REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 151 OF 2015

BETWEEN

HON. GIDEON MWITI IREA……..……PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS….....1ST RESPONDENT

INSPECTOR GENERAL OF POLICE…….……2ND RESPONDENT

THE CHIEF MAGISTRATE'S COURT, MILIMANI…..…….....…3RD RESPONDENT

MUCIIMI MBAKA……...……..4TH RESPONDENT

HARUN NDUBI……..……5TH RESPONDENT

THE ATTORNEY GENERAL…….6TH RESPONDENT

TERESA OMONDI…….……..……..7TH RESPONDENT

AND

THE VICTIM PROTECTION BOARD……..……..INTERESTED PARTY

JUDGMENT

1. The Petitioner, Hon. Gideon Mwiti Irea is a Member of the National Assembly for Imenti Central Constituency. He is the 1st accused person in **Criminal Case No. 609 of 2015; Republic v Gideon Mwiti Irea and another** at the Chief Magistrate's Court at Milimani. The Chief Magistrate's Court at Milimani is the 3rd Respondent herein. The Petitioner has been charged in the aforesaid criminal case with three counts as follows:

"Count 1:

Rape contrary to Section 3(1)(a) and (c) as read with Section 3(3) of the Sexual Offences Act

Particulars:

On the night of 21st day of March, 2015 at Tana Club along Woodvale Groove Westland within Nairobi County, intentionally and unlawfully obtained consent by force and caused penetration with your genital organ namely Penis into the genital organ namely Vagina of M.M.I.

Alternative to Count 1

Committing an indecent act with an adult contrary to section 11(6) of the Sexual Offences Act No. 3 of 2007

Particulars

On the night of 21st day of March, 2015 at Tana club along Woodvale Groove Westlands within Nairobi County, intentionally and unlawfully touched the vagina and breast of M.M.I. with your penis without her consent.

Count II

Intimidation contrary to Section 238(2) as read with Section 238 (1) of the Penal Code.

Particulars

On the night of 21st day of March, 2015 at Tana Club along Woodvale Groove Westlands within Nairobi County, intimidated M.M.I with intent to cause her to do an act namely sexual intercourse with you, which she is not legally bound to do, caused unlawful injury to her.

Count III

Assault causing actual bodily harm contrary to Section 251 of the Penal Code

Particulars

On the night of 21st day of March, 2015 at Tana Club along Woodvale Groove Westlands within Nairobi County, unlawfully assaulted M.M.I. thereby occasioning her actual bodily harm."

The Petitioner pleaded not guilty to all the aforesaid charges.

2. The Petitioner has filed the Amended Petition dated 4th May, 2015 claiming that Muciimi Mbaka, Harun Ndubi and Teresia Omondi, the 4th, 5th and 7th respondents respectively have included themselves in the criminal proceedings in violation of the law and the Constitution since the 1st Respondent (the Director of Public Prosecutions) is the only entity mandated to have a role in criminal proceedings. He also claims that the respondents have tampered with evidence to be adduced in **Criminal Case No. 609 of 2015.** It is therefore his case that the Respondents' have violated his fundamental right to fair trial as provided for under Article 50 of the Constitution. He has also challenged the constitutionality of Section 3 of the Sexual Offences Act.

3. His case as stated in his Amended Petition is that the 4th and 5th respondents who are advocates of the High Court of Kenya led investigative journalists of a media house to the hospital where the Complainant in the **Criminal Case No. 609 of 2015** was allegedly recuperating; that they proceeded to interview the complainant and tamper with evidence; and that in tampering with the evidence they directed how the

complainant's personal belongings which formed crucial evidence in the aforesaid criminal case would be dealt with. In particular, he claimed that they directed that the Complainant's clothes to be cut into two. Allegedly, the 2nd Respondent (the Inspector General of Police) and the Complainant's husband each received a piece of the cut clothes. It is therefore Petitioner's position that the clothes lost the evidential value both to him and the 1st Respondent.

4. It is the Petitioner's position therefore that the tampering of evidence by the 4th and 5th respondents has denied him a fair trial because the destruction of the Complainant's clothes renders them of no evidential value. He thus claims that the tampering of evidence by the 4th and 5th respondents has denied him the opportunity to exonerate himself therefore violating his right to a fair trial under Article 50 of the Constitution.

5. He further claims that it is the mandate of the 2nd Respondent under Article 245 of the Constitution to investigate any offence while the 1st Respondent is the body mandated under Article 157 of the Constitution to prosecute criminal offences on behalf of the Republic. It is therefore his contention that he had a legitimate expectation that the 2nd Respondent would conduct investigations and gather evidence; and on the strength of the evidence available, the 1st Respondent would conduct the prosecution independently, fairly and in an impartial manner free from direction from any other party. He thus contends that any participation by the 4th, 5th and 7th respondents in the proceedings before the 3rd Respondent renders any such proceedings against him a violation of his right to fair trial as enshrined under Article 50 of the Constitution. In that regard, he states that the 4th, 5th and 7th respondents do not have the authority to appear before the 3rd Respondent and usurp the powers of the 1st Respondent.

6. The Petitioner further claims that the criminal proceedings before the 3rd Respondent are *ultra vires* due to the involvement and participation of the 4th, 5th and 7th respondents. That even if the Victim Protection Act, 2014 enables the protection of a complainant's rights in a criminal trial, the participation of the 4th, 5th and 7th respondents as advocates in the criminal trial is limited under Section 19(4)(d) of the Act as the same is yet to become operational because the victims' rights charter is yet to be developed by the Interested Party (the Victim Protection Board). He thus contends that in the absence of such guidelines, the participation of the 4th, 5th and 7th respondents in the criminal proceedings is a violation of his right to fair trial.

7. It is also his position that there is no law that allows the participation of the 4th, 5th and 7th respondents in criminal proceedings and as such their participation is an abuse of the court process. He also contends that the 3rd Respondent by allowing their participation in the criminal proceedings has acted in excess of his powers. In his view, the participation of the 4th, 5th and 7th respondents in **Criminal Case No. 609 of 2015** amounts to a private prosecution and contravenes Section 28(2) and (3) of the Office of Director of Public Prosecutions Act.

8. According to Hon Mwiti therefore even if the Victim Protection Act allows a victim the right to have his/her views and personal interests presented and considered in the criminal proceedings, the Court ought to ensure that the exercise of such rights shall not be prejudicial to the rights of the accused. Furthermore, he contends that in criminal proceedings, the complainant is a victim and not a party *per se*.

9. It is also the contention of the Petitioner that Section 3(3) of the Sexual Offences Act is unconstitutional to the extent that it provides for a penal sentence that has a minimum term as opposed to setting of a maximum term. He states that the drafters of the said Act and the Legislature that enacted the law erred in setting a minimum term and in so doing violated the principle of separation of powers by imposing a mandatory minimum sentence and therefore removing from the Judiciary the power to determine a sentence in line with the mitigating factors. It is his case that the Legislature violated Article 160 of the Constitution as it has interfered with the independence and discretion of the Judiciary. It is therefore his position that to the effect that Section 3(3) of the Sexual Offences Act is unconstitutional any further proceedings against him would be in breach and violation of his rights as enshrined under

Article 50 of the Constitution.

10. In his Amended Petition, he has therefore sought for the following orders:

"(a)Declaration that the acts and omissions of the Respondents as stated above are in complete contravention to the Petitioner's rights and freedoms as provided for under the Constitution of Kenya.

(b) Declaration that section 3 (3) of the Sexual Offences Act is unconstitutional for it is in breach of the principle of the separation of powers as it seeks to prohibit the judiciary from invoking its inherent discretionary powers in matters of sentencing.

(c) An order directing the 6th Respondent to take necessary steps to amend Section 3(3) of the Sexual Offences Act to make it in line with the provisions of the Constitution.

(d) Declaration that the actions of the 4th, 5th and 7th Respondents by their tempering of evidence and participation in the proceedings of Criminal Case No. 609 of 2015 have denied the Petitioner a right to a fair trial as allowed under the provisions of Article 50 of the Constitution.

(e) Declaration that the proceedings before the 3rd Respondent against the Petitioner cannot be free and fair as a result of the acts of the 4th, 5th and 7th Respondents.

(f) An order of stay against the proceedings against the Petitioner before the 3rd Respondent in Criminal Case No. 609 OF 2015.

(g) That the Petitioner is due damages for the breach of his constitutional rights by the Respondents and this Court do direct a manner in which those damages are to be assessed.

(h) Any other relief that the Court deems fit to grant the Petitioner as a result of the breach of his constitutional rights.

(i) Costs and interest of this petition."

11. Mr. Khaminwa presented the Petitioner's case. It was his submission that the Petitioner having been charged with the offence of rape need to prove two things; there was sexual intercourse to wit penetration of the vagina by the penis and that the sexual intercourse was without consent. He stated that at the time of the alleged rape, the Complainant must have been wearing clothes which ought to be stained, soiled or torn. That the clothes she was wearing were torn into two by non-State agents. The investigation officers had rejected the clothes on the ground that they had been tampered with. He therefore submitted that the Petitioner will, during the criminal trial, be denied the opportunity of cross-examining the Complainant on the clothes she wore with the aim of establishing the credibility or otherwise of her testimony. It is therefore his view that his right to a fair hearing will be violated.

12. It was his submission that Article 50 of the Constitution is intended to promote the rule of law, order and a critical way of promoting justice. That if any of its provisions is violated, the advocates as officers of the Court should be able to say so and the judges should be bold enough to say there is a violation. He stated that the right to a fair trial starts from the time investigations begin up to the conclusion of the trial. That the police in conducting investigations are expected to comply and respect human rights.

13. In addition, he stated that Article 50(2) provides that an accused person has the right to adduce and challenge evidence. He claimed that he will be denied the opportunity to cross-examine and challenge the credibility of the evidence of the Complainant as is stipulated under the Constitution because the clothes which are crucial evidence were tampered with. He claimed that even the investigating officer had rejected the clothes as they were tampered with. He claims that the investigating officer acted properly in

rejecting the clothes as evidence for having been tampered with. It is his contention that the 4th and 5th respondents usurped the investigative powers of the 2nd Respondent. He therefore submitted that the tampering of clothes by the 4th and 5th respondents is an incurable and irreversible error which has destroyed the entire criminal case. He disclosed and stressed that the Petitioner was not a party to the actions of tampering with evidence.

14. It is Mr. Khaminwa's further submission that Article 50(2) of the Constitution provides for the right to prepare a defence. That an accused person requires adequate time and facilities to prepare his defence including the exhibits. It is his contention that the Petitioner has been denied a facility namely the clothes to enable him prepare his defence and such denial would ultimately lead to a violation of his right to fair trial and fair hearing.

15. The 1st and 2nd respondents in opposing the Petition filed written submissions on points of law. Mr. Asimosi presented their case.

16. It is his submission that under Article 50(9) of the Constitution, a victim of a crime has a right to legal representation in the criminal case. That the Victim Protection Act has been enacted to provide for the mechanisms and the extent to which victims are entitled to participate in the criminal trials. In that regard, he stated that Section 9(2) of the Victim Protection Act requires victims to establish personal interest in criminal trial. That it has been held in **Mary Kinya Rukwaru v Raghunathan Santosh and Republic Criminal Application No. 169 of 2014** that the Constitution allows a victim to communicate to the Court. It was his submission therefore that victims of crime have *locus standi*.

17. It is therefore the DPP's position that the victim was acting in accordance with the law by appointing intermediaries to communicate on her behalf to the Court. He submitted that the Victim Protection Act allows the victim's advocates to directly address the Court on matters of law only. That it has been held in **Republic v Veronica Gitahi & PC Issa Mzee, Criminal Case No. 41 of 2014** that victims' advocates are permitted to take an active and direct role in the criminal proceedings only on matters of law. He therefore submitted that the 4th, 5th and 7th respondents did not act *ultra vires* in addressing the trial court.

18. On the issue as to whether the 4th, 5th and 7th respondents have usurped his mandate, the DPP stated that the 4th, 5th and 7th respondents had not taken any direct act in presenting the 1st Respondent's case. He asserted that there is no law that bars the 1st Respondent from presenting in Court an affidavit in support of its case on grounds that it had been drawn elsewhere. Nonetheless, he submitted that the 1st Respondent's decision to prosecute the Petitioner was taken independently after determining that there was sufficient evidence to sustain the charges against the Petitioner. This was done after perusal of the investigations file presented to the DPP by the 2nd Respondent. He therefore claimed that challenging the involvement of the 4th, 5th and 7th respondents in the trial was premature as the trial was yet to begin.

19. He further submitted that the issue of tampering with evidence was irrelevant to the criminal proceedings because the 4th and 5th respondents are not required to produce any evidence in Court. That evidence would be produced by the 2nd Respondent. He claims that the trial is yet to begin and evidence has not been produced before the trial court. He therefore opined that when the trial starts, the Petitioner will have the opportunity to challenge the evidence that will be tendered by the prosecution. As to the evidential value of the torn clothes, he stated that those clothes were not the subject of the trial as they were not yet on record before the trial court.

20. As regards the constitutionality of Section 3 of the Sexual Offences Act, he submitted that the Legislature is the body mandated to make laws. That by introducing minimum sentences, it has put in place checks and balances to make sure that as much as the Judiciary exercises its discretion, it remains guided by the law. And in any event, mitigation does not change an offence that has been established. Mitigation must in his view be considered within the law and accordingly that explains the need to have minimum sentence so as to guide judicial officers.

21. On the basis of the foregoing submissions Mr. Asimosi urged the Court to dismiss the Petition with costs.

22. In reply to the Petition, the 4th, 5th and 7th respondents filed a replying affidavit sworn by Muciimi Mbaka (the 4th Respondent) on 20th May, 2015. He states that the complainant and the victim in **Criminal Case No. 609 of 2015** instructed him together with the 5th and 7th respondents to provide legal protection to her as a victim of crime and to safeguard her rights and welfare as a victim. He thus states that they appear in the criminal case as counsel instructed by a person entitled to participate in the case pursuant to the Victim Protection Act and not as 'parties' as alleged by the Petitioner. He states that under the Victim Protection Act, a victim is entitled to actively participate in the criminal case so as to ensure that her/his rights are given meaningful effect and their dignity protected. He indeed claimed that Article 50 (9) of the Constitution recognizes the need to protect the rights and welfare of the victims of crimes. In his view therefore, the 3rd Respondent did not err by giving the 4th, 5th and 7th respondents audience.

23. It is Mr. Muciimi's further contention that Section 13(1) of the Victims Protection Act allows a victim who is a complainant in a criminal case to adduce evidence either in person or through an advocate. He thus claims that the Petitioner does not have the legal basis for challenging the affidavits of the victim and her husband which were prepared through the 4th Respondent.

24. It is also his averment that he was not responsible for the publicity of the offence and neither were the 5th and 7th respondents.

25. He further deposed that the trial court would be best suited to determine allegations of tampering with evidence and to determine what weight to attach to such allegations vis-à-vis the totality of evidence that will be adduced in the trial. He also states that the Complainant in the criminal case played no role in relation to the evidence alleged to have been tampered with.

26. Mr. Nderitu presented the 4th, 5th and 7th respondents' case. It is his submission that the trial court would be the best place for the Petitioner to prove the allegations of tampering with evidence as that cannot be done through affidavit evidence before this court. He also states that even if the allegation of evidence tampering was true, that does not imply that there is absolutely no evidence upon which the prosecution can proceed. That it is for the trial court to determine the weight of the evidence adduced to prove the charges against the Petitioner. He submits that the criminal trial should be allowed to proceed so that the testimony and evidence of the Complainant can be tested.

27. On the issue of violation of the Petitioner's right to fair trial, Mr. Nderitu submits that the Petitioner had not demonstrated how the said right is to be violated by the criminal trial. He claims that the criminal trial is the only process that would ascertain the value of the evidence allegedly tampered with. In any event he states that all the arguments being made in this Petition are only useful to the Petitioner if made in the course of defending himself against the charges facing him in the trial court.

28. It is his further submission that the alleged breach of the doctrine of equality of arms does not arise. His view is that the principle of equality of arms is between the prosecution and an accused person and not between an accused person and a private citizen who acts in a manner allegedly disadvantageous to the accused without any complicity on the part of the investigating authorities. He claims that the alleged cutting of the clothes is both disadvantageous to the victim as much as it is to the Petitioner.

29. Mr. Nderitu urged the court to dismiss the Petition with costs to the respondents.

30. The 3rd Respondent and 6th Respondent (the Attorney General) as well as the Interested Party did not file any response to the Petition. They also did not make any submissions on the same nor attend the proceedings.

31. From the pleadings and submissions of the parties before me, I am of the view that the four issues for

determination in this Petition are:

(i) Whether a victim of crime has any right to representation during a criminal trial and to what extent;

(ii) Whether the 4th, 5th and 7th respondents have usurped the mandate of the 1st Respondent;

(iii) Whether the proceedings in the **Criminal Case No. 609 of 2015** violate the Petitioner's right to fair trial; and

(iv) Whether Section 3 of the Sexual Offences Act is unconstitutional.

32. It is Mr. Khaminwa's contention that the criminal proceedings before the 3rd Respondent are *ultra vires* due to the involvement and participation of the 4th, 5th and 7th respondents. He challenges their involvement allegedly on grounds that there is no law that allows the involvement of complainants' advocates in criminal trials. In response, Mr. Asimosi submitted that Constitution permits an intermediary to assist a complainant to communicate with the court. That the Complainant in respect of these proceedings was therefore allowed to do so through the 4th, 5th and 7th respondents. On his part Mr. Nderitu claims that a victim of a crime has the right to participate in the trial either through an advocate or in person.

33. In that context, Article 50 (9) of the Constitution provides as follows:

"50(9) Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences."

Pursuant to the above provision, Parliament enacted the Victim Protection Act as Act No. 17 of 2014. The preamble to that Act reads thus:

"AN ACT of Parliament to give effect to Article 50 (9) of the Constitution; to provide for protection of victims of crime and abuse of power, and to provide them with better information and support services to provide for reparation and compensation to victims; to provide special protection for vulnerable victims, and for connected purposes."

34. Section 2 of the Victim Protection Act has defined a victim to mean, **"any natural person who suffers injury, loss or damage as a consequence of an offence."** The same Section has defined a victim's representative as **"an individual designated by a victim or appointed by the Court to act in the best interests of the victim."**

35. Of fundamental importance is the provision of Section 9(1) which provides for the rights of a victim in the following manner:

"(1) A victim has a right to-

(a) be present at their trial either in person or through a representative of their choice;

(b) have the trial begin and conclude without unreasonable delay;

(c) give their views in any plea bargaining;

(d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal established by law;

(e) be informed in advance of the evidence the prosecution and defence intends to rely on, and

to have reasonable access to that evidence;

(f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and

(g) be informed of the charge which the offender is facing in sufficient details.

(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; and

(b) ensure that the victim's views and concerns are presented in a manner which is not-

(i) prejudicial to the rights of the accused; or

(ii) inconsistent with a fair trial.

(3) The victim's views and concerns referred to in subsection (2) may be presented by the legal representative acting on that behalf."

36. Looking at the law above, it is clear and contrary to the submissions made by Mr. Khaminwa that a victim has no right to participate in the criminal proceedings, the law has provided that he or she can participate in criminal proceedings either in person or through a representative. That being the law therefore, I do not find that the 3rd Respondent acted *ultra vires* his mandate by allowing the participation of the 4th, 5th and 7th respondents in the **Criminal Case No. 609 of 2015**. In any event under Section 4(2) of the Victim Protection Act, a victim has the right to be given an opportunity to be heard and respond in the criminal proceedings before any decision that affects the victim is taken.

37. In addition to the above, under Article 50(7) of the Constitution, a victim has the right to communicate to the court. In the case of **Mary Kinya Rukwaru v Raghunathan Santosh, (supra)** the court held that before a victim would be allowed to communicate to the court, she must establish personal interest in the proceedings. In the instant case, the victim is the complainant and accordingly I am satisfied that she has established sufficient personal interest to warrant her to communicate to the court through her representatives, in this the 4th, 5th and 7th respondents as she has appointed them as her advocates.

38. It is the Petitioner's also contention that the 4th, 5th and 7th respondents have usurped the powers of the 1st and 2nd respondents in two ways. Firstly, through their participation in **Criminal Case No. 609 of 2015** which according to him amounts to a private prosecution and contravenes Section 28(2) and (3) of the Office of the Director of Public Prosecutions Act. And secondly, that 4th, 5th and 7th respondents were involved in the investigations of the alleged offence in violation of his expectation that the 2nd Respondent would be the one to investigate commission of alleged crimes. His specific complaint in that regard is that the 1st Respondent has filed affidavits in court that were drawn by the 5th Respondent.

39. The State's prosecutorial powers are vested in the DPP under Article 157 of the Constitution. The relevant part provides as follows:

"157 (6) The Director of Public Prosecutions shall exercise State powers of prosecution and may-

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;"

The decision to institute criminal proceedings by the DPP is however discretionary and is not subject to

the direction or control by any authority because Article 157 (10) stipulates that:

> **"The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority."**

These provisions are also replicated in Section 6 of the Office of the Director of Public Prosecutions Act, 2013.

40. In interpreting the manner in which the 1st Respondent exercises his powers, Lenaola J in **Republic v Director of Public Prosecutions exparte Meridian Medical Centre Ltd & 7 Others Petition No. 363 of 2013** expressed himself as follows:

> **"I also agree with the submission of Mr. Kilukumi that the decision to prosecute is a quasi-judicial decision which should not be taken lightly given the penal consequences inherent in any criminal proceeding - See Floriculture International Ltd & Others vs Trust Bank Ltd and Others (supra). There is also no doubt that the office of the DPP should exercise its mandate and discretionary power to prosecute within constitutional limits and the independence of his office. The allegation therefore made that the DPP has prosecuted the Applicants against the advice of the Attorney General is also misplaced as he (the DPP) does not and should not take advise from the Attorney General when making a decision as to whether he should prosecute or not."**

The learned judge concluded thus:

> **"Having said so, it is also true that the said power of the DPP should not be exercised arbitrarily, oppressively or contrary to public policy. As can be seen from the above cited authorities, the Court may intervene where it is shown that intended criminal prosecutions are instituted for other means other than the genuine enforcement of criminal law or otherwise an abuse of the court process".**

41. I am in agreement with the learned Judge. I heard the Petitioner complain that the 4th, 5th and 7th respondents do not have the mandate to prosecute crimes on behalf of the DPP. I agree with that proposition. However, I have elsewhere above found that a complainant in a criminal case has a right to participate in criminal proceedings either in person or through a representative. In that regard I did not find any wrong-doing on part of the 4th, 5th and 7th respondents.

42. In any event, their participation in the criminal case cannot amount to private prosecution. I say so, because it is evident that the 1st Respondent true to his mandate is the one prosecuting the criminal case against the Petitioner. The participation of the 4th, 5th and 7th respondents is only limited to safeguarding and protecting the interest of the Complainant who is also the victim in the aforesaid criminal case. Such participation is guided and is also within the parameters stipulated under the Victim Protection Act. That being so, I am of the view that the 4th, 5th and 7th respondents have not usurped the powers of the 1st Respondent in any manner.

43. Further to the above, I do not have any iota of evidence to demonstrate that the 1st Respondent in making the decision to prosecute the Petitioner did not act independently. Neither did I hear the Petitioner claim that the decision to prosecute him is an abuse of the legal process. As a constitutional body, the actions of the 1st Respondent must at all times be in accordance with the Constitution and the law. In the present case, I have no evidence that the 1st Respondent violated the Constitution or any other written law in making the decision to prosecute the Petitioner, and I so find.

44. Having found as I have, the other complaint made by the Petitioner was that the 4th, 5th and 7th respondents usurped the mandate of the 2nd Respondent by investigating the alleged crimes. His

complaint is based on the claim that the 2nd Respondent allowed non-State actors to tamper with evidence by cutting clothes that were being worn by the victim of the crime at the time of the commission of the alleged offence.

45. The Constitution at Article 243 establishes the National Police Service. The objects of the National Police Service are set out under Article 244 which states that:

> **"The National Police service shall –**
>
> **(a) strive for the highest standards of professionalism and discipline among its members;**
>
> **(b) prevent corruption and promote and practice transparency and accountability;**
>
> **(c) comply with constitutional standards of human rights and fundamental freedoms;**
>
> **(d) train staff to the highest possible standards of competence and integrity and to respect human rights and fundamental freedoms and dignity; and**
>
> **(e) foster and promote relationships with the broader society."**

46. Among the functions of the National Police Service found at Section 24 of the Act of the National Police Service Act, 2012 is investigation of crimes.

47. Looking at the law above, it is clear that the 2nd Respondent is the body mandated to investigate crimes committed within the Republic. Did the 4th, 5th and 7th respondents usurp the powers of the 2nd Respondent? I do not think so. I say so because under Section 13(1) of the Victim Protection Act a complainant has the right to adduce evidence that has been left out. That section provides thus:

> **"Where a victim is a complainant in a criminal case, the victim shall, either in person or through an advocate be entitled to-**
>
> **(a) subject to the provisions of the Evidence Act, (Cap. 80) adduce evidence that has been left out;**
>
> **(b) give oral evidence or written submission."**

48. The law above is clear and simple. A victim who is a complainant in a criminal case can adduce additional evidence that has been left out. As stated earlier, a victim can participate either in person or through an advocate. To my mind therefore, nothing stops an advocate from drawing up affidavits when he or she is representing a victim in criminal proceedings. Such actions do not in my view amount to investigation of a crime and therefore usurping of the mandate of the 2nd Respondent.

49. Further, there is no evidence to show that the 2nd Respondent's officers played any role in the cutting of the clothes into two. There was no allegation that they were present during the occurrence of this incident. The cutting of the clothes cannot therefore be used to support the Petitioner's claim that the 1st Respondent surrendered his investigatory powers to non-State actors.

50. The larger issue for determination is whether this court should intervene and quash the criminal proceedings against the Petitioner on the basis that his right to fair trial will be violated as crucial evidence has been tampered with.

51. Article 50 (2) of the Constitution provides that every accused person has the right to a fair trial. The Petitioner before me has challenged the violation of his right to a fair trial on the basis that he has been denied the right to adduce and test the evidence against him. He in particular claims that the 4th, 5th and 7th respondents tampered with the complainant's clothing by ordering a sub-division of the same into

two. That the investigating officer refused to use of the clothes as evidence on ground that they were tampered with. According to him therefore, he will not have a fair trial as he has been denied the opportunity to use the clothing in his favour. He claims that the clothes of a rape victim are very core to proving the ingredients of the offence he has been charged with.

52. On their part the respondents contend that even if there was tampering of evidence, it does not imply that there is absolutely no evidence upon which the prosecution can proceed. It is their contention that the trial court is the only body that can determine the weight of the evidence to be adduced at the trial and also the evidential value of the evidence allegedly tampered with.

53. In the case of **DPP vs Meakin (2006) EWHC 1067** the Court stated that a criminal case would only be stayed if it would be impossible in all the obtaining circumstances to have a fair trial for the accused. The Court stated:

> **"A stay should not be imposed unless the defendant shows that he will suffer such prejudice that a fair trial is not possible…the concept of a fair trial involves fairness to the prosecution and to the public, as well as fairness to the defendant."**

I am in agreement with the Court.

54. Looking at the facts of this Petition and the totality of evidence before me, I find that this court cannot at this stage determine the evidential value of the Complainant's clothes that were tampered with, as alleged by the Petitioner. A challenge to that evidence can only be properly ventilated and resolved before the trial court which is sufficiently empowered to do so.

55. Secondly, this court does not have the evidence that the prosecution intends to use to support the charges preferred against the Petitioner. Even if there was tampering, that does not imply that there is absolutely no evidence upon which the prosecution can proceed.

56. Thirdly, the principle that the accused is innocent until proven guilty is one of the tenets of a fair trial envisaged under Article 50(2) of the Constitution. In my view therefore, all the grounds raised by the Petitioner and touching on the issue whether the tampered with evidence is so crucial in proving the alleged offence can only be determined by the trial court as that is the court designed to test the veracity and sufficiency of the evidence against the Petitioner. In so finding, I am guided by the holding by the Court of Appeal in **Meixner & another v Attorney General [2005] eKLR** that:

> **"The criminal trial process is regulated by statutes, particularly, the Criminal Procedure Code and the Evidence Act…. It is the trial court which is best equipped to deal with the quality and sufficiency of the evidence gathered to support the charge…. 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."**

57. I will also and for a good reason avoid an analysis of the facts as pleaded, including the fact that the 4th, 5th and 7th respondents interviewed the Complainant, because that would lead me to make findings which would prejudice the trial of the Petitioner. The arena for production and interrogation of the evidence is the trial court. This court is not equipped, in the nature of the proceedings before it, to return a verdict of guilty or not guilty for the Petitioner.

58. Lastly, the Petitioner apart from claiming that he may not be able to challenge and cross-examine the Complainant in regard to the clothing she wore on the day of the alleged crime, has failed to state how he would in any other manner be prejudiced so as to demonstrate that he cannot have a fair trial at the trial court hence warranting a stay of his criminal case.

59. In my view, any evidential value in form of clothes worn by the Complainant on the material day goes to the merits of the criminal case against the Petitioner. If the Petitioner is granted a stay of his criminal case at this stage, it would be detrimental to the respondents as this court does not have the

benefit of the evidence in the possession of the 1st Respondent and it would amount to pre-empting the 1st Respondent's case.

60. At this point, this court is not to be concerned with the sufficiency of the evidence available to support the charges facing the Petitioner as that is at the core of the criminal trial. To my mind, all the 1st and 2nd respondents are entitled to demonstrate at this stage is that they have a reasonable basis to believe that an offence has been committed and the Petitioner should therefore stand trial-see **William S.K. Ruto & Another vs Attorney General (2011) eKLR.** The Petitioner on his part had the burden of proving that he may not have a fair trial if the case proceeds against him without the tampered evidence, which burden in my view he has failed to discharge and I so find.

61. The last ground upon which the Petitioner seeks orders is that Section 3(3) of the Sexual Offences Act is unconstitutional to the extent that it provides for a penal sentence that has a minimum term as opposed to setting of a maximum term. He particularly challenges the Act on ground that the Legislature in enacting the said law usurped the powers of the Judiciary by stipulating a minimum sentence and therefore interfering with the discretion and independence of a magistrate in considering the accused's mitigation factors before sentencing.

62. The issue at hand demands an interpretation of the provision of a statute so as to determine whether it violates the Petitioner's rights to fair trial as provided for under Article 50 of the Constitution. Before I proceed to do so and while determining the constitutionality of a provision of the law, the Court starts by presuming that a provision of the statute is constitutional and should not fault that which Parliament did in a lengthy process. The burden of proof lies on the person who alleges otherwise-see **Ndyanabo v Attorney General of Tanzania [2001] EA 495.**

63. It is also a well settled principle of law that a statute should be construed according to the intention expressed in the Act itself-see **Craies on Statute Law (6th Edition) p. 66**. It has been held in **Direct United States Cable Co. v The Anglo-American Telegraph Co, (1877) 2 A.C 394** that:

> **"The Tribunal that has to construe an Act of a legislature or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject-matter with respect to which they are used and the object in view."**

64. It has also been held in **Hiralal Ratanlal v S.T.O. AIR 1973 SC 1034** that:

> ***"In construing a statutory provision the first and foremost rule of construction is the literary construction. All that we have to see at the very outset is what does the provision say? If the provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other rules of construction of Statutes. The other rules of construction are called into aid only when the legislative intent is not clear."***

65. In addition, in determining whether a statute meets constitutional muster, the Court must have regard not only to its purpose but also its effect.

66. With those principles in mind, I now turn to determine whether Section 3(3) of the Sexual Offences Act is unconstitutional. In that regard and for avoidance of doubt, Section 3(3) states that:

> **"A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.'**

Looking at the above provision, it is plain and clear and it requires no more than a literal interpretation. It is clear that a person who has been found guilty and convicted of an offence under Section 3 of the Sexual Offences Act shall serve a prison sentence of not less than ten years.

67. To my mind therefore, the intention of the Legislature is clear in that regard. Is it therefore unconstitutional for violating the principle of separation of power? I think not. Parliament is the organ with the mandate of legislating for the Republic. In carrying out its legislative business, it has been held that Parliament does not legislate in a vacuum as it knows the needs of its people-see **Pravin Bowry v Ethics and Anti-Corruption Commission (2015) eKLR.**

68. On the other hand, the Judiciary has the responsibility of interpreting and enforcing the law as enacted by Parliament. In enforcing the law, it is not for the Judiciary to determine the wisdom of Parliament in enacting the law in question. Its power is only that of judgment. In that context, the power the Court has is to determine two things; whether the law in question has affected the fundamental rights and freedoms in an unwarranted manner and secondly, whether the law is inconsistent with any of the provisions of the Constitution. The Court will thus declare a law unconstitutional when that law is plainly impossible to uphold.

69. The court does not have the power to decide the constitutionality of a law on other considerations such as conveniences or sentimental values. It cannot even question the wisdom of Parliament in enacting the said law if it is not a violation of the Constitution. In reaching that finding, I am guided by the United States Supreme Court decision of **U.S v Butler, 297 U.S. 1[1936]** in which the Court expressed itself as follows:

> **"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. All the court does, or can do, is to announce its considered judgment upon the question. <u>The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy.</u> Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."**

70. I have elsewhere above found that Section 3(3) of the Sexual Offences Act does not violate the principle of separation of power as Parliament has the mandate to enact the law. I have also found that the Judiciary cannot question the intention and wisdom of Parliament in enacting a certain provision of the law if that provision is constitutionally complaint. The argument by Mr. Khaminwa that Section 3 (3) interferes with independence of the magistrate in sentencing is therefore unfounded.

71. The court enforces and interprets the law as passed down by the Parliament. In enacting that the minimum sentence in offences of rape IS ten years, Parliament must have been aware that an accused person is entitled to mitigate upon conviction and before sentencing.

72. My understanding of the law as stipulated in Section 3(3) is that a magistrate may impose any sentence on a person who has been found guilty of the offence stipulated under Section 3(3) of the Sexual Offences Act but at no point even after considering the accused's mitigation can he or she impose a sentence of less than ten years. That is the law and as long as it remains in the statute books it has to be enforced for I do not find it to be unconstitutional.

73. In any event, even if I was wrong, I would still arrive at the same decision. Mitigation is at the discretion of the magistrate and it is not binding and cannot and must not oust a provision of the law as stipulated under Section 3(3) of the Sexual Offences Act.

74. I have addressed all the issues I set out to in the beginning of this judgment. I have come to the end of the judgment and it is obvious by now that I do not see any merit in the Petition.

75. Elsewhere above I have reproduced verbatim the prayers the Petitioner has sought from this court. It is also clear that the Petition having failed none of those prayers can issue. In the circumstances I shall dismiss the Petition.

76. As to costs, I do not see any reason why I should burden any party with costs as they are still involved in **Criminal Case No. 609 of 2015.** The best order therefore is one that necessitates each party to bear its own costs, and I so order.

Dated signed and delivered at Nairobi this 3rd day of December, 2015.

W. KORIR,

JUDGE OF THE HIGH COURT