IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 153 OF 2013

CONSOLIDATED WITH

PETITION NO. 369 OF 2013

BETWEEN

THUITA MWANGI …….....1ST PETITIONER

ANTHONY MWANIKI MUCHIRI .....…2ND PETITIONER

ALLAN WAWERU MBURU …….....3RD PETITIONER

AND

THE ETHICS AND ANTI-CORRUPTION COMMISSION….....1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS…….....2ND RESPONDENT

ATTORNEY GENERAL…….....3RD RESPONDENT

THE CHIEF MAGISTRATE'S COURT NAIROBI ……..... 4TH RESPONDENT

JUDGMENT

Introduction

1. These two petitions **Petition Nos 153 of 2013** and **369** of **2013** were consolidated as they raise similar issues. It involves the purchase of some property in Tokyo, Japan for the Kenyan embassy premises by the Ministry of Foreign Affairs ("the Ministry") in the recent past.

2. This decision is about whether the court should intervene and stay criminal proceedings being

undertaken against the petitioners, then officials in the Ministry over the purchase of the property in which it was claimed that the purchase process flouted procurement rules and that the Kenyan Government lost colossal sums of money in the transaction.

3. The case in point is **Anti-Corruption Case No. 2 of 2013, *Republic v Thuita Mwangi, Anthony Mwaniki Muchiri and Allan Mburu*** ("the Criminal Case") lodged in the Nairobi Chief Magistrates' Court on 28th February 2013 in which the petitioners are charged with various counts of offences relating to corruption and abuse of office.

The Parties

4. The 1st petitioner was at the material time the Permanent Secretary in the Ministry for Foreign Affairs while the 2nd and 3rd petitioners served at the Kenya Embassy in Tokyo as the Head of Mission and the *Charge d' Affairs* respectively.

5. The 1st respondent is the Ethics and Anti-Corruption Commission (hereafter known as "EACC"); the body contemplated in **Article 79** of the Constitution and established under **Section 3(1)** of the ***Ethics and Anti-Corruption Commission Act (No. 22 of 2011)*** (hereafter referred to as "**EACC Act**") for purposes of ensuring compliance with, and enforcement of, the provisions of **Chapter Six** of the Constitution. Its functions include investigating and recommending to the Director of Public Prosecutions ("DPP") the prosecution of any acts of corruption or violation of codes of ethics or other matter prescribed under the Act or any other law enacted pursuant to **Chapter Six** of the Constitution. EACC is the successor to the defunct Kenya Anti-Corruption Commission ("KACC") established under the ***Anti-Corruption and Economic Crimes Act*** ("***ACECA***").

The Facts

6. The facts necessary for determination of this dispute are largely not in dispute and are set out in the parties' depositions. The Kenya Embassy, comprising of the Chancery and ambassador's residence, has since 1989 been located on property known as 3-24-3 Yakumo, Meguro-Ku in the city of Tokyo, Japan. The Government of Kenya had been paying a monthly rent of ¥4.7 Million (Kshs.4,094,170.00).

7. Sometimes in July 2008, the Ambassador of Kenya to Japan, forwarded a proposal to the Permanent Secretary in the Ministry of Foreign Affairs, Mr Mwangi, the 1st petitioner, recommending the purchase of a plot identified from the Government of Japan and located at 4-1-5 Minami Azabu, Minato-ku, Tokyo, pending an offer from the Japanese Government. This was in line with an earlier Government policy adopted in the year 2006 to acquire its own premises and thereby reduce long-term costs associated with rental payment.

8. In October 2008, the Ambassador informed Mr Mwangi that the plot identified would cost approximately Japanese ¥ 900 million or Kenya Shillings 603 million at the exchange rates then prevailing. The Ambassador informed Mr Mwangi in December 2008 that the Government of Japan had made an offer for the sale of the plot at the sum of ¥ 1.307 billion.

9. Between 15th and 16th January 2009 an inspection of potential plots for purchase was conducted by a team of four officers together with the Ambassador and the 2nd petitioner. The visit to Japan would also include the inspection of similar plots in strategic places for comparison purposes. Following inspection, a plot measuring 1,431.28 square metres, together with the buildings thereon, was offered for sale by its owner, for the sum of ¥ 1.9 billion (approximately KShs. 1.6 billion). Mr Mwangi, the Permanent Secretary then instructed the Kenyan embassy in Tokyo to negotiate a reduction of the purchase price, whereupon the owner offered to sell the plot for the sum of ¥ 1.75 billion, with the offer being valid for a period of one month.
10. On 26th January 2009 and 28th January 2009 the 2nd petitioner caused to be placed in the local Tokyo newspapers, *Japan Times* and *Daily Yomiuri* an advertisement inviting interested bidders to

submit expression of interest to sell a plot to Kenyan Embassy. The bids were to be submitted by 30th January 2009. There were allegedly no bids received by the close of that date.

11. On or about 16th March 2009, the Permanent Secretary at the Treasury, informed Mr Mwangi of Treasury's authority for the purchase of the plot in question for the sum of Kenya Shillings 1,524,425,000/= and the Kenyan embassy in Tokyo was accordingly informed of this development. Consequently, the Ambassador informed the Government of Japan that the Kenya Government was no longer interested in purchasing the plot offered by the Japanese Government.

12. Following the above sequence of events, the Public Procurement Oversight Authority on 15th April 2009 advised the Ministerial Tender Committee ("MTC") to follow the relevant conventional procedures in the ***Public Procurement and Disposal Act*** in relation to the acquisition of the plot from the owner, one Mr Kuriyama.

13. On 24th April 2009, the MTC held a meeting which approved the purchase of the plot in question through the direct procurement method and in furtherance of this resolution a negotiation team was sent to Tokyo, Japan by the Government of Kenya to negotiate the purchase price of Kshs1.5 billion. On 25th May, 2009 the MTC approved the acquisition of Meguro-Ku property for ¥1.75 Billion. During the MTC deliberations, the size of the property was established to be 1,431 square metres. Based on the reduction of the size of the property the Government valuer returned a value of JPY 1,431,300,000 (Kshs. 1, 245,231,000.00).
14. The agreement for the purchase of land and building was subsequently signed on 30th June 2009 between the owners of Meguro Ku property and the 2nd petitioner as a representative of the Republic of Kenya.The Government of Kenya paid the owners of the property the sum of ¥ 1.477.634.381, being 80% of the purchase price, after which the ownership of the property was transferred. Around January, 2010 a new version of the agreement was signed by the interested party and sent to Kenya Embassy in Tokyo to be signed by the owners.

15. On or about March 2010, Mr Mwangi wrote to the Permanent Secretary at the Treasury, Mr Joseph Kinyua, proposing that value-for-money audits be conducted in specified Kenyan foreign missions on projects then under construction and including purchase of residential and non-residential houses. A value-for-money audit covering the period July 2008 to April 2010 was subsequently undertaken in May 2010 by audit officials from the Office of the Auditor-General and the Internal Audit Department of the Ministry of Finance. The Terms of Reference included to,*"evaluate procedures and processes followed in the purchase of the Tokyo Embassy within value for money context."* The Audit reported among other things that the Government of Kenya had *"secured value for money on the procurement of the Chancery and Ambassador's residence in Tokyo, Japan."*

16. On or about 5th May 2010, KACC wrote to the Ministry informing it that it was carrying out investigations into allegations touching on the acquisition of the Kenya Mission in Japan.

17. Following the purchase of the Kenyan embassy property, the Parliamentary Departmental Committee on Defence and Foreign Relations travelled to Tokyo, Japan around the month of July 2010 and inspected the property acquired by the Government of Kenya. It tabled it report in Parliament on 12th October 2010 and Parliament adopted it on 21st October 2010. The Parliamentary Committee made several findings and recommendations including the following:

i. That the Government had lost close to Kenya Shillings 1 billion in the procurement of the embassy premises and that measures be instituted to recover money lost in the acquisition transaction;
ii. That the defunct KACC should investigate the Tokyo transaction;
iii. That necessary action be taken against the Minister for Foreign Affairs at the material time, the Permanent Secretary in the Ministry of Foreign Affairs, the 1st petitioner as well as 2nd and 3rdpetitioners and any other officers allegedly involved in the purchase of Government property

for the embassy in Tokyo;

18. Following the adoption of the Report, the 2nd petitioner was recalled from his duty station and from his position as *Charge d'Affaires* at the Kenyan embassy in Tokyo, Japan. Upon his return to Kenya and by a letter dated 6th December 2010, the 2nd petitioner was interdicted.
19. On 28th February 2013, the DPP charged the petitioners. The charges are as follows:

COUNT I

Conspiracy to commit an offence of corruption contrary to section 47A (3) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003.

1. *Thuita Mwangi*
2. *Anthony Mwaniki Muchiri*
3. *Allan Mburu*

On diverse dates between January, 2009 and October 2009, at the Ministry of Foreign Affairs Nairobi, within Nairobi Province, being the Permanent Secretary and the Charge D'Affairs, Ministry of Foreign Affairs and the Kenya Embassy Tokyo, respectively, jointly with another not before court conspired to commit an offence of corruption namely, breach of trust by approving the purchase of the property known as 3-24-3 Yakumo Meguro-Ku in Tokyo for the Chancery of the Kenya Embassy and Ambassador's residence at a price of 1.75 billion Japanese Yen while aware that a fair market price could have been obtained had proper procurement procedures been adhered to.

COUNT II

Abuse of office contrary to section 46 as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003

Particulars of the offence

1. *Thuita Mwangi*
2. *Allan Mburu*

On or about the 30th day of June, 2009 at the Ministry of Foreign Affairs, Nairobi within Nairobi Province, being the Permanent Secretary and Charge D'Affairs, Ministry of Foreign Affairs and the Kenya Embassy Tokyo, respectively jointly with another not before court used your offices to improperly confer a benefit of 318,700,000 Japanese Yen to Mr. Nobuo Kuriyama for the purchase of the property known as 3-24-3 Yakumo Meguro-Ku in Tokyo for the Chancery of the Kenya Embassy and Ambassador's residence, being the difference between the actual price paid of 1,750,000,000 Japanese Yen and 1,431,300,000 Japanese Yen being the value assessed by the Government of Kenya Valuer.

COUNT III

Wilful failure to comply with the law and applicable procedures relating to procurement contrary to section 45(2)(b) as read with section 48(1) of the Anti-Corruption and Economic Crimes Act, 2003.

Particulars of the offence:

1. *THUITAMWANGI 2. ANTHONY MWANIKI MUCHIRI 3. ALLAN MBURU – On diverse dates between January 2009 and October, 2009, at the Ministry of Foreign Affairs Nairobi, within Nairobi Province, being the Permanent Secretary and the charge D'Affairs, Ministry of Foreign*

Affairs, Kenya and the Tokyo Kenya Embassy, respectively, being officers whose functions concern the use of public revenue, jointly wilfully failed to comply with the applicable law and procedures relating to procurement of real property, to wit, sections 50 of the Public Procurement and Disposal Act, 2005, and Regulation 35 of the Public procurement and Disposal Regulations, 2006, by directly purchasing the property known as 3-24-3 Yakumo Meguro-Ku in Tokyo the Chancery for the Kenya Embassy and Ambassador's residence in contravention of the said procurement procedures.

COUNT IV

False assumption of authority contrary to section 104(b) of the Penal Code as read with section 34 of the Penal Code.

Particulars of the offence.

3. ALLAN MBURU – On or about 30th day of June 2009, at the Kenya Embassy in Tokyo, Japan, being the Charge D' Affairs, without authority signed a contract for the purchase of the property known as 3-24-3 Yakumo Meguro-ku in Tokyo for the Chancery of the Kenya Embassy and Ambassador's residence, an act he was not authorised by the law to do.

The Petitioners' Case

20. The 1st petitioner seeks several declarations and orders prohibiting any magistrate from receiving or continuing the charges against the petitioner, prohibition against suspending petitioner from his position and prohibition against the 1st and 2nd respondents from presenting to court or accepting the charges. He contends that the decision to charge him and the decision seeking his suspension are null and void; that his fundamental rights to have details of his case, to a fair trial, to fair administrative action have been violated; that actions of EACC are void as it was not properly constituted at the time and that the charges violate indemnity under **Article 236** of the Constitution.

21. The 1st petitioner complains that his fundamental rights were breached by the respondents due to the unreasonable delay in commencement of the charges against him stating that the space of five years when the alleged events took place in October 2009 and when charges were brought in February 2009 amounted to inordinate delay. The 1st petitioner contends that the decision to charge him was selective and discriminatory. He contends that other parties who played a central and direct role in the transaction have been spared without a rational basis. He also complains that the manner of his arrest which the respondent ensured was captured by the press amounted to harassment and caused him embarrassment.

22. The 1st petitioner contends that there was no *prima facie* evidence to support the charges brought against him and that the case was commenced for ulterior motives. To support the allegation that there was ulterior motives and abuse of process in his prosecution, the 1st petitioner points to selective prosecution, dramatic arrest and media display in his arrest, haste to suspend him from office, shielding the MTC from prosecution and duplicity of charges. The petitioner urged that the court to examine all the facts and intervene. He called in aid several authorities including the following; ***Republic v Chief Magistrate's Court Nairobi & 4 others ex- parte Beth Wanja Njoroge*** **(2013) *e*KLR,** ***Kuria & 3 others v Attorney General*** **[2002] KLR 2,** ***Githunguri v Republic*****[1986] KLR 1,** ***Joram Mwenda Guantai v Chief Magistrate's Court,*** **CA Nairobi Civil Appeal No. 228 of 2003 and** ***Republic v Attorney General & another ex parte Ng'eny*****, Misc. Civil Appl. No. 406 of 2001.**

23. On their part, the 2nd and 3rd petitioners allege violation of the right to fair trial, that the charges are defective and ambiguous for duplicity and violation of **Articles 29**, **27(1)**, **47,** and **157** of the Constitution. They challenge the constitutionality of **sections 48, 53, 58** and **59** of the ***ACECA***.

The petitioners aver that **section 58** of ***ACECA*** is unconstitutional and violates their right to a fair trial in that it contravenes the principle of presumption of innocence guaranteed by **Article 50(2)** ***(a)*** of the Constitution. For these alleged violations, the petitioners seek for orders of judicial review prohibiting continued prosecution of the criminal case or any other case in connection to the facts; an order for permanent stay and for compensation.

Respondents' Case

Case for the EACC

24. EACC opposes the petition and relies on the replying affidavit of Mr Kipsang Sambai, an investigator with EACC and one of the case officers in respect of the matters raised in the petition, and further affidavit filed on 14th August 2013.

25. EACC's case is that following allegations of irregularities in the purchase of a Chancery and Ambassador's residence for the Kenyan Embassy in Tokyo Japan, the now defunct KACC initiated investigations into the circumstances surrounding the procurement. According to EACC, the investigations revealed that the procurement procedures were not followed and that the Government of Kenya did not benefit from the services of a lawyer in the negotiation of the purchase of the Meguro-Ku Property, the Embassy officials having chosen to negotiate with the owners of the property themselves. There were also allegations of alleged demands of "kickbacks" by Embassy officials. The investigations further revealed that there was no analysis of bids but instead a meeting between the 2nd petitioner and the owner of the property in which meeting the 2nd petitioner conveyed the commitment of the Kenya Government to purchase the property to the owner.

26. EACC's contends that it acted within the law as it exercised its constitutional and statutory mandate. It contends that it was entitled to independently verify any complaint, allegation or statement that it received from anyone, including the petitioners. It submitted that on matters falling within its competence it executes its mandate and functions without any interference from any person or institution, neither is it influenced by the political developments or events.

27. EACC accused the petitioners of trying to use the Court to subvert the criminal law process and to determine issues of fact that are within the province and competence of the trial court. According to EACC, the decision as to whether there is a prima-facie case against the petitioners and their co-accused was an issue to be determined by the trial court and granting the orders sought will amount to fettering the execution of its mandate.

28. EACC denies claims of mistreatment by its officers contending that at all material time, the 2nd petitioner was treated with respect and in accordance to the provisions of the Constitution of Kenya and that no single officer of the EACC harassed or mistreated the petitioner. It also denies ferrying and using the press during the arrest process.

29. EACC further argued that the petitioners' fundamental rights are not absolute and must be balanced with the rights of others and public interest. Further, that the petitioners had not indicated the rights which had been breached with clarity, apart from enumerating the Articles in the Constitution. Counsel representing EACC, stated that ***ACECA*** is new law to fight corruption with procedures and it was made by Parliament with knowledge of other legislation.

Case for the DPP

30. The DPP, the 2nd respondent, opposes both petitions and has filed replying affidavit and further affidavit in opposition thereto, sworn by Katto Kasinga Wambua, a prosecution counsel in the Office of the DPP. DPP submits that it received the investigations file with a report and recommendations from the EACC on 12th February 2013. The DPP independently reviewed and

analyzed the evidence contained in the investigations file that was submitted, including the witness statements, documentary exhibits and statements of the petitioners as required by the law. It is on the basis of the review that the DPP issued directions to prosecute the petitioners. The DPP states that he reached an independent finding that there was sufficient evidence to charge the petitioners with offences under the ***ACECA*** and the ***Penal Code*** as set out on the charge sheet. The DPP maintains that the decision to charge the petitioners was informed by the sufficiency of the evidence on record and the public interest and not any other consideration.

31. The DPP asserts the independence of his office noting that under **Article 157(10)** the office is free from control or direction of any person or authority in the commencement of criminal proceedings. Counsel for the DPP relied on several cases including; ***Republic v Attorney General ex-parte Ngeny,*** **Misc. CA No.448 of 2003** and ***Stanley Munga Githuguri v Republic*** **(Supra)** for the proposition that the Court should exercise extreme care not to interfere with the constitutional power of the DPP to institute and undertake criminal proceedings and should only interfere with the independent judgment of the DPP if it is shown that the exercise of his powers is contrary to the Constitution, is in bad faith or amounts to an abuse of process.

32. The DPP submits that the petitioners have not demonstrated that the 1st and 2nd respondents lacked jurisdiction, acted in excess of jurisdiction or departed from the rules of natural justice in conducting investigations and in directing that the petitioners be charged. Further, that an order of prohibition does not lie to correct the course, practice or procedure of an inferior tribunal. The Court of Appeal case in ***Kenya National Examination Council v. Republic, ex-Parte Geoffrey Gathinji Njoroge*** **Civil Appeal No. 266 of 1996,** was cited in support of this proposition.

33. The DPP contends that the accuracy and correctness of the evidence or facts gathered in an investigation can only be assessed and tested by the trial court which is best equipped to deal with the quality and sufficiency of evidence gathered and properly adduced in the support of the charges. The case of ***Meixner & Another v The Attorney General*** **[2005] 1 KLR 189** was cited to support that proposition.

34. The DPP denies the petitioners' allegations of inordinate delay and contends that the investigations were carried out across two jurisdictions which required elaborate planning, time and funding and international mutual legal assistance and other logistics such as translations and interpretation.

35. In response to the petitioners' contention that they were entitled to the witness statements and other evidentiary material before plea was taken and the right to be informed of the charge with sufficient detail to answer it, the DPP submits that all the law requires is that the charge(s) contain a statement of the specific offence coupled with enough particulars to give the accused reasonable information as to the nature of the offence that they face. That at the stage of making the decision to charge, the DPP does not need to have gathered all evidence and all he needs is to have is an assessment of the available evidence that leads him to believe that there is a probable case against an accused. The DPP cited the cases of ***George Ngodhe Juma & Others v The Attorney General,*** **Misc. Crim. Appl. No. 345 of 2001,*****Thomas Patrick Cholmondeley v Republic*** **CA Crim. Appeal No.116 of 2007 [2008]*e*KLR,** and ***Dennis Edmond Apaa & 2 Others v. Ethics and Anti-corruption Commission & Another,*** **Petition No. 317 of 2012 [2012]*e*KLR** to support its case.
36. Counsel acting for the DPP submitted that **Article 35** does not apply in respect of evidence gathered in the course of investigation as **Article 50** is very specific to the rights of the accused. He submitted that the provisions of **Article 50** were satisfied when the provisions of the ***Criminal Procedure Code*** were followed which provide that the trial commences at when the accused is called upon to plead and it is at that stage that the petitioner is entitled to all the evidence in possession of the prosecution.

Case for the Attorney General

37. Counsel acting for the 3rd and 4th respondents' case adopted the submissions of the 1st and 2nd

respondents. Counsel focused his submission on the issue of discrimination in regard to categories of offences under the ***Penal Code*** and ***ACECA*** raised by the 2nd and 3rd petitioners. He submitted that differentiation is permissible for a legitimate purpose and that Parliament in its wisdom enacts specific legislation to deal with a specific category of offences and they must be construed to give effect to a specific legislative purpose.

38. Counsel further submitted that outside provisions of ***ACECA***, rebuttable presumptions existed in various statutes and the mere fact that the provisions of **sections 49** and **58** creates rebuttable presumptions did not render these provisions unconstitutional. Counsel concurred with DPP's submission that severity of a sentence cannot be equated to cruel, inhuman and degrading.

Determination

General Principles

39. The State's prosecutorial powers are vested in the DPP under **Article 157** of the Constitution, the pertinent part which provides as follows;

> *(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.*

40. The decision to institute criminal proceedings by the DPP is discretionary. Such exercise of power is not subject to the direction or control by any authority as **Article 157(10)** stipulates that;

> *(10) 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.*

41. These provisions are also replicated under **section 6** of the ***Office of the Director of Public Prosecutions Act, No. 2 of 2013*** in the following terms;

> *6. Pursuant to Article 157(10) of the Constitution, the Director shall—*
>
> *(a) not require the consent of any person or authority for the commencement of criminal proceedings;*
>
> *(b) not be under the direction or control of any person or authority in the exercise of his or her powers or functions under the Constitution, this Act or any other written law; and*
>
> *(c) be subject only to the Constitution and the law.*

42. In the case of ***Githunguri v Republic*** **(Supra at p.100)**, the Court observed as follows, regarding then Attorney General's powers to institute proceedings under the former Constitution; "*The Attorney-General in Kenya by section 26 of the Constitution is given unfettered discretion to institute and undertake criminal proceedings against any person "in any case in which he considers it desirable so to do."...<u>this discretion should be exercised in a quasi-judicial way. That is, it should not be exercised arbitrarily, oppressively or contrary to public policy</u>...." [Emphasis added]*. The discretionary power vested in the DPP is not an open cheque and such discretion must be exercised within the four corners of the Constitution. It must be exercised reasonably, within the law and to promote the policies and objects of the law which are set out in **section 4** of the ***Office of the Director of Public Prosecutions Act*****.** These objects are as follows; the diversity of

the people of Kenya, impartiality and gender equity, the rules of natural justice, promotion of public confidence in the integrity of the Office, the need to discharge the functions of the Office on behalf of the people of Kenya, the need to serve the cause of justice, prevent abuse of the legal process and public interest, protection of the sovereignty of the people, secure the observance of democratic values and principles and promotion of constitutionalism.

43. The court may intervene where it is shown that the impugned criminal proceedings are instituted for other means other than the honest enforcement of criminal law, or are otherwise an abuse of the court process. As the Kuloba J., observed in ***Vincent Kibiego Saina v Attorney General,*** **High Court Misc Civil Appl. No. 839 of 1999 (Unreported)** at pages 20, 21,*"If a criminal prosecution is seen as amounting to an abuse of the process of the court the court will interfere and stop it. This power to prevent such prosecutions is of great constitutional importance. It has never been doubted. It is jealously preserved. It is readily used, and if there are circumstances of abuse of the process of court the court will unhesitatingly step in to stop it."*

<u>Lack of prima facie case</u>

44. The petitioners have challenged the charges on the ground that the same were unfounded. It is their case that the EACC and the DPP have no prima-facie case against them either in fact or in law and the criminal case was initiated for ulterior motives. The 2nd and 3rd petitioners state at para. 61 of their Petition*; "…on an objective, fair and impartial study of the statements upon which the recommendation for prosecution was based, any reasonable person would have reached a decision declining to recommend prosecution, based on glaring material contradictions that existed in initial statements by witnesses in relation to subsequent statements by the same witnesses, as well as contradictions between statements by different witnesses. Accordingly, Your Petitioners contend that the decision to recommend their prosecution was not procedurally fair."*

45. Mr Mwangi, in his supplementary supporting affidavit of 18th April 2013, goes to great length to lay out facts regarding the transaction in a bid to justify the process and exonerate himself from any wrong doing. He deposes that the purchase of the Embassy premises gave the Kenyan government and tax-payers value for money as amongst other things, no rent would be paid in future.

46. The petitioners also impugn the investigation report relied on by M.K. Bosire, Principal Forensic Investigator which they claim makes a number of untrue and ingenious allegations. According to Mr Mwangi's Supplementary deposition, *"Nothing he has alleged is forensic at all in regard to the purchase of property for the Kenya Embassy in Tokyo. In fact all he states are reckless designs to twist innocent events to sensationally recommend charges*." Mr Mwangi also states that he was not part of the MTC and goes on to deny that there was any overpricing at all. He also denies that no diligence was carried out by his Ministry and goes on to point to specific instances to support this assertion. It is notable that paragraphs 36 to 57 are dedicated to justifying the transaction and supporting the point that there was no prima facie case.

47. While these arguments are forceful, attractive and cogent, I am afraid that the High Court at this point is not the right forum to tender the justifications concerning the subject transaction let alone test the nature and veracity of these allegations. In ***Meixner & Another v Attorney General*** **(Supra)**, the Court held that *"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 be a subversion of the law regulating criminal trials if the judicial review court was to usurp the function of a trial court."* Similarly in ***Beatrice Ngonyo Kamau & 2 Others v Commissioner of Police and the Director of Criminal Investigations Department & Another*** **Petition 251 of 2012 [2013]*e*KLR,** , Lenaola J., captured this balance as follows;*"[22]. The point being made above is that the DPP though not subject to control in exercise of his powers to prosecute criminal offences, must exercise that power on reasonable grounds. <u>Reasonable grounds, it must be noted, cannot amount to the DPP being asked to prove the charge against an accused person at the commencement of the trial</u> but merely show a <u>prima facie</u> case before mounting a prosecution. The proof of the charge is made*

at trial."

48. I have avoided analysing the facts as any finding I make may prejudice the trial of the petitioners but based on the facts on record, I am unable to read capricious conduct on the part of the respondents or detect an abuse of process. The petitioners are in any case presumed innocent until proved guilty to the required standard before the trial court. I did not hear the petitioners to say that they will not receive a fair trial before the court. **Article 50** firmly secures the rights of the petitioner facing trial before the Magistrates court.

49. Under **section 35** of the ***ACECA***, a prosecution can only be brought to the court with the authority of the DPP. The EACC's duty is to investigate and make recommendations for prosecution to the DPP. The DPP applies his mind independently and makes the decision to prosecute. (*See* ***Nicholas Muriuki Kangangi v Attorney General*** **CA Crim. Appl. No. 331 of 2010**). Any defects in the process of investigation including incompetence of the investigator cannot be attributed to the DPP's decision to charge the petitioners' in the circumstances. The petitioners have not demonstrated the DPP has not acted independently or has acted capriciously, in bad faith or has abused the process in a manner to trigger the court's intervention.

Discrimination and Equal protection under the law

50. **Article 27** protects the right of equality and prohibits discrimination. **It** provides *inter alia* as follows;

> ***27.(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***
>
> ***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***

51. The petitioners have pointed to certain allegations to prove that they were denied the right to equal protection under the law and non-discrimination. I shall briefly highlight these grounds as herein below.

Selective Prosecution

52. The petitioners accuse EACC and DPP of selective prosecution and aver that it was discriminatory not to bring charges against other persons who played a central and direct role in the transaction. The 1st petitioner submits for instance that there was bias in excluding the members of the MTC as it was the body that resolved to effect the purchase. In the 1st petitioner's view, the members of the MTC should be first in the line of prosecution.

53. The DPP and EACC counter this argument by stating that it is not the petitioners who determine who should be charged or dictate the persons EACC should recommend for prosecution. The DPP's position is that there is no constitutional, statutory or legal requirement that all persons involved in a criminal activity must be charged. The DPP contends that he has discretion to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges and omission to charge other individuals perceived by the petitioners as accomplices is not fatal to the criminal proceedings against them.

54. I find and hold that the DPP exercises discretionary power and what is required is a reasonable basis for the exercise of the discretion. I think it would be crossing the line of independence of the Office of the DPP to descend into the arena to finding whether or not there is a prima facie case against those other persons, who are not even parties to the petition, quite apart from the fact that meandering along this path would usurp the jurisdiction of the trial court.

55. In this respect, I would do no better than cite the holding of the Mumbi Ngugi J., in the case of

Hon. James Ondicho Gesami v The Hon. Attorney General & 2 Others*, Petition No. 376 of 2011** where she observed that; "*[68] The petitioner also argues that there has been failure of legal process and discrimination against him as he has been singled out for prosecution yet under Section 23(1) of the CDF Act, the Member of Parliament is only one member and should not be singled out for criminal prosecution. He also argues that such failure of legal process is manifested by his prosecution for the same offence that he is a witness to in **Nyamira Criminal Case No 190 of 2011 Republic–v- Gilbert Ateyi Onsomu.** [69]. With respect, I do not find anything discriminatory in the preferment of criminal charges against the petitioner. The DPP is at liberty to prefer charges against any party in respect of whom he finds sufficient evidence to prefer charges. I do not know of anything in the law that would require that all members of the CDF Committee for West Mugirango Constituency be prosecuted for alleged misappropriation of funds unless there was evidence against them*. [Emphasis added](See also ***Charles Okello Mwanda v Attorney General & 2 Others **Petition No. 95 of 2011 [2012] *e*KLR**).

56. Accordingly, I find the allegation for selective prosecution against the petitioners to be unmeritorious.

Discrepancy in penalties under the Penal Code and the ACECA

57. It is submitted by the 2nd and 3rd petitioners that **section 48(i)(b)** of ***ACECA*** imposes a penalty more severe than that imposed by **section 127** of the ***Penal Code***. This, according to the petitioners, subjected the persons to differential treatment under the two regimes. The DPP submitted that **section 48(1)(a)** of ***ACECA*** imposes a penalty that is identical to **section 127** of the ***Penal Code***. However, the **section 48(1)(b)** punishes an additional and distinct aggravating situation. It was submitted that **section 48(1)(b)**of ***ACECA*** cannot therefore be unlawful or unconstitutional.

58. **Section 48** of ***ACECA*** reads as follows;

> *48. (1) A person convicted of an offence under this Part shall be liable to—*
>
> *(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and*
>
> *(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.*
>
> *(2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows —*
>
> *(a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);*
>
> *(b)if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.*

Section 127 of the **Penal Code** reads as follows;

> *127. Frauds and breaches of trust by persons employed in the public service*
>
> *(1) Any person employed in the public service who, in the discharge of the duties of his office, commits any fraud or breach of trust affecting the public, whether the fraud or breach of trust would have been criminal or not if committed against a private person, is guilty of a felony.*

(2) A person convicted of an offence under this section shall be liable to a fine not exceeding one million shillings or to imprisonment for a term not exceeding ten years or to both.

59. I hold that acceding to the petitioners' submission would entail this court adopting an interpretation that presupposes Parliament was oblivious of the existence of the ***Penal Code*** when it enacted the ***ACECA*** in the year 2003. It certainly was aware and saw it fit that in addition to the sentence under the paragraph (a) of the section, a mandatory punishment be specifically provided for in cases where a public officer had received a benefit as a result of the economic crime.

60. These provisions cannot be read in isolation and at all times, the purpose of the legislation ought to be borne in mind. ***ACECA*** was introduced to serve a specific purpose of thwarting corruption and economic crimes. It is, *"An Act of Parliament to provide for the prevention, investigation and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith."*

61. On the other hand, the ***Penal Code*** is not a one stop shop of all the criminal offences, several other Acts create similar offences, depending on the specific objects of the legislation in question and the gravity of the offence. It is notable that even under the ***Penal Code*** itself, we have varied sentences for similar offences. Take for instance, punishment for stealing under **section 275** which differs depending on the unique circumstances of the crime so that we have varied sentences for what is for all intents and purposes the crime of theft, such as stealing by servant.

62. As I observed in ***Commission for The Implementation of The Constitution v Parliament of Kenya and Another*****Nairobi Petition No. 454 of 2012 [2013] *e*KLR**;*"[52] Parliament does not legislate in a vacuum but within an overall framework of existing laws and institutions framework and unless it is clear that a latter statute intends to repeal or otherwise replace the corresponding existent legislation, each legislative enactment continues to have the full force of law and is enforceable accordingly.....[69].Declaring a statute as unconstitutional, needless to say is a serious issue with deep-seated ramifications and the court should not be overly enthusiastic in pronouncing so unless clear grounds known in law have been clearly established. On this, I agree with the Transparency International, the 2nd Amicus curiae on the point that it is not for this court to dictate to Parliament what it should or should not pass as that is the sole prerogative of Parliament. The court can only deal with the legislative results of Parliament."*

63. The legislature is therefore entitled to adopt different levels of penalties to satisfy certain policy objectives. The question of severity of punishment cannot of itself render a statute unconstitutional. The substance of legislation including the sentence to be meted out is within the realm of the legislature and the court's role is limited and will not interfere unless it is shown that such sentence violates any of the known Constitutional rights and freedoms. I therefore find and hold that there was no violation of the petitioners' right to equal protection of the law as alleged by the petitioners or at all.

Constitutionality of sections of ACECA

64. The petitioners have challenged certain provisions of ***ACECA*** as being unconstitutional on various grounds. Before proceeding on to deal with the issue, I find it necessary to mention in passing the principles that guide the court in considering whether or not provisions of a statute are constitutional. There is a general presumption that every Act is constitutional and the burden of proof thus lies on any person who alleges otherwise, with the exception that where there are limitations to fundamental rights, the onus is on the body restricting the right to show that such limitation was justified (See ***Ndyanabo v Attorney General*** **[2001] EA 495**).

65. It has always been a canon of constitutional interpretation that the Constitution must be read as a whole without any one particular provision destroying the other but each sustaining the other. (See ***Tinyefuza v The Attorney General of Uganda*****, Constitutional Appeal No. 1 of 1997**, ***Centre for***

***Rights Education and Awareness (CREAW) and Others v Attorney General*, Nairobi Petition No. 16 of 2011(Unreported)**).

66. In determining whether an Act is constitutional, the overall object and purpose of the Act must also be considered. The other principle is that the Constitution should be given a purposive liberal interpretation. As adopted by the Supreme Court in ***Re Matter of the Interim Independent Electoral Commission*** **Constitutional Application No. 2 of 2011**, *"…The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion."*

67. **Article 79** mandates Parliament to enact legislation to establish an independent ethics and anticorruption commission for purposes of ensuring compliance with and enforcement of the provisions of **Chapter Six** of the Constitution. In fulfilment of this mandate, Parliament enacted the ***Ethics and Anti- Corruption Commission Act*** **(Act No. 22 of 2011)** whose object is, *"…to provide for the functions and powers of the Commission, to provide for the qualifications and procedures for the appointment of the chairperson and members of the Commission, and for connected purposes"*

68. The High Court in ***Trusted Society of Human Rights Alliance v the Attorney General and 2 Others***,**[2012] eKLR** captured the essence of the integrity provisions when it stated;*"[102] We are persuaded that this is the only approach to the interpretation of Article 73 of the Constitution which maintains fealty to the Constitution and its spirit, values and objects. Kenyans were very clear in their intentions when they entrenched Chapter Six and Article 73 in the Constitution. They were singularly aware that the Constitution has other values such as the presumption of innocence until one is proved guilty. Yet, Kenyans were singularly desirous of cleaning up our politics and governance structures by insisting on high standards of personal integrity among those seeking to govern us or hold public office. They intended that Chapter Six and Article 73 will be enforced in the spirit in which they included them in the Constitution. The people of Kenya did not intend that these provisions on integrity and suitability for public offices be merely suggestions, superfluous or ornamental; they did not intend to include these provisions as lofty aspirations. Kenyans intended that the provisions on integrity and suitability for office for public and State offices should have substantive bite. In short, the people of Kenya intended that the provisions on integrity of our leaders and public officers will be enforced and implemented. They desired these collective commitments to ensure good governance in the Republic will be put into practice."*

69. It is therefore clear that the enactment separate of offences under the ***ACECA*** underlie one of the themes of our Constitution contained in **Chapter Six**. I shall now address the individual allegations of unconstitutionality as here below:

Violation of the right to fair hearing

70. The petitioners submit that **sections 58** and **59** of ***ACECA*** violate the right to a fair hearing under **Article 50** in as far as they shift the burden of proof to the accused person and compromise on the right to be presumed innocent under **Article 50(2)*(a)***.

71. **Section 58** reads as follows;

> *58. Presumption of corruption if act shown*
>
> *If a person is accused of an offence under Part V an element of which is that an act was done corruptly and the accused person is proved to have done that act the person shall be presumed to have done that act corruptly unless the contrary is proved.*

72. **Section 58** is impugned on the basis that it infringes on the right to be presumed innocent until the contrary is proved. It would, in my view, be necessary to assume the corrupt practice, if one was

to be charged in the first place. The words, 'corruptly' are used in regard to the offence of bribery involving agents under **section 39** of the Act. By adding the adverb 'corruptly' qualifies the elements of the offence so that the act can only be said to be an offence if it is committed in that manner. I must emphasize that sight must not be lost that the burden of proof still rests with the prosecution, and it will be up to it to prove the elements of that offence including convincing the court that such an act was done corruptly. I therefore do not read any unconstitutionality on this section.

73. In ***Christopher Ndarathi Murungaru v Kenya Anti-Corruption Authority &Another*** **[2006] 4 KLR**, one of the issues that the court was faced with was whether it was constitutionally permissible that **sections 26, 27, 28** and **58** of ***ACECA*** should allegedly shift the burden of proofing criminality from the shoulders of the investigators and the prosecutor in contravention of **section 77(2)** of the former Constitution. The **sections 26, 27 and 28** permit the anti-graft body to demand a written statement and information relating to the suspect's property and production of records and property of the suspect, and allows for a suspect's associate to be required to provide information in relation to specified property. **Section 58**, whose content is set out above is one that provides for presumption of corruption if act shown unless the contrary is proved. The court noted that the ***ACECA*** is a penal statute and like all other penal statutes must be construed strictly and in upholding their constitutionality observed as follows, *"It is therefore a social and economic imperative for a country like Kenya to enact and implement to the letter an anti-corruption and economic crimes legislation. Corruption …is a complex fraud and the large sums of money embezzled be it through procurement of goods and services or transfer pricing are readily laundered through the purchase of real estate property and stocks, both locally and overseas through chains of trusts and cross-trusts and foundations. Borrowing from various multi-lateral instruments on corruption and economic crimes, the Kenyan Anti-Corruption and Economic Crimes Act had to adopt new and novel modes of investigation and detection of complex webs of local and international corruption. Because much of the information lies within the suspect's knowledge and that of his associates the investigatory power must be all encompassing to include such associates and accomplices in some cases."*

74. **Section 59** is one that states thus;

> ***59****. Certificates to show value of property, etc.*
>
> *(1) In a prosecution for corruption or economic crime or a proceeding under this Act, a certificate of a valuation officer as to the value of a benefit or property is admissible and is proof of that value, unless the contrary is proved.*
>
> *(2) A court shall presume, in the absence of evidence to the contrary, that a certificate purporting to be the certificate of a valuation officer is such a certificate.*
>
> *In this section,* ***"valuation officer"*** *means a person appointed, employed or authorised by the Commission or the Government to value property and whose appointment, employment or authorisation is published by notice in the Gazette.*

75. The petitioners allege that the **section 59** is unconstitutional in that it infringes on the right to adduce and challenge evidence under **Article 50(2)(k)**, the right to examine, or have examined, witnesses against them; and the right to a fair trial by shifting the burden of proving the value of the property in question to the petitioners.

76. **Section 59** deals with the presumption of authenticity of a certificate of a valuation officer as to the value of a benefit. There are many instances in which the law presumes the authenticity of documents. For instance, under **section 77** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, in any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis, the court may presume that the

signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it.

77. In dealing with the presumption such as that contained in **section 59** of ***ACECA***, I would adopt the approach in ***Attorney General's Reference (No. 1 of 2004) (2004),*** **WLR 2111** where Court of Appeal of England considered the issue of reversal of burden in relation to **Article 6(2)** of the ***Convention for the Protection of Human Rights and Fundamental Freedoms*** which provides, *"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."* The Court observed as under that, *"(2) That the common law and article 6 (2) of the Convention both permitted the imposition of a legal burden of proof on a defendant, provided that it was proportionate and reasonably necessary in the circumstances; that such a legal burden would usually be justified if the prosecution had to prove the essential ingredients of the offence but, in respect of a particular issue, it was fair and reasonable to deny a defendant the general protection normally guaranteed by the presumption of innocence; that the easier it was for a defendant to discharge such a burden, as where the relevant facts were within his own knowledge, the more likely it was that the legal burden would be justified; that the difficulty which would face the prosecution in establishing those facts was also a relevant factor and that the ultimate question was whether such a legal burden would prevent a fair trial and, if it would, it must either be interpreted, if possible, as imposing only an evidential burden, in which case there would be no risk of contravention of article 6 (2), or it should be declared incompatible with article 6 (2)."* (Emphasis mine)

78. I do not think the presumption interferes or diminishes the right to a fair trial. It is only a rule of evidence and does not impose a legal burden on the accused to disprove the evidence of the prosecution. The accused is still entitled to question or challenge the evidence of the valuer who presents the report under **section 59** of ***ACECA***. On the whole, the State still bears the burden of proving the case beyond reasonable doubt.

79. I do not find the provisions of ***ACECA*** to be *ultra vires* the Constitution in the manner as alleged by the petitioners.

Cruel and degrading treatment

80. The 2nd and 3rd petitioners claim that the punishment provided in **section 48(1)(b**) of the Act exceeds,*"what is usual, proper, necessary or normal, and that the punishment is grossly disproportionate, bears no articulable correlation vis-a-vis the gravity of the offences charged, and is too severe for the crime contemplated."* They aver that the punishment imposed by **section 48** of ***ACECA*** is cruel, inhuman or degrading contrary to **Article 29** of the Constitution.

81. The petitioners cited an article by Kieran Riley titled,***"Trial By Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine,"*** where the author at page 303 notes; *"Individual criminal defendants need to be protected against "the occasional excesses of the popular will." It is the duty of the judiciary to protect them and to uphold our constitutional system of checks and balances that is "precisely designed to inhibit swift and complete accomplishment of that popular will."The legislature, in theory, acts to please the people. When crime rates rise, the people want to see that the legislature is doing something to protect them. This relationship can lead to broad criminalization and punishment schemes that are "tough on crime" at the expense of the rights of individuals who are convicted of crimes. The Constitution entrust the judiciary to protect individual defendants from unjust application of the rule of the majority. Therefore, the judiciary is the branch that should make the final sentencing determination for each individual."*[Footnotes omitted]

82. The court has on various occasions pronounced itself as to what amounts to *'cruel, inhuman or degrading treatment'*.In the case of ***Hon. James Ondicho Gesami v The Hon. Attorney General & 2 Others***(Supra) the Court stated,*"[72] The terms 'cruel, inhuman and degrading treatment' have acquired a specific meaning in law. They have also been judicially considered in our courts-*

see for instance the decision of the court in ***Republic v Minister for Home Affairs and Others ex parte Sitamze Nairobi HCCC NO. 1652 OF 2004 [2008] 2 EA 323 and Dennis Mogamb iMong'are v The Attorney General & Others Petition No. 146 of 2011****.They do not refer to general discomfort or inconvenience arising out of the application of the ordinary legal process.In the case of Republic v Minister for Home Affairs and Others ex parte Sitamze Nairobi (supra) Justice Nyamu noted that "Inhuman treatment" is physical or mental cruelty so severe that it endangers life or health. It is an intentional act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.'"*

83. In determining whether the requirements of the ***ACECA*** that required suspect to furnish a list of his assets constituted torture, inhuman and degrading punishment or treatment, the court in the earlier case of ***Christopher Ndarathi Murungaru v Kenya Anti-Corruption Authority & Another*** **(Supra)**, had this to say at page 78, *"The object of the Anti-Corruption and Economic Crimes Act in its entirety is to provide an enforceable legislative or legal framework as its long title clearly states an Act of Parliament to provide for the prevention, investigation (or detection) and punishment of corruption, economic crime and related offences and for matters incidental thereto and connected therewith. Requiring the Plaintiff to declare his earthly possessions in pursuit of this objective may cause a person suspected of corruption or economic crimes, some mental anxiety, but cannot constitute torture, or inhuman or degrading treatment within the meaning contemplated by section 74 of the Constitution."*

84. I agree with and adopt the above sentiments. The petitioners have not established the standard upon which penalties can be judged as cruel and inhuman. Imprisonment, fines and disgorgement of ill-gotten gains through corruption are with normal human standards of decency even though its may occasion mental anxiety and discomfort as other punishments do. The penalties prescribed by ***ACECA*** are within the legislative competence and cannot be considered as cruel and inhuman in light of the Constitutional and legislative policy on corruption and economic crimes.

<u>Protection of public officers and violation of indemnity</u>

85. The petitioners alleged that the process was a violation of the indemnity provisions under **Article 236** and **section 206** of the ***Public Finance Management Act***. **Article 236** of the Constitution provides for protection of public officers in the following terms;

> *A public officer shall not be—*
>
> *(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or*
>
> *(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.*

86. In determining the above provisions, this court in ***Charles Okello Mwanda (*****supra)** had this to say, *"[39] The provisions of Article 236 provide additional protection to a public officer. In my view these protections are secured by the ordinary laws concerning the discipline, promotion and demotion of public officers. For example, the Public Service Commission Regulations, 2005 provides due process rights but settling out clearly the circumstances when a public officer may be interdicted. ……. [42]. I do not read Article 236 to provide immunity to the petitioner from investigations where an offence under ACECA has been alleged. As the facts in this case shows, the investigations are still in the primordial stage. The Commission is bound to act fairly, that is consider all matters including giving the petitioner an opportunity to present his evidence before it comes to any conclusion. This is part of the due process contemplated under Article 236(2). [43]. I also do not read Article 236 as entitling this Court to restrain the performance by the ACECA of its statutory mandate and substituting itself as the decision maker to determine whether indeed a case has been made out for investigations. It is for this reason that I have exercised*

restraint in commenting on or making any definitive that would otherwise prejudice the outcome of the investigation."

87. I reject the petitioners' contention on infringement of the protection of public officers and I find and hold that the provisions of **Article 236** do not immunize or indemnify public officers including the petitioners against investigation or prosecution. These provisions re-emphasise the need for due process in dealing with public officers.

88. The 1st petitioner has challenged **Section 62** of ***ACECA*** which require that a public officer charged with corruption or economic crime be suspended on half pay, on full allowances until proceedings are discontinued or the officer is acquitted. The section reads, in part, as follows;

62. *Suspension, if charged with corruption or economic crime*

> *(1) A public officer who is charged with corruption or economic crime shall be suspended, at half pay, with effect from the date of the charge.*
>
> *(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.*
>
> *(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.*
>
> *(4) This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.*

89. The **section 62** must be read in context of its purpose, the overall purpose of the Act and the spirit enshrined in **Chapter 6** of the Constitution. Suspension does not amount to a penalty but merely suspends certain rights pending determination of the trial. In the event the person is acquitted the full benefits are restored. If the person is convicted, then the suspension merges into a penalty.

Issue of Defective charge sheets

90. The petitioners contend that there was duplicity of charges and that the charge sheets were defective. I agree with the respondents' submission that issues of competency of charge sheets are matters perfectly within the jurisdiction of the trial court. I am satisfied that matters of competence of the charge sheets are catered for under **sections 89(5), 137** and **214** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)***.

91. I agree and adopt the holding of the court in ***William S. K. Ruto and Another v Attorney General*** **Nairobi HCCC No. 1192 of 2005 [2010]*e*KLR** where it stated, *"The applicants only need to move the trial magistrate to strike out the charge for being incompetent or the prosecution can seek to substitute the charges. The fact that the charge is defective does not raise a Constitutional issue."*

Inordinate delay in Investigation and prosecution

92. The petitioners allege that there was inordinate delay in investigating and bringing the charges in the criminal case. The 2nd and 3rd petitioners aver that investigations were completed about May, 2011 when statements from potential witnesses were received and that it was not until 28th February 2013 that the DPP in conjunction with EACC laid charges against them. They contend that by failing to promptly decide to recommend or to decline to recommend their prosecution, the DPP violated the specific requirement that they were entitled to administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair.

93. The DPP and EACC on the other hand contend that the matter at hand was one that involved

cross-border investigations and complex issues including mutual legal assistance with Japanese authorities and translations.

94. The right to trial without unreasonable delay is one of the components of a fair trial under **Article 50**. After considering the international jurisprudence on the right to a trial within a reasonable time, the Court of Appeal in ***Julius Kamau Mbugua v Republic*, Criminal Appeal 50 of 2008 [2010] *e*KLR** summarized the principles on the right to a trial within a reasonable time *inter alia* as follows;

i. *The trial within a reasonable time guarantee is part of international human rights law and although the right may not be textually in identical terms in some countries the right is qualitatively identical.*
ii. *The right is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions.*
iii. *The general approach to the determination whether, the right has been violated is not by a mathematical or administrative formula but rather by judicial determination whereby the court is obliged to consider all the relevant factors within the context of the whole proceedings.*
iv. *There is no international norm of "reasonableness". The concept of reasonableness is a value judgment to be considered in particular circumstances of each case and in the context of domestic legal system and the economic, social and cultural conditions prevailing.*
v. *The standard of proof of an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorized as unreasonable.*
vi. *The right is to trial without undue delay. It is not a right not to be tried after undue delay except in Scotland and it is not designed to avoid trials on the merits.*

95. What is clear from the decision is that what constitutes 'unreasonable delay' is not a matter capable of mathematical definition but one dependent on the facts and circumstances of the particular case. In the present matter, it is common ground that the transaction subject of the criminal matter took place in the year 2009. It is also common ground that the charges were taken to court on the 28th February 2013. The question is, can this be termed as unreasonable delay and hence a violation to the right to fair trial under **Article 50**.

96. What is not in dispute is that the matter at hand is complex and involved investigations within and outside jurisdiction. The petitioner's bear the burden of proving that there has been unreasonable delay in charging them to the extent that a fair trial is impaired. I find and hold that they have not satisfied the, "*relatively high threshold has to be crossed before the delay can be categorized as unreasonable*" propounded in the ***Julius Kamau Mbugua Case* (Supra)**.

Failure to be informed of the charge with sufficient detail

97. The petitioners contend that they were denied witness statements and other evidentiary material before plea was taken. Under **Article 50(2)** one of the elements of a fair trial is the right, ***"to be informed of the charge, with sufficient detail to answer it."*****Article 50(2)(b)** provides that a person charged has the right, *"to have adequate time and facilities to prepare a defence"*while **Article 50(2)(c)** provides that a person charged has a right,"*to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence."*

98. According to the 1st petitioner, 'trial' includes plea taking and the question is whether the requirements of the fair trial under the **Article 50** as read with the right to access to information under **Article 35** contemplate that all prosecution material be availed to the accused before plea taking.

99. The DPP and the EACC submit that the duty imposed on the prosecution at the plea taking stage of proceedings is that created under **sections 134** and **137** of the **Criminal Procedure Code**. The duty is that the charge must contain a statement of the specific offence coupled with enough

particulars to give the accused reasonable information as to the nature of the offence to unable the accused answer to the charge.

100. The Court of Appeal in the case of ***Thomas Patrick Cholmondeley v Republic*** **(Supra)**,*"We think it is now established and accepted that to satisfy the requirements of a fair trial guaranteed under section 77 of our Constitution, the prosecution is now under a duty to provide an accused person with, and to do so in advance of the trial, all the relevant material such as copies of statements of witnesses who will testify at the trial, copies of documentary exhibits to be produced at the trial and such like items. If for any reason the prosecution thinks it ought not to disclose any piece of evidence in its possession, for example, on the basis of public interest immunity, they must put their case before the trial judge or magistrate who will then decide whether the claim by the prosecution not to disclose is or is not justified. The position is the same in various commonwealth countries."*(See also ***George Ngodhe Juma & 2 Others v The Attorney General*** **(Supra)**).

101. In the case of ***Dennis Edmond Apaa & 2 Others v Ethics and Anticorruption Commission & Another*** **(Supra)**, the court observed as follows, *"[26] The Cholmondeley Case does not support the proposition that all the witnesses and evidence must be disclosed in advance of the trial. The case of R v Ward (Supra) cited by the Court of Appeal is clear that the duty of disclosure is a continuing one throughout the trial. Furthermore, the words of Article 50(2)(j) that guarantee the right "to be informed in advance" cannot be read restrictively to mean in advance of the trial. The dutyimposed on the court is to ensure a fair trial for the accused and this right of disclosure is protected by the accused being informed of the evidence before it is produced and the accused having reasonable access to it. This right is to be read together with the other rights that constitute the right to a fair trial. Article 50(2)(c) guarantees the accused the right, "to have adequate facilities to prepare a defence." [27]. This means the duty is cast on the prosecution to disclose all the evidence, material and witnesses to the defence during the pre-trial stage and throughout the trial. Whenever a disclosure is made during the trial the accused must be given adequate facilities to prepare his or her defence. This position had also been stated in R v Stinchcombe (Supra), where the Supreme Court of Canada observed, "The obligation to disclose was acontinuing one and was to be updated when additional information was received."*

102. The right to be provided with? material the prosecution wishes to rely on is not a one-off event but is a process that continues throughout the trial period from the time the trial starts when the plea is taken. The reality is that there will be instances where all the information relating to investigation may not all be available at the time of charging the suspect or taking the plea. The disclosure of evidence, both inculpatory and exculpatory, is easily dealt with during the trial as the duty to provide the material is a continuing one and the magistrate is entitled to give such orders and directions as are necessary to effect this right. When the fresh material is provided, the accused is entitled to have the time and opportunity to prepare their defence.

103. The provisions of **Article 50** deal with the rights of the accused at a trial therefore recourse cannot be had to **Article 35** of the Constitution that protects freedom of information once the person is charged with the criminal offence. Furthermore, the right under **Article 50** is one that is properly enforced by the trial court should the need arise during the proceedings.

Adverse Pre-trial publicity

104. The petitioners also complained of being exposed to adverse media publicity at the behest of the respondents. They complain their work places were stormed in the company of members of the press as they were arrested and as a result they felt harassed and embarrassed. The issue of harassment is one that is subject to proof and on the basis of the material before the court, I am unable to find that the petitioners suffered harassment and embarrassment in violation of the right to dignity.

105. The issue of media publicity *vis a vis* the right to fair hearing has been subject of various court's decisions. In this respect I concur with the sentiments of the court in ***William S.K. Ruto &***

***Another v Attorney General*, HC Civil Suit No. 1192 of 2005** where it was stated that; *"The applicants will be tried by qualified, competent and independent judicial officers who are not easily influenced by statements made by politicians to the press. In our country today, such statements are the order of the day and it is our view that the courts will rise above such utterances. We find no basis for the applicant's fears. In **Kamlesh Pattni v AG Misc. App. No. 1296/1998**, the court held as follows:-"**Media publicity per se does not constitute of itself a violation of a party's right to a fair hearing."** The court in **Deepak Kamani v AG Civil Appeal (Application)** 152/2009 reached a similar finding on allegations of pre-trial publicity."*

Composition of the EACC

106. The 1st petitioner alleges that during the time the investigation was conducted, the EACC was not properly constituted as it neither had a Chairman and it officers had not been vetted. This question is partly answered by **section 53** of the ***Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)*** which provides that;

> *53. Power of board, etc., not affected by vacancy, etc.*
>
> *Where by or under a written law a board, commission, committee or similar body, whether corporate or un-incorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by—*
>
> *(a) a vacancy in the membership thereof; or*
>
> *(b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof.*

107. The question of transition and composition of EACC was also dealt in the case of ***Ruth Muganda v Kenya Anti-Corruption Commission and Director of Public Prosecutions*** **Nairobi HC Misc. Crim. Appl. No. 288 of 2012** where, in holding that the members of the secretariat of the Commission were properly in office, Achode J., held that, *"[45]…. Thus this Court is alive to the fact that the envisaged transitional period prescribed in the statute could not foresee all transitional challenges, bearing in mind possibilities of litigation as in the case here affecting the appointment of the chairman and therefore assumption of office by members of the Commission.. [46] A purposive approach to this issue requires the Court, in the spirit of the Constitution, to promote the continuing and intended objects and functions of the Commission throughout the transitional process as opposed to extinguishing its existence."* (See also ***African Centre For International Youth Exchange (ACIYE) & 2 Others vEthics And Anti Corruption Commission & Another***, **Petition 334 of 2012 [2012]eKLR**).

108. It is clear the petitioners' argument regarding the alleged defect in composition of EACC is untenable. My reasoning is further buttressed by the fact that the decision to prosecute is an independent decision made by the DPP and whether there is a defect in the composition of the EACC, the DPP exercised his independent discretion to charge the petitioners.

Conclusion

109. The petitioners in this case alleged that the institution of the criminal proceedings was done in bad faith and for ulterior motives. The petitioners have however fallen short of demonstrating that the proceedings were instituted for other purpose other than enforcement of the law, or otherwise an abuse of the court process. From the evidence before me, I am unable to arrive at such a conclusion.

110. In the case of ***Kuria & 3 others v Attorney General*** **[2002] 2 KLR 69**, it was observed as follows at pages 79, 80;*"There should be concrete grounds for supposing that the continued prosecution of a criminal case manifests an abuse of the judicial procedure, much that the public*

interest would be best served by the staying of the prosecution. In the instant case, the applicants have stated that there is an abuse of the process of the court by the AG. Several allegations have been levelled against the state that there is selective prosecution, that there is harassment of the applicants and pressure from the state to settle the civil dispute… I have not seen any evidence of these allegations made against the state. There is no evidence of malice, no evidence of unlawful actions, no evidence of excess or want of authority no evidence of harassment or intimidation or even manipulation of court process so as to seriously deprecate the likelihood that the applicants might not get a fair trial as provided under section 77 of the Constitution…..There is need to show how the process of the court is being is being used or misused. There is a need to indicate or show the basis upon which the rights of the applicant are under serious threat of being undermined by the criminal prosecution …….. The effect of a criminal prosecution on an accused person is adverse, but so also are their purpose in the society, which are immense. There is a public interest underlying every criminal prosecution, which is being zealously guarded, whereas at the same time there is a private interest on the rights of the accused person to be protected, by whichever means… Given these bi-polar considerations, it is imperative for the court to balance these considerations vis-à-vis the available evidence…However, just as a conviction cannot be secured without any basis of evidence, an order of prohibition cannot also be given without any evidence that there is manipulation, abuse or misuse of the court process or that there is a danger to the right of the accused person to have a fair trial."

Disposition

111. For the reasons I have outlined, I am unable to grant the orders sought and accordingly, the consolidated petitions be and are hereby dismissed.

112. In the circumstances, each party shall bear its own costs.

DELIVERED and DATED at NAIROBI this 1st day of November 2013

D.S. MAJANJA

JUDGE

Mr Katwa instructed by Katwa & Kemboy Advocates for the 1st petitioner.

Mr Nderitu, instructed by Nderitu & Partners Advocates for the 2nd and 3rd petitioners.

Mr Ruto, Advocate, instructed by the Ethics and Anti-Corruption Commission for the 1st respondent.

Mr Kamula, Advocates, instructed by the Office of the Director of Public Prosecution, the 2nd respondent.

Mr Bitta, Litigation Counsel, instructed by the State Law Officer for the 3rd and 4th respondents.