



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A.)

CRIMINAL APPEAL NO.44, 45 AND 76 OF 2014

BETWEEN

KARISA CHENGO1ST APPELLANT

JEFFERSON KALAMA KENGHA2ND APPELLANT

KITSAO CHARO NGATI3RD APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal against the judgment and orders of the High Court of Kenya at Malindi (Meoli & Angote, JJ.) dated 7th March, 2014

in

H.C.Cr.A.No.49 of 2012)

JUDGMENT OF THE COURT

These three appeals were on 4th March, 2015 consolidated for ease of hearing, since they all raised two common issues; whether a judge appointed to the Environment and Land Court (hereinafter ‘ELC’) has jurisdiction to hear and determine criminal matters and secondly the Constitutional right to representation by counsel in accordance with **Article 50(2)(h)** of the Constitution.

The facts leading to these appeals are fairly simple and straightforward. The appellants were charged in various magistrates courts with the capital offences of robbery with violence contrary to **section 296(2)** of the Penal Code. They all pleaded not guilty and soon thereafter, their trials ensued. Subsequent thereto they were all convicted and sentenced to death. They thereafter lodged appeals to the High Court. **Meoli, J.**, a Judge of the High Court and **Angote, J.** a Judge appointed to the ELC, a court with the equal status as the High Court. jointly presided over the appeals. The appeals were all dismissed, hence these 2nd and perhaps last appeals to this Court.

In their appeals to this Court, the appellants raised various grounds of appeal. However the two common grounds raised as already stated were that the proceedings before the High Court as presided over by

Meoli and Angote, JJ. were a nullity for want of jurisdiction and that the State having failed to provide each of the appellants with legal counsel as per **Article 50(2)(h)** of the Constitution, their constitutional rights were violated rendering the proceedings a nullity again.

The appellants were represented by **Ms Otieno, Mr. Ngumbau** and **Mr. Ole Kina**, learned counsel respectively, whereas the State was represented by **Mr. Monda**, learned Senior Assistant Director of Public Prosecution. When the appeals came up for hearing on 19th November, 2014, the parties agreed to canvass the twin issues by way of written submissions. Parties subsequently filed and exchanged written submissions which we have carefully read and considered alongside the cited authorities.

Arguing the first ground, Mr Ole Kina, learned counsel for the 3rd appellant and whom the other counsel had agreed should present his arguments first submitted that pursuant to **section 359(1)** of Criminal Procedure Code the jurisdiction to hear criminal appeals from the subordinate courts is granted to two judges of the High Court and can only be limited when the Chief Justice or a judge to whom the Chief Justice has given authority in writing, directs that the appeal be heard by one judge of the High Court. That when Meoli, J. sat with Angote, J. in the appeals, it was a confirmation that Meoli, J. had not been appointed by the Chief Justice and vested with the authority contemplated under **section 359(1)** of the Criminal Procedure Code. He further submitted that the designation of judicial officers and their categorization is anchored in the Constitution and various statutes that create the courts that they preside over. That the Chief Justice cannot cloth any office of the judiciary with any powers outside the Constitution. That as the head of the Judiciary, he may assign duties, create divisions and transfer judicial officers within those divisions but he cannot confer jurisdiction upon any officer of the judiciary neither can he take away the jurisdiction conferred on a judicial officer. He claimed that **Article 162(1)** of the Constitution establishes the system of courts while **Article 162(2)** of the Constitution establishes specialized courts such as the Employment and Labour Relations Court, (hereinafter “ELRC”) and ELC. That the High Court under **Article 165(5)** does not have jurisdiction to deal with matters reserved exclusively for those courts. That the judges appointed to the High Court, ELRC or ELC can only exercise jurisdiction in regard to the Court to which they were specifically appointed to by the President. Accordingly, Angote, J. having been appointed by the President and sworn into office as an ELC judge pursuant to **Article 162(2)** of the Constitution had no jurisdiction to hear criminal appeals as a Judge of the High Court. That the said Court and judges are bound to a specific jurisdiction by the Constitution and the statute. Similarly he contended that under **section 4** and **12** of the Industrial Court Act enacted, pursuant to the provisions of **Article 162(2)** of the Constitution, the ELRC had exclusive jurisdiction in regard to the labour relations matters. He further submitted that judges of the ELRC and ELC were only employed after the creation of their respective courts under **Article 166** of the Constitution. That the judges of the High Court were not transferred to the newly established courts, but a recruitment drive was undertaken and judges specifically appointed to those courts. It was further submitted that under **section 43** of the Interpretation and General Provisions Act, where a written law imposes duties on a certain office those duties must be performed by the holder of that office for the time being. He therefore submitted that the Chief Justice could not lawfully extend the jurisdiction of a judicial officer appointed to perform a given function without offending **section 43** of the said Act. That he could assign judges to a particular court within which they were appointed but he could not move judges back and forth to within the courts they were never appointed. On the question of the distinction between judges and court, he submitted that a court is an organ of the State created for the purpose of adjudication of disputes and it is properly constituted when it is managed by a competent person duly appointed in accordance with the law. Thus a High Court cannot be properly constituted if a judge of the courts contemplated under **Article 162(2)** of the Constitution was to preside over it. For this proposition, counsel relied on the Supreme Court case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank and two others (2012) eKLR**; where the court held that a court of law can only exercise jurisdiction conferred upon it by the Constitution, the Statute or both. It was his position that a court is the institution while a judge is the officer presiding over it. That jurisdiction is not to the building but to the officer presiding over it. He went on to submit that in a criminal trial in the High Court, the court would be duly constituted if manned by a High Court judge, public prosecutor, court clerk, accused and/or the appellant. Counsel urged the Court to declare the proceedings in the High Court culminating in these appeals as a nullity for want of jurisdiction on account of Angote J’s participation in the same when he had no such jurisdiction. As a parting shot counsel urged that in the event that we agreed with him we should order a

re-hearing of the appeal in the High Court of course properly constituted!

Ms Otieno, for the 1st appellant associated herself fully with the submissions made by Mr. Ole Kina and added that the proceedings in the Superior Court below were a nullity as the Court was not properly constituted. It was her position that a bench constituted under **section 359(1)** of the Criminal Procedure Code was a criminal court bench and had to be constituted by judges of the High Court. That the High Court is the only court under **Article 165(3)** of the Constitution with jurisdiction to hear and determine criminal appeals and not the ELRC as provided for under **Article 162(2)(b)** of the Constitution as read together with the Industrial Court Act as well as the Environment and Land Court Act. Further that the qualifications set out for appointment of a High Court Judge and an ELC or ELRC judge were different. For these two other courts, there is the added requirement of considerable knowledge and experience in those fields. It was her case that the Judicature Act was not amended to provide for the courts contemplated under **Article 162(2)** of the Constitution and as such it would be a judicial creation and/or innovation to define a judge of ELRC and ELC as a judge of the High Court as envisaged by **section 3** of the Judicature Act. That the ELC was set up and established to determine matters related to land and was therefore distinct from the High Court whose mandate is clear; original and unlimited jurisdiction in civil and criminal matters. That by constituting the bench comprising of Meoli and Angote, JJ. the Chief Justice failed to appreciate the distinction between the High Court and courts with the status of a High Court and their judges. That it was only in the pre-2010 Constitution that all judges of the High Court were appointed as puisne judges and could deal with all matters falling within the jurisdiction of the High Court. That after the promulgation of the current Constitution, the Chief Justice could not confer jurisdiction upon any judge serving in the judiciary to hear any matter as he did vide Gazette Notice No.13601 dated 14th October 2013 which constituted the bench that heard the appeals now the subject matter of these proceedings. That the ELC was not a High Court but has the status of the High Court. She thus submitted that to create a mixed bench comprising of judges of the High Court and ELC was unconstitutional and the Gazette Notice No.13602 and the subsequent handling of the appeals by Meoli and Angote, JJ. were also unconstitutional. On this proposition counsel relied on the decisions; **Owners of Motor Vessels 'Lillian s' v Caltex Oil Ltd (1989) KLR, Samuel Kamau Macharia & Another v Kenya Commercial Bank (supra), Peter Oduor Ngonge v Francis Ole Kaparo & 5 others (2012) eKLR, Mary Ariviza v Interim Independent Electoral Commission & Another (2010) eKLR and Kamlesh Mansukhlal Damji Pattni v International Centre for Policy and Conflict & 5 Others (2013) eKLR**. It was her further submission that **Article 166** of the Constitution cannot be interpreted to include judges of the ELC as the Constitution does not list down the qualification for the appointment of a judge in ELC as those are provided for under **section 7** of the Environment and Land Court Act. She concluded this aspect of her case by submitting that Angote, J. did not have jurisdiction to preside over the 1st appellant's case and therefore those proceedings and judgment entered were a nullity.

Mr. Ngumbau, for the 2nd appellant too associated himself fully and adopted the submissions made by Ms Otieno and Mr. Ole Kina. He urged the Court to allow the appeal solely on the ground of jurisdiction and order for the release of the 3rd appellant. According to him, a re-hearing of the appeal would occasion a miscarriage of justice and would prejudice the appellants as a re-hearing would have been occasioned by a mistake that was not of the appellant's making.

Mr. Monda in response submitted that there is no single provision in the Constitution or Statute that makes a distinction between the office of a judge of the High Court. That the Constitution contemplates specialized courts and not specialized judges. For this proposition counsel relied on the decision of **East African Railways Corp v Antony Sefu Dar-es-Salaam HCCA No.19 of 1971 (1993) EA 327** where it was held that a statute cannot be construed to oust jurisdiction of the superior court in the absence of clear and unambiguous language to that effect. That the Gazette Notice by the Chief Justice stated that he was acting pursuant to the provisions of **Article 161(2)** of the Constitution as read with **section 5(2)(c)** of the Judicial Service Act. It was his case that this Court should therefore apply a generous and purposive approach in interpreting the Constitution and find that there is no office of judge of the High Court, ELRC and ELC. Judges should be deemed to be as stated in the Gazette Notice, superior court judges who can administratively be assigned duties as was the case during the service week. That any construction to the contrary would lead to absurdity because all judges can handle matters of substantial question of law

including criminal appeals.

So how did Meoli and Angote, JJ. find themselves in the bench that heard the appeals in the High Court? The Judiciary held a service week between 14th and 18th October 2013 in which all Judges of the High Court, ELRC and ELC were engaged in hearing criminal appeals at all the 20 High Court stations. Pursuant to Gazette Notice No.13601 dated 4th October, 2013 the Chief Justice designated Meoli and Angote, JJ. to hear such criminal appeals in the High Court of Kenya at Malindi.

We are aware that this issue has been a source of great controversy and considerable debate in the High Court. It is apparent that there are two schools of thought. The first school of thought argues that the judges of the three courts are of equal status, but that the judge of one court cannot be a judge in any other court. In other words, if you are a judge of the High Court, you cannot sit over a matter in the ELRC or the ELC, and similarly if you are a judge of the ELRC or ELC, you cannot sit as a judge of the High Court, unless the judge is specifically appointed by the appointing authority, which is the President, to sit in the other court. The opposing school of thought is that so long as a person has been appointed judge, he can sit in any of the three courts at the discretion of the JSC or Chief Justice. See **Samson Matende v Republic, Criminal Appeal No. 141 of 2009, Benson Ndiwga Njue & 80 others vs Central Glass Ltd, HCCC NO. 505 of 2003 and Kenya Medical Research Institute v The Attorney General & 3 others (2014) eKLR.**

The above decisions, epitomize the legal controversy. Is it about to go away any time soon? Maybe with this judgment. All the above decisions though were decisions relating to mixed benches. None so far, has come with regard to the sitting of a single judge in a court in which technically, he was not appointed to by the President, but this issue is bound to arise at one time or another especially from a litigant who may have lost. This begs the question what the position of the law is, with regard to these two opposing positions.

We now turn to the consideration of the issues raised before us. We are aware that the task at hand demands that we interpret various provisions of the Constitution as well as statutes. We must therefore start the task ahead by setting out at this early stage the principles that will guide us in this task.

First, under **Article 259** of the Constitution, the Constitution is to be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of rights, permits the development of the law and that contributes to good governance. In exercising its judicial authority, this Court is obliged under **Article 159(2)(e)** of the Constitution to protect and promote the purpose and principles of the Constitution. Secondly, in **Ndyanabo v Attorney General [2001] 2 EA 485** the Tanzanian Court of Appeal held that in interpreting the Constitution, the Court should be guided by the general principles that; the Constitution was a living instrument with a soul and consciousness of its own. Thirdly, the principle established in **Kigula and Others v Attorney General [2005] 1 EA 132** by the Ugandan Court of Appeal is that the entire Constitution has to be read as an integral whole and no one particular provision destroying the other but each sustaining the other and that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument. See also **Tinyefuza v Attorney General of Uganda, Constitutional Petition No.1 of 1997 (1997 UGCC 3)**. Fourthly, the Constitution should be given a purposive and liberal interpretation as gathered from its spirit and the intention of the drafters. The Supreme Court in **Re The Matter of the Interim Independent Electoral Commission Constitutional Application No.2 of 2011** at para.51 adopted the words of Mohamed A J in the Namibian case of **State v Acheson 1991 (2) SA 805, 813(NM)** at page 8132 B-C where he stated that:-

“The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between government and the governed. It is a mirror reflecting the “national soul” the identification of ideals and ... aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.”

The foregoing notwithstanding we also accept that while interpreting the Constitution, we must bear in mind that a Constitution is drafted with an eye into the future, its major function being to provide a continuing framework for the legitimate exercise of governmental power including the exercise of judicial authority and function. Most fundamentally we are aware that once enacted, the provisions of the Constitution cannot be easily amended or repealed. A constitution therefore must be capable of growth and development over the time so as to meet new social, political and historical realities often unimagined by its framers. We must therefore not forget that a Constitution is not an empty vessel, on the contrary it is a living instrument and it is always speaking. It is a house with many rooms and doors, conservative enough to protect the past but flexible enough to advocate new issues and the future. Finally, it is also necessary to consider the historical, textual, structural, doctrinal and ethical models while giving meaning to the provisions of the Constitution.

With these principles in mind, we now turn to consider the issue at hand. A determination of this issue requires an analysis of the provisions of **Article 162** and **165** of the Constitution which establish the courts and set out the jurisdiction of each court. However before that we should reiterate that jurisdiction is a fundamental principle in the dispensation of justice. The Supreme Court in the recent decision; **Re the Matter of the Interim Independent Electoral Commission** (supra) at paras 29 and 30 stated that:-

“Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by Statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14): “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. [30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

In answering the question before us, we propose to divide the large question in two limbs. We shall consider the jurisdiction of the Courts contemplated under **Article 162(2)** of the Constitution vis-à-vis the High Court as established under **Article 165** of the Constitution. We shall thereafter determine the question of the judges presiding in these two courts and whether those judges can preside over any other courts.

The starting point would be the provisions of Article 162 of the Constitution which provides as follows:-

- “162. [1] *The superior courts are the Supreme Court, the Court of Appeal,*
the High Court and the courts mentioned in the clause [2]
- [2] *Parliament shall establish courts with the status of the High*
Court to hear and determine disputes relating to
- a) *Employment and labour relations; and*
- b) *The environment and the use and occupation of,*
and title to land
- [3] *Parliament shall determine the jurisdiction and functions of the*

courts contemplated in clause (2).

[4] *The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.”*

On the other hand, **Article 165** of the Constitution provides as follows:-

“165. (1) *There is established the High Court, which*

a) Shall consist of the number of judges prescribed by an Act of Parliament; and

b) Shall be organized and administered in the manner prescribed by an Act of Parliament.

(2) *There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.*

(3) *Subject to clause (5), the High Court shall have:-*

(a) unlimited original jurisdiction in criminal and civil matters.

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

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144.

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –

(i) The question whether any law is inconsistent with or in contravention of this Constitution;

(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of this Constitution;

(iii) Any matter relating to constitutional powers of state organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) A question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief justice.

(5) *The High Court shall not have jurisdiction of the matters*

(a) Reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) Falling within the jurisdiction of the courts contemplated in Article 162(2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.”

A summary of these provisions is that there are five Superior Courts in Kenya, namely; the Supreme Court, the Court of Appeal, the High Court, and the two Courts contemplated under clause (2) of **Article 162** of the Constitution; that is ELRC and ELC. That Parliament is empowered under the said Article to establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. Under **Article 162(3)**, Parliament is empowered to determine the jurisdiction of the court of the status similar to that of the High Court.

Pursuant to the provisions of **Article 162(2)** of the Constitution, Parliament enacted the Industrial Court Act. The Preamble to this Act states as follows:-

“An Act of Parliament to establish the Industrial Court as a Superior Court of record, to confer jurisdiction on the Court with respect to employment and labour relations and for connected purposes.”

Section 12 of the Industrial Court Act, 2011 sets out the jurisdiction of the court as follows;

“12. (1) The Court shall have exclusive original and appellate jurisdiction to hear

and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including

- (a) disputes relating to or arising out of employment between an employer and an employee;
- (b) disputes between an employer and a trade union;
- (c) disputes between an employers’ organization and a trade unions organization;
- (d) disputes between trade unions;
- (e) disputes between employer organisations;
- (f) disputes between an employers’ organization and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer’s organization or a federation and a member thereof;
- (i) disputes concerning the registration and election of trade union officials; and

(j) *disputes relating to the registration and enforcement of collective agreements.*”

Similarly, Parliament enacted the Environment and Land Court Act. The object of the Act is stated as follows:-

An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land and to make provision for its jurisdiction, functions and powers, and for connected purposes

The jurisdiction of the Court is set out at **section 13** of ELC Act as follows;

- 1) *The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*
- 2) *In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes:*
 - a. *Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*
 - b. *Relating to compulsory acquisition of land;*
 - c. *Relating to land administration and management;*
 - d. *Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*
 - e. *Any other dispute relating to environment and land.*
- 3) *Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.*
- 4) *In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.*

It is necessary to consider the historical context which led to the creation of these Courts with the status of the High Court as discerned from the Constitution making process in Kenya. The creation of these courts was a new phenomenon in our judicial system. The discussion or conversation which culminated in the creation of the two courts as can be deciphered from the Final Report of the Committee of Experts on Constitutional review was long and protracted. Notably these provisions were not in the various constitutional drafts the precursor to the current Constitution being the Bomas, Ghai and Wako Drafts. A Committee of Experts which was appointed to reconcile and harmonise all these drafts, included the provision regarding the establishment of the two specialized courts but in their draft forwarded to the Parliamentary Select Committee on the Constitution, the references to the specialized courts were deleted. The Parliamentary Select Committee then recommended that the specialized courts be removed from the draft Constitution and instead be replaced with a broad grant of authority to Parliament to establish other courts with such jurisdiction, functions and status as Parliament may determine. The Committee of Experts maintained that such a provision would not signal the establishment of specialized courts on employment and labour relations, environment and land and would not resolve the competing jurisdictional issues that had historically existed between the High Court and the Industrial Court.

The Judiciary's response to the Harmonized Draft noted the difficulties inherent in having a High Court and other courts of the status of the High Court. It stated;

“The problems inherent in this provision are as follows: Already, specialized divisions of the High Court have been administratively created. They deal with disputes concerning Commercial Law, Criminal Law, Family Law, Land & Environmental Law and Constitutional Law. It is not clear how the proposed new courts will relate with these divisions. It is not clear what jurisdiction the proposed new courts will have vis-à-vis the High Court. Already, existing legislation that gave the Industrial Court the same status as the High Court has brought about a jurisdictional conflict.”

The Judiciary therefore wanted the proposed courts to be established as divisions of the High Court. Consequently, the Committee of Experts reinstated the provision allowing Parliament to establish by legislation ELRC and ELC but maintained in the Constitution that they would be of the status equivalent to that of the High Court. It was therefore clear what jurisdiction the two courts contemplated under **Article 162(2)** would exercise. The jurisdiction of the High Court as established under **Article 165** of the Constitution is limited in two fronts. First, it shall not exercise jurisdiction on matters reserved for the Supreme Court and matters falling within the jurisdiction of the two courts contemplated in **Article 162(2)**. It is therefore clear that the High Court no longer had original and unlimited jurisdiction in **all** matters as it used to have under the repealed Constitution. It cannot deal with matters set out under **section 12** of the ELRC Act and **section 13** of the ELC Act. Conversely, the courts contemplated in **Article 162(2)** of the Constitution cannot deal with matters reserved for the High Court. Of fundamental importance in this appeal is **Article 165(6)** of the Constitution which empowers the High Court to supervise subordinate courts and any other person exercising judicial or quasi-judicial function but not over a superior court including the ELRC and ELC. This therefore brings us to the question of the nature of the relationship between the High Court, ELRC and ELC.

We do not see any difficulty with giving an answer to that question. We say so because the Constitution has at **Article 162(2)** provided that; *Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to ...*”To our minds, by using the words ‘with the status of the High Court’ it is clear that the High Court is not higher in hierarchy than the ELRC and ELC; these are courts of equal rank. By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The constitution though does not define the word ‘status’. The intentions of the framers of the Constitution in that regard are obvious given the choice of the words they used; that the three courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercises the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court.

At this juncture, even though none of the parties referred us to any comparative jurisprudence, we think it is important to look beyond our borders to see how the South African Courts from where the expression in our Constitution is borrowed from has handled the situation. **Article 166** of the South African Constitution provides that courts include, “any other court established or recognized in terms of an Act of Parliament, including any court of a status to either the High Courts or Magistrates Court.” Under **Article 169** of their Constitution, the High Court may decide;

- “a. Any constitutional matter except a matter that
 - i. Only the Constitutional Court may decide or
 - ii. Is assigned by an Act of Parliament to another court of a status similar to a High Court; and

- b. Any other matter not assigned to another court by an Act of Parliament.’

Subsequently, the Parliament of South Africa enacted the **Labour Relations Act of 1995** establishing the Labour Court as a Court with the status of the High Court to adjudicate over a class of labour disputes. Section 151 of the Labour Relations Act provides that the Labour Court;

“Is a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of provincial division of the Supreme Court has in relation to the matters under its jurisdiction.”

The Labour Court has exclusive jurisdiction in respect of all matters stated to be determined by the court under the Act. The question as to whether the High Court had jurisdiction in matters reserved for the Labour Court has arisen severally in South Africa. For instance in the case of **Gcaba v Minister of Safety and Security and Others CCT 64/08 [2009] ZACC 26**, the Constitutional Court of South Africa dealt with and brought much clarity to the vexed question of overlapping constitutional and general jurisdiction of the Labour Court and the High Court. The Court held:-

“The Labour Court and other LRA structures have been created as a special mechanism to adjudicate labour disputes such as alleged unfair dismissals grounded in the LRA ... The High Court adjudicates the alleged violations of constitutional rights, administrative review applications, and of course all other matters. ... Section 157(1) confirms that the Labour Court has exclusive jurisdiction over any matter that the LRA prescribed should be determined by it ... Section 157(1) should, therefore, be given expansive content to protect the special status of the Labour Court, and section 157(2) should not be read to permit the High Court to have jurisdiction over these matters as well.”

We have deliberately discussed the law in South Africa to demonstrate that like in Kenya the ELRC under **Article 162(2)** was intended to be autonomous, distinct and independent of the High Court and it is for that reason that it was bestowed with the status of the High Court. Indeed, it can be gathered from the Final Report of the Committee of Experts on Constitutional Review process that there was a need to address the competing jurisdictional issues that historically existed between the High Court and the ELRC under the repealed Constitution. It was the intention of the drafters in our view to give the ELRC and ELC independence from the High Court. This independence is essential to the role of the Courts as specialized courts charged with the responsibility of developing coherent and evolving labour relations, environment and land jurisprudence.

However, unlike the clear provisions of the South African Constitution on the Industrial Court, the South African Constitution does not have a specialized Environment and land court. We must therefore resort to our peculiar history and circumstances to understand why it was necessary to have an ELC. Land in Kenya is an emotive issue and for good reasons; agriculture is the backbone of the country’s economy. In our view there was need to have expeditious disposal of land and environment matters and a specialized court would ensure that was done as well as provide jurisprudence on adjudication of land and environment disputes. The need therefore for preserving the objective of creating the specialised courts contemplated under **Article 162(2)** of the Constitution cannot be gainsaid. We have already stated that the matters handled by these courts are extremely important and sensitive which have an impact on socio-economic well-being. Consequently, it is important to empower those courts in dealing with their mandate and shuffling the Judges appointed to these court to other courts may subvert this aim. In concluding this aspect of the matter, we reiterate that the High Court, the ELRC and ELC are courts of equal status, autonomous of each other and each exercises peculiar jurisdiction. They are not one and the same.

We now turn to the submission made that Angote, J. a judge appointed to ELC did not have jurisdiction to deal with criminal appeals specifically reserved for the High Court. We have already found that the High Court as established under **Article 165(1)** of the Constitution is not the same as the one established

pursuant to the provisions of **section 60** of the Repealed Constitution and we have said why. It is also clear to us that Parliament did not have the constitutional mandate under the repealed Constitution to create a court of equal status with the High Court. It is also not in dispute that pursuant to the provisions of **section 359** of the Criminal Procedure Code, all criminal appeals emanating from the subordinate courts are heard by the High Court. For avoidance of doubt, this section provides;

“359 (1) Appeals from subordinate courts shall be heard by two judges of the High Court, except when in any particular case, the Chief Justice, or a judge to whom the Chief Justice has given authority in writing, directs that the appeal be heard by one judge of the High Court

(2) If on the hearing of an appeal the court is equally divided in opinion the appeal shall be re-heard before three judges.”

Looking at the above provisions, it is apparent that the High Court is the only court with jurisdiction to hear and determine criminal appeals. Indeed the provisions of **Article 165(3)(a)** leave no doubt that the High Court has unlimited original jurisdiction in criminal and civil matters save those reserved for the two special courts. Nowhere is it provided under the Industrial Court Act or the Environment and Land Court Act that these two courts shall have jurisdiction to deal with criminal matters other than those matters reserved for the specialized courts. If there had been such an intention, nothing would have been easier than specifically stating so. They too therefore do not have jurisdiction to deal with matters reserved specifically for the High Court and the reasons for that are obvious.

Black’s Law Dictionary, 9th Edition, defines a ‘Court’ as;

i. *“A governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice”*

ii. *The judge or judges who sit on such a governmental body*

Given the above definition of a court, there is no doubt that courts are a creature of the Constitution. A court as an institution is an inanimate body that must be activated, run, managed and controlled by animate organs authorised by law. These are judges who must of essence be human beings and according to the Constitution the judges of the High Court, ELRC and ELC must as of necessity in law be of equal rank and standing.

The Constitution has provided for the mode of appointment of judges and their qualifications. It is within the mandate of the Judicial Service Commission as provided for under **Article 172(1)(a)** of the Constitution to recommend to the President the appointment of judges to preside over the said courts. In our view it is the court that a judge is appointed to, that determines the kind of jurisdiction that judge is seized of. In the premises we would agree with the submission that a judge appointed to any of the two specialised courts does not have jurisdiction to sit in courts other than the one he/she was specifically appointed to. We say so because **section 2** of the Judicature Act has defined ‘judge’ to mean; ‘the Chief Justice or a puisne judge appointed under **Section 61** of the old Constitution (the equivalent of now **Article 166(5)** of the current Constitution) or a judge of the Court of Appeal appointed under **Section 64** of the old Constitution (the equivalent of now **Article 166(4)** of the current Constitution). Notably, both the Constitution and the Act are silent with regard to a judge appointed in the two specialised Superior Courts. **Article 166(2)** of the Constitution provides for the qualifications that one must have to be appointed a judge of a Superior Court by the President. It provides thus;

“166(2) Each judge of the superior court shall be appointed from among persons who

(a) Hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common law jurisdiction

(b) Possess the experience required under clause (3) to (6) as applicable, irrespective

of whether that experience was gained in Kenya or in another Commonwealth law jurisdiction; and

(c) Have a high moral character, integrity and impartiality.”

A plain and literal reading of the above provisions leaves no doubt that the qualifications for the appointment of Superior Court judges are almost the same. However, **sub-clause (3) to (6)** of the same Article provide for professional experience for appointment into each of the Superior Court. In that regard the professional experience that is required for one to be appointed as a judge of the Supreme Court is set out under **Article 166(3)**, that of a Court of Appeal judge under **Article 166(4)** and of a High Court judge under **Article 166(5)** of the Constitution. We are alive to the fact that the Constitution has not specifically provided for the professional experience required for the appointment of judges of the ELRC and ELC. However, we do not find any lacuna in that. We say so because Parliament while exercising the authority conferred on it by **Article 162(3)** of the Constitution has set out the professional experience required to be appointed as judges of the ELRC and ELC in the respective statutes establishing the said courts. On this aspect, **section 6** of the Industrial Court Act provides:-

“6. A person shall be qualified for appointment as a judge of the court if the person;

(a) has at least ten years’ experience as a Superior Court judge or a professionally qualified magistrate

(b) has at least ten years’ experience as a distinguished academic or legal practitioner with considerable knowledge and experience in the law and practice of employment and labour relations in Kenya; or

(c) holds the qualifications specified in paragraphs (a) and (b) for a period amounting in the aggregate, to ten years.”

Similarly, the Environment and Land Court Act provides for the professional experience required at **section 7** of the Act as follows:-

“7. A person shall be qualified for appointment as judge of the court if the person-

(a) Possess the qualifications specified under Article 166(2) of the Constitution; and

(b) Has at least ten years’ experience as a distinguished academic or legal practitioner with knowledge and experience in matters relating to environment or land.”

To our mind therefore it is clear that the drafters of the Constitution envisaged that there would be Superior Court judges who would possess different professional experience. As for the specialised courts, Parliament envisaged that the judges in those court would have additional qualifications in terms of experience which judges of the High Court do not necessarily need to have. The law is that these courts need judges with measurable experience in the specific mandate of the Court. This is due to the special and peculiar nature of the disputes handled by the said courts. We have not been urged to find that **section 6** of the Industrial Court Act and **section 7** of the Environment and Land Court that provide for the professional experience of ELRC and ELC judges over and above what is provided for under **Article 166(2)** of the Constitution unconstitutional. We are aware of the general rule that, what Parliament has enacted in a long process should be deemed to be constitutional unless proved and declared otherwise, which is not the case here. It therefore follows that as long as those provisions continue to exist in our law books they are and remain the law on professional experience that guide the

appointment of judges of the ELRC and ELC. The law envisages that the judges of the two specialized courts should be different from judges of the High Court in terms of experience and specialization, with different jurisdictions but the same status. It is also not lost on us that when the vacancies for appointment of judges for the courts were advertised it was left to an applicant to elect and apply to be a judge for the specific court he aspired to join. Having elected that his future lay in ELRC or ELC, it would not be desirable for such a judge to be forced into the High Court to preside over criminal appeals. Further, can it be said that justice would be served to an appellant when a judge whose only flair is either in ELRC or ELC is suddenly empaneled by the Chief Justice to hear a criminal appeal?

We are alive to the fact that the intended clause (6) of **Article 166** of the Constitution is ‘missing’. However, we must remind ourselves that our duty is to interpret the Constitution as promulgated. It is not our responsibility to rewrite the Constitution or purport to fill in real or perceived gaps. A written Constitution, like ours, speaks for itself and it cannot be interrogated to suit popular views or opinions. It is therefore our finding that the courts established under the Constitution and the judges appointed to sit in them are synonymous with the court they are appointed to. We reject the argument that a judge once appointed as either a High Court, ELRC or ELC judge can hear and determine matters reserved for any of those courts. We have already found that each judge appointed to a particular court possesses the requisite Constitutional or statutory experience required of one to serve in that court. How then can it be said that a judge is just a judge? He is a judge of what court? It would certainly not have been the intention of the drafters of the Constitution or Parliament to establish different requirements of professional experience for one to be appointed as a judge to a specific court and then imply that a judge is but a judge who can be moved around at the instance of the Chief Justice.

We have seen the Gazette Notices by which the appointment of the two judges in this matter was made by the President in accordance with the advice of the Judicial Service Commission. Such gazette notice in our view plays two roles; first, it is supposed to give notice to the public that a certain individual has been appointed as a judge to that specific court. In this case, the Gazette Notices appointing Judges of the High Court and ELC were in these terms:-

“GAZETTE NOTICE NO. 10225

THE CONSTITUTION OF KENYA

THE JUDICIAL SERVICE COMMISSION

(No. 1 of 2011)

APPOINTMENT OF JUDGES OF THE HIGH COURT

IN EXERCISE of the powers conferred by Article 166 (1) (h) of the Constitution, as read with Article 172 (1) (a) of the Constitution and section 30 and the First Schedule of the Judicial Service Act, 2011, I, Mwai Kibaki, President and Commander - in- Chief of the Kenya Defence Forces, in accordance with the recommendation of the Judicial Service Commission, appoint each of the following persons as a judge of the High Court of the Republic of Kenya.

(a) ...

(b) Meoli Christine Wanjiru (Mrs.)

(c) ...

(Emphasis provided)

Dated 23rd August, 2011.

MWAI KIBAKI

President”

“GAZETTE NOTICE NO. 14346

THE CONSTITUTION OF KENYA

THE JUDICIAL SERVICE COMMISSION

APPOINTMENT OF JUDGES OF THE ENVIRONMENT AND LAND COURT OF KENYA.

IN EXERCISE of the powers conferred by Article 166 (1) (b) as read with Article 162 (2) (b) and (3) of the Constitution of Kenya, I Mwai Kibaki President and Commander - in-Chief of the Kenya Defence Forces, acting in accordance with the advice of the Judicial Service Commission appoint-

(a) ...

(b) Oscar Amugo Angote

(c) ...

as Judges of the Environment and Land Court of the Republic of Kenya, with effect from 1st October, 2012.

(Emphasis provided)

Dated 3rd October, 2012

MWAI KIBAKI

President.”

Could the intention of the appointing authority have been any clearer? The second purpose of the Gazette Notice is to play an evidentiary role. In addition to the Gazette Notice, once a judge is appointed, he takes the oath of office to the specific court he has been appointed to. He is also given an appointment letter specifying that he has been appointed as a judge of; the Supreme Court, the Court of Appeal, the High Court, ELRC or ELC. Having been so appointed, it requires no gainsaying that a judge can only exercise the jurisdiction conferred to the court he is so appointed.

In this regard, Angote, J. was specifically appointed a judge of the ELC and it is in that court and that court alone that his jurisdiction lies. Having been so appointed by the President, the Chief Justice or indeed any other entity cannot lawfully move him to hear matters reserved for the High Court. The converse is again true, judges appointed to the High Court and ELRC have no constitutional and statutory mandate to deal with ELC matters. Indeed, the Constitution expressly prohibits the High Court, (which can only be constituted by a judge appointed to that court), from hearing matters to do with environment, land and employment. The purported appointment of judges to do that which the Constitution prohibits is therefore inconsistent with the Constitution. Indeed **Article 2 (2)** of the Constitution is emphatic that:-

“2. No person may claim or exercise State authority except as authorized under this Constitution.”

The scheme of the constitution was to appoint specialized persons to deal with matters of land,

environment and employment. Such judges would come with appropriate experience which they would build on and trail-blaze jurisprudence for the new court. This objective may not be achieved if judges are not considered to be judges of the special courts they are appointed to but simply treated as just judges, who can then be moved across to the High Court and vice versa. The essence of building up a culture and jurisprudence for those courts may very well be lost forever.

There are of course advantages and disadvantages in specializing. An obvious advantage is that the judge ends up being an expert in a particular field. The disadvantage of course, is that the judge will lack exposure in the other fields. There could also be concerns in career development but on our part, we do not think that holding of the position of judge in either of the three courts should hamper career development in the progression to this court and beyond. This Court also hears appeals from the two specialized courts and it will be natural that when seeking appointments to this Court judges from the specialized courts are considered as their experience and expertise will be invaluable in enriching the jurisprudence in this Court and beyond. Indeed, nothing stops this court from being organized in administrative units that specialize in different branches of the law. We realise we have digressed a little bit.

Let us now revert to the provisions of **section 43** and **44** of the Interpretation and General Provisions Act that provides as follows;

43. *Where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office.*

44. *Power to appoint by name or office where the President, a Minister, a public officer or a public body is empowered by a written law to appoint a person to perform any functions or hold any office, he or it may either appoint a person by name or appoint the holder of a named office to perform the functions or hold the office in question.*

It then follows that Angote, J. having been appointed as a judge of the ELC can only perform the functions and duties of the ELC and cannot purport to discharge the functions and duties of the High Court because that is not the office or the court to which he was appointed. We are therefore unable to accept the argument advanced by Mr. Monda that once a judge has been appointed as a judge of the High Court, ELRC or ELC that judge is available for deployment to any of those three courts by the Chief Justice. We say so because one cannot be appointed a judge at large as, Waweru, J. ably demonstrated in his dissent in the case of **Benson Ndwiga Njue & 108 others v Central Glass Industries Ltd (2014) eKLR**, nor can a Judge be appointed without portfolio. A judge is appointed to a particular court and given that appointment and subsequent swearing in to that court, that judge can only perform the duties of that court.

The Gazette Notice No.13601 dated 4th October 2013, by the Chief Justice is titled ‘*Designation of High Court Judge to participate in service week.*’ In that Gazette Notice the Chief Justice appointed High Court Judges as well as judges of the ELRC and ELC to hear and determine criminal appeals. It is unquestionable that **section 5** of the Judicial Service Act provides for the functions of the Chief Justice, in particular **section (2)(c)** grants the Chief Justice powers to exercise general control over the judiciary. He therefore has powers to transfer judges within the courts they are appointed, create divisions for administrative purposes, issue practice directions to control the running of courts but he does not have the powers to deploy and empanel judges to sit and preside over matters reserved for the courts they were not appointed to.

The following edict of the Supreme Court in **Samuel Kamau Macharia & Another v Kenya Commercial Bank** (supra) rings loud in our ears;

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with

counsel for the first and second respondent in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

It is obvious that a Court must operate within the constitutional limits. Of course for a court to be operational it must consist of a judicial officer amongst others. However such judicial officer must first preside over what he was appointed to do. To hold otherwise would be absurd and would defeat the very essence and spirit of **Articles 162(2), 165(3) and (5)** as well as **166** of the Constitution. Therefore the Chief Justice cannot by his fiat confer on a Judge or judicial officer jurisdiction which in law he does not have. We think that the act of the Chief Justice in appointing judges from the two specialized courts to hear matters specifically reserved for the High Court was conferring jurisdiction on these judges through Judicial craft and innovation the very vice that the Supreme Court warned against.

We are not oblivious to the fact that this decision may have serious ramifications in administration of justice. However, we are alive to the fact that, in exercising the judicial authority bestowed upon us under **Article 159** of the Constitution, we are enjoined to observe, protect and promote the purpose and principles of the Constitution. We are also required to uphold the Constitution, the rule of law and administer justice without fear or favour. Our fidelity therefore is to the Constitution and nothing else. Much as the Chief Justice acted in good faith and intention in designating the judges of the ELRC and ELC to hear and determine criminal appeals, he nonetheless violated the Constitution as he had no power to confer jurisdiction except where the law specifically provides and such power must be exercised within the confines of such law. It is an established principle of law that anything done without jurisdiction is a nullity and we so find. See Owners of **Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited** (supra). In other words we hold that the proceedings before the High Court were a nullity to the extent that Angote, J. sat in them without jurisdiction.

With regard to the second ground, both counsel argued that the appellants were entitled to legal representation at States’ expense in the trial court pursuant to **Article 50** of the Constitution of Kenya. That their trials commenced when the current Constitution was in force. However, the State failed to provide such legal representation, therefore violating the appellant’s right to a fair trial.

Responding, Mr. Monda submitted that there was no such violation and that the right to legal representation was progressive right and required legislation to give it effect. Such legislation, counsel submitted was in the offing.

The right to legal representation is universally acknowledged as a fundamental right. For instance **Article 14(3)(d)** of the International Covenant on Civil and Political Rights (“ICCPR”) obligates state parties to assign legal assistance in any case where the interests of justice so require and without payment if the accused person does not have the means to pay for it. Similarly **Article 7(1)(c)** of the African Charter on Human and Peoples Rights (“ACHPR”) provides that:

“Every individual shall have the right to have his case heard. This comprises...the right to defence, including the right to be defended by counsel of his choice...”

The United National Body of Principles for the protection of All persons under Any form of detention or imprisonment (General Assembly Resolution 43/173 of 9th December 1988), is in terms that a detained person shall be entitled to have legal counsel assigned to him or her by a judicial or other authority in all cases where the interests of justice so require and without payment by him or her if he does not have sufficient funds to pay. The United Nations Standard Minimum Rules for the Treatment of Prisoners envisaged that untried prisoners be allowed to apply for legal aid where such aid is available.

The importance of legal representation was recognized by the African Commission in **Advocats Sans Frontiers (on behalf of Bwampanye) v Burundi, African Commission on Human Rights, Comm.**

No. 213/99 (2000) when it observed that:-

“...Legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case...”

The Commission concluded on the need of legal representation thus:-

“the right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words, be able to ‘argue their cases ...on an equal footing.’”

The importance of a counsel’s participation in a criminal trial was reiterated by this Court in **David Njoroge Macharia vs Republic; Criminal Appeal No. 497 of 2007** where it delivered itself thus:-

*“The counsel’s role at the trial stage is most vital. This is because of his knowledge of the applicable laws and rules of procedure in the matter before the court, and his ability to relate them to the fact sieve relevant, admissible, and sometimes complex evidences from what is irrelevant and inadmissible. A lay person may not have the ability to effectively do so and hence the need to hire the service of a legal representative. The importance of a counsel’s participation was succinctly articulated by **Lord Denning** in his decision in **Pett-vs Greyhound Racing Association (1968) 2 ALL E.R 545, at 549**. He had this to say:*

‘ it is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue –tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: ‘you can ask any questions you like; whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task.’”

In this country, the right to legal representation at the State’s expense is captured in **Article 50** of the Constitution which is in these terms:-

“Article 50

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

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

(g) *to choose, and be represented by, an advocate, and to be informed of this right promptly;*

(h) *to have an advocate assigned to the accused person by the state and at State expense, if substantial injustice would otherwise result and to be informed of this right promptly...” Emphasis added.*

As can be seen, the Constitution has expressly provided that the right to a fair trial includes the right of an accused person: *to have an advocate assigned to the accused person by the State and at State expense, if*

substantial injustice would otherwise result, and to be informed of this right promptly. This provision is therefore in accordance with the state's obligation under **Articles 14(3) (d)** of ICPR and **Article 7(1) (c)** of the ACHPR, and its implementation will bring the State in compliance with its international and regional obligations.

The appellants have argued that the failure by the state to provide them with legal representation during trial in the magistrate's court, having been charged with capital offence, violated their rights and were thus entitled to an acquittal. However, judicial precedents, international conventions, the comments and recommendations of various human rights bodies on the right to legal representation were analyzed and discussed at length by this Court, (constituted differently) in the case of **David Macharia Njoroge v Republic (2011) eKLR**. As regards the applicability of **Article 50** of the Constitution, the Court held as follows:-

*“State funded legal representation is a right in certain instances. **Article 50(1)** provides that an accused shall have an advocate assigned to him by the State and at state expense, **if substantial injustice would otherwise result** (emphasis added). Substantial injustice is not defined under the Constitution, however, provisions of international conventions that Kenya is signatory to are applicable by virtue of **Article 2(6)**. Therefore provisions of the ICCPR and the commentaries by the Human Rights Committee may provide instances where legal aid is mandatory.*

We are of the considered view that in addition to situations where ‘substantial injustice would otherwise result.’ persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense. We would not go so far as to suggest that every accused person convicted of a capital offence since the coming into effect of the new Constitution would automatically be entitled to a re-trial where no such legal representation was provided. The reasons are that, firstly, the provisions of the new Constitution will not apply retroactively, and secondly every case must be decided on its own merit to determine if there was serious prejudice occasioned by reason of such omission.”

It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences. The Constitution is crystal clear that an accused person is entitled to legal representation at the State's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This Court in the **David Njoroge Macharia** case (supra) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result' and to include *all situations where an accused person is charged with an offence whose penalty is death*. This may be misunderstood to mean that all persons, regardless of their economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.

Again, this Court differently constituted in the case of **Moses Gitonga Kimani v Republic, Meru Criminal Appeal No. 69 of 2013**, recognized that the Constitution has placed an obligation on Parliament to enact legislation which would ensure realization of an accused person's right to a fair trial under **Article 50** of the Constitution within four years of the promulgation of the Constitution. In that regard the court stated as follows:

“It is the envisaged legislation that would set out the circumstances and parameters under which an accused person is entitled to legal representation at the State's expense. While appreciating that the framers of the Constitution intended the right to legal representation to be achieved progressively we implore Parliament to enact the requisite legislation.”

Article 261 of the Constitution provides *inter alia*:-

(i) *Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.*

(ii) *Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year*

It is therefore apparent that the provisions of **Article 261** and the Fifth Schedule to the Constitution, that would give effect to the provisions of **Article 50**, including **Article 50(2)(h)**, are to be implemented within a period of between 4 and 5 years. We must however lament the obvious lack of the appropriate legislation almost five years after the promulgation of the Constitution to provide guidelines on legal representation at State's expense. We believe time is now ripe and nigh for the enactment of such legislation. That right cannot be aspirational and merely speculative. It is a right that has crystalized and which the State must strive to achieve. We say so while alive to the fact that right to fair trial is one of the rights that cannot be limited under **Article 25** of the Constitution.

The problem of lack of legal representation for persons charged with capital offences cannot be wished away, it is here with us and there is therefore need to have legislation in place as it would guide how that right would be achieved and be in line with the internationally acceptable standards. To that end, we strongly urge Parliament to fast track the enactment of the envisaged legislation under **Article 261** of the Constitution. The legislation would entail a comprehensive approach that would address the issue of realization of the right to legal representation at the state's expense and should be done in close consultation with various interested stakeholders in recognition of the principle of public participation as envisaged in **Articles 9** and **10** of the Constitution. The Attorney General must therefore move with speed and jump start the process leading to the enactment of that legislation. However, we take comfort in the fact that the draft legal aid bill is in the works. We believe this would be crucial in enabling the State to meet and fulfil its obligations with regard to the fulfilment of the Bill of Rights under **Article 19** of the Constitution.

As regards the denial of that representation in the instant case, we do not think that an acquittal is the remedy available to the appellants as they submitted. It cannot have been the intention of the framers of the Constitution, to halt all criminal prosecutions of persons charged with capital offences until the implementation of a scheme to provide legal representation to all persons charged with such offences. Sadly, again an acquittal is not the remedy available to the appellants even if their right was violated in the trial court. This Court in **Julius Kamau Mbugua v Republic Criminal Appeal No. 50 of 2008** has held that an acquittal is not an appropriate remedy where the alleged violation of fundamental rights of the accused has been proved. Nor did the appellant point out that the substantial injustice was caused to them by such failure. The respective records show that they were never inhibited at all in the prosecution of their cases during the trial. They actively participated in their trials and subjected to intense cross-examination the witnesses availed by the prosecution. We therefore discern no substantial injustice occasioned to the appellants by the State's failure to accord them legal representation. This ground must of necessity therefore fail.

What then is the way forward? Mr. Monda suggested that in the event that we find in favour of the appellants on the first ground, we should order the re-hearing of the appeals before the High Court by judges of competent jurisdiction. The appellants will hear none of the above claiming that they should not be victimized for mistakes or omissions that were not of their making. We have no doubt at all that the mistake or omission was not deliberate but made in good faith and with noble intentions. A re-hearing of an appeal can be ordered where the interest of justice cry for it. It will also be ordered when the resultant proceedings were defective, illegal or manifested mistakes of the court for which the prosecution is not to blame. But at the end of day each order of re-hearing or lack of it must depend on the particular facts and circumstances of each case. We also observe that the appellants' appeals were

determined barely a year ago.

Applying these principles to the circumstances of this case, we are of the considered view that this is a proper case for an order for the re-hearing of the appeals afresh. In the result we allow the appeal only to the extent that we quash the proceedings in the High Court for being a nullity. We however order that the appeals be heard afresh but expeditiously by the High Court manned by judges of competent jurisdiction.

Dated and delivered at Malindi this 8th day of May 2015.

H.M. OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR