Vros Produce Limited v Mwebi & 5 others (Civil Appeal E053 of 2021) [2023] KECA 1327 (KLR) (10 November 2023) (Judgment)

Neutral citation: [2023] KECA 1327 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E053 OF 2021

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

NOVEMBER 10, 2023

BETWEEN

VROS PRODUCE LIMITED ..... APPELLANT

AND

PETER OMWENGA MWEBI ..... 1ST RESPONDENT

JOHN KEBASO ELIJAH ..... 2ND RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION ..... 3RD RESPONDENT

INSPECTOR GENERAL, NATIONAL POLICE SERVICE ..... 4TH RESPONDENT

CHIEF MAGISTRATE COURT, NAIROBI ..... 5TH RESPONDENT

THE ATTORNEY GENERAL ..... 6TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Mombasa (E. K. Ogola J.) dated 14th May 2020 in Mombasa Petition No. 31 of 2018)

JUDGMENT

1. Vros Produce Limited, the Appellant herein, is aggrieved by a judgment delivered by the High Court at Mombasa (E. K. Ogola J.) on 14th May 2020 in Petition No. 31 of 2018, in which the said Court dismissed the main prayers and allowed alternative prayers in a petition dated 13th March 2018 filed by the Peter Omwenga and John Kebaso Elijah, the 1st and 2nd Respondents herein. The High Court in this respect held that the choice of place of trial of Criminal Case No. 1612 of 2015 at the Chief Magistrates Court, Milimani, Nairobi was contrary to the provisions of section 72 of *Criminal Procedure Code* and violated Article 48 of the *Constitution*, and prohibited the Director of Public Prosecutions (the 3rd Respondent herein) from making any further substitution of the charges facing the 1st and 2nd

Respondents, nor bringing new charges, or re-introducing charges against them which had initially been withdrawn.

2. The Appellant was an Interested Party in the said petition, and a brief summary of the pleadings filed therein is necessary to place this appeal in context. The 1st and 2nd Respondents averred in the petition that they reside and work in Mombasa as advocates, where they were arrested in September 2015 by officers under the command of the Inspector General of the National Police Service (the 4th Respondent herein); that they were transported by road to Nairobi for the purpose of answering to criminal charges preferred against them by the 3rd Respondent herein at the Chief Magistrate's Court at Milimani in Nairobi (the 5th Respondent herein); and that they accordingly took plea on 24th September 2015, when seven (7) charges were levied against them which they all denied.

3. That on 28th November 2016 when they attended the trial Court for hearing, they were again required to take another plea in respect of a substituted charge sheet containing four counts against them and three other accused persons were added making a total of five (5) accused persons. However, that the case never proceeded to hearing because on various occasions the 3rd Respondent was not ready to proceed, and on 12th October 2017, the charge sheet was again substituted and they took plea again for a third time, and two other accused persons were added, making the total number of accused persons seven (7). That the case was scheduled for hearing on 8th and 9th March 2018, but did not proceed for the reason that the 3rd Respondent yet again sought to substitute the charge sheet and levelled a total of eleven (11) counts against the accused persons.

4. The 1st and 2nd Respondents contended that the 3rd Respondent was not seeking to do justice but had unexplained ulterior motives in preferring charges against them, which they were not ready to prosecute after three years and thirteen attendances in court; that it was not possible for a fair hearing to be accorded them under Articles 25(c) and 50(2) of *Constitution* since the 3rd Respondent had brought vague charges against them which stated that the offences were committed on 'unknown date and unknown place' and in 'unknown places within Kenya', and they did not know the place of alleged commission of the offence for them to adequately prepare for their defence; that the charges as drawn were a clear breach of the Constitutional safe guards of a fair trial as envisaged in *Constitution* under Article 50 (2) (b) and (c) since they were not framed with sufficient details as required by law; and that the conduct of the respondents violated the provisions of article 50(2)(e), as the commencement of the trial has been delayed by the 3rd and 4th Respondents by introducing various accused persons, seeking to substitute charges, and not being ready to proceed during the hearings.

5. The 1st and 2nd Respondent further contended that the allegations in the charges related to land parcel number LR No. MN/IV/271 to 309 situate in Malindi, they resided and worked in Mombasa, and that it was evident from the charges that some of the allegations related to Malindi High Court Petition No. 9 of 2013 in respect of land situate in Kilifi County, which was the place of trial of any suit emanating from the circumstances and as required by section 72 of the *Criminal Procedure Code*. Further, that it was prohibitively expensive for them to travel to Nairobi and seek accommodation therein during the trial, and also cater for the upkeep of their advocates who were based in Mombasa. Therefore, that charging them in Nairobi violated Article 48 of *Constitution* and impeded the availability of justice. Lastly the 1st and 2nd Respondents were apprehensive of the trial Magistrate's impartiality, arising from the manner the file moved from the previous trial Magistrate, and that on 8th March 2018, upon application for substitution of the charges by the 3rd Respondent, the said trial Magistrate made orders that the defence be served with the intended substituted charge sheet and that the substitution of the charge sheet and hearing be held on 5th and 6th April 2018, without giving them as opportunity to oppose the substitution.

6. The 1st and 2nd Respondent accordingly sought prohibitory orders against the 3rd , 4th and 5th Respondents from prosecuting them or continuing the hearing of Nairobi Milimani Chief Magistrate's Criminal Case No. 1612 of 2015 or any other criminal case on the same allegations; and the following declarations: that the charges against them, the delayed prosecution and choice of place of trial were in breach of the provisions of section 72 of the *Criminal Procedure Code*, Article 48 and Article 50(2) (b), (c) (and e) of *Constitution*; that the conduct of the current trial Magistrate disclosed overt circumstances leading to threats of violation, and or actual violation of their rights to a fair trial protected by Article 25(c) and Article 50(2) of *Constitution*; and that the continued prosecution and hearing of Nairobi Milimani Chief Magistrate's Criminal Case No. 1612 of 2015 was invalid in face of Article 2(4) of *Constitution*. In the alternative that if the prosecution is allowed by the Court to proceed, then, orders be made that the place of trial be any other Court within the local limits of where the land and analogous suits were filed being at either Kilifi or Mombasa Counties, or if continued in Nairobi, then the same be before any other Magistrate other than the then trial Magistrate, and that at no moment at all should the 3rd Respondent be allowed to introduce new charges against the 1st and 2nd Respondents which had initially been withdrawn against them.

7. The Appellant, 3rd 4th, 5th and 6th Respondents opposed the said petition in the High Court. The Appellant filed a replying affidavit sworn on the 31st May 2018 by its director, John Nganga. He deponed that the Appellant was the complainant in the subject criminal case against the 1st and 2nd Respondents, and that the petition was made in bad faith and in abuse of court process, as it was a deliberate attempt to subvert the criminal justice system by granting the 1st and 2nd Respondent license not to be prosecuted, and an attempt to transmute ordinary criminal matters to constitutional issues. Further, that the petition related to issues of sufficiency of charges, adequate time and facilities to prepare a defence and to have the trial proceed without unreasonable delay, place of trial and purported bias, which were matters that should be raised before the trial Court at the first instance and were not constitutional issues, and that there were avenues provided under the *Criminal Procedure Code* to challenge the decisions made in this regard. Additionally, that the Appellant was ready and willing to proceed with the trial and that the delay in hearing the criminal case was caused by the 1st and the 2nd Respondents, their co-accused and the prosecution, and it would be prejudiced and suffer grave and irreparable injustice if the orders sought were granted.

8. The said deponent further averred that the 1st and 2nd Respondents were aware that the Appellant and the Registrar of the Companies, whose records were tampered with, were situated in Nairobi. Lastly, that the power, duty and mandate of investigation criminal offences was a constitutional and statutory duty conferred to the National Police Service, while the 3rd Respondent had constitutional power to direct prosecutions and had decisional and operational independence, and was not under the direction, control or supervision of another person or authority. Therefore, that the criminal case in Nairobi Milimani Chief Magistrate's Criminal Case No. 1612 of 2015 was properly instituted and within the jurisdiction of the trial Court.

9. The 3rd Respondent filed Grounds of Opposition dated the 8th March 2019 and stated that the petition offended section 193A of the *Criminal Procedure Code* since pending civil proceedings was not a ground for any stay or prohibition of the criminal proceedings, that the High Court was not the forum to determine the sufficiency of evidence in the criminal case as this was the duty of the trial Court, and that the 3rd Respondent is mandated under Article 157 of *Constitution* to institute and undertake criminal proceedings against any person including the 1st and 2nd Respondents. The 4th Respondent on its part filed a replying affidavit sworn on 27th April 2018 by IP Peter Kabogo, an officer in the Directorate of Criminal Investigations, and one of the police officers assigned the subject criminal case. The said officer deponed that he conducted the preliminary enquiry and the evidence

disclosed commission of an offence and he forwarded the investigation file to the 3rd Respondent, who directed the prosecution of the suspects who included the 1st and 2nd Respondents. Further, that the amendment of the charge sheet was due to the further arrest and addition of accused persons and consolidation of charges, which is allowed under section 214 of the *Criminal Procedure Code*.

10. The 4th Respondent further averred that the High Court did not have jurisdiction to issue the orders sought because of the nature of the criminal activities and offences involved, including an extensive web of conspiracy and forgeries, which required viva voce evidence and production of documents which could only be adduced before the trial. In addition, that the delay in the criminal proceedings was caused by various factors, including the fact that on 8th November 2015, a Mr. Stephen Macharia Kimani, an advocate, filed Constitutional Petition No. 16 of 2015 at Malindi High Court and was granted conservatory orders to stay prosecution in Milimani Criminal Case No 1415 of 2015 involving the 1st and 2nd Respondents, which petition was determined on 23rd April 2018; and the fact that the trial Magistrate was transferred during the pendency of the proceedings. With regards to the use of the words 'unknown place' and 'unknown dates', it was averred that these were proper descriptions which were acceptable on the charge sheet based on the nature of the offences. Additionally, that if an accused person did not understand the nature or the particulars of the offence in a charge sheet, they are required to raise it before the trial Court, and there was no evidence that the 1st and 2nd Respondents had been denied time and facilities to prepare their defence.

11. Additionally, that the Nairobi Chief Magistrate's Court had the power to hear and determine the transfer of the case if the offence was committed outside its jurisdiction, and the place of trial in Nairobi was for the general convenience of parties since the principal acts were committed in Nairobi which was the location of majority of the witnesses. Lastly, that there was no time limitation in criminal offences and the 3rd to 6th Respondents had the power to amend, consolidate and alter the charge sheet at any stage of the trial, as provided under section 214 and section 275 of the *Criminal Procedure Code*.

12. The learned Judge of the High Court (E. K. Ogola J.) after hearing the parties, found that there are well set provisions of the *Criminal Procedure Code*, which deal with the issue of defective charge sheets and that the said concern should have been raised before the trial Court; that there appears to have been considerable delay in this matter, but that it had not cost the 1st and 2nd Respondents the ability to defend themselves because of unavailability of witnesses or the dimming of memories of witnesses and the delay was not primarily caused by the 3rd, 4th and 5th Respondents; however that further delay may actually injure the 1st and 2nd Respondents s' ability to defend themselves in the trial; that the charging of the 1st and 2nd Respondents in Nairobi impeded their access to justice as it involved highly prohibitive costs, expenses, and logistical inconvenience, and the 3rd, 4th and 5th Respondents can still easily get their witness to any seat of trial in the Republic as they are the ones who brought the said charges; that the frequent substitution of the charges in the criminal case was likely to occasion an erosion to the concept of fair trial and the manner in which substitution has so far been done was prejudicial to the 1st and 2nd Respondents who had no way of knowing with certainty the real charges they are facing and every time substitution is made the they had to re-plan their defences; and that where a party has an issue with a judge or any judicial officer, the settled practice was set out by the East African Court of Justice in *Attorney General vs. Anyang' Nyong'o and Others* [2007] 1 EA 12 and the High Court therefore lacked the jurisdiction to stray into the allegations of bias made against the trial Court.

13. The upshot was that the petition therefore failed in respect of the main prayers therein, but succeeded with respect to the alternative prayer No. 3 , and the learned Judge of the High Court made the following orders in this respect:

i. The choice of place of trial of the Petitioners in Criminal Case No. 1612 of 2015 in the Chief Magistrates Court, Milimani, Nairobi is contrary to provision of Section 72 of *Criminal Procedure Code*, and violates Article 48 of *Constitution*. Accordingly therefore, the aforesaid Criminal Case No. 1612 of 2015 in the Chief Magistrates Court at Milimani, Nairobi is hereby moved, and or transferred, to proceed in the Chief Magistrates Court at Mombasa.

ii. The 1st Respondent is prohibited from making any further substitution of the charges facing the Petitioners, and shall not bring new charges, or re-introduce charges against the Petitioners which had initially been withdrawn.

iii. Parties shall bear own costs.

14. Being dissatisfied with the decision of the High Court, the Appellant proffered this appeal and has raised twenty-three (23) grounds of appeal in its memorandum of appeal dated 30th June 2021. We heard the appeal on 2nd March 2023 on this Court's virtual platform, and learned counsel Mr. Ouma appeared for the Appellant, learned counsel, Mr. Paul Buti, appeared for the 1st Respondent, learned counsel Mr. William Mogaka, appeared for the 2nd Respondent, learned counsel Mr. Jami Yamina, appeared for the 3rd Respondent and learned counsel Mr. Penda, appeared for the 4th to 6th Respondents. As indicated earlier the High Court granted the alternative prayers as reproduced in the foregoing, which touch on two main issues, the place of trial and substitution of charges in the criminal case. The majority of grounds of appeal raised by the Appellant are on various aspects of these two issues, but in addition, it has also raised the ground that the High Court failed to take into account the rights of the Appellant a victim, which issue we propose to address at the outset.

15. Although the Appellant's counsel did not make any submissions on the issue of violation of its rights as a victim, the 3rd Respondent's counsel submitted that the Appellant's and other complainants/victims' competing rights to have a fair trial as envisaged under Article 50(9) of *Constitution* read together with the *Victims Protection Act* were impeded by the inability of the prosecutor to bring amendments, which bordered on "judicial- based secondary victimization" contrary to section 3 (b) (v) , 4 and 9 (1)of the *Victims Protection Act*.

16. The 1st and 2nd Respondent's counsel on their part submitted that the Appellant had usurped the powers, duties, functions and constitutional mandate of the Director of Public Prosecution, and that the Appellant was not a party in Nairobi Milimani Chief Magistrate's Criminal Case No. 1612 of 2015 and never participated either as a victim or as an interested party. Therefore, that the Appellant was instituting this appeal with the purpose of obtaining orders on behalf of, and for the benefit and use by the 3rd Respondent. The counsel in this respect cited the decision in *Joseph Lendrix Waswa vs Republic* [2020] eKLR that a victim can only be a natural person and not a company, and submitted that a victim under the *Victim Protection Act* in a criminal prosecution process lacked the authority to institute and/or commence a challenge on appeal matters vested in the constitutional and statutory office of the Director of Public Prosecutions.

17. Rule 75(1) of the *Court of Appeal Rules* of 2010 and Rule 77 (1) of the *Court of Appeal Rules* of 2022 provide that any person who desires to file a civil appeal shall give notice in writing, which shall be lodged with the registrar of the superior court within fourteen days of the date of the decision sought to be appealed. A similar rule is provided for criminal appeals in Rule 59 (1) of the *Court of Appeal Rules* of 2010 and Rule 60(1) of the *Court of Appeal Rules* of 2022. This rule was explained by this

Court (Waki, Nambuye, Musinga, Gatembu & Murgor JJ.A.) in the decision in *Law Society of Kenya, Nairobi Branch vs Malindi Law Society & 6 others* [supra] as follows:

> "25. It seems to us from that interpretation that the issue as to who has locus standi before a court of law has now been crystallized. It is any aggrieved party.
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> 26. This brings us to the applicability of Rule 75 of the Rules of this Court.
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> It provides:
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> > "75 (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the superior court." [Emphasis added]
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> 27. The Rule is specific about "a person who desires to appeal" and not a party to the impugned decision. Halsbury's Laws of England's 4th Edition Para. 49 page 52, has this to state on locus standi:
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> > "In order to maintain proceedings successfully, a plaintiff or applicant must show not only that the court has power to determine the issue, but also that he is entitled to bring the matter before the court....
> >
> > In other contexts, locus standi depends primarily on the nature of the remedy or relief sought .....a right of appeal.....is frequently confined to a " person aggrieved" or a person who claims to be or feels aggrieved...."
>
> 28. Paragraph 66 page 92 of the same treatise defines an aggrieved party as follows:-
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> > "The meaning of a person aggrieved may vary according to the context. However, as a matter of general principle, any person who has a decision decided against him (particularly in adversarial' proceedings) will be a person aggrieved for the purposes of appealing against that decision unless the decision amounts to an acquittal of aspiral criminal offence."
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> 29. When Rule 75 as well as the above extracts from Halsbury's Laws of England are read in conjunction with the Supreme Court's interpretation of Articles 22, 258 and 260 of *Constitution*, this creates no doubt in our minds that a person, association, body corporate or an unincorporated body, have the locus standi, not only to institute original proceedings but also appellate proceedings provided that such a party is aggrieved by the decision intended to be challenged. The respondent branches asserted that they were aggrieved by the impugned decision as the same had impacted negatively on their legal practice in particular and the general welfare of their members. In our view, such an assertion was sufficient justification for them to intervene irrespective of its ultimate outcome."

18. Rule 2 of the *Court of Appeal Rules* also identifies parties who may participate in an appeal, even though not parties to the suit in the trial Court. An "amicus curiae" is accordingly defined as a person who is

not a party to a matter, but has been allowed by the Court upon application, to appear as a friend of the Court to address it in respect of a matter of law; and an "interested party" as a person or entity that has an identifiable stake, legal interest or duty in the proceedings before the Court but is not a party to the proceedings, or may not be directly involved in the litigation but has been allowed by the Court upon application, to appear as an interested party to address it in respect of a matter of law or fact. The crosscutting requirement therefore, is that the person filing an appeal or seeking to be participate as a party at appellate stage needs to demonstrate a personal interest they have in the matter, or the prejudice that they will suffer if not enjoined in the matter.

19. In the present appeal, it is not disputed that the Appellant was the complainant in Nairobi Milimani Chief Magistrate's Criminal Case No. 1612 of 2015 and the impugned judgment therefore directly affects it as the victim of the alleged crimes and criminal proceedings that were the subject of the orders made therein. The Appellant has therefore demonstrated the direct result, impact or consequence of the said decision on its legal rights and interests and this appeal is accordingly properly before us.

20. The next issue before us is whether the High Court erred in transferring the place of trial for Milimani Chief Magistrate Court Criminal Case No 1612 of 2015 from Nairobi to Mombasa. The Appellant's counsel urged this issue along various fronts. Firstly, that the order affecting parties who were not before it since it was not in dispute that there were seven (7) accused persons in the said criminal case, yet only two accused persons petitioned the Court to transfer the case to Mombasa, while the other accused persons did not participate in the petition. Further, that the other complainants, the Registry of Companies at Nairobi, was not aware of and did not participate in the proceedings and reliance was placed on the decision in *Town Council of Olkalau vs Ng'ang'a General Hardware* C.A. No. 269 of 1997 for the position that where an order affects several parties who were not before the Court, they should be given an opportunity to be heard.

21. Secondly, that the order of transfer was contradictory to the orders given in Malindi H.C Constitutional Petition No 16 of 2015 in which the High Court in its decision dated 31st January 2018 declined to transfer the matter in which the petitioner therein, Stephen Kimani Macharia, was charged with the same offence as the 1st and 2nd Respondents to Malindi, while noting that there is no evidence that the said petitioner would not get a fair trial before the Milimani Trial Court. Thirdly, that the High Court reached the conclusion that the place of trial at Milimani Chief Magistrate Court violated section 72 of the Criminal Procedure Code when there was irrefutable evidence of the investigating officer that Nairobi was the epi- centre of the crime.

22. Lastly, the Appellant' counsel also relied on the principle of constitutional avoidance, and while citing the decision by the Supreme Court of Kenya in *Communication Commission of Kenya & 5 others vs Royal Media Services and 5 Others* (2014) e KLR, submitted that the place of trial and substitution of charges were not constitutional issues but were ordinary criminal trial issues that were dealt with by trial Courts and the High Court therefore short circuited and usurped the ordinary criminal trial, appeal and revision process provided for in the Criminal Procedure Code, thereby subverting the law regulating criminal trials and usurping the powers of the Director of Public Prosecutions and the trial Court.

23. The Appellant's position was supported by the 3rd, 4th, 5th and 6th Respondents' counsel. Counsel for the 3rd Respondent, while citing the provisions of sections 72, 74 and 81 of the *Criminal Procedure Code*, submitted that the learned Judge equated and elevated the 1st and 2nd Respondent's travel and accommodation as an access to justice issue, and that there was no violation of the 1st and 2nd Respondents' rights by the 3rd Respondent's discretionary choice or place of institution of trial since any contestation in this regard was capable of being resolved at the trial court or by reference to the High

Court with the participation of all the parties. They faulted the learned Judge for usurping the power of the trial Court to make a determination on ordinary matters arising from criminal proceedings and placed reliance on the case of *Uwe Meixner and Another vs Attorney General* [2005] eKLR where the Court held that 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.

24. Similar submissions were made by the counsel for the 4th, 5th and 6th Respondents, who cited section 71 and 72 of the *Criminal Procedure Code* to submit that the place where an offense is committed or where the consequences of the offence are felt are the determinant factors in deciding the place of trial, and that the principal acts of the subject offenses occurred in Nairobi as shown by a reading of the charge sheets. Furthermore, that when that question of the place of trial is brought before a court, section 76 of the Criminal Procedure Code provides the process in determining that question.

25. The 1st and 2nd Respondent's counsel in reply submitted that access to justice included access to the adjudicatory processes including the availability of and proximity to Courts by both litigants and their advocates. Further, that Nairobi Milimani Chief Magistrate's Criminal Case No. 1612 of 2015 had since been transferred to the Chief Magistrate's Court in Mombasa and was part heard with eight (8) witnesses having already testified. Therefore, it would be in the interest of justice and fairness that the same proceeds to conclusion.

26. It is notable that the question of the place of trial and substitution of charges were raised by the 1st and 2nd Respondents in a constitutional petition, in which it was alleged that it was prohibitively costly, expensive and logistically inconvenient for them to attend trial in Nairobi which was in violation of Article 48 of *Constitution* on the right to access to justice, and despite section 72 of the *Criminal Procedure Code* providing the place of trial to be the place where the subject land was situated. In addition, that the continued substitution of charges had made it difficult for the 1st and 2nd Respondents to adequately prepare their defences in violation of Article 50 (2)(c), and delayed the trial in violation of Article 50 (2) (e). The Appellant and 3rd to 6th Respondent claim that these are issues that could have been adequately addressed by the trial Court by applying the procedures in the *Criminal Procedure Code*.

27. In this respect, the main determinant of whether a matter should be heard as a constitutional petition or by ordinary suit is whether there is a constitutional question raised by a dispute. A constitutional question is defined by *Black's Law Dictionary*, Ninth Edition as "a legal issue resolvable by the interpretation of a constitution, rather than by statute". In this respect, the 1st and 2nd Respondents were seeking an interpretation of Articles 50(2) on the right to a fair trial and Article 48 on the right to access to justice, in light of the criminal processes that they had been subjected to, which is a constitutional question. In addition, under Article 23 (1) and 165 (3)(b) of *Constitution*, the jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights is granted to the High Court.

28. Magistrates' Courts are only granted limited jurisdiction in this respect under section 8 (1) and (2) of the *Magistrate's Courts Act* , which provides that subject to Article 165 (3)(b) of *Constitution* and the pecuniary limitations set out in section 7(1), Magistrate's Courts shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights only in relation to the rights guaranteed in Article 25 (a) and (b) of *Constitution*, namely the freedom from torture and cruel, inhuman or degrading treatment or punishment; and freedom from slavery or servitude. Any claim of violation of the rights to access to justice and fair trial can therefore only be made in the High Court, and the 1st and 2nd Respondents' petition was properly before the High Court, and the Magistrate's Court had no jurisdiction to hear

the issues raised therein. The Appellant and 3rd to 6th Respondents had the opportunity to raise the issue as regards any other parties who were affected to be joined in the petition, and did not do so, and cannot raise it as an issue on appeal.

29. For the same reasons, the doctrine of constitutional avoidance, which is used to strike out claims presented before Court where it is shown that there exist alternative, sufficient and adequate avenues for parties to ventilate their grievances, was not applicable in the suit before the High Court since the 1st Respondent could not raise their concerns before the Magistrate's Court, since it did not have jurisdiction and was therefore not the appropriate forum as opposed to the High Court. It is important to reiterate that the issues raised were not place of trial or substitution of charges per se, which could have easily been addressed in the Chief Magistrate's Court, but the implications of the said events and acts on the rights of the 1st and 2nd Respondents to a fair trial, which could only be determined by the High Court.

30. As regards the substantive finding by the High Court that the place of trial in Nairobi violated the 1st and 2nd Respondent's right to access to justice, it is necessary to examine the elements of this right. The core elements of this right in the context of human rights standards has been identified in page 17 of the *Handbook on European Law relating to Access to Justice* prepared by the European Union Agency for Fundamental Rights and Council of Europe, to include effective access to a dispute resolution body, the right to fair proceedings and the timely resolution of disputes, the right to adequate redress, as well as the general application of the principles of efficiency and effectiveness to the delivery of justice. Therefore, the right of access to justice obliges states to guarantee each individual's right to go to court or, in some circumstances, an alternative dispute resolution body to obtain a remedy if it is found that the individual's rights have been violated, and is thus also an enabling right that helps individuals enforce other rights.

31. There will be breach of this right where citizens, and especially marginalized groups see it as alien and do not access it; where the justice system is financially inaccessible; where individuals have no lawyers; where they do not have information or knowledge of rights; or where there is a weak justice system. A holistic approach to access justice therefore addresses both the opportunity for all litigants to access Courts, and also aims to achieve equality of outcomes by addressing the barriers faced by those trying to access the judicial system. The place of trial is therefore a key determinant of access to justice in this respect, as it not only impacts on the physical ability to access the court, but the costs of doing so, and the question of whether the costs unduly restrict access to courts will depend on the facts of each case. The main reasons why section 72 and 74 of the *Criminal Procedure Act* provide that the place of trial is where act giving rise to the offence was done or where the consequence of the offence ensued, is so as to ensure that the venue is convenient for all concerned, including the court, the witnesses, and the person accused persons, and also to avoid any unfairness, improper motive and abuse of power in the selection of the place of trial.

32. A perusal of the latest charge sheets that were annexed by the 1st and 2nd Respondents show that of the eleven counts, six were in relation to acts alleged to have been undertaken on unknown dates and in unknown places, while five counts were in relation to land in Malindi County, or acts that took place in Mombasa High Court or Malindi High Court. There was no count with respect to acts that took in Nairobi as alleged by the Appellant. Lastly, it is also notable in this respect that the decision in Malindi H.C Constitutional Petition No 16 of 2015 which it is submitted held a contrary decision as regards the place of trial was made with respect to a different criminal case namely Milimani Criminal Case No. 1410 of 2015, and not the criminal case that was the subject of the impugned judgment. Furthermore, the place of trial was not in issue, and the petitioner therein had sought conservatory and stay orders

with respect to the said criminal case arising from the issue of concurrent civil and criminal proceedings and perceived impartiality arising from his selective prosecution.

33. We therefore find that the High Court did not err in finding that the 1st and 2nd Respondent right to access to justice would be impaired by having the trial held in Nairobi and in transferring the place of trial to Mombasa, as it was not disputed that the Respondents and their lawyers were resident in Mombasa, and given that Mombasa was within the local limits where some of the acts giving rise to the offences were alleged to have been committed.

34. On the issue of whether the High Court erred in barring the further substitution of charges against the 1st and 2nd Respondents, the Appellant's counsel submitted that the learned Judge unreasonably and unjustifiably determined which charges the 1st and 2nd Respondent would face, thereby usurping the powers of the Director of Public Prosecutions and the trial Court contrary to Article 157 (7) and sections 214 and 275 of the *Criminal Procedure Code*, and ignored the reasons and evidence advanced for the substitution of the charges. Further, that the reason given by the learned Judge that the 1st and 2nd Respondents would not know with certainty the real charges facing them if the amendment was allowed did not accord to the normal practice of amendment and substitution of charges as settled by section 214 of the *Criminal Procedure Code*, which accords an accused person the opportunity to recall any witness who had testified. Reliance was placed on the decision in *Harrison Mirungu Njuguna vs Republic*, Criminal Appeal No. 90 of 2004 which cited with approval the case of Dennis Calvin Birumba vs Republic [2010] eKLR.

35. The 3rd Respondent, while citing Article 157 of *Constitution*, section 5 (4)(e) of the *Office of the Director of Public Prosecutions Act*, and the decisions in *Diamond Hasham Lalji & Another vs A.G. & 4 others* (2018] eKLR, and *Ezekiel A. Omollo vs Director of Public Prosecution & 2 others* [2021] eKLR, submitted that its constitutional functions and powers had been curtailed by being barred from amending substituting or reinstating charges whereas sections 134-137 and 214 of the *Criminal Procedure Code* read together with Section 20-22 of the *Penal Code* provided for safeguards that the 1st and 2nd Respondents could have utilised.

36. The elements of the right to adequately prepare for one's defence under Article 50 (2)(c) is one of the elements of an accused's right to a fair trial, and what constitutes adequate time and facilities to prepare a defence will depend on the circumstances of each case. This right also involves the quality of such preparation, and therefore involves the right not to be subjected to an unduly hasty trial and to legal assistance for the preparation of one's defence. Similarly, an accused must receive adequate information from the prosecution regarding the case against him, so that he can prepare an effective defence. The right to be prepared for one's case is crucial for meaningful and informed participation in the criminal process, and its purpose is to ensure "equality of arms". The right to be prepared for one's trial also forms part of the rules of natural justice.

37. The requirements of this right when it comes to charges is that the accused person is required to be informed of the facts alleged against him or her and the charge must contain some recognisable offence; to be given adequate time to prepare his case; and to be given access to all material evidence held by the prosecution which bears on his guilt or innocence. Section 214 of the *Criminal Procedure Code* in this respect allows for the amendment and substitution of charges, and such amendment or substitution will only be unconstitutional where it will prejudice the accused in his defence, especially if he or she is not able to exercise the safeguards contained in the section 214 of the *Criminal Procedure Code* of taking fresh plea and recalling witnesses. The question before us in the present appeal, is whether the various amendments and substitutions of the charges by the 3rd Respondent is demonstrated to have caused prejudice to the 1st and 2nd Respondents defence.

38. We are of the view in this respect that the trial Court was the proper forum to address this question in the first instance, upon an examination of the charges sought to be amended and/or substituted and in light of the facts and circumstance of the subject criminal case. It is notable in this regard, that the factors to be taken into account, particularly the effect of such amendments or substitution on the accused persons, witnesses and the victims, as well as its effects on the administration of justice could only be examined in the trial Court and not in the constitutional petition before the High Court. We therefore find that the High Court did in this respect usurp the trial Court's role and jurisdiction.

39. This appeal accordingly partially succeeds only to the extent that we set aside the order of the High Court at Mombasa (E. K. Ogola J.) in the judgment delivered on 14th May 2020 in Petition No. 31 of 2018 that prohibited the 3rd Respondent herein from making any further substitution of the charges facing the 1st and 2nd Respondents herein, and from bringing new charges, or re-introducing charges against the 1st and 2nd Respondents which had initially been withdrawn. Each party shall bear their costs of the appeal in the circumstances.

40. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF NOVEMBER, 2023.

GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR