**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: WAKI, NAMBUYE & MAKHANDIA JJA)**

**CIVIL APPEAL NO. 79 OF 2013**

**BETWEEN**

**NISHA SAPRA.....APPELLANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....RESPONDENT**

**KULDIP MADAN MOHAN SAPRA.....INTERESTED PARTY**

**(Appeal from the Judgment and or Decree of the High Court of Kenya at Nairobi (D. Majanja, J.) Dated 30th March, 2012**

**in**

**H.C. Petition No. J.R. 291 of 2011 (Formerly Petition No. 79 of 2011(Criminal**

**Div.) and originally H.C. Petition No. JR. Misc. 265 of 2008)**

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**JUDGMENT OF THE COURT**

The appeal arises from the Judgment of **D.S. Majanja, J**. dated 30th March, 2012.

The undisputed background to the appeal is that, the appellant was wife to **Yogesh Madan Mohan Sapra** (deceased), who was allegedly attacked by unknown assailants at his residence at lower Kabete within Nairobi on the night of 20th and 21st August, 2005 and seriously injured. He was rushed to Nairobi Hospital where he died on 8th September, 2005. It was not however until the 11th September, 2005, that the appellant reported both incidents to Spring Valley Police Station, triggering her arrest and detention in police custody for a period of twenty three (23) days from 11th September, 2005 to 3rd October, 2005.

On 27th September, 2005, Police investigators sent the investigation file to the Hon. Attorney General (AG) for directions. The AG recommended an inquest which was subsequently conducted by the **Hon. Mr. Felix Kombo,** Resident Magistrate (Magistrate) from November, 2005 to 15th January, 2008. In a ruling dated 15th January, 2008, the Magistrate recommended that the appellant be apprehended and arraigned before the High Court for the murder of the deceased. On 21st January, 2008, the police resubmitted the investigation file to the AG together with a copy of the Magistrate's ruling on the inquest for further advice following which the AG recommended the appellant to be charged with the offence of the murder. The appellant was accordingly arrested on 15th January, 2008 and on 28th January, 2008, she was arraigned before the High Court of Kenya at Nairobi on a murder information in Criminal Case No. 7 of 2008.

The appellant filed Misc. Criminal Application Number 39 of 2008 in the High Court of Kenya at Nairobi, seeking review and setting aside of the ruling of the Magistrate. In a ruling delivered on 27th February, 2008**, J.B. Ojwang J**. (as he then was) declined to review and set aside the Magistrate's ruling for reasons *inter alia*, that, all that the Magistrate did was to recommend arrest and arraignment of the appellant for murder contrary to the appellant's assertions that the Magistrate hadactually directed that she be arrested and be charged with the said offence in excess of his jurisdiction under **section 387(4)** of the Criminal Procedure Code (CPC). The AG subsequently terminated the murder case on 14th April, 2008. On 15th April, 2008, the appellant was re-arrested and charged a fresh in the Chief Magistrate's Court at Nairobi in Criminal Case No. 528 of 2008, with the offence of manslaughter contrary to **Section 202** of the Penal Code. She pleaded not guilty.

During the pendence of the above Criminal proceedings, the appellant filed Nairobi High Court JR Misc. Application No. 265 of 2008 premised on **sections 70(a), 72(2) (e),** 72**(3) (b), 77(1)** and **77(2)** (a) of the repealed Constitution of Kenya contending *inter alia*, that she was charged with murder as a direct consequence of the Magistrate's recommendation/order in excess of the scope and powers vested in the Magistrate under **section 387(4)** of the CPC; and was therefore illegal and in breach of her fundamental rights and freedoms as guaranteed under the constitution; that criminal proceedings brought against her almost three years after the incident were in contravention of her right to a fair hearing contrary to **section 77(1)** of the Constitution.

The appellant therefore sought from the High Court declarations that: her detention in police custody for a period of 23 days from 11th September, 2005 to 3rd October, 2005 was in breach of **sections 70 (a), 72(2)** and (**3)** and **77(2)** (a) of the Constitution; her apprehension on 15th January, 2008 as a direct consequence of the Magistrate's recommendation and her subsequent detention in police custody till her appearance in court on 28th January, 2008 was illegal and in breach of the Constitution; the sustenance and prosecution of the Chief Magistrate's criminal case No. 528 of 2008 commenced almost three years after the incident was in breach of her right to fair hearing and was therefore null and void.

In rebuttal to the appellant's petition, the respondent filed a replying affidavit sworn by Corporal **Harrison Gikandi** averring, *inter alia*, that the appellant was held for a total of twenty three (23) days from 12th September, 2005 to 3rd October, 2005 pending investigations into the attack on the deceased reported seventeen (17) days after its occurrence and three days after the death of the deceased; that although investigations commenced soon after the receipt of the report from the appellant, they took time to be concluded as the scene had been interfered with necessitating the involvement of forensic experts who had to collect exhibits, have these tested and analyzed at the Government Chemist, before compiling the investigation file that was forwarded to the AG; that although they conceded that the appellant was arraigned before the High Court for the offence of Murder and subsequently before the Chief Magistrate for the offence of Manslaughter almost three years after the incident there was sound justification for the delay, because, there were intervening inquest proceedings which the prosecution had no control over. The appellant's apprehension that she may not get a fair hearing were therefore unfounded especially when she fully participated in the inquest proceedings. She would also be accorded an opportunity in the criminal proceedings to be represented by counsel of her own choice, to cross-examine the prosecution witnesses, give her own defence and call witnesses in support thereof; that the Magistrate did not order but merely recommended that the appellant be apprehended and arraigned before the High Court for the offence of murder; that the decision to charge the appellant with the offence of murder was made by the AG after forming an independent opinion based on the contents of the investigation file including the ruling on the inquest.

The appellant filed a further affidavit deposed on 22nd July, 2008,in rebuttal to the respondent's replying affidavit, basically reiterating the averments in the petition and the supporting affidavit as summarized above.

The cause was canvassed by way of written submissions, orally highlighted by learned counsel for the respective parties, at the conclusion of which the trial court analyzed the record and identified issues for determination.

With regard to the issue as to whether the appellant's arrest and detention from 11th September, 2005 to 3rd October, 2005 and from 15th, Januarys, 2008 to 28th January, 2008 was contrary to **section 72(3) (b)** as read with **section 70(a)** of the Constitution, the trial Court reviewed the case of **Paul Mwangi Murunga versus Republic,** Nakuru Criminal Appeal No. 35 of 2006 (UR); **Gerald Macharia Gathuku versus Republic Nairobi Criminal Appeal No. 119 of 2004 (UR**); and **Albanus Mwasia Mutua versus Republic ,**Nairobi Criminal Appeal No. 120 of 2004 (UR), in which the Court of appeal had variously held that, pretrial detention in excess of the time limited for under section **72(3) (b**) of the Constitution entitled an accused person to an automatic acquittal irrespective of the strength of the prosecution case; and contrasted that position with the later position taken by the Court in **Julius Kamau Mbugua versus Republic,** Nairobi Criminal Appeal No 50 of 2008 (UR) and made the following conclusion:

> ***"[14] At the time material to this case, the Court of Appeal was the highest Court in the land. By virtue of the doctrine of stare decisis the decisions of that court bind the High Court and all the subordinate courts. The Court of Appeal, while not bound by its own decisions would, for the sake of consistency and stability, ordinarily follow its decisions. The Court of Appeal under the Constitution is properly constituted by a bench of three Judges, so that it is proper for a bench of three to overrule its previous decisions. However, where a request is made to the Court, the Court may consider constituting a five Judge Bench to overrule a previous decision of the court or to reconcile inconsistent decisions."***

The trial court also reviewed the Court of Appeal decision in the case of **Income Tax versus T.[1974] EA 546; Trouristick Union International & another versus Mrs. Jane Mbeyu and another** Civil Appeal No. 145 of 1990 (UR); **Erick J Makokha & others versus Lawrence Sagini and others** Nairobi Civil Application No. 2 of 1994 (UR); **Echaria versus Echaria** Civil Appeal No. 75 of 2005(UR) and was satisfied that a bench of three Court of Appeal Judges sitting in the ordinary course of business has power to reverse its own decision just as that of a five (5) Judge bench of the same Court specifically constituted for that purpose and then stated as follows:-

> ***"[16] I take the position that the case of Julius Kamau Mbugua overruled the previous decisions on pretrial arrest and detention and restated the law concerning the interpretation of section 72(3) of the Constitution. I am bound by that decision and even if I were to choose between the conflicting authorities, I would prefer it as it was an extensive and exhaustive analysis of both local and international decisions on arrest and pre-trial detention and is an authoritative interpretation of section 72(3) of the Constitution. It is therefore clear that Mr. Billing's arguments lacks merit.***
>
> ***[17] Section 72(3) of the Constitution implies that the 14 days, applicable to arrest upon suspicion of having committed an offence punishable by death, is not absolute. The State may, in an appropriate case, offer an explanation which may absolve it from blame for the detention and delay in charging a person."***

The trial court then construed **section 72(3)** of the Constitution following the **Julius Kamau Mbugua** case (supra), namely, the length of the

delay; waiver of time periods; the reasons for the delay including the delay caused by the nature of the case and actions of both the accused and the state if any; limits of the institutional resources and; prejudice to the accused person. The trial court ruled that the responsibility for justifying the above elements lay with the respondent and upon taking into consideration the explanation given by Corporal **Harrison Gikandi** , it concluded as follows:

> ***"[25] I have considered this explanation in light of the factors I have set out in paragraph 19 above. The petitioner originally faced a charge of murder, which more often than not, is not a straight forward offence to investigate. I have also taken into account the fact that the initial report about the case was that the death of the deceased related to a robbery. The deceased succumbed to injuries on 8th September, 2005 which was several days after the violent act that led to his death.***
>
> ***[26] The petitioner was held for an additional 9 days in addition to the 14 days permitted under the constitution. In light of the facts set out by the respondent, I do not consider the period of pre-trial detention unreasonable in the circumstances and I hold that in this respect there was no breach of the petitioner's fundamental rights."***

Turning to the complaint with regard to the second period of detention between 15th January, 2008 to 28th January, 2008, the trial court stated:

> ***"[29] Quite* apart from the fact that the second arrest was on the basis of a judicial recommendation, the period of detention was for a period of 13 days which was well within the provisions of section 72(3) of the Constitution. I therefore do not find any breach of the provisions of section 72(3) of the Constitution."**

Turning to the jurisdictional issue, the trial court relied on the case of **Peter Ng'ang'a Muiruri versus Credit Bank Limited & 2 others** Nairobi Civil Appeal No. 203 of 2006 (UR) and declined to interfere with the ruling of **Ojwang , J** in Misc. Criminal Application No. 39 of 2008, as both courts had coordinate jurisdiction.

With regard to fair trial, the trial court construed **section 77(1)** of the Constitution and applied the **Julius Kamau Mbugua case** (supra), thus:

> "***that the trial within a reasonable time guarantee is part of international human rights law; that the right to trial within a reasonable time 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 if found guilty; that when determining as to whether, the right to fair trial has been violated the court is obliged to consider all the relevant factors within the context of the whole proceedings; that the concept of reasonableness is a value judgment to be considered in particular circumstances of each case and in the context of domestic legal systems and the economic, social and cultural conditions prevailing; that although an applicant has the ultimate legal burden throughout to prove a violation, the evidentiary burden may shift depending on the circumstances of the case; that the court may make a determination on the basis of the facts emerging from the evidence before it without undue emphasis as to whom the burden of proof lies; and lastly, that the standard of proof of an unconstitutional delay is a high one and a relatively high threshhold has to be crossed before the delay can be categorized as unreasonable."***

Finally, the trial court concluded as follows:

> ***"36. The Chronology of events since the petitioner was arrested had been set out in this judgment. She was arrested first on 11th September, 2005. Thereafter the inquest took place from 14th November, 2005 to 15th January, 2008. The petitioner was arraigned in court to plead to the offence of murder and pleaded to the charge on 4th February, 2008. Thereafter, a nolle prosequi was entered on 14th April, 2008 and those proceedings terminated.***
>
> ***37. The petitioner was charged with manslaughter before the Chief Magistrate's court in Criminal Case No. 528 of 2008 on 15th April, 2009. It is therefore clear that the petitioner has been subject of continuous judicial proceedings since she was first charged. A stay of those proceedings was issued on 11th June, 2006 when this petition was filed and it is still in force pending this determination.***
>
> ***38. No facts have been placed before the court to show that indeed the petitioner will suffer prejudice by reason of the delay. The facts, in my view, do not disclose an unreasonable delay if only because the pending trial for manslaughter, has been stayed to enable her agitate this petition which seeks to vindicate her fundamental rights and freedoms. But for these proceedings, her trial for manslaughter would have proceeded for hearing.***
>
> ***39. I therefore hold that there has been no unreasonable delay of trial as contemplated by section 77(1) of the Constitution."***

The petition was dismissed.

The appellant was aggrieved and is now before this Court on a first appeal raising six (6) grounds of appeal. It is the appellant's complaint that the learned Judge erred in law:

> ***(1) By not holding that the appellant's fundamental rights under sections 72(3) and 70(a) of the constitution were breached.***
>
> ***(2) By not holding that the recommendation of the Inquest Magistrate was outside the scope of section 364 of the Criminal***

***Procedure Code chapter 75 of the Laws of Kenya, and therefore in breach of the appellant's fundamental rights and freedoms.***

***(3) By not holding that the appellant will be deprived of a fair trial contrary to section 77(1) of the constitution.***

***(4) By misdirecting himself in interpreting the Judgment of the High Court in HC Misc. CR. application number 39 of 2008.***

***(5) In holding that the Court of appeal Judgment in Julius Kamau Kuria versus Republic Nairobi Criminal Appeal No. 50 of 2008 overruled previous Court of Appeal case in particular Gerald Macharia Githuku versus Republic Nairobi Criminal Appeal No. 119 of 2004 and Albanus Mwasia Mutua versus Republic, Nairobi Criminal Appeal No. 120 of 2004.***

***(6) By not resolving the conflict of law, between the Court of Appeal Judgment sitting as a constitutional Court and therefore in breach of the applicant's fundamental rights under the Constitution.***

The appeal was canvassed by way of written submissions adopted and orally highlighted by learned counsel for the respective parties. Learned senior counsel **Mr. Githu Muigai (**Senior Counsel) with **Emmanuel Wetangula,** appeared for the appellant; Senior Prosecution Counsel **Mr. Makori Jalson** appeared for the State, while learned Counsel **Mr. A. R. Rebelo** appeared for the interested party.

Supporting the appeal, Senior Counsel submitted that the appellant's petition was well founded on this courts jurisprudence in the case of **Gerald Macharia versus Republic [2007] eKLR**, which affirmed the decision of the Court in **Albanus Mwasia Mutua versus R**. [2006] eKLR, which according to him was not only good law but the correct jurisprudential threshhold. In his view, the jurisprudential position held in the case of **Julius Kamau Mbugua versus Republic** (supra), was inapplicable since the events complained about occurred long before the decision in that case was made.

With regard to breach of the appellant's fundamental Rights under **section 72(3) (b)** of the Constitution, counsel faulted the trial court for relying on the explanation given in the replying affidavit of CPL **Harrison Gikondi** which did not disclose any cogent evidence justifying the detention of the appellant. In his view, there was no explanation for failure to seek the services of the police pathologist sooner; why investigations were not properly done and also why the police did not release the appellant unconditionally pending investigation in the first instance and pending the AG's second opinion on the file in the second instance. It was therefore wrong, and plainly unfair in the circumstances, for the trial court to direct the appellant a person facing a death sentence, to seek solace in a civil remedy for damages. The State had exceeded Constitutional the powers granted to it.

Senior Counsel relied, among, on the case of **Norton versus Crescent City Ice Mfs. Co, 150 SO.855 (La.1933) I.C.; Gola Knath & others versus State of Punjab & another [1967] AIR 1643** on the doctrine of prospective overruling and faulted the trial court for applying the case of **Julius Kamau Mbugua** (supra) retrospectively, thereby denying the appellant the benefit of a constitutional right.

The salient features of the said doctrine as highlighted by Senior Counsel were that the principles of law as pronounced in the latter decision operate both prospectively and retrospectively except that these will not be permitted to be applied to upset vested rights. Counsel appreciated that the doctrine enables the court to recognize the duty to announce a new and better rule for future transactions whenever the court is persuaded that an old precedents is unsound. In his submission, the doctrine enables the court to resolve any dilemma in law by changing bad law without upsetting the reasonable expectations of those who relied on the changed law before the changes were made.

Referring to the cases of **Mary Wambui Munene versus Peter Gichuki King'ara & 2 others [2014] eKLR**; and **Paul Posh Aborwa versus Independent Election & Boundaries Commission & 2 others [2014] eKLR,** Senior Counsel urged us to embrace and apply the doctrine of prospective overruling in the determination of this appeal to bestow to the appellant the benefit of the decision in the **Albanus Mwasia Mutua** case (supra) especially, when in circumstances of this appeal, it is evident that **section 72(3) (b)** of the Constitution set the boundary on circumstances under which in law, the State could curtail the Constitutional right to personal liberty.

Opposing the appeal, learned Counsel **Mr. Makori Jalson,** submitted that the decision in the **Albanus Mwasia Mutua** case (supra), was rightly rejected by the trial court in favour of the holding in the **Julius Kamau Mbugua case** (supra); that the trial court properly analyzed and appreciated the circumstances under which the Court of Appeal in the **Julius Kamau Mbugua** case (supra), laid a sound basis for reversing the position it had previously taken in the **Albanus Mwasia Mutua** case (supra). Among those highlighted by counsel were the court's observations that the **Mutua case** decided in July, 2006 had immediate ramifications on the criminal justice system as it gave rise to divergent opinions amongst the Judges of both the High Court and the Court of Appeal itself with some Judges upholding it and releasing accused persons /appellants, while others explained it away and refused to release accused persons/appellants; that the Court in the **Julius Kamau Mbugua case** (supra), was therefore entitled to find that the law was unsettled and on that basis correctly held the view that there was need for the law on the issue to be crystalized by the same court; that before arriving at the decision in the **Julius Kamau Mbugua case,** the Court carried out an in-depth analysis of local as well as common wealth and international case law on violation of the bill of rights. According to counsel, the factors for consideration are firstly, where there was sufficient demonstration that an accused has suffered pretrial related prejudices such as the death of witnesses or that a witness has lost memory. Secondly, where there was cogent proof that a civil right remedy by way of compensation of damages would not be an appropriate remedy. Thirdly, that the court has an obligation to balance the rights of an accused person as against those of the public's legitimate expectation in seeing to it that a suspect is subjected to a full trial and punished appropriately if found guilty.

Counsel submitted further that all the above factors were absent in this appeal, as the appellant had failed to demonstrate how the unlawful detention for nine (9) days as contrasted with the 8 months delay in the **Albanus Mwasia case** (supra) and the one hundred and seven (107) days in the **Julius Kamau Mbugua** case (supra) had any link or effect on the trial process she was then undergoing or that it caused trial related prejudices to the appellant which would seriously affect fair trial. Counsel therefore urged us to affirm the trial court's position that the respondent had sufficiently justified the delay in holding the appellant for the nine (9) days complained of. Secondly that no basis had been laid for the appellant's unfounded apprehension that she would be subjected to an unfair trial if the criminal prosecution were to

continue to its logical conclusion.

Learned counsel **Mr. A.R. Rebelo** adopted the interested party's submissions filed at the trial court and opposed the appeal submitting that the criminal trial had been continuing and was nearing conclusion with no complaint of unfairness having been raised by the appellant as it progressed; that the rights stipulated under the provision of the Constitution are not absolute. Counsel therefore concurred with the submissions of **Mr. Makori** that the prosecution gave a reasonable explanation as to why there was that delay of nine (9) days in bringing the appellant before court. We were therefore urged to affirm the position taken by the trial court especially when the appellant merely alleged breach of her rights and fundamental freedoms without demonstrating existence of any prejudice suffered as a result of that delay; and did so after unreasonable delay. Secondly, Counsel also associated himself with the respondent's submission that the appellant's request for an outright acquittal on account of the alleged violation was subject to the right of the public's legitimate expectation as represented by the interested party to ensure that the appellant who is accused of causing the death of the deceased stands trial in accordance with the law; that since the trial court properly appreciated the undisputed facts of the petition and properly applied the law to those undisputed facts, there was no basis for upsetting the trial court's decision; and on that account, also urged us to affirm the trial court's decision and dismiss the appeal.

To buttress the above brief submissions, counsel relied on this Court's ruling in Civil Application No. Nai 62 of 2013 (UR 41/2013) that the decision in the **Julius Kamau Mbugua** case, (supra) represents the correct view of the law and is therefore good law which should be adopted as the correct threshhold in the determination of this appeal.

In reply to the respondent and interested party's submissions, Senior Counsel reiterated the earlier submission that, it was erroneous for the trial court to rule against the appellant especially after making a finding of fact that the appellant was held for nine (9) days beyond the period stipulated in the constitution; that the trial court should have faulted the respondent's conduct of holding the appellant in detention beyond the period stipulated in the constitution, especially when it is now a matter of public notoriety, that days are gone when the State tramped upon the rights of its citizens with impunity and urged us to allow the appeal.

This is a first appeal. Our mandate under Rule **29(1) (a)** of the Court of Appeal Rules (CAR) is to re-appraise the evidence and draw out our own inference of fact, while at the same time reminding ourselves that an appeal from the High Court to this Court is by way of a trial. We must therefore reconsider the record, reevaluate the facts on the record ourselves and then draw out our own conclusions thereon. While at the same time, reminding ourselves that we are not bound to follow the trial court's findings of fact if it appears to us that the trial court clearly failed on some point to take account of particular circumstances; or misapprehended the facts or misapplied the law to the facts and thereby arrived at a wrong conclusion on the matter. See **Selle & Another versus Associated Motor Board Company and others [1968] EA 123**.

Secondly, since the appeal arises from a constitutional petition determined by way of judicial Review, the principles of constitutional law that guide the High Court in the discharge of its constitutional mandate when determining a claim with a constitutional underpinning is as was stated by the court in the case of **Child Welfare Society of Kenya versus Republic Exparte Child in Family Forces Kenya [2017] eKLR** , namely, that following the promulgation of the Kenya constitution 2010, judicial review is available as a relief to a claim for violation of the rights and fundamental freedoms guaranteed in the Kenya Constitution 2010, which we have no doubt would also apply to claims founded on the repealed Constitution like the one subject of this appeal.

We have considered the above mandate in light of the rival submissions set out above and the principles of law relied upon by the respective parties in support of their opposing positions. The issues that fall for our determination are the same as those addressed by the trial court.

Issue of violation of the right to liberty and the right to fair trial are interrelated and will be dealt with as one. The approach we take is as was taken by the Court in **Paul Mwangi Murunga versus Republic [2008] eKLR**, wherein the Court stated *inter alia* that:

> ***"Under section 72(3) of the Constitution, the burden to explain the delay is on the prosecution and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raises a complaint.....so long as the explanation proffered is reasonable and acceptable no problem would arise."***

In the case of **Fappyton Mututku Ngui versus Republic [2014] eKLR,** where the Court also stated as follows:

> ***"The correct position in law was set out in Julius Kamau Mbugua versus Republic [2010] eKLR, where the Court stated that the violation of the appellant's right to be produced in court within twenty four hours would not automatically result in his acquittal. Instead, the appellant would be at liberty to seek remedy in damages for the violation of his constitutional rights."***

While in the case of **Attorney General versus Kituo cha Sheria & 7 others [2017] eKLR,** the Court dealing with the same issue stated that:

> ***"human rights and fundamental freedoms have an inherent value and utility. Their recognition, protection and preservation is not depended on State will but are attached to persons by virtue of their being human beings."***

In light of the above guiding principles, it is our view that the need for the State to respect rights and fundamental freedoms of its citizenry is not a favour given by the State or those in Authority to a citizenry. It is a constitutional command directed to the State to obey.

When rejecting the appellant's complaints, the trial court construed and applied **section 72(3) (b)** of the Constitution to the opposing positions before arriving at its conclusion. **Section 72(3) (b)** of the repealed constitution provided *inter alia:*

*"72(3) A person who is arrested or detained*

*(a) .....*

*(b) .....and who is not released shall be brought before a court as soon as reasonably practicable.....the burden of proving that the person arrested or detained has been brought before a court as soon as reasonably practicable, shall vest upon any person alleging that the provision of this subsection have been complied with."*

It is not in dispute that two incidences were cited by the appellant as basis for her complaints in the petition. The first is where she was arrested on 11th September, 2005 following the lodging of the report of both the violent attack on the deceased by unknown assailants on the night of 21st/22nd August, 2005 and his death on 8th September, 2005. It is also common ground that the appellant was detained from 11th September, 2005 until 3rd of October, 2005, a period of twenty three (23) days when she was released to participate in the inquest proceedings as recommended for by the Attorney General. She was therefore held for nine (9) days in excess of the fourteen days constitutionally stipulated for in section **73(3) (b).** The second incident followed the recommendation of the inquest magistrate pursuant to which the appellant was arrested on 15th January, 2008 and taken to court on 28th January, 2008 which is a period of thirteen (13) days as correctly computed by the trial court. Plea was however, deferred to 4th February, 2008 at the request of the appellant's own counsel. The above being the position, it is our finding as did the trial court that this is no longer a source of grievance as the thirteen (13) days she was held in custody before being arraigned in court at the conclusion of investigation, fell within the period constitutionally provided for under **section 73(3) (b)** of fourteen (14) days. It was therefore correctly rejected by the trial court as source of grievance, a position we affirm for the reasons stated above.

Reverting back to the 1st incident, the appellant relied on the case of **Albanus Mwasia Mutua** (supra), as stating the correct position in law and which according to the appellant was erroneously rejected by the trial court in favour of the threhshold set by the **Julius Kamau Mbugua** case (supra), a position the appellant has urged us to reverse. It is not in dispute that both the **Albanus Mwasia Mutua** case (supra) and **Julius Kamau Mbugua** case (supra), were both three Judge Bench decisions of the Court of Appeal. The stand taken in the **Albanus Mwasia Mutua** case (supra) was that noncompliance with the constitutional time lines results in an automatic acquittal of an accused/appellant irrespective of the strength of the prosecution case; contrary to the divergent view taken by the Court in the **Julius Kamau Mbugua** case already highlighted above.

As already observed above, the trial court before rejecting the position taken by the court in the **Albanus Mwasia Mutua** case (supra) in favour of that taken by the court in the **Julius Kamau Mbugua** case (supra), gave reasons already highlighted above.

When asking us to depart from the view taken by the Court in the **Julius Kamau Mbugua** case, the appellant relied on the guidelines distilled from the case law cited in support of the appeal on the doctrine of progressive overruling. This was in support of their assertion that the decision in the **Julius Kamau Mbugua** case should not have been applied retrospectively to deny the appellant a remedy crystalized by the **Albanus Mwasia Mutua** case (supra); especially when the violations complained of by the appellant occurred long before the decision in the **Julius Kamau Mbugua** case (supra) was made. The salient features of the said doctrine are as highlighted above. We find it prudent to adopt them for purpose of determining this issue. Our take on the said doctrine is that prohibition against applying current decisions to disturb vested rights would in our view, refer to rights that have already been adjudicated and fully appreciated and crystalized by a court decision. This would refer to crystalized rights like the right to acquittal that the decision in the **Albanus Mwasia Mutua case** (supra), vested on him and which acquittal was never reversed by the decision in the **Julius Kamau Mbugua** case. It has nothing to do with an unadjudicated right.

Although we agree that the violations complained of by the appellant had occurred as at the time the **Albanus Mwasia Mutua** case (supra) was decided, the only vested right appellant had as at that point in time in our view, was the right to agitate and seek redress for those violations complained of and which she subsequently availed herself of when she filed the petition almost three years after the event.

The right to change bad law without upsetting the reasonable expectations of those who relied on it as an instrument of justice and public respect for the law is what in our view, the court took into consideration in the **Julius Kamau Mbugua** case (supra), when it went to great length to carry out an in-depth analysis of the law on the subject from across the globe before arriving at the guidelines set out above as factors to be taken into consideration by a court of law when determining complaints raised with regard to violation of both the right to liberty and fair trial.

In light of the above assessment and reasoning, we find no basis for faulting the trial Judges rejection of the appellant's petition with regard to the complaint that her rights to liberty and fair trial had been violated. We therefore agree with the trial court for holding that the case of **Julius Kamau Mbugua** (supra) was good law. We affirm that it is still good law and was therefore properly appreciated and applied by the trial court to the rival positions on the record before arriving at the conclusion that the nine (9) days delay in bringing the appellant before court had been plausibly explained by the respondent and therefore sufficiently accounted for the actions undertaken by the investigative agencies as explained above. Secondly, that in the absence of demonstration that the ongoing trial had greatly been prejudiced by reason of either the death of a witness or loss of memory of a witness may it be for the prosecution or the defence, we do not find the nine (9) days delay complained of as sufficient justification for declining to uphold the public legitimate expectation; that preferably a trial should be held to its logical conclusion to determine the person (s) responsible for the death of the deceased and where found guilty be punished for that death.

Turning to the second issue which related to the inquest recommendation, it is not in dispute that although the magistrate recommended that the appellant bearrested and arraigned in court for the offence of murder, no action was taken immediately against her following that recommendation. Instead, the file was forwarded to the Attorney General for further consideration and recommendations inclusive of the magistrate's recommendations. It was the respondent's explanation that it was following a reappraisal by the Attorney General of the available evidence inclusive of that gathered during the inquest, that the Attorney General sanctioned the appellant's arrest and caused her to

be arraigned before the High Court for the offence of murder. This was one of the factors of paramount consideration that **J.B. Ojwang, J** took into consideration when he declined the appellant's request to review and set aside the Magistrate's recommendation. There is nothing on the record to controvert that position. The second reason for the trial court's ruling against the appellant on this issue was because, **J.B. Ojwang** had revisited that complaint and declined to accede to the appellant's request to overturn the magistrate; as a High Court Judge. Secondly, that no appeal was proffered by the appellant against that decision. The appellant's invitation for the trial court to revisit that issue was also in the exercise of its jurisdiction as a High Court. The trial court declined jurisdiction because, giving a merit decision on the issue would have amounted to sitting on an appeal of a decision of a court of co-ordinate jurisdiction. We find no error in the trial court's reaching the above conclusion as it was the correct position in law.

The upshot of all the above assessment and reasoning is that we find no merit in the appeal. It is accordingly dismissed. There will be no order for costs.

**Dated and Delivered at Nairobi this 25th day of October, 2019.**

**P.N. WAKI**

**.....**

**JUDGE OF APPEAL**

**R.N. NAMBUYE**

**.....**

**JUDGE OF APPEAL**

**ASIKE MAKHANDIA**

**.....**

**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR.**