



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**PETITION NO. 8 OF 2016**

**ALEX OTIENO ONYANGO ..... PETITIONER**

**VERSUS**

**THE DIRECTOR OF**

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

**THE RESIDENT MAGISTRATE'S**

**COURT AT MALINDI ..... 2<sup>ND</sup> RESPONDENT**

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

**JUDGEMENT**

There is before the court a constitutional petition dated 29<sup>th</sup> March, 2016 orally amended on 20<sup>th</sup> June, 2016. Accompanying the petition is a notice of motion application similarly dated, that sought for and was granted conservatory orders against the arrest of and prosecution of the Petitioner and interlocutory orders viz stay of proceedings and any further action in Malindi **CMCR No. 206 of 2015 R v Alex Otieno Onyango** pending the hearing and determination of the petition. The petition is supported by the supporting and supplementary affidavits of the petitioner.

The Petitioner seeks the following reliefs: -

- 1. A declaration that the trial of the Petitioner in the circumstances of this case is unconstitutional, null and void.***
- 2. To the extent that Section 194 of the Criminal Procedure Code appears to permit the trial of an accused person in his absence for reasons other than his conduct during the trial, the said Section is unconstitutional null and void.***
- 3. In the alternative and without prejudice to the foregoing, the reading of Section 194 of the Criminal Procedure Code as permissive of the exclusion of an accused person from his trial for reasons other than the disruptive conduct of an accused person during trial, is unlawful null and void as being contrary to Article 50 (2)(h) of the Constitution (amended to read 50 (2)(f) ),***
- 4. (spent)***

5. *(spent)*

6. *An order of certiorari to remove into the High Court and to quash the entire proceedings and all consequential orders in Criminal Case No. 2016 of 2015 R v Alex Otieno Onyango*

7. *An order of prohibition directed against the 2nd Respondent, continuing or conducting proceedings in Criminal Case No. 2016 of 2015 RV Alex Otieno Onyango*

8. *Damages*

9. *All necessary and consequential directions and orders be made.*

10. *The costs of and incidental be borne by the Respondent.*

The Petitioner has approached the court in its jurisdiction as a constitutional court by invoking Articles 20, 22, 23, 25, 26, 157, 159, 165, and 259 of the Constitution. The Petitioner basis his claim on these summarised facts: He was charged with the offence of defilement under section 8 (1) as read with 8(3) of the Sexual Offences Act and arraigned in court. Subsequently, having pleaded not guilty, the trial commenced before **Hon.** C.M. Nzibe, RM on 12.05.2015 by a team of two prosecutors, Mr. Alenga and Mr. Nyongesa from the DPP. The Petitioner had a defence team of two advocates, Mr. S. Gikanana and S. Obaga present.

The alleged complainant was examined in chief, then at the time of cross-examination his defence Counsel made an oral application under Section 194 of the Criminal Procedure Code (CPC) to exempt him from his own trial with an aim of allowing the defence ample time to cross-examine the complaint. The court allowed the application without seeking his opinion though he had not disrupted the trial nor conducted himself in a manner to justify the exclusion.

When the trial resumed on 25.02.2016, the petitioner informed the court through his advocate about his lack of confidence in the manner in which his trial was being conducted and sought for the reclusion of the court from the trial. This application was rejected via a ruling delivered on 04.03.2016 and the matter fixed for a two-day hearing on 9th and 10th, June, 2016. Thus he grew apprehensive that as the matter had proceeded unlawfully and may so continue and thereby summing up to a nullity, he may be at risk of being subjected to another trial in the future. He states that he sought the earliest opportunity to commence trial before a different magistrate but the 3rd Defendant denied him the said opportunity.

The Petitioner states that there is injury suffered or likely to be suffered on his part due to infringement of his fundamental rights and freedoms. He has pleaded that his right under Article 25 (c) on fair trial has been compromised for reasons that the trial court took into consideration extraneous matters in reaching its conclusion to exclude him from trial. Secondly, that fairness in trial implies meeting one's accuser face to face unless it is impossible to do so in which case the accused must still be accorded an opportunity to personally participate in his own trial in particular by hearing and watching them testify first hand. Hence the comfort of the alleged victim, though important, cannot be elevated under any circumstances beyond that of the accused person's right to be present as the alleged victim testifies.

Further to this, Section 213 and 307 of the CPC have the combined effect of availing an opportunity to the accused person to be present and participate in his own trial. Section 213 gives the accused the right to ask questions even where his advocate already has and gives the right to address the court or seek or offer clarification. Section 307 invites the accused to comment on the evidence of the prosecution with the presupposition that the accused was present at trial and heard the witnesses. Thus the dispensing with of his presence was a violation of this right. In his estimation, therefore the proceedings are null and void and the 2<sup>nd</sup> Respondent action was inimical to his rights.

The Petitioner also pleaded that his right under Article 50 (2) (f) of the Constitution was violated as he was offered no explanation by his advocates nor by the 2nd Respondent as to his right to be present in court and the circumstances under which he could be excluded. The Petitioner also avers that the 2nd

Resolution applied wrong principles in reaching the decision to exclude him. The decision was contrary to Article 10 and it was capricious, irrational, oppressive, unlawful and an abuse of power.

The Petitioner also pleaded that as Section 194 of the CPC anticipates a situation that warrants the absencing of an accused person from trial other than for reasons of his conduct, then the said provision is unconstitutional, null and void as it is contrary to Article 50 (2) (f) of the Constitution. The Petitioner also claims to have suffered mental anguish, prejudice and therefore loss and damage. He also states that as the infraction to dispense with his presence is trial related, he ought to be acquitted.

The Petitioner in addition averred that he found it strange for the trial magistrate to be represented by the DPP. That they have ganged up against him diluting the neutrality of the court as the trial court had to discuss his case with the DPP in his absentia so as to give the DPP instructions which ought to have been given to the 3rd Respondent. Hence he called for the striking out of the 2nd Respondent's affidavit. He also urged that the affidavit of the DPP and the trial court are at variance as to what transpired in court. He avers that he was led out of the court room and never heard the witness testify, that the court ought to have recorded that he was present in court if at all he was there.

The Respondents opposed the petition. The 1st respondent filed a replying affidavit dated 25th May, 2016. By one of the prosecutors conducting the trial, Mr. Alenga. He stated that the Petitioner had so far conducted himself in a manner to suggest that he was a flight risk and he had interfered with witnesses. He was thus denied bail until the victim and her mother testified. It is averred that the petition is an attempt to forum shop. It is stated that this prosecutor was present throughout the trial and the Petitioner was in the direct view of the complainant as she testified but her demeanour changed upon identifying the Petitioner. The Petitioner's advocates then applied under Section 194 of the CPC to dispense with his presence for purposes of cross-examination and re-examination which in the view of the advocates for his own good or advantage. The application was allowed and the Petitioner moved to the edge of the bench away from the complainant's direct view and his advocates cross-examined the complainant in his ear-shot. The Petitioner was therefore not prejudiced in anyway. It is also averred that Section 194 of the CPC does not deal with the conduct of the accused person and is voluntary.

Further, it is urged that the trial magistrate would not have compelled the Petitioner to address the issue as he was represented and in fact he kept mum and moved as directed. The Petitioner's current advocate made the application of recusal which the DPP opposed and it was denied as it was unmeritorious. In addition it is stated that the advocates who moved the court under Section 194 of the CPC are not enjoined in the application and neither is there evidence of a complaint to the Law Society over the same.

The DPP has averred that the petition is the same as that made on 25th April, 2016 for recusal of the presiding magistrate and is calculated at averting the expeditious disposal of the suit contrary to Articles 10, 27(4), 47, 48, 49, 50 (1) & (9) of the Constitution and Sections 3,4,5, and 9 of the Victim Protection Act, to the victim's right to commencement of trial without unreasonable delay. It is equally averred that a declaration of the trial as a nullity will be in violation of the rights of the victim under Section 4(2)(f) of the Victim Protection Act for reasons not occasioned by her doing. It is averred that there is no evidence to support the Petitioner's claim.

A replying affidavit dated 25<sup>th</sup> May, 2016 by the trial magistrate Hon. C.M. Nzibe was also filed in opposition to the petition. It is averred that on material hearing date, the complainant, who is a child, became hysterical and the trial was adjourned until she calmed down. When she was composed, the trial was conducted in camera in the presence of Petitioner and his two advocates. The demeanour of the child then changed after identifying the Petitioner hence the Petitioner's advocate made the application under Section 194 of the CPC for purposes of cross-examination.

In addition, it is averred that the application was allowed and the Petitioner was moved from the direct view of the complainant but not out of the court room. He would be able to hear the witness. It is also stated that the trial magistrate did not need to clarify whether or not the Petitioner had instructed his advocates to make the said application as he was ably represented. On the application to recuse itself, the court stated that it disallowed the application as it acted within the law when it allowed the application

under Section 194 of the CPC.

In his oral submissions, the Petitioner, through his Advocate, Mr. Ole Kina, stated that as his presence was dispensed with during his trial, in particular during the cross-examination of the alleged victim, his right was infringed. He stated the right to a fair trial is absolute and under no circumstances can it be limited. That under Article 50 (2) (f) of the Constitution it is provided for fair and public hearing including the right to be present at one's trial unless his conduct makes it impossible for the case to proceed or the accused interferes with the due process of the law. The proceedings do not indicate that this was the case when the Petitioner's presence was dispensed with. He submitted that the Court in making its order to dispense with his presence considered extraneous issues namely, that he was represented by two advocates and that he had been identified by the witness, which reasons did not fall under Article 50 (2) (f) of the Constitution. Furthermore, Section 194 of the CPC requires the consent of the accused person before his exemption from trial. However, if it does not then it lies in contravention of Article 50 (2)(f) of the Constitution. He stated that in any case, the Trial Court indicated that it did not seek the consent of the Petitioner.

The Petitioner in addition submitted that Section 213 and 307 of the CPC on the final address and summing up a trial anticipates the participation of the accused person who heard the witnesses. He relied upon the decision in Otieno Kopyo Gerald v Republic [2010] eKLR, Akhuya v Republic [2003] eKLR.

According to the Petitioner, Section 213 and 210 of the CPC were violated and hence it cannot be said that the accused received a fair hearing. He called for the nullification of the record stating that it is better that it is nullified at the earliest opportunity to avoid wastage of judicial time.

The Petitioner faulted the 1st Respondent for representing the 2nd Respondent stating that the Attorney General (AG) being the 3rd Respondent ought to be the person representing the 2nd Respondent. He quoted Article 156 of the Constitution establishing the office of the AG and his role as the principal legal advisor to the Government. That Article 157 of the Constitution establishing the office of the DPP does not donate similar powers to the DPP to represent the 2<sup>nd</sup> Respondent.

He submitted that as a criminal trial is about perception and wrong perception can be drawn where the trial court files an affidavit drawn by the DPP in particular that there is a per-determined outcome. The petitioner also attacked the affidavits stating that that of the 2nd Respondent and the 1<sup>st</sup> respondent were not in harmony as only one affidavit indicates that the accused was present during the said trial and only eye contact was dispensed with. The Petitioner prayed for the trial to be pronounced as a mistrial and that the matter be heard before another court.

In response, Mr. Monda for the DPP stated that they opposed the petition. He stated that the issues being raised had been canvassed before the trial magistrate, in particular the recusal of the court due to the manner in which the trial was conducted and a ruling delivered on 04.03.2016. The advocate for the Petitioner then indicated to that court that he would appeal but instead filed the petition.

The DPP stated that the affidavit sworn by the trial magistrate bears the same content as the ruling of 04.03.2016. They stated that Mr. Gekanana for the accused made the application under Section 194 of the CPC as part of the defence strategy. The presumption is that the advocate had agreed with his client the accused to do so. Later the accused was represented by Mr. Onduso who never raised an objection and Mr. Mayaka holding brief and sought an adjournment. The Accused has been delaying the hearing of the matter which is an abuse of the court process. Subsequently, Mr. Lughanje and Mr. Otara also appeared for the accused but never raised any issues with the proceedings.

The DPP also pointed out that Mr. Ole Kina never filed a formal application for the recusal of the court though the DPP responded to the application. The Petitioner is raising what he would have raised at an appeal and the issues are *res judicata*. The application to dispense with the presence of the accused was made about a year ago. Besides which, the exclusion from trial was a defence strategy which was contested to by the Petitioner and his counsel, who is not enjoined to the suit. They submitted that the petitioner had waived his right. The DPP stated that Section 194 of the CPC though distinct does not

offend Article 50 of the Constitution.

The DPP further submitted that Article 156 of the Constitution expressly excludes the AG from criminal proceedings that the DPP rightly represented the 2nd Respondent and the petition emanates from criminal proceedings.

The DPP also submitted that they were interested in fairness of the process and that the victim is also entitled to a speedy conclusion of the matter. They further submitted that the Petitioner was forum shopping and that the option was an appeal not a petition.

The Petitioner reiterated his points and further stated that the Petitioner did not stall the proceedings. After his application for adjournment was allowed, the trial court took leave and all proceedings thereafter related to the issue of bond. The matter was then fixed for hearing on 25.2.2016 and his advocate applied for leave to obtain the proceedings. Mr. Ole Kina then discovered what had transpired during trial. He emphasised that an accused person cannot be said to have waived his right unless he renounces it himself. He drew an analogy with the position of an advocate in pleading for the accused and that it was the onus of the trial magistrate to apply the law.

In furtherance of his points, the Petitioner stated that he sought for a quashing of the proceedings under Article 23(3) of the Constitution. He stated that the court under Article 22 has the power to make a finding his argument being that the power of the court is limited in its appellate jurisdiction. He further stated that Articles 25 and 50 of the Constitution govern fair hearing and all provisions of the law must conform to the same.

The issues raised are whether or not: -

***a) the right under Article 25 and 50 (2)(f) of the Constitution was breached?***

***b) section 194 of the CPC contravenes Article 50 (2)(f) of the Constitution?***

***c) the DPP can represent the 2nd Respondent?***

***d) the reliefs are available to the Petitioner?***

### **Jurisdiction**

This court is properly clothed to deal with the matter at hand as it derives its jurisdiction on the enforcement of a right under the bill of rights from Article 23(1) as read together with Article 165 (3)(b) of the constitution which provides that: -

***The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.***

***Article (165 (3) Subject to clause (5), the High Court shall have—***

***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***

Secondly and just as importantly, as the petition seeks the enforcement of his fundamental rights and the annulment of a provision of the law on grounds that it is unconstitutional, the interpretation of the Constitution to give effect to the said rights and to ascertain the unconstitutionality or otherwise of the provision of the law must be taken into account.

Article 259 (1) of the Constitution guides on the interpretation of the Constitution it provides that: -

***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.***

Having the aforesaid in mind the issues are now addressed: -

**Was the right under Article 25 and 50 (2)(f) of the Constitution breached?**

The trial court proceedings annexed to the petition indicate that the Petitioner's advocate made an application under on Section 194 of the CPC to absent the Petitioner from the trial at the point of cross-examination of the complainant.

The Petitioner claims that his right to fair trial under Article 25 (c) and 50 (2) (f) of the Constitutional was violated as a result of the trial court granting the prayer for absencing him from trial. According to the Petitioner, the court ought to have rendered him an explanation as to which circumstances warranted his removal from his own trial. The Petitioner is calling for the enforcement of his fundamental rights under Article 23 as read together with Article 165 of the Constitution and hence an interpretation of the Co

The Court of Appeal in **Center for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR (the Creaw Case)** held that in interpretation of the Constitution the principle of harmonization, amongst others, ought to be engaged and agreed with the finding of the High Court that:

***“the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument”***.

The Court of Appeal also adopted the finding of the Court of Uganda in **Tinyefuza v The Attorney General** where it had been held that: -

***“the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution.”***

The Court of Appeal in the **Creaw Case** (*supra*) also adopted the finding of the US Supreme Court in **South Dakota V North Carolina 192 US 268 (1940) L ED, p. 465** where that court said that the: -

***“Elementary rule of constitutional construction is that no one provisions of the constitution is to be segregated from all others to be considered alone, but all provisions bearing on a particular subject are to be brought into view and to be so interpreted as to effectuate the general purpose of the instrument.”***

The long and short of it is that in interpreting the Constitution one part must be read in context of the whole. E.M Githinji, J.A in the **Creaw Case** (*supra*) also emphasized that in the construction of a Constitution there is, amongst others: -

***“...the presumption against absurdity that is a court should avoid a construction that produces an absurd result” and 'presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result”***

*In the Judicial Service Commission -v- Mbalu Mutava & Another CACA No. 52 of 2014 [2015] eKLR, E.M Githinji, J.A held that: -*

*“It is clear that fair hearing as employed in article 50(1) is a term of art which exclusively applies to trial or inquiries in judicial proceedings where a final decision is to be made through the application of law to facts. By article 25 that right cannot be limited by law or otherwise.”*

Article 25 (c) of the Constitution provides that: -

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

***(c) the right to a fair trial;***

Article 25 (c) of the Constitution must therefore be read together with Article 50(1) which provides that: -

***Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.***

Hence, the absolute feature to the right to fair hearing is the resolution of disputes to which law can be applied in a manner that is fair, to be conducted publicly before a court or an independent and impartial tribunal or body. This does not affect Article 50 (2) (f) which provides that: -

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

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

*Since “No provision of the Constitution is unconstitutional” as held by the then Chief Justice Willy Mutunga in Judges & Magistrates Vetting Board & 2 Others -v- Centre for Human Rights & Democracy & 11 Others [2014] eKLR, it must be that Article 25(c) read together with Article 50(2) (f) requires that the right to a fair trial to include the right to absent from trial an accused as a result of his conduct.*

*It is on record that the Petitioner's advocate Mr. Gekanana, made an application to have him exempted from trial during the said cross-examination so as to give the defence ample time to cross-examine the witness. The application was under Section 194 of the CPC which provides that: -*

***Except as otherwise expressly provided, all evidence taken in a trial under this Code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any).***

*Now it is urged by the Petitioner that his removal was for the sake of the comfort of the witness and that it had no bearing on his conduct hence the decision was unconstitutional. It is on record that the prosecution conceded to the Accused's application stating that the witness appeared traumatized and there being no witness protection box the accused could be removed from court. The demeanour of the witness was also noted by the trial magistrate during the examination-in-chief indicating that she appeared traumatized, had hesitated to stand up to identify the accused and broke down in tears at the end of the examination-in-chief. The DPP has urged that the complainant's rights under the Victim Protection Act (VPA) also had to be considered.*

A victim is defined under Section 2 (1) of the VPA as: ***“any natural person who suffers injury, loss or damage as a consequence of an offence”*** Its Section 2(2) provides that: -

**In this Act, a person is a victim regardless of:**

**(a) whether the crime perpetrated against the person has been reported to the police**

**(b) whether the perpetrator of the crime has been identified, apprehended, prosecuted or convicted; and**

**(c) ...**

*There is an alleged offence for which the Petitioner has been charged hence the complainant falls under the definition of a victim. Further due to her apparent age, for which the trial court even conducted a voir dire examination, puts her under the category of vulnerable victim which is defined under the PVA as: -*

**a victim who, due to age, gender, disability or other special characteristics as may be prescribed by regulations under this Act, may require the provision of special justice and support.**

It is provided for under the PVA **Section 17 (1)** that: -

**A court or competent authority may, on its own motion or at the request of the prosecution or the victim officer declare a victim a vulnerable victim, where in the opinion of the court or competent authority, the victim is likely to be vulnerable on account of: -**

**(b) age**

**(j) the nature of the offence committed against them.**

*The complainant testified that she was 14 years of age hence a child and the nature of the offence is defilement. Section 17 (5) of the PVA Act provides that: -*

**A victim who is a person considered to be vulnerable as defined under this Act, shall be accorded all the rights conferred to them in the Constitution and shall**

**(c) in the case of a child, ensure that the best interest of the child is of paramount consideration and all the rights accorded in the Children's Act are observed.**

*This court should take judicial notice that the complainant was a child and accord her the status of a vulnerable victim hence it was expected of the trial court to ensure her best interest was taken into consideration during trial. The ruling by the trial court dated 04.03 2016 indicates that when the application to dispense with the presence of the accused was granted, the Petitioner was not removed from court but rather kept away from the direct eye-contact with the complainant. This too is the averment of the Magistrate in the affidavit dated 25<sup>th</sup> May, 2016. At this juncture i wish to point out that there is no glaring difference between the averments of the trial magistrate and the DPP on this point and reach the conclusion that the Court was acting in the best interest of the vulnerable victim when it allowed the application.*

*The Petitioner has called to the attention of this Court the stare decisis in the Court of Appeal case of **Akhuya** (supra ) and the High Court case of **Otieno Kopyo Gerald** (supra ) which in a nutshell was that the trial was defective as written submissions are unknown in criminal trials, that is not to say they cannot be filed but that the parties must orally submit so as to accord the other party, more so the accused, an opportunity to respond or rebut the same In both cases the submissions were tendered by the counsels for the accused. By analogy therefore, as Article 50(2)(f) of the Constitution envisages the conduct of the accused to be the deciding factor and as he was never offered an explanation nor his consent sought, the argument is that the trial ought to be declared defective. Interestingly, the time at which the case of **Akhuya** (supra) was subsisting was during the repealed 1963 Constitution where its Section 77 (2)(f) on the right of the accused to be present at trial was only limited either by his consent or his conduct. In the current provision of law, the consent of the accused is not the deciding factor.*

As the conduct of the accused at trial is not recorded as warranting his absence, ought the Petitioner at least have been offered an explanation before a decision is made? I believe it would have served the interests of justice better for there to be an explanation offered by the court or in the least for the Court to allow for some *deliberations with his counsel and his decision be relayed to the court* for it is his constitutional right to be present in court and to literally face his accusers. However, due to the circumstances of the case and in particular the age of the complainant, the nature of the offence the complainant's adverse reaction before the trial and upon identifying him which the court noted as appearing to be traumatised, the fact that the Petitioner was only excused from the eye view of the Complainant but remained within his earshot in the same court room, then under the circumstances of the case it was in the best interest of the child to allow the application under Section 194 of the CPC and it did not prejudice the Petitioner.

For emphasis sake I wish to point out that in as much as there exists rights of the accused during trial, these rights must be balanced out with those of the victim which are captured under Section 4(2) (d) & (f) and 9 (2) (a) of the PVA which provide as follows: -

**Subject to subsection (1), a court or administrative authority or person performing functions under this Act shall ensure that-**

**(d) every victim is addressed in a manner appropriate to his or her age, intellectual development, and is spoken to and allowed to speak in his or her language of choice, or through an interpreter if necessary**

**(f) every victim is protected from secondary victimization in all informal, administrative and judicial proceedings relating to the victim;**

**Section 9. (2) Where the personal interests of a victim have been affected, the Court shall—**

**(a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court**

Hence the decision by the trial court to move the Petitioner from direct eye contact so as to allow his own advocates to cross-examine the complainant freely was a lawful decision and the fundamental rights of the Petitioner was not infringed upon.

**Does Section 194 of the CPC contravene Article 50 (2)(f) of the Constitution?**

The Petitioner argues that to the extent Section 194 of the CPC allows for the exclusion of the accused from trial other than for reason of his conduct then it is contravenes Article 50 (2) (f) of the Constitution. Section 194 of the CPC provides that: -

**Except as otherwise expressly provided, all evidence taken in a trial under this Code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any).**

The principle of a presumption of conformity is that an Act of parliament is in conformity with the principles of the Constitution. See the Supreme Court in Communications Commission of Kenya & Five Others v. Royal Media Services Ltd & Five Others [2014] eKLR where it was held that:-

**“Our apprehension is that on the effective date, it is only the old Constitution that fell into disuse, save for the various sections saved by the Sixth Schedule. The existing legislative regime, on the other hand, remained in force, as decreed by Section 7 of the Sixth Schedule in the following terms: -**

**“(1) 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.’***

***The inevitable inference resolves into the principle that the new Constitution did not envisage or create a legal vacuum, and all processes regulated by law were to continue in progress, as signaled by the Constitution.”***

This principle was referred to as “reading into legislation” by the Supreme Court in Hassan Nyanje Charo v Khatib Mwashetani & 3 others [2014] eKLR where the court pointed out Section 7(1) of the Sixth Schedule to the Constitution of Kenya, 2010, which stipulates:

***“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”.***

And also held that:

***“Such a position (of reading into legislation) however, is qualified; it is only applicable to existing laws that were in force under the old constitutional dispensation, and is an element in the transition from the previous status quo. (own emphasis)***

The Court in Ndyanabo -v- Attorney General [2001] EA 495 held that: -

***[20]... until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, a legislation should receive such a construction as will make it operative and not inoperative.”***

It must be stated that Section 194 of the CPC is not null and void unless it is applied contrary to Article 25 (c) as read together with Article 50(2)(f) of the Constitution.

### **Can the DPP represent the 2nd Respondent?**

The Petitioner argues that as per Article 156 of the Constitution, it was the AG and not the DPP who ought to have drawn the affidavit sworn by the trial magistrate. The DPP argues that these proceedings emanate from criminal proceedings hence Article 156 (4) ought to apply which provides that: -

#### ***(4) The Attorney-General—***

***(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings;***

Constitutional petitions are *sui generis*. They are neither criminal nor civil in nature. See the ruling by Judge J.R. Karanja in Joel Onsare v Governor Trans Nzoia County & 16 others [2014] eKLR. In my thinking, then, either the DPP or the AG would have drawn the affidavit.

The ruling of 04.03.2016 by the said judicial officer is still good in law as it was a valid ruling which has not been revised or appealed against. The same reveals that the Petitioner was in the court room but just out of sight of the complainant and he suffered no prejudice as a result. In any event, on enforcement of the bill of rights, Article 22 (3) (d) of the Constitution provides that: -

***the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities***

The argument about which party drew the affidavit in my view would fall under a procedural technicality.

### **Are the reliefs available to the Petitioner?**

*As no fundamental right, has been violated the reliefs prayed for are not available to the Petitioner. 7*

In my view, too, the trial was not illegal and the event it is found to be otherwise, the Court of Appeal held in the **Akhuya Case** that

“Ordinarily whether or not to order a retrial largely depends on whether the trial of the accused was illegal or defective (see **Njeru v R [1980] KLR 108**). In certain rare cases however, circumstances may exist which would militate against ordering a retrial notwithstanding that the trial was unsatisfactory. In that event an appellate court would normally order the release of the accused.”

The upshot of this is that I would disallow the petition with no order as to costs and order that the trial proceed before the Resident Magistrate's Court at Malindi. In any event as it is within the Court's knowledge that the trial magistrate is on transfer via the usual judiciary transfers, the matter shall be placed before another magistrate, who shall hear and determine the case. The trial court is at liberty to have the complainant recalled for purposes of further cross-examination. Otherwise, the record of the trial court is quite in order.

In the end, the petition herein lacks merit and is hereby disallowed.

**Dated and delivered this 1<sup>st</sup> day of November, 2016.**

**S.J. CHITEMBWE**

**JUDGE**