitioner alleges violation and or infringement of his rights and fundamental freedoms. He claims that this was occasioned by the application of Section 323 of the Penal Code as read together with Section 26 of the Criminal Procedure Code (CPC) leading to his detention and prosecution in Court to answer to charges yet that provision of law presumes the guilt of the person charged under it and places the onus of proving innocence on the accused person thus contravening the unlimited right to fair trial as enshrined under Articles 25(c) and 50(2) (a) of the Constitution.

5. The Petitioner also contends that his right to equal protection and equal benefit of the law under Article 27 of the Constitution has been violated as he is required to prove his innocence thus shifting the burden of proof upon him. This requirement, according to the Petitioner, has violated his right to inherent dignity under Article 28 of the Constitution. He therefore terms his trial unfair.

6. Further, he states that the trial is unfair as there was no complaint registered with the police and neither was there a complainant hence the prosecution had failed to prove ownership of the motorcycle but the trial Court has shifted the burden to him by putting him on his defence.

7. In addition, the Petitioner claims that as a result of being subjected to the unfair trial his freedom of movement has been limited thus contravening his rights under Article 39(1) of the Constitution.

8. Consequently, the Petitioner prays for orders as follows:

- a) A declaration that Section 323 of the Penal Code as read with Section 26 of the Criminal Procedure Code is unconstitutional and invalid for violating Article 50(2)(a) of the Constitution;
- b) A declaration that the continued enforcement of Section 323 of the Penal Code by the 2nd, 3rd and 4th respondents against the Petitioner violates the Bill of Rights, militates against public interest and the administration of justice, and constitutes abuse of the legal process;
- c) An injunction barring the 2nd, 3rd and 4th respondents from carrying on the prosecution of the Petitioner in Busia Chief Magistrate's Court Criminal Case No. 1723 of 2014;
- d) Award of general damages, exemplary damages and aggravated damages under Article 23(3) of the Constitution for injuries suffered due to unlawful arrest, detention and prosecution and for the unconstitutional conduct of the 2nd and 3rd respondents;
- e) Any other reliefs or further orders, writs, declarations and directions as the court may deem appropriate, fair, just and fit to grant; and
- f) Costs.

9. The Petitioner also proposes that the Court can engage its supervisory jurisdiction under Article 165(6) & (7) of the Constitution and call for the trial file so as to make orders or give directions it considers appropriate to ensure fair administration of justice.

10. The Petitioner filed a supporting affidavit and further supporting affidavits to buttress the Petition. The affidavits are in essence a restatement of the Petition. He states that the owner of the motorcycle was not called as a witness so as to prove his culpability and thereby requiring him to prove his innocence which is contrary to Article 50 (2)(a) of the Constitution. He avers that in the trial the police were the complainants, investigators and prosecutors. Further, that only the arresting officer and investigating officer were called as witnesses and no independent witness or complainant had been called to testify.

11. The Petitioner reiterates that Section 323 of the Penal Code as read together with Section 26 of the CPC does not presume the innocence of a person before conviction hence unconstitutional.

12. The Petition is opposed. When the matter came up for highlighting of the submissions Mr. Tarus who appeared for the Attorney General indicated that the 1st, 3rd and 4th respondents had filed grounds in opposition to the Petition. I do not find the grounds of opposition in the file but there are submissions dated 22nd February, 2017 and filed on 28th February, 2017. I shall revert to the said submissions in due course.

13. The 2nd and 3rd respondents put in a joint replying affidavit drawn by the Office of the DPP in response to both the Petition and the submissions of the Petitioner. It is noticed that both the DPP and the

AG claim representation of the 3rd Respondent. Nevertheless, I must state that no prejudice has been caused to the 3rd Respondent as a result of the convergence in representation. The 2nd and 3rd respondents aver that the impugned provision of the law is constitutional. They emphasise that it is upon a claimant to demonstrate that a provision of statute is unconstitutional and in this case the Petitioner has failed to do so. They say that their position is guided by the principles on interpretation of constitutions and in particular the general presumption that Acts of Parliament are constitutional and the burden lies on the one who alleges unconstitutionality of a law to demonstrate the alleged unconstitutionality. In support of their position, reliance is placed on the decisions in **Ndyanabo v Attorney General [2001] 2 EALR 485 (CAT)**, **Alex Kyalo Mutuku & 7 others v Ethics and Anti-Corruption Commission & 2 others [2016] eKLR** and **US v Butler, 297 US 1 [1936]**.

14. According to the respondents, a person detained under Section 26 of the CPC is simply a suspect and remains so with all the rights of an arrested person, accruing to him under Articles 25, 49, 50 and 51 of the Constitution, remaining guaranteed and protected throughout the process. They further assert that the Petitioner and his co-accused were arrested on reasonable suspicion as they had in their possession a motorcycle whose ownership was unaccounted for. According to the respondents, reasonable suspicion implies beyond mere suspicion but less than evidence that would justify a conviction hence the detention cannot be faulted. They rely on **O'hara v Chief Constable of The Royal Ulster Constabulary (1997) A.C. 286** in support of this submission.

15. They also state that Section 323 of the Penal Code grants an accused person an opportunity to give an account of how he came by the thing reasonably suspected to have been stolen or unlawfully obtained. This opportunity will only arise after the court is satisfied by way of trial that the suspicion that led to the detention was reasonable. In their view, this opportunity guarantees and protects the right to fair hearing under Article 50(2) of the Constitution and hence the burden does not shift from the prosecution to an accused person. According to the respondents the Petitioner was given an opportunity to cross-examine the witnesses and to defend himself hence the right to fair hearing was protected both procedurally and substantively.

16. The respondents further aver that an offence is committed under Section 323 of the Penal Code when the person admits to the facts and fails to give an account to the satisfaction of the court of how he came by the thing reasonably suspected to have been stolen or unlawfully obtained as held in **Chege v Republic [1983] eKLR** which adopted the decision in **Koech v Republic [1968] EALR 190**. It is their opinion that until then an accused person is presumed innocent and therefore the presumption of innocence is still guaranteed and protected. In their view, the onus of the prosecution is to prove that the detention was warranted and reasonable. They therefore posit that detention under Section 26 of the CPC and prosecution under Section 323 of the Penal Code is in compliance with Articles 25(c) and 50(2)(a) of the Constitution as fair trial and presumption of innocence are guaranteed and protected.

17. As for the claim that there was no complainant, the respondents retort that in criminal matters the State is always the complainant. They refer to **Kamau John Kinyanjui v Republic [2010] eKLR** to support this assertion. The respondents assert that the State brought charges that had a proper and factual foundation and availed material evidence making the case prosecutable thus complying with the decision in **R v Attorney General exp Kipngeno Arap Ngeny High Court Application No. 406 of 2001** quoted with approval in **Republic v Attorney General & 4 others ex-parte Kenneth Kariuki Githii [2014] eKLR**.

18. The respondents also contend that the trial of the Petitioner has been reasonably carried out and is not actuated by malice or extraneous matter to warrant its prohibition.

19. In answer to the assertion that material witnesses had not been called, the respondents state that Section 124 of the Evidence Act provides that no particular number of witnesses is required to prove a fact and the failure to call members of the public as witnesses cannot vitiate the trial. They refer to the Court of Appeal decision in **David Kamau Gicharu v Republic [2016] eKLR** in support of this averment. They further assert that the finding that a *prima facie* case was established and the sufficiency or otherwise of the evidence cannot be questioned through the procedure adopted by the Petitioner as he

will be entitled to appeal if convicted.

20. In addition, the respondents posit that the fact that the Petitioner has been put on his defence does not imply that he needs to prove his innocence or that he is guilty but only that there is a probability that he has committed an offence. It is the respondents' case that in this particular case the trial was fair and the Petitioner elected to remain silent in exercise of his right under Article 50 of the Constitution.

21. The respondents state that the Petitioner's right to equal protection of the law guaranteed by Article 27 of the Constitution was not tampered with as the impugned provisions of the law apply equally to persons reasonably suspected to have stolen or unlawfully obtained a thing and he falls under such category of persons.

22. According to the respondents, the right to be treated with dignity under Article 28 of the Constitution was not violated as the trial of the Petitioner and his co-accused was fair in that they were accorded the chance to cross-examine witnesses and were only put on their defence after the prosecution's case met the threshold of a *prima facie* case. Furthermore, they have been given an opportunity to rebut the prosecution case so as to give an account to the satisfaction of the court.

23. The respondents admit that the Petitioner's right to movement under Article 39(1) of the Constitution has been curtailed but assert that this has been done through the operation of the law and in particular the impugned sections of the law. It is therefore their position that the limitation was reasonable and justifiable pursuant to Article 24 (1) of the Constitution.

24. On the Petitioner's proposition that this Court exercises its supervisory jurisdiction, the respondents submit that there is no need to invoke the Court's supervisory jurisdiction as the Petitioner has failed to prove that the prosecution militates against public interest, the interest of administration of justice and or is an abuse of the legal process. They further aver that the impugned provisions are neither arbitrary nor discriminatory and are hence within the parameters of the Constitution. They hold the view that the Court cannot declare a piece of legislation unconstitutional for the reason that it does not favour the standing of a person and the impugned provisions being constitutional in their application ought not to be declared unconstitutional as this would harm the public interest and the criminal justice system.

25. The parties put in written submissions which they highlighted. The Petitioner urges that as long as Section 323 of the Penal Code as read together with Section 26 of the CPC requires any suspect, in the absence of a complaint registered with the police, to give an explanation to the satisfaction of the court, the right to presumption of innocence is violated. According to him, the provision is unconstitutional as it presumes the accused to be guilty until proven innocent and contravenes Article 50 (2) (a) of the Constitution.

26. The Petitioner urges the Court to consider the unconstitutionality of the impugned sections based on the finding in the cases of **Ndyanabo** (supra), **Murang'a Bar Operators and another v Minister of State for Provincial Administration and Internal Security & others [2011] eKLR** as followed in the case of **Alex Kyalo Mutuku** (supra) and **Thuita Mwangi & 2 others v Ethics & Anti-corruption Commission & 3 others [2013] eKLR**.

27. The Petitioner relies on the finding in **Paul Alala Okoth v Kenya Airports Authority & 2 others [2014] eKLR** in support of his contention that it is unconstitutional to cause a person to prove his innocence as it violates the rights under Articles 25 and 50 of the Constitution. He also relies on the finding in **Meixner & Another v Attorney General [2005] 2 KLR 189** in support of the proposition that the High Court can interfere with the exercise of the prosecutor's discretion to charge a suspect if the indictment contravened fundamental rights and freedoms as had been enshrined under Section 77 of the repealed Constitution.

28. The Petitioner submits that his unlimited right to fair trial guaranteed under Articles 25 and 50(2) was contravened when he was put on his defence in the absence of any complainant or the complainant's testimony at the prosecution stage. Further, that failure to call those who tipped off the police about the

suspected stolen motorcycle rendered the prosecution untenable. He relies on **ex-parte Kipngeno Arap Ngeny** (supra) cited with approval in **ex-parte Kenneth Kariuki Githii** (supra) for the proposition that a criminal prosecution commenced in the absence of proper factual foundation or basis is always suspect for ulterior motive or improper purpose and further that there must be in existence material evidence leading the prosecution to state with certainty that there exists a prosecutable case without which the prosecution will be malicious and actionable.

29. The Petitioner buttresses his submissions using **Republic v Commissioner of Police and another ex-parte Michael Monari & another [2012] eKLR** and **Kuria & 3 others v Attorney General [2002] 2 KLR 69** for the proposition that the High Court can intervene and prohibit the continuation of a criminal prosecution where the prosecution and those charged with the responsibility of making the decisions to prosecute do not act in a reasonable manner or if extraneous matters outside the goals of justice guide the instigation of the charges. In his view the prosecution did not need to institute the charges as proper investigations were not carried out, no cogent evidence was produced and putting him on his defence will humiliate him as it requires that he proves his innocence. He therefore concludes that the trial is in contravention of his rights under Articles 25(c) and 50(2) of the Constitution.

30. In furtherance of the foregoing assertion, the Petitioner urges this Court to exercise its supervisory jurisdiction under Article 165(6) & (7) of the Constitution and make a declaration that the continued enforcement of Section 323 of the Penal Code is contrary to public interest, the interest of administration of justice and constitutes an abuse of the legal process thus violating his rights under Articles 25(c) and 50 (2) of the Constitution.

31. The Petitioner further submits that by being taken through an unfair trial his rights under Articles 27, 28 and 39(1) were violated. In particular, his rights to fair trial, dignity and freedom of movement have been curtailed by an unfair trial. The Petitioner posits that by upholding this Petition the Court will be acting on its interpretative powers donated by Article 259 of the Constitution.

32. Finally, the Petitioner urges the Court to award him damages for infringement of his rights by dint of Article 23(3)(e) of the Constitution. He states that the unfair and unconstitutional charges facing him have occasioned him humiliation, mental torture and distress and prays for 13 million shillings in damages. In support of his claim, he refers to the case of **Peter Kariuki v Attorney General [2014] eKLR** in which the Court of Appeal awarded the appellant 15 million shillings as compensation for being subjected to an unfair trial.

33. The written submissions of the 2nd and 3rd respondents are materially the same as the contents of their replying affidavit. They place reliance on the same authorities cited in their affidavit. The respondents reiterate that the burden fell upon the Petitioner to establish the unconstitutionality of the impugned provisions of law and he has failed to discharge the same. Further, that if the provisions of the law in issue are laid side by side the provisions of the Constitution they will be found to be constitutional. They cite **Ndyanabo, Alex Kyalo Mutuku** and **U.S. v Butler** to buttress their position.

34. The respondents submit that a police officer can arrest a person on the ground that he has either committed or is about to commit a cognizable offence and that the Petitioner was detained on probable and reasonable suspicion. They refer to **O'hara** (supra) and submit that reasonable suspicion is not mere suspicion but does not however exceed evidence that would justify a conviction. The respondents therefore assert that a detention under Section 26 of the CPC is not unconstitutional as it provides for the charging of the person in court in accordance with the law. It is the respondents' view that the rights protected by Articles 49, 50 and 51 of the Constitution are not violated in any way.

35. Addressing Section 323 of the Penal Code, they state that it provides for the charging in court of a person detained under Section 26 of the CPC and grants him an opportunity to account for the thing that is reasonably suspected to have stolen or unlawfully obtained. According to the respondents the court by way of trial determines if the suspicion was reasonable. The respondents submit that a person only commits the offence if they fail to give a satisfactory account. Reliance is placed on the decisions in the already cited cases of **Koech** and **Chege** in support of the said argument.

36. According to the respondents, the trial ensures fairness as evidence is produced to demonstrate the reasonable suspicion before the accused is accorded the opportunity to give an account thereby protecting the presumption of innocence. Their position is that the burden of prove of an accused's guilt does not shift from the prosecution to the accused. This, the respondents contend, is demonstrated by the fact that the Petitioner was given an opportunity to cross-examine witnesses and defend himself. Procedural and substantive law was thus adhered to. They therefore submit that the impugned sections do not derogate from the right to be presumed innocent until proven guilty or from the right to a fair trial.

37. The respondents emphasise that as per the decision in **Kamau John Kinyanjui** (supra) there was a complainant being the State and the criminal charges preferred had a proper and factual foundation and material evidence was produced in accordance with the decision in the **ex-parte Kipngeno Arap Ngeny** case. They address the issue of the lack of an independent witness by stating that Section 124 of the Evidence Act does not provide for any particular number of witnesses to prove a fact and refer to the finding in **David Kamau Gicharu** (supra) to support their position.

38. The respondents posit that the purpose of being put on defence is not because one is guilty but rather that there is a probability of the commission of the offence. According to them, the guilt of a person can only be pronounced upon close of the defence case and to place one on his defence does not connote guilt. They hold the view that the sufficiency or otherwise of the evidence cannot be challenged through a constitutional petition.

39. According to the respondents, the Petitioner's rights to equal protection of the law, human dignity and freedom of movement under Articles 27, 28 and 39(1) respectively of the Constitution were not infringed.

40. The respondents belabour the point that the curtailment of the Petitioner's freedom of movement was done in accordance with the law. Additionally, that this is not a matter suited for invocation of the Court's supervisory jurisdiction under Article 165(6) & (7) of the Constitution as no basis has been laid for the engagement of such power and neither are the impugned provisions arbitrary or discriminatory.

41. In closing their submissions, the 2nd and 3rd respondents reiterate reliance on their averments in their replying affidavit. They urge the Court to dismiss the Petition with costs as it is without merit and an abuse of the court process.

42. As already stated, the Attorney General filed submissions urging for the dismissal of the Petition. The case of the Attorney General is that the impugned provisions are constitutional. The principle established in **Ndyanabo** (supra) on the burden of proof is reiterated. The Attorney General submits that statute should be construed in accordance with the intention expressed in the Act itself. Further, that it was never the intention of the legislature to take away the right of an accused to be presumed innocent until proven guilty.

43. The Attorney General points out that a person who commits an offence under Section 323 of the Penal Code is guilty only if he fails to give a satisfactory account to the court and the burden of proving that the offence was committed remains with the prosecution. Further, that the person becomes guilty only upon admitting being in possession or conveying anything which might reasonably be suspected to have been stolen or unlawfully obtained. The State relies on the case of **Koech** (supra) as cited with approval in **Chege** (supra) in support of this proposition.

44. The State submits that the import of the impugned provisions do not diminish or interfere with the right to fair trial as they are only rules of evidence which do not impose a legal burden on the accused to disprove the evidence and the prosecution still bears the burden to prove its case beyond reasonable doubt.

45. The Attorney General concludes that the Petitioner has not met the conditions for grant of orders to prohibit his continued prosecution in the trial Court. According to the AG, the Petitioner has not established that his prosecution constitutes an abuse of the court process thus requiring the stay or

termination of his trial in public interest.

46. In response to the respondents' submissions, the Petitioner filed two sets of written submissions. The first set was filed on 18th August, 2016 and the second set was filed on 4th November, 2016. In the first set he urges that an application of the constitutional interpretation principles established in the **Ndanyabo** and **Alex Kyalo Mutuku** cases would result in the impugned provision of the law being adjudged unconstitutional. Further, that the police do not have sweeping powers to arrest, detain and charge any suspect but that they can only do so on reasonable and justifiable suspicion.

47. On his arrest, the Petitioner admits that the same was indeed executed in exercise of the powers bestowed on the police by Section 13(d) of the Administration Police Act. He however holds the view that he ought to have been released upon denying the allegation that the motorcycle was stolen. It is the Petitioner's submission that charging him in the absence of a complainant amounts to presuming him guilty subject to his establishing his innocence.

48. In the Petitioner's view, the reasoning in the **Chege** case was that the suspect must admit possession of suspected stolen property and be given an opportunity to give an account by way of trial. His view is that he ought not to have been charged as he did not make any admission. He urges that the trial has been set up so that he gives an account of the possession of the motorbike regardless of not admitting that it was stolen and this contravenes the decision in the **Koech** case. The Petitioner also points out that the impugned provisions are ambiguous thereby affording the police opportunity to harass innocent Kenyans.

49. Insisting that there was no complaint or complainant against him, the Petitioner distinguishes the decision in **Kamau John Kinyanjui** (supra), stating that the said case had a complainant. He submits that the charges facing him amounts to mere suspicion without cogent evidence. The Petitioner contends that suspicion however strong cannot be a basis for inferring guilt which must be proved by evidence. In that regard he points to the decisions in **Abdalla Bin Wendo & Sheh Bin Mwambere v Republic [1953] EACA 166**, **Sawe v R, Cr. App No. 2 of 2002 (UR)** and **Republic v Kassim Mohammed Ngao & 3 others [2014] eKLR**.

50. Citing the decision in **Butt v Republic [1957] EA 332**, the Petitioner stresses that the burden lies on the prosecution to prove its case beyond reasonable doubt. On the respondents' assertion that Section 124 of the Evidence Act and the decision in **David Kamau Gicharu** (supra) upsets the Petitioner's insistence that other witnesses ought to have been availed by the prosecution, the Petitioner insists that it was necessary to avail all the evidence in his trial. It is the Petitioner's position that Section 124 of the Evidence Act is irrelevant to this matter as the same only relates to corroboration of the evidence of a minor in cases involving sexual offences. As for the statement by the Court of Appeal in the **David Kamau Gicharu** case that failure to call members of the public who arrested the appellant did not weaken the prosecution case, the Petitioner asserts that the said case is distinguishable as the appeal had arisen out of a conviction for a sexual offence and the Court was simply restating the principle of non-corroboration in such cases. He refers to the case of **George Ihugo Mwaura v Republic [2005] eKLR** for the proposition that a negative inference must be drawn where not all witnesses have been called and the evidence is barely adequate. The Petitioner insists that there was no complainant in the instant case thus detracting his right to a fair trial.

51. To further buttress the earlier point that this Court has supervisory jurisdiction, the Petitioner relies on the case of **Law Society of Kenya v Centre for Human Rights and Democracy & 13 others [2013] eKLR**. He concludes by reiterating his earlier submissions.

52. In the second set of submissions filed on 4th November, 2016, the Petitioner specifically addresses the doctrine of reverse onus in a criminal trial. He commences by distinguishing the South African decision in **The State v Samuel Manamela & 2 others, Constitutional Court of South Africa Case No. CCT 25/99**, stating that in that particular case the Court was addressing a provision of the law similar to Section 322 of the Penal Code of Kenya on handling stolen property and the Court found the impugned section to be constitutional.

53. The Petitioner's view is that any provision of law which shifts the burden of proof from the prosecution to an accused person in a criminal trial violates the doctrine of presumption of innocence entrenched in the Constitution. He cites various international covenants to demonstrate that the requirement that an accused person be presumed innocent until proven guilty according to the law is a principle that is jealously guarded by the international community. The international treaties cited are Article 11(1) of the United Nations Universal Declarations of Human Rights, Article 14(2) of the International Convention on Civil and Political Rights and Article 7 (b) of the African [Banjul] Charter on Human and Peoples Rights of 1981.

54. The Petitioner in pursuance of his cause against reversal of the onus for establishing guilt relies on scholarly articles by **Kuan Chung Ong: Statutory Reversals of Proof: Justifying Reversals and the Impact of Human Rights** <http://www.austlii.edu.au/journals> and **K. E. Dawkins: Statutory Presumptions and Reverse Onus Clauses in the Criminal Law: In Search of Rationality, Canterbury Law Review [Vol. 3, 1987] 214**. He also cites the decisions in **Peter Wafula Juma & 2 others v Republic [2014] eKLR, R v Oakes [1986] 1 R.C.S. 103** and **R v Lambert [2001] All ER 570**. Other decisions emphasized by the Petitioner are those of the South African Constitutional Court in **S v Bhulwana; S v Gwadiso CCT 12/95 1995 (12) BCLR 1579 (CC)** and **The State v Abraham Liebrecht Coetzee & 3 others 1995 (10) BCLR 1382 (CC)**.

55. The main issue in this Petition is whether Section 323 of the Penal Code is unconstitutional? The other issues are all offshoots of this issue and will be identified and dealt with at an appropriate stage of this judgement.

56. It is important to note at the outset that as the impugned Section was in force before the promulgation of the Constitution, Section 7(1) of the Sixth Schedule (Transitional and Consequential Provisions) of the Constitution comes into play. The said Section states:

“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”

57. Article 2(1) provides for the supremacy of the Constitution. This provision is closely followed by clause (4) of the same Article which declares any law, including customary law, that is inconsistent with the Constitution void to the extent of the inconsistency.

58. Since the parties are in agreement on the principles that guide the declaration of the constitutionality or otherwise of a statute, I only need to briefly state some of those principles for purposes of record. The first principle in determining the constitutionality of a statute or a provision thereof is the general presumption that Acts of Parliament are enacted in conformity with the Constitution-see **Ndyanabo** and **Alex Kyalo Mutuku**.

59. The second principle is that the onus of proving that a law is unconstitutional lies with the person saying so. The duty of the court then is to juxtapose the statute or its impugned provisions with the provisions of the Constitution as was held in **U.S. v Butler 297 U.S. 1 [1936]**. In the said case the Court stated that:

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”

The principle derived from this decision has been followed in many constitutional petitions in this jurisdiction.

60. On interpretation of the Constitution, the Supreme Court stated in **The Matter of the Principle of Gender Representation In the National Assembly and the Senate, SC Advisory Opinion No. 2 of**

2012 as follows:

“A consideration of different constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards express safeguards and public commitment. But the Kenyan Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and interact among themselves and with their public institutions. Where a Constitution takes such a fused form in terms, we believe a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other.”

61. Thirdly, the Court must also be guided by the cardinal rule that a statute should be construed according to the intention expressed in the statute itself-see **Halsbury’s Laws of England, 4th ed. Vol. 44(1) para 1372b**. The Court of Appeal confirmed this principle when it stated in **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** that:

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...”

62. In stating that particular principle of interpretation the Court cited the Australian decision in the case of **Amalgamated Society of Engineers v Adelaide Steamship Company Ltd. & others (1920) 28 CLR 129** where it was held that:

“The fundamental rule of interpretation, to which all others are subordinate, is that statute is to be expounded according to the intent of parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning....”

63. The fourth principle is that the Constitution should be given a purposive and liberal interpretation-see **Anthony Njenga Mbuthi v Attorney General & 3 others [2015] eKLR**. This principle is hinged on Article 259(1) of the Constitution which provides the tools for interpreting the Constitution as follows:

“This Constitution shall be interpreted in a manner that –

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) Contributes to good governance.”

There are other principles of constitutional interpretation but the ones I have stated will suffice for the purpose of this decision.

64. The matter herein does not in any way invite the Court to travel a novel path in the sense that courts in other jurisdictions have addressed concerns over provisions similar to those impugned by the Petitioner.

Various provisions of the Penal Code have also been challenged within our jurisdiction.

65. The impugned Section 323 of the Penal Code provides that:

“Any person who has been detained as a result of the exercise of the powers conferred by section 26 of the Criminal Procedure Code and is charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account to the satisfaction of the court of how he came by the same, is guilty of a misdemeanour.”

66. The Petitioner seems not to be contending that Section 26 of the CPC is unconstitutional but for the sake of enabling a better understating of Section 323 of the Penal Code, the said Section 26 of the CPC to be reproduced in this judgement. It states:

“A police officer, or other person authorized in writing in that behalf by the Commissioner of Police, may stop, search and detain-

(a)...

(b)...

(c) any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained.”

67. So what is the purpose of that provision of the law or what was the intention of Parliament? It is important to remember that a statute should be interpreted as one whole. In Kenya, the Penal Code is the substantive written law intended to cover all aspects of criminal law. It prohibits certain acts and omissions and prescribes the appropriate punishment in relation to their commission or omission. Section 323 falls under the Penal Code. Hence Section 323 prohibits certain acts and provides the punishment for those who commit the banned deeds. It is therefore a crime deterrent device according to the scholarly Article **“The Law of Unlawful Possession”** by P. K. Menon, (a former Director of the Criminal Law Programme, University of the West Indies, Faculty of Law) in the **Lawyer of the Americas, Vol. 8, No. 3 (Oct., 1976), pp. 743-761.**

68. Kenya's Penal Code is a pre-colonial law borrowing from the Indian Statute of 1856 but since modified through various amendments. Provisions similar to Section 323 are found in other former British colonies like India. In the case of **The High Court in Mumbai Criminal Appeal No. 278 of 1969 Champalal Ganeshmal v The State of Maharashtra** a similar provision was traced to the English Law of 2 & 8 Victoria C. 71, Section XXIV which provides as follows:

“That every person who shall be brought before any of the said magistrates charged with having in his possession or conveying in any manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an account to the satisfaction of such magistrate how he came by the same, shall be deemed guilty of a misdemeanour.”

69. The Court in Mumbai established that the said provision of the English statute was enacted in the Indian law under Section 85, Clause (1) of Act XIII the Indian Statute of 1856 which provides that:

“Whoever has in his possession, or conveys in any manner, anything which may be reasonably suspected of being stolen or fraudulently obtained, shall, if he fail to account satisfactorily how he came by the same, be liable to a penalty not exceeding one hundred Rupees, or to imprisonment, with or without hard labour, for any terra not exceeding three months.”

A similar provision was found in the then United Kingdom Metropolitan Police Courts Act of 1839 under

its Section 24 which provided that:

“ . . . every Person who shall be brought before any of the said Magistrates charged with having in his Possession or conveying in any Manner anything which may be reasonably suspected of being stolen or unlawfully obtained, and who shall not give an Account to the Satisfaction of such Magistrate how he came by the same, shall be deemed guilty of a Misdemeanour, and shall be liable to a Penalty of not more than Five Pounds, or, in the Discretion of the Magistrate, may be imprisoned in any Gaol or House of Correction within the Metropolitan Police District, with or without hard labour, for any Time not exceeding Two Calendar Months.”

70. Under Section 66 of the 1839 Act, a constable could detain and search any vessel, cart or carriage in or upon which there shall be reason to suspect that anything stolen or unlawfully obtained may be found. The search could also extend to any person reasonably suspected of having or conveying such a thing.

71. Locally, Muli, J in **Charo v R. [1982] KLR 1** stated that the ingredients of the offence created by Section 323 of the Penal Code are:

- (i) detention pursuant to Section 26 CPC;
- (ii) possession of anything capable of being stolen or unlawfully obtained;
- (iii) reasonable suspicion that the property has been stolen or unlawfully obtained; and
- (iv) failure to give an account to the satisfaction of the court.

72. In **Attorney General of Hong Kong v Lee Kwong-Kut [1993] 2 LRC 259** where the respondent had been charged with an offence contrary to Section 30 of the Summary Offence Ordinance which is similar to Section 323 of our Penal Code, the Privy Council (Lord Woolf) held that:

“S.30 is ... an offence which contains three elements (1) the possession or conveying of the property by the defendant (2) the reasonable suspicion that the property has been stolen or unlawfully obtained and (3) the inability of the defendant to give a satisfactory account of how the property came into his possession.”

73. The main bone of contention is that an accused person becomes guilty of the offence if he does not give an account to the satisfaction of the court of how he came by the item suspected to have been stolen or unlawfully obtained. To clear the way it is important to first deal with the Petitioner's concerns that it is upon the basis of mere suspicion that a charge under Section 323 is crafted.

74. The provision requires that there be a reasonable suspicion in existence, and the suspicion is that the property was stolen or unlawfully obtained. Menon (supra) suggests that since the term 'reasonable' is difficult to define **“... it is sufficient that the facts and surrounding circumstances are such as to allow a person of prudence and caution to suspect that the goods in question are stolen or unlawfully obtained”**.

75. In **O'hara** (supra) Lord Hope of Craighead stated at page 14 that:

“The ‘reasonableness’ of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in article 5(1) (c) [section 5(1) (e)]. The court agrees with the Commission and the Government that having a ‘reasonable suspicion’ presupposes the existence of facts or information which would justify an objective observer that the person concerned may have committed the offence. What may be regarded as ‘reasonable’ will however depend upon all the circumstances?”

76. Hence the prosecution ought to prove beyond reasonable doubt that the charges were preferred not

based on mere suspicion but on reasonable suspicion. The Petitioner submits that since he had informed the police, at the time of his arrest, about the source of the motorcycle, he should not have been charged. The respondents on the other hand argue that the Petitioner did not have proof of ownership hence the arrest. The Petitioner seems to suggest that the arrest was done arbitrarily. In the **O'hara** case it was held by Lord Steyn that:

“Certain general propositions about the powers of constables under a section such as section 12(1) can now be summarised. (1) In order to have a reasonable suspicion the constable need not have evidence amounting to a prima facie case. Ex hypothesi one is considering a preliminary stage of the investigation and information from an informer or a tip-off from a member of the public may be enough: Hussien v. Chong Fook Kam [1970] A.C. 942, 949. (2) Hearsay information may therefore afford a constable a reasonable ground to arrest. Such information may come from other officers: Hussien's case, ibid. (3) The information which causes the constable to be suspicious of the individual must be in existence to the knowledge of the police officer at the time he makes the arrest”

77. In **O'hara** the appellant was aggrieved with his arrest under the Prevention of Terrorism (Temporary Provisions) Act 1984. He termed the arrest as being prima facie unlawful. Section 12(1) of the said Act states:

“...a constable may arrest without warrant a person whom he has reasonable grounds for suspecting to be-

....

"(b) a person who is or has been concerned in the commission, preparation or instigation of acts of terrorism to which this Part of this Act applies;..."

78. In my estimation therefore a police officer has a statutory duty to arrest pursuant to Section 26 of the CPC on reasonable suspicion. Based on Section 26 and Lord Steyn's reasoning above there would be no breach of the Petitioner's rights if the prosecution proves that the suspicion was reasonable. The trial is at the stage where the Court has found that the Petitioner has a case to answer as a prima facie case was established by the prosecution. It is therefore difficult to point out any breach and it would be jumping the gun to make such a conclusion without the benefit of the proceedings.

79. The Petitioner's averment that the prosecution called two witnesses only and he ought not to have been put on his defence cannot be entertained by this Court. The laws of this country have provided procedures for dealing with criminal matters and interrogating the proceedings before the Magistrate's Court through this case would indeed amount to interference with the work of a Court that has been established by the law. The respondents are indeed correct that the only way the Petitioner can challenge the outcome of his trial or anything related to that trial is through an appeal. The Petitioner has done that once before and his appeal was successful as he was directed to present his defence before a different magistrate.

80. It is not in issue that the Petitioner's right to fair hearing, in the sense that he took plea and was accorded the opportunity to cross-examine witnesses, was not violated. At this point I agree with the respondents that if, at the end of the trial, the Petitioner is of the view that the evidence adduced by the prosecution is insufficient to support existence of reasonable suspicion that is an issue for an appeal.

81. The position I have taken is supported by the decision in **Meixner & another v Attorney General [2005] 2KLR 189** which was one of the authorities cited by the Petitioner. In that case the Court of Appeal held that:

“Having regard to the law, we agree with the finding of the learned judge that the sufficiency or otherwise of the evidence to support the charge of murder goes to the merits of the decision of the Attorney General and not to the legality of the decision. The other grounds which the

appellants claim were ignored ultimately raise the question whether the evidence gathered by the prosecution is sufficient to support the charge.

The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act. There are also constitutional safeguards stipulated in section 77 of the Constitution to be observed in respect of both criminal prosecutions and during trials. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge. Had leave been granted in this case, the appellants would have caused the judicial review court to embark upon an examination and appraisal of the evidence of about 40 witnesses with a view to show their innocence. That is hardly the function of the judicial review court. It would indeed, be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court.”

82. I find that this is the appropriate stage to address the Petitioner’s assertion that his prosecution was commenced in the absence of a formal complaint by any complainant. Not much emphasis was placed on this issue by the parties. In **Republic v Faith Wangoi [2015] eKLR**, R. Nyakundi, J citing the decision of the Court of Appeal in **Roy Richard Elimma & another v Republic, Criminal Appeal No. 67 of 2002** concluded that in a criminal trial the State is the complainant as it is in its name that all criminal cases are instituted. I agree with the learned Judge. The manner in which Section 323 is drafted clearly does not envisage the owner of the suspected stolen property being identified. The victim of the crime of theft is at the time of the arrest and prosecution unknown although they may surface later thus necessitating the amendment of the charge. The Petitioner’s submission that there was no formal complaint is therefore without merit and so is his contention that that there was no complainant.

83. I now turn to the main issue in this Petition. A perusal of the pleadings discloses that the Petitioner's real concern is that the requirement to give an account is equivalent to shifting the burden of proof and as such infringing upon the right to fair hearing, in particular, the presumption of innocence until proven guilty.

84. The principle that an accused person is presumed innocent until proven guilty by a court of law did not arrive on our shores with the promulgation of the current Constitution. It is a doctrine that has long been accepted in the criminal justice systems of most countries in the world. That doctrine was forcefully expressed by Lord Viscount Sankey, L. C., in **Woolmington v. D.P.P. [1935] A.C. 462** thus:

"Throughout the web of English Criminal Law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt subject to...the defence of insanity and subject also to any statutory exemption. If, at the end of and on the whole of the case, there is a reasonable doubt, created by either the prosecution or the prisoner... the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

85. The exceptions to the principle are where an accused person raises the defence of insanity or where a statute shifts the burden to the accused person.

86. The principle of presumption of innocence is a fundamental component of a fair trial in a criminal process and is indeed a right protected under article 50(2)(a) of the Constitution which states that **“[e]very accused person has a right to a fair trial, which includes the right...to be presumed innocent until the contrary is proved.”** One does not need to resort to international treaties in order to understand and appreciate the importance of this protection.

87. Discussing the doctrine of presumption of innocence, the South African Constitutional Court stated that it is the onus of the State to prove the elements of the offence beyond reasonable doubt. In essence the principle one draws out is that the burden of proof beyond reasonable never falls on the accused person. It is never the duty of an accused person to assist the prosecution to adduce evidence that will

lead to his conviction. The position taken by the South African Court was expressed by Madala, J in **Osman and another v Attorney-General for the Transvaal (CCT 37/97) 1998 ZACC 14** as follows:

“[13] This Court has dealt with the presumption of innocence at length in Zuma and in Bhulwana; Gwadiso, and consequently I do not propose to examine the concept in any further detail in this judgment. The principles that may be distilled from the jurisprudence set out in those cases which are of particular relevance to the case at hand are: (a) that the state bears the burden of proving each of the essential elements of the offence charged and there is no onus on the accused to disprove any of them; and (b) that the standard of proof is one of proof beyond reasonable doubt.”

88. Still on the international scene, in the case of the **Government of The Virgin Islands v Miguel Angel Torres Cr. No. 7-1958** the Court held that:

“Due process of law in a criminal case includes this presumption of innocence and places the burden on the prosecution to prove the guilt of the accused beyond a reasonable doubt by the evidence which it offers and the inferences which may reasonably be drawn therefrom.”

89. Does the requirement to give an account therefore presume guilt on the Petitioner which he is required to rebut? According to the Petitioner, Section 323 of the Penal Code presumes his guilt until an account is given to the satisfaction of the court. His position is that Section 323 automatically requires him to give an explanation as to how he came to be in possession of or in conveyance of the motorcycle in issue. It is his submission that if he elects to remain silent he will be found guilty.

90. The submission by the Attorney General tends to suggest that the guilt of the accused is established and the offence proved once the accused admits that he was arrested with a thing that was reasonably suspected to have been stolen or unlawfully obtained. However, in **Kimanzi v Republic [1983] KLR 325**, Porter, J found that even if an accused admits all the assertions set out in the charge under Section 323 of the Penal Code, it is a mandatory requirement that he must be asked whether he has any explanation for his possession of the said property. In **Charo** (supra) the learned Judge held that failure to invite the accused person to give an explanation is fatal to the prosecution case. In **Kimanzi** (supra) the learned Judge held that it is the failure to give an account to the satisfaction of the court that renders the accused person guilty.

91. In **Chege v Republic [1983] eKLR**, Porter, Ag. J expounded that such an admission by the accused about his arrest while in possession or conveying of a thing reasonably suspected to be stolen or unlawfully obtained is not an admission that the suspicion is reasonable and it is upon the prosecution to prove the reasonableness of the suspicion.

92. In **Chege** (supra) the Court followed **Koech** (supra) and stated that:

“...at page 109 it was pointed out that under section 323 of the Penal Code the offence with which an accused is charged was not that he had in possession or was conveying in any manner anything which might be reasonably suspected of having been stolen or unlawfully obtained but that if he admitted to those facts and failed to give an account to the satisfaction of the court of how he came by the same, then and only then would he be guilty of an offence.”

93. According to **Menon** (supra) any reasonable and true explanation, not necessarily one that convinces the magistrate suffices as a satisfactory explanation. To expound on this point he refers to the finding by the Court of Appeal of Jamaica in **R v Doreen Hill (1974) Court of Appeal Jamaica**. Jamaica shares a similar history with Kenya in that it was a former British colony.

94. In **Doreen Hill** a constable received information concerning a robbery, housebreaking and larceny at a certain area. On that same day he came across the appellant in the same area wearing some gold jewelry. When he approached her she suddenly put her bejeweled hand behind her back. When questioned about the same she explained that she had bought them from someone in another area. The constable told her

that he did not believe her story and arrested her. On the way to the police station she made an attempt to escape and was rearrested. At the police station the police officer informed her that he believed that the items had been unlawfully obtained. The appellant was then charged. Her account to the magistrate, which was not found satisfactory, was that she had been given some of the jewelry by her boyfriend and had bought the others from a travelling salesman. She was nevertheless convicted. On appeal the Court found that her explanation was reasonable and allowed the appeal. In reaching the decision the Court cited **King v Brown [1929] Clark's Supreme Court Judgements, 301** where it was held that:

“...though the burden is on the prisoner, the evidence must be viewed reasonably, and if, it appears that the account given by the prisoner is one which appears to be reasonably true, he should not be convicted”

95. Moving back to the issue of the requirement to give an account and whether that infringes upon the rights of the Petitioner to a fair trial, I note that courts have before held that the offence is only established when there is failure to give an account to the satisfaction of the court. For instance, in **Joseph Khakavo & another v Republic [2007] eKLR** the Court stated that:

“The offence had not been constituted unless the appellants had been required to give an explanation of how they had come to be in possession of the properties and had failed to give an explanation to the satisfaction of the court.”

96. In **Lee Kwong-Ku** (supra) the Court held that the inability of the defendant to give a satisfactory account of how the property came into his possession was **“an ingredient of the offence which places the onus on the defendant, in order to avoid a finding of guilt, to establish that he is able to give an explanation as to his innocent possession of the property.”**

97. Hence to answer the question in part is that there is a requirement by Section 323 of the Penal Code to give an account. However, failure to give an account is only one of the ingredients of the offence. The prosecution must establish that the item found with an accused person was reasonably suspected to have been stolen or unlawfully obtained.

98. According to the Petitioner the Section invites a reversal of onus contrary to the constitutional principle of innocent until proven to the contrary. In **Peter Wafula Juma case & 2 others** (supra) F. Gikonyo, J explained that there is a difference between legal burden of proof and the evidential burden of proof. He emphasised that the legal burden of proof does not shift and referred to **Halsbury's Laws of England, 4th Edition, Volume 17, paragraph 13** which defines it as **“...the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.”** The learned Judge then proceeded to cite paragraph 15 of the same volume of the said treatise and concluded that **“[e]vidential burden is the basis for the practice in criminal law where the trial court makes a ruling as to whether the prosecution has adduced prima facie evidence as to warrant the accused person to be placed on his defence.”**

99. In the instant case, the respondents asserted that the requirement to give an account was merely a rule of evidence, in other words evidential burden, which does not impose a legal burden on an accused person to disprove the evidence. After reviewing various decisions, F. Gikonyo, J in **Peter Wafula Juma & 2 others** (supra) concluded that:

“It is worth of note that, one might say that normally, creation of evidential burden on a party, or a shifting of an evidential burden only is unlikely to be held unconstitutional, but what really matters is the court testing the constitutionality of the shift; the decisive character and effect of the evidential burden so created on the rights of the accused.”

100. In **The State v Abraham Liebrecht Coetzee & 3 others, Case CCT 50/95**, the Constitutional Court of South Africa (Langa, J) commenting on when a reverse onus should be deemed unconstitutional held that:

“[38] I consider that both Holmes and Schwartz are distinguishable from the present case. In both, the majority of the court reached their respective decisions on the basis that the provisions they were dealing with did not impose a reverse onus and that there was no danger that the accused could be convicted despite the existence of a reasonable doubt. Section 332(5) involves elements which have to be proved by the accused and which form the substance of the offence. In the circumstances of this case, I am of the view that the approach in Whyte is to be preferred in considering the effect of section 332(5) on the presumption of innocence. The provision imposes an onus on the accused to prove an element which is relevant to the verdict. It should make no difference in principle whether or not an offence created by statute is formulated in a way which makes proof of certain facts an exemption to the offence. What matters in the end is the substance of the offence. If a provision is part of the substance of the offence and the statute is formulated in a way which permits a conviction despite the existence of a reasonable doubt in regard to that substantial part, the presumption of innocence is breached.” [Emphasis supplied]

101. Once the legal burden shifts it presents an issue of unconstitutionality for contravening the principle of innocence until the contrary is proved. As already demonstrated, an accused person charged under Section 323 is expected to give an explanation to the satisfaction of the court as to how he came by the property suspected to have been stolen or unlawfully obtained. Whether this amounts to shifting the burden of proof in a manner that infringes on his constitutional rights is what needs to be answered.

102. In **Oakes** (supra), the Court set the test for determining the legitimacy of a reverse onus provision as follows:

“To determine whether a particular reverse provision is legitimate, Martin J.A. outlined a two-pronged inquiry. First it is necessary to pass a threshold test which he explained as follows, at p. 146:

The threshold question in determining the legitimacy of a particular reverse onus provision is whether the reverse onus clause is justifiable in the sense that it is reasonable for Parliament to place the burden of proof on the accused in relation of an ingredient of the offence in question. In determining the threshold question consideration should be given to a number of factors as: (a) the magnitude of the evil sought to be suppressed, which may be measured by the gravity of the harm resulting from the offence or by the frequency of the occurrence of the offence or both criteria; (b) the difficulty of the prosecution making proof of the presumed fact, and (c) the relative ease with which the accused may prove or disprove the presumed fact. Manifestly, a reverse onus provision placing the burden of proof on the accused with respect to a fact which is not rationally open to him to prove or disprove cannot be justified.

If the reverse onus provision meets these criteria, due regard having been given to Parliament’s assessment of the need for the provision, a second test must then be satisfied. This second test was described by Martin J.A. as the “rational connection test”. According to it, to be reasonable, the proven fact (e.g., possession) must rationally tend to prove the presumed fact (e.g., an intention to traffic). In other words, the proven fact must raise a probability that the presumed fact exists.”

103. In the Kenyan context regard should always be had to Article 24(1) of the Constitution on the limitation of rights. The test must be in the terms of that Article which states that:

“A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) The nature of the right or fundamental freedom;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitation;

(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.”

104. Therefore, any legislation that purports to limit the rights and fundamental freedoms of an individual must pass the standards set by the Constitution. Above all, it must be remembered that the right to a fair trial as guaranteed by Article 50 is a non-derogable right by virtue of Article 25.

105. In **Osman & another** (supra) the South African Constitutional Court was faced with a challenge to a provision similar to Section 323. The Court first identified the ingredients of that impugned provision as follows:

“[8] The impugned provision of the Act, section 36, states:

“Any person who is found in possession of any goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959 (Act 57 of 1959), in regard to which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.”

The elements of the offence are that: (a) the accused person must actually be found in possession of goods; (b) a suspicion founded on reasonable grounds must exist in the mind of the finder (or possibly some other person) that the goods had been stolen; and (c) there must be an inability on the part of the person found in possession to give a satisfactory account of such possession. It is the last requirement - the inability to give a satisfactory explanation - which raises the challenge to section 36 in the case before us.”

[Citations omitted].

106. What were the facts of the Osman case? The appellants were charged in the Regional Court for the North West Province for contravening Section 36 of the General Law Amendment Act 62 of 1955. It was alleged that they were found in possession of tyres, which were reasonably suspected to have been stolen. The appellants were allegedly unable to give a satisfactory account of such possession. Their challenge to the constitutionality of the provision was dismissed in the Transvaal High Court and they appealed to the Constitutional Court.

107. In the High Court, the appellants’ case was that the provision affected their right not to be compelled to make a confession or admission which could be used in evidence against them and to be presumed innocent and to remain silent during the trial and not to testify during trial. In dismissing the appellants’ case the High Court held that the impugned section was not in conflict with the constitutional provisions which enshrine the right to a fair trial and in particular it held that the section was not in conflict with the right of an accused person to remain silent at all stages of the trial and not to be compelled to testify or to become a witness against himself or herself.

108. The Constitutional Court of South Africa upon considering the impugned provision held that:

“[16] The plain language of section 36 does not suggest that the inability to give a satisfactory account of possession is anything other than an element of the offence, and thus the burden of proving such element still rests squarely on the state throughout the trial. The consequences of a failure to give evidence depend upon the strength of the state case. If the prosecution

fails to discharge its onus, the accused is entitled to be acquitted. If the case is strong enough to warrant a conviction in the absence of any countervailing evidence by or on behalf of the accused, the accused cannot be heard to say that a conviction in such circumstances infringes her or his right to silence. At no point does the onus of proof shift, nor does the accused ever lose the protection of the presumption of innocence. Appellants' contention that the practical effect of section 36 is similar to that of a reverse onus provision is therefore without merit. In the light of the foregoing analysis, I am of the view that section 36 does not violate the right to be presumed innocent."

[Citations omitted]

109. The Court proceeded to dismiss the appeal stating that:

"[22] Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice. The circumstances in which it would be constitutionally permissible for a court to draw an adverse inference from the failure of an accused person to testify personally is not a matter which we are called upon to decide in this case and therefore I expressly refrain from doing so.

[23] Where the prosecution has proved a reasonable suspicion that the goods are stolen, that they were found in possession of the accused, and that the accused has not satisfactorily accounted for such possession or led evidence to the contrary, this will ordinarily establish a prima facie case of a contravention of the section. Absent any evidence to the contrary, it may be possible to infer that the accused is unable to give a satisfactory account. An accused, when faced with the assembled evidence of his or her possession may find it wise to furnish a defence with or without his or her own testimony at any stage of the trial, but that is a practical impetus and not one imposed by the law. The election to testify or to lead evidence remains that of the accused. The impugned section imposes no legal compulsion on the accused. The choice to testify or not is left entirely to the accused. He or she need not testify but may call the evidence of other witnesses in his or her defence. The accused may be content to defend himself or herself by exploration of some technical defect within the indictment alone. The choice remains that of the accused. The important point is that the choice cannot be forced upon him or her."

Similarly, the Court in **Lambert** (supra) held that:

"On the other hand, an evidential burden requiring the accused to explain his possession of the goods would not have amounted to a violation of the constitutional right of silence."

[Emphasis supplied]

110. Section 323 of the Penal code ought to be examined to determine if it imposes upon an accused person an evidential or legal burden. Does it take away the accused person's right to remain silent and not to testify in the proceedings? Although the Petitioner does not claim that the law under which he is charged disentitles him of his right to remain silent, the right to be presumed innocent is intertwined with the rights to remain silent and not to give self-incriminating evidence.

111. In **Osman**, the Constitutional Court of South Africa cited with approval Lord Mustill, on the facets of the right to silence, in **R v Director of Serious Fraud Office, Ex Parte Smith [1993] AC 1 [HL]** at 30E-31A thus:

“This expression arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified: (1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies. (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them. (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind. (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock. (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority. (6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.”

112. In **S v Manamela & another 1999 (9) BCLR 994 (W)** the Constitutional Court of South Africa turned its sights on Section 37(1) on the General Law Amendment Act 62 of 1955 which read as follows:

“Any person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959, without having reasonable cause, proof of which shall be on such first-mentioned person, for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory.”

The majority (Madala, Sachs and Yacobs) with Regan, J and Cameron, AJ dissenting held that the words **“proof of which shall be on such first-mentioned person”** imposed an unjustifiable reverse onus on an accused person. The said phrase was declared inconsistent with the Constitution and invalid. In addition a last sentence was read in thus: **“In the absence of evidence to the contrary which raises a reasonable doubt, proof of such possession shall be sufficient evidence of the absence of reasonable cause.”**

113. Looking at **Osman** and **Manamela** one can easily get the impression that there is a thin line between a provision that shifts the burden to an accused person thus rendering it unconstitutional and one that meets the constitutional requirements for reversing an onus. The provisions that were the subjects of the two cases follow one another in the same statute and were all meant to address the vice of people taking possession of property without enquiring into the legitimacy of the source of such property. However, a closer look at the provisions that were the subject of the decisions show a different picture. In the **Osman** case, the provision was similar to the one being challenged by the Petitioner herein. The provision simply required an accused person to give a satisfactory explanation as to how he came by the goods that were suspected to have been stolen or unlawfully obtained. On the other hand, the provision that was the subject of the **Manamela** case required the accused person to demonstrate that the person he bought the goods from was the owner of those goods. That provision therefore required an accused person to do more. It expected a buyer to carry out investigations before making a purchase. Such a provision was likely to net an innocent purchaser of goods as a purchaser was expected to explain matters that were not within his knowledge and which he could not easily establish.

114. Section 323 of the Penal Code is meant to dissuade members of society from assisting thieves in moving or disposing stolen property. In a society like ours where theft is common, such a provision has its purpose. The Court cannot therefore close its eyes to the happenings in the society. That is not to say

that the Court should turn a blind eye to laws that are unconstitutional. If a provision of a statute is unconstitutional the Court must state so and proceed to declare that provision void.

115. From the case law cited it is clear that the burden imposed on an accused person is an evidential one. Although the provision appears to require an accused person to give a satisfactory account of how he came by the item suspected to have been stolen or unlawfully obtained, he need not give an account for the burden remains with the prosecution to satisfy the trial court through evidence that there is sufficient reason to suspect that the property was stolen or unlawful obtained. The prosecution must also prove that no satisfactory explanation has been put forth by an accused person. If an accused person opts to keep quiet, then like in every other criminal case the risk attendant to that choice is conviction. For conviction to occur the accused person need not prove or disapprove anything but whatever explanation he gives, whether through his own testimony or that of his witnesses or by way of cross-examination, must be taken into account in reaching a decision as to his innocence or guilt.

116. In **Attorney-General's Reference (No. 1 of 2004) R v Edwards & others [2004] EWCA Crim 1025 (29 April 2004)** the European Court of Human Rights in addressing a reference on the effect of reverse onus provisions on the presumption of innocence, which is a principle entrenched in the European Convention on Human Rights, gave the guiding principles as follows:

"The General Guidance

A) Courts should strongly discourage the citation of authority to them other than the decision of the House of Lords in *Johnstone* and this guidance. *Johnstone* is at present the latest word on the subject.

B) The common law (the golden thread) and the language of Article 6(2) have the same effect. Both permit legal reverse burdens of proof or presumptions in the appropriate circumstances.

C) Reverse legal burdens are probably justified if the overall burden of proof is on the prosecution i.e., the prosecution has to prove the essential ingredients of the offence, but there is a situation where there are significant reasons why it is fair and reasonable to deny the accused the general protection normally guaranteed by the presumption of innocence.

D) Where the exception goes no further than is reasonably necessary to achieve the objective of the reverse burden (i.e. it is proportionate), it is sufficient if the exception is reasonably necessary in all the circumstances. The assumption should be that Parliament would not have made an exception without good reason. While the judge must make his own decision as to whether there is a contravention of Article 6, the task of a judge is to "review" Parliament's approach, as Lord Nicholls indicates.

E) If only an evidential burden is placed on the defendant there will be no risk of contravention of Article 6(2).

F) When ascertaining whether an exception is justified, the court must construe the provision to ascertain what will be the realistic effects of the reverse burden. In doing this the courts should be more concerned with substance than form. If the proper interpretation is that the statutory provision creates an offence plus an exception that will in itself be a strong indication that there is no contravention of Article 6(2).

G) The easier it is for the accused to discharge the burden the more likely it is that the reverse burden is justified. This will be the case where the facts are within the defendant's own knowledge. How difficult it would be for the prosecution to establish the facts is also indicative of whether a reverse legal burden is justified.

H) The ultimate question is: would the exception prevent a fair trial? If it would, it must

either be read down if this is possible; otherwise it should be declared incompatible.

I) Caution must be exercised when considering the seriousness of the offence and the power of punishment. The need for a reverse burden is not necessarily reflected by the gravity of the offence, though, from a defendant's point of view, the more serious the offence, the more important it is that there is no interference with the presumption of innocence.

J) If guidance is needed as to the approach of the European Court of Human Rights, that is provided by the Salabiaku case at para 28 of the judgment where it is stated that "Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires states to confine them within reasonable limits which take into account the importance of what is at stake and maintains the rights of the defence".

117. In my view Section 323 does not put a burden on an accused person that cannot be easily and reasonably discharged. The accused person is simply required to give an explanation on a balance of probabilities as to how he came by the property in question. It is only the accused person who can explain how he came by a certain item. It would indeed be difficult to expect the finder (the police) to know the circumstances under which an item that is reasonably suspected to have been stolen or unlawfully obtained landed in the hands of an accused person. In my view, the provision does not carry the inherent risk of innocent persons being got in its web and convicted.

118. I therefore find that this Petition lacks merit and the same is dismissed. This being a matter that sought to test the boundaries of constitutional protection of fundamental rights, I direct each party to meet own costs of the proceedings.

119. Had the Petitioner succeeded, I would not have awarded any damages. The case of **Peter Kariuki v Attorney General [2014] eKLR** cited by the Petitioner in support of his plea for compensation dealt with a situation where it had been established that the appellant had been subjected to an unfair trial. In the case at hand, the Petitioner has so far undergone a fair trial. He has been accused of committing an offence known to the law. The ideal order would have been that of Mumbi, J in **Anthony Njenga Mbuti & 5 others v Attorney General & 3 others [2015] eKLR** wherein she stated that:

“The petitioners have prayed for compensation for the violation of their rights through the application of the peace bond to them. The Court recognises that an injustice has been done, over many decades, to many people. It was an injustice that resulted from provisions in the law, whose constitutionality had not been tested. In the circumstances, it would place an undue burden on the taxpayer to order that the State pays compensation to the petitioners, for then it would need to make similar recompense to all those others who have been subjected to the peace bond statutes. In the circumstances, I am not able to make any orders for compensation to the petitioners.”

120. The final order in this matter is that the Petition fails and the same is dismissed with no order as to costs.

Dated and signed at Malindi this 27th day of June, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT

Dated, delivered and signed at Busia this 12th day of July, 2017.

K. W. KIARE,

JUDGE OF THE HIGH COURT