IN THE COURT OF APPEAL

AT NAIROBI

CRIMINAL APPEAL NO. 50 OF 2008

JULIUS KAMAU MBUGUA …… APPLICANT

AND

REPUBLIC …….. RESPONDENT

(Appeal from a ruling of the High Court of Kenya at Nairobi (Muga, J.) dated 16th May, 2008

in

H.C.CR.A. NO. 12 OF 2006)

****

JUDGMENT OF THE COURT

INTRODUCTION:

On 8th February, 2006, the appellant was taken before the High Court, Nairobi and arraigned on an Information dated 13th January, 2005 charging him with murder contrary to **Section 203** as read with **Section 204** of the Penal Code. He was alleged to have murdered **Milcah Wanjiru Wamanji** who was his wife on 19th September, 2005 at Gatunyu village, Thika District. The appellant who was represented by a counsel pleaded not guilty to the charge. Although the trial was at first scheduled for 17th and 18th May, 2006, it did not for various reasons commence until 12th October, 2006. On that date, the trial commenced with the aid of assessors but it was adjourned from time to time for various reasons. Before the prosecution case was completed, the *Criminal Procedure Code* (CPC) was amended by *Act No. 7 of 2006* with effect from 15th October, 2007 and the requirement that trials in the High Court should be held with the aid of assessors repealed.

The trial nevertheless continued with the aid of assessors. On 21st January, 2008, the prosecution closed its case after calling **P.C. Joseck Murule**, the ninth witness after which the case was adjourned to 4th February, 2008 for submissions. It seems that the case was again adjourned to 5th February, 2008. The trial was however, adjourned on the application of the appellant's counsel to 19th February, 2008. The submission did not proceed as scheduled as the appellant on the same date filed a petition under **Section 84 (1)** of the *1963 Constitution* alleging violation of his constitutional rights. The 1963

Constitution has now been repealed by article 264 of the *Constitution of Kenya, 2010* which became effective on 27th August, 2010.

CONSTITUTIONAL APPLICATION:

More specifically, the petition alleged contravention of the appellant's right to personal liberty under **Section 72 (1)** and **(3);** violation of his right of protection against inhuman treatment under **Section 74 (1)**, and violation of his right of freedom of movement under **Section 81 (1)**.

In support of the alleged breaches of the Constitution, the appellant deposed, among other things, that he was arrested on 7th November, 2005 on allegation of having murdered his wife; that he was unlawfully kept in police custody for unreasonably long period of 107 days until 8th February, 2006 when he was charged in court; that he was kept in police custody in degrading and inhuman conditions as the Police station did not have toilet facilities or toilet papers and shaving facilities.

The redress sought in the petition were a declaration that the unlawful detention for a period of 107 days and the subsequent charge amounts to a gross violation of appellant's constitutional rights guaranteed by **Sections 72 (1)** and **(3)**; **77 (1)** and **81 (1)**; a declaration that the unlawful detention under deplorable degrading and inhuman conditions amounts to gross violation of the right guaranteed by **Section 74 (1)** and, lastly, pursuant to those declarations (and without prejudice to the rights of the appellant to defend himself against the charge), the appellant:

"be discharged and the State be forever injuncted from arresting, prosecuting or charging the petitioner for any offence or charge of similar nature ……..".

The petition was fully heard. It was ultimately dismissed on the main ground that the issue of breach of constitutional right was raised too late in the trial as an afterthought. The court said in part:

"for over two years, the defence counsel has been representing the accused and he never saw the need to raise the issue of violation of constitutional rights – till PW9 was presented to the court. As a general principle, the defence counsel had the duty, and obligation to raise the issue at the earliest opportunity to enable the prosecution have a chance to call evidence in rebuttal".

The court continued:

"unfortunately in this case, the application was made as an afterthought and as an additional defence to counter the evidence on record. Obviously the application was brought too late and did not afford the prosecution adequate time to avail evidence to rebut the same. Given the evidence on record the court is of considered opinion that fairness and justice dictate that this case should be decided purely on merit. Due to above, I hereby dismiss the application. The accused is at liberty to file a suit for compensation relating to any violation of his constitutional rights".

The superior court proceeded to make a finding under **Section 306 (2)** of the CPC that the prosecution has established a *prima facie* case requiring the appellant to be put on his defence.

Nonetheless, the trial did not proceed to conclusion because the appellant, being dissatisfied by the decision of the superior court filed the present appeal.

PROTECTION OF RIGHT TO PERSONAL LIBERTY:

Section 72 of the 1963 Constitution protected the rights to personal liberty and **Sections 72 (1) (e)**; **72 (3)**, **72 (5)** and **72 (6)** in particular, provided:

> **"Section 72 (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases –**

(a) …….

(b) …….

(c) …….

(d) …….

(e) Upon reasonable suspicion of his having committed, being about to commit, a criminal offence under the law of Kenya.

……

……

……

and

Section 72 (3) provided:

A person who is arrested or detained –

(a) ……

(b) Upon reasonable suspicion of his having committed or being about to commit, a criminal offence;

and who is not released, shall be brought before a court as soon as is reasonably practicable, and where he not brought to before court within twenty four hours of his arrest or from the commencement of his detention; or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable of suspicion of his having committed or about to commit an offence punishable by death, the burden of proving that the person arrested or detained has been brought before a court as soon as is reasonably practicable shall rest upon any person alleging the provisions of this subsection have been complied with.

(5) If a person arrested or detained as mentioned in subsection (3) (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless be is charged with an offence punishable by death, he released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(6) Any person who is unlawfully arrested or detained by another person shall be entitled to compensation therefor from that other person".

Although the appellant complained in the petition that his right of protection against inhuman treatment, his right of freedom of movement and right to fair trial within a reasonable time had been violated, the petition was principally based on the violation of his right to personal liberty under **Section 72 (3)**. His specific complaint was that he was unlawfully kept in police custody for 107 days before he was charged in court, which according to him, was a gross violation of his rights under **Section 72 (1)** and **Section 72 (3)** and sought a discharge, among other reliefs. To be fair to the appellant, he also complained that such detention was a gross violation of his right under **Section 77 (1)** – that is a right to a fair trial within a reasonable time. Nonetheless, the petition was prosecuted on the basis of violation of the right to personal liberty and the decisions of the court cited in support of the petition also related to

breach of right to personal liberty and not to breach of right to a fair trial within a reasonable time.

The numerous grounds of appeal relied on in essence relate to unlawfulness of the detention and the failure by the trial judge to follow the relevant decisions of various courts on the effect of such unlawful detention on the trial or conviction. Indeed, Mr. Ngunjiri, learned counsel for the appellant argued all the grounds of appeal together saying: *"They relate to the issue whether the holding of the accused was unlawful and whether the delay was inordinate"*.

DOMESTIC CASE LAW: ON VIOLATION OF SECTION 72 (3) (b):

Mr. Ngunjiri relied on several decisions of this Court and of the High Court, all dealing with unlawful detention of a suspect by police before they are charged in court. The first and the outstanding case to consider the question of unlawful detention before a suspect is charged in court is **Albanus Mwasia Mutua vs. Republic** – *Criminal Appeal No. 120 of 2004* (unreported) where the issue of unlawful detention was, for the first time, raised in a second and final appeal. There, the counsel representing the appellant contended that the appellant had been unlawfully detained in police custody for eight months before he was charged in court with the offence of robbery with violence under **Section 296 (2)** of the Penal Code which carries a death penalty and that such violation of the appellant's right under **Section 77** rendered the trial and the conviction a nullity. He sought the acquittal of the appellant on that ground. The Court instead, invoked **Section 72 (3) (b)** and allowed the appeal saying:

> **"At the end of the day, it is the duty of the courts to enforce provisions of the Constitution, otherwise there would be no reason for having those provisions, in the first place.**
>
> **The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge ….. The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone".**

The Court in reaching that decision relied mainly on the authority of **Ndede vs. Republic** [1991] KLR 567 and said that in **Ndede's** case:

> **"The quashing of the conviction must have been on the basis that Ndede's constitutional right given to him by Section 72 (3) (b) of the Constitution had been violated and he was entitled to an acquittal".**

In **Ndede's** case, the appellant contended that his apparent plea of guilty was involuntary and consequently a nullity since he had been illegally detained incommunicado for 30 days after arrest and had further been tortured, intimidated and forced to make the unequivocal plea of guilty. There, the unlawful detention was considered as one of the elements which affected the voluntariness of the plea of guilty recorded by the trial court and the appeal was allowed expressly because the first appellate court:

> **"had erred in making a finding on the issue of voluntariness of the appellant's plea without considering any evidence thereon and in the result occasioned miscarriage of justice to the appellant".** (See page 574 – line 15 – 20).

With respect, it is clear that the appeal in **Ndede's** case was not allowed solely because the appellant had been unlawfully detained before he was arraigned in court but rather because of such unlawful detention and other circumstances which raised reasonable doubts about the voluntariness of the apparent plea of guilty were not considered by the first appellate court. It is thus evident that **Mutua's** case is the pioneering authority where an appeal was allowed specifically for violation of an accused's right to be brought to court within a reasonable time under **Section 72 (3) (b**).

The decision of **Mutua** in July 2006 had immediate ramifications on the criminal justice system. The majority of appellants both in the superior court and in this Court invariably raised the issue of unlawful detention under **Section 72 (3) (b)** either by filing supplementary ground of appeal or through separate constitutional applications. Initially many appellants had some measure of success and many appeals were allowed and appellants released on the ground of violation of constitutional right by unlawful detention before they were charged. It was not before long that a sharp divergence of opinion arose on the interpretation of the law amongst the judges of this Court and of the superior court. The divergence of opinion still persists thereby leaving the law unsettled. It is necessary to refer to a few of the decisions of the superior court and of this Court some of which were relied upon on by the appellant to illustrate the state of law under the 1963 Constitution.

Starting with decisions of this Court, in **Paul Mwangi Murunga vs. Republic**, *Criminal Appeal No. 35 of 2006* (Nakuru) (unreported), on which the appellant relies, the appellant who had been convicted and sentenced to death for the offence of capital robbery with violence filed a second appeal to this Court and in the course of prosecuting the appeal, his counsel raised the issue of unlawful detention for 10 days under **Section 72 (3) (b)** before he was taken to court. The court made a finding that a delay of 10 days which was totally unexplained was too long and allowed the appeal on that account. In the judgment, the court stated regarding the burden of proof, thus:

> **"We do not accept the proposition that the burden is upon an accused person to complain to a magistrate or a judge about the unlawful detention in custody of the police.**
>
> **…….**
>
> **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 raises a complaint. But in case the prosecution does not offer any explanation, then, the court as the ultimate enforcer of the provisions of the Constitution must raise the issue".**

In **Gerald Macharia Githuku vs. Republic**, *Criminal Appeal No. 119 of 2004* (unreported) also relied on by the appellant, the appellant who had been convicted for capital robbery and sentenced to death complained in the course of the appeal of unlawful detention for three days in violation of **Section 72 (3) (b)**. The court allowed the appeal on that ground notwithstanding that it was satisfied on the evidence, that, the appellant was guilty of the offence and the breach did not result in substantial prejudice to him.

The initial liberal attitude of entertaining allegations of unlawful detention raised for the first time in the course of a second appeal has drastically changed. This change of attitude is illustrated by the decision in **Samuel Ndungu Kamau & Another vs. Republic,** *Criminal Appeal No. 223 of 2006* (Nairobi) where this Court said:

> **"The provisions of Section 72 (3) (b) above are framed in a way which presupposes that a complaint with regard to violation would either be raised at the trial or in an application under Section 84 of the Constitution, where witnesses are normally called or affidavit evidence is presented to prove or rebut a factual position. When such a complaint is raised for the first time before this court, it may not be possible to investigate the truth or falsity of the allegation. That being our view of the matter, this ground fails, more so when it does not relate to the question whether or not the 2nd appellant alone or together with other persons not before the court committed the offence he stands convicted of".**

(See also **Dominic Mutie Mwalimu vs. Republic**, *Criminal Appeal No. 217 of 2005* (unreported). Moreover, the Court has declined to entertain a ground of breach of **Section 72 (3) (b)** raised for the first time in the appeal where an appellant, who being represented by a counsel, failed to raise such complaint in the trial court saying that in such a case, the appellant must be treated to have waived his right to complain about the alleged violations of his constitutional rights before he was brought to court (see

James Githui Waithaka & Another vs. Republic, *Nyeri Criminal Appeal No. 115 of 2007* (unreported) and **Protus Madakwa alias Collins & Two Others vs. Republic**, *Criminal Appeal No. 118 of 2007* (Nairobi) (unreported).

Next we refer to a few decisions of the superior court on the interpretation of **Section 72 (3) (b)**.

In **Ann Njogu & 5 Others vs. Republic**, *High Court Miscellaneous Application No. 551 of 2007* (unreported) the superior court (Mutungi, J.) strictly applied the decision in **Mutua's** case. In that case, the applicants were arrested for non-capital offence and detained in police station for more than 24 hours and charged in court after slightly more than 48 hours later. Their constitutional application alleging that the unlawful detention rendered the charge a nullity was allowed, the court saying in part:

> **"….. there is as yet no known cure for the nullity that results from attempted prosecution of any person, in this country, once it is shown that his/her constitutional and fundamental rights were violated prior to the purported institution of the criminal proceedings complained against. Nor is there any room for extension of the constitutionally provided for period of 24 hours, it could as well come after a year. Either way, such prosecution is a violation on the rights of the arrested or detained person and is illegal and null and void".**

In **Amos Karuga Karatu**, High Court (Nyeri), *Criminal Case No. 12 of 2006* (unreported) cited by the appellant in support of this appeal the accused was tried by the High Court for the offence of murder contrary to **Section 203** as read with **Section 204** of the *Penal Code*. The prosecution called 10 witnesses and after closing its case, the counsel for the accused relying on **Mutua's** case, submitted that the accused should be acquitted because he was unlawfully detained for 5 months before he was charged.

The superior court (Makhandia, J.) acquitted the accused solely on that ground, holding:

> **"A prosecution mounted in breach of the law is a violation of the rights of the accused and is therefore a nullity. It matters not the nature of the violation. It matters not that the accused was brought to court one day after the expiry of the period required to arraign him in court. Finally, it matters not that the evidence available against him is weighty and overwhelming. As long as that delay is not explained to the satisfaction of the court, the prosecution remains a nullity".**

Lastly, the appellant relied on **Republic vs. George Muchoki Kungu**, *Nairobi Criminal Case No. 49 of 2007* where a preliminary objection to a charge of murder was raised on the ground that the accused was unlawfully detained by police for 106 days before he was charged with the offence. The prosecution filed an affidavit explaining the delay and submitted, among other things, that murder is a serious offence; that the accused should not be released without the case being heard on merit and that releasing the accused would result in bad law and, lastly, that such release would be against the public interest. The superior court (Mutungi, J.) nevertheless rejected the explanation proffered and held that the proceedings were illegal, null and void as they were instituted in violation of **Section 72 (3) (b)**. The court emphatically said:

> **"Upon discovery of the Constitutional violation, the court has no jurisdiction to continue hearing an illegality, and, or, a nullity. That is the basis for the court's firm holding that any proceedings instituted outside the 14 days stipulated in Section 72 (3) (b) are illegal, null and void irrespective of the weight of evidence that the prosecution, might have. Put differently, the evidence, might be there with the prosecution. But the forum at which such evidence can be adduced does not legality exist due to the illegality of the proceedings when they were first instituted in violation of the constitutional provisions under Section 72 (3) (b)".**

The analysis of the decisions of the superior court will not be complete without highlighting the apparently dissenting view of Anyara Emukule, J. in **Republic vs. David Geoffrey Gitonga**, *Criminal Case No. 79 of 2006* (Meru) (unreported). In that case, the accused was tried for the offence of murder and after the conclusion of the trial and after the accused had made his defence, his counsel submitted that

the trial was a nullity since the accused was detained for 140 days before he was charged in violation of **Section 72 (2) (b)** of the Constitution.

The trial Judge declined to acquit the accused saying that a breach of **Section 72 (3) (b)** does not render a trial a nullity but entitles an accused to compensation as stipulated in **Section 72 (6)**. The trial Judge reasoned thus:

> **"I am aware that contrary opinions have been expressed by others in this court. I do not share those views. I hold the considered view that such trial is not a nullity at all. These are my reasons. Firstly, the principle of nullity presupposes that the process of trial is void either because it is against public policy, law, order, and indeed, nullity is non-curable. Secondly, for a trial to be void in law it must be shown either that the offence for which the accused is being tried is non-existent, or that the authority or court seized of the matter has no authority to do so. It is a public policy of all civilized States that offenders be subjected to due process in respect of defined offences, and by duly competent courts or tribunal.**
>
> **……..**
>
> **A trial will be a nullity where the offence is non-existent or there is lack of jurisdiction. To say otherwise would be against both public policy and the law. The court will not act against the law nor will it go against public policy. A rapacious rapist and a serial killer will not be allowed to go scot-free because either deliberately or inadvertently, the prosecution authority has not deemed it fit to have him brought before a court within 24 hours or as case may be within 14 days".**

In a subsequent decision – **Republic vs. Judah Kiogora Ngaruthi & Another** – *Meru Criminal Case No. 14 of 2008*, Emukule, J. in dismissing a preliminary objection to a charge of murder based on violation of **Section 72 (3) (b)** reiterated those views.

The decision of Osiemo, J. in **J. K. vs. Republic**, *Eldoret High Court Criminal Appeal No. 83 of 2007* deserves mention. In that case, the appellant in the course of hearing of an appeal against both the conviction and sentence for defilement, raised a preliminary objection (issue), in essence, that, the trial and conviction were a nullity since he was unlawfully detained in police custody for more than 24 hours in violation of **Section 72 (3)**.

The superior court after making a finding that the rights of the appellant had not been violated, added:

> **"The appellant having failed to assert his right from the time he appeared in court and throughout the proceedings, he must now be treated as having waived the alleged violation of the constitutional right and I reject this ground and further no prejudice to the appellant had been established.**
>
> **Secondly, a declaration that the accused's right has been violated does not automatically entitle accused to an acquittal. As often said, justice must be seen to be done but the watchful eye of the public. The court must constantly balance the claim of the accused against the possibility unproven and unprovable in many cases that delay has been procured or encouraged by someone acting in the interest of accused".**

COMMONWEALTH AND INTERNATIONAL JURISPRUDENCE:

Although the constitutional application in the superior court was not based on violation of rights secured by **Section 77 (1)** the rights which were secured by **Sections 72 (3) (b)** and **77 (1)** are closely related although not identical. It is pertinent for comparison purposes to consider some of the broad principles applicable to the consideration of the allegation of the violation of rights under **Section 77 (1)** particularly the violation of reasonable time guarantee. **Section 77 (1)** provided:

"If a person is charged with a criminal offence then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law".

Section 77 (1) enacted the international human rights law protecting the rights of persons awaiting trial. It is part of the Bill of Rights which is modeled on the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*. The text of the protection provision is identical in some Commonwealth countries but varies slightly in other countries. For instance, the Sixth Amendment to the Constitution of United States, provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury ……..".

In Canada **Section 11 (b)** of the Canadian Charter of Rights and Freedoms provides that any person charged with an offence has the right:

"to be tried within a reasonable time"

Articles 6 (1) of *The European Convention for the Protection of Human Rights and Fundamental Freedoms,* (Convention) provided:

"In determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Section 25 (3) (a) of the Interim Constitution of *South Africa – Act 200 of 1993,* provides:

"Every accused person shall have the right to a fair trial, which shall include the rights:

(a) To a public trial before an ordinary court of law within a reasonable time after having been charged".

Lastly, **Section 10 (1) of the Constitution of Mauritius provides;**

"where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law".

In **Darmalingum vs. State** [2000] 5 LRC 522 the Privy Council, (Lord Steyn) construed that section thus:

"It will be observed that s. 10 (1) contains three separate guarantees, namely, (1) a right to fair hearing; (2) within a reasonable time; (3) by an independent and impartial court established by law.

Hence, if a defendant is convicted after a fair hearing by a proper court, this is no answer to a complaint that there was a breach of the guarantee of disposal within a reasonable time".

That construction was adopted by the Privy Council in **Mills vs. HM. Advocate** [2002] 5 LRC 367. That is also the construction given to article 6 (1) of the Convention (see speech of Lord Hope in the House of Lords in **Porter vs. Magill** [2002] 1 All ER 465 at page 501 paragraph 87 where Lord Hope said in essence that although the rights are closely related and although the overriding question is whether or not there was a fair trial, the rights are separate and distinct and should be considered separately (see also **R vs. Lord Advocate** [2003] 2 LRC 51).

In contrast, by **Section 35 (3) (d)** of the Constitution of South Africa like **Section 25 (3) (a)** of the

previous Interim Constitution, the right to trial without unreasonable delay is expressly one of the components of a fair trial. Similarly, in **Section 50 (2) (e)** of the Constitution of Kenya, 2010 the right to trial without unreasonable delay is one of the enumerated elements of a fair trial.

It is convenient to consider first the general principles applicable to violation of reasonable time guarantee before considering the available remedies for the violation of the right. We will do so very briefly and broadly because it is not the violation of the trial within a reasonable time guarantee which is in issue in this appeal.

In **Bell vs. Director of Public Prosecutions & Another** [1986] LRC (Const.) 392, the Privy Council was dealing with an appeal against the dismissal of an application by an accused for a declaration that **Section 20 (1)** of the Jamaica Constitution which affords an accused a right to a fair hearing within a reasonable time by an independent and impartial court established by the law had been infringed. **Section 13** of the Constitution of Jamaica provides that *"every person in Jamaica is entitled to the fundamental rights and freedoms of the individual"* including *"the protection of the law"* but *"subject to respect for the rights and freedoms of others and for public interest"*.

The Privy Council in construing both **Sections 20** and **13** of the Constitution of Jamaica said at page 401 paragraph h:

> **"……. In giving effect to the rights granted by Sections 13 and 20 of the Constitution of Jamaica, the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica".**

In **Flowers vs. The Queen** [2000] 1 WLR 2396 Lord Hutton in delivering the judgment of the Privy Council again dealing with the reasonable time guarantee under **Section 20 (1)** of the Constitution of Jamaica said at page 2413 paragraph c:

> **"In Bell vs. Director of Public Prosecutions, the Board stated that the right of an individual to be tried within a reasonable time is not an absolute right but must be balanced against the public interest in attainment of justice".**

In each of the two cases the Board held that the relevant factors for consideration where unreasonable delay is alleged include, the length of the delay, the reasons given by the prosecution to justify the delay, the responsibility of the accused for asserting his rights and the likelihood of prejudice to the accused resulting from the delay though proof of real prejudice was not necessary. The Board, however, stated in **Bell** at page 401 paragraph h that the weight to be attached to each factor must vary from jurisdiction to jurisdiction and from case to case.

In the famous Canadian case of **R vs. Morin** [1992] 1 SCR 771 the Supreme Court, particularly Sopinka J, in his leading judgment exhaustively considered the relevant principles applicable to an application for stay of proceedings for infringement of the right to be tried within a reasonable time under **Section 11 (b)** of the Charter.

Sopinka, J. said in part:

> **"The general approach to a determination as to whether the right has been denied is not by the application of mathematical or administrative formula but rather by a judicial determination balancing the interest which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of the delay".**

The relevant factors to be considered were identified by the majority of the Court as the:

> **"1. Length of delay;**

2. Waiver of time periods;

3. The reasons for delay including inherent time requirements

of the case, action of the accused; actions of the crown;

limits on institutional resources; and

4. Prejudice to the accused".

On the question of burden of proof, it was held in that case that although the applicant has the ultimate legal burden throughout to prove a violation, the evidentiary burden of putting forth the evidence or argument may shift depending on the circumstances of each case but that a case will only be decided by reference to burden of proof, if the court cannot come to determinate conclusion on the facts presented to it.

Regarding prejudice to the accused it was there held that prejudice may be inferred from the length of the delay, and, that, in the circumstances in which prejudice is neither inferred nor proved the basis for the enforcement of the right is seriously undermined. The court further held that the purpose of the right is to expedite trials and minimize prejudice and not to avoid trials on the merits.

On the question of waiver of time periods by an accused, Sopinka, J. said that such waiver could be explicit or implicit from the conduct of the accused but that such waiver must be clear and unequivocal with full knowledge of the rights and of the effect that the waiver will have on those rights.

On his part, McLachlin, J. said in essence, that, in considering the factors which bear on the determination whether the right has been violated the true issue at stake is the determination of where the line should be drawn between the conflicting rights of the accused and societal interests. McLachlin, J. said in part:

"On one hand stands the interest of society in bringing those accused of crimes to trial, of calling them to account before the law for their conduct. It is an understatement to say that this is a fundamental and important interest. Even the earliest and most primitive of societies insisted that the law bring to justice those accused of crimes. When those charged with criminal conduct are not called to account before the law the administration of justice suffers. Victims will conclude that justice has not been done and the public feels apprehension that the law may not be adequately discharging the most fundamental of its tasks.

On the other side of the balance stands the right a person charged with an offence to be tried within a reasonable time. When trials are delayed, justice may be denied. Witnesses forget, witnesses disappear. The quality of evidence may deteriorate. Accused persons may find their liberty and security limited much longer than necessary or justifiable. Such delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice.

The task of a judge in deciding whether proceedings against the accused should be stayed is to balance, the societal interest in seeing that persons charged with offences are brought to trial against the accused's interest in prompt adjudication. In the final analysis, the judge before staying charges, must be satisfied that the interest of accused and society in a prompt trial outweighs the interest of society in bringing accused to trial".

His Lordship continued further on:

"An accused person may suffer little or no prejudice as a consequence of delay beyond the expected normal. Indeed, an accused may welcome the delay. On the other hand, an accused

person can suffer great prejudice because of the delay. Where the accused suffers little or nor prejudice, it is clear that the consistently important interest of bringing those charged with criminal offences to trial outweighs the accused's and society's interest in obtaining a stay of proceedings on account of delay, because the consequences of delay are not great. On the other hand, where the accused has suffered clear prejudice which cannot be otherwise remedied, the balance may tip in the accused's favour and justice may require stay".

The decision of **R. vs. Morin** (supra) was adopted and applied by the Court of Appeal of New Zealand in **Martin vs. Tauranga District Court** [1995] 2 LRC 788 (see particularly the first judgment of Cooke P.). There, the accused had made an application in the trial court for an order on grounds of delay; that no indictment should be presented on the three assault charges against him and directions that he should be discharged or for an order of stay. The application was dismissed. An application for Judicial Review to quash the decision of the trial court was similarly dismissed. On appeal to the Court of Appeal, the appeal was allowed and the indictments stayed.

In considering the period of delay as one of the relevant factors Richardson, J. said at page 798, paragraphs h – i:

"It was not suggested in argument that there is or could be an international norm of what constitutes undue delay expressed in terms of a specific period of weeks or months. Some recognition has to be given to the circumstances of a particular society".

The Court of Appeal also examined extensively the question of the appropriate remedy for violation of **Section 25 (b)** of the *New Zealand Bill of Rights Act, 1990* which guaranteed a person charged with an offence a right to a fair and public hearing by an independent and impartial court without undue delay.

Again, the decision in **R vs. Morin** was considered in detail and applied the Supreme Court of Western Samoa in **Police vs. Tulaga** [2007] 2 LRC 235 where the Supreme Court was considering an application by an accused person for stay or dismissal of the charges against him on the ground that his right to a hearing within reasonable time under article 9 (1) of the *Constitution of Western Samoa, 1960* had been infringed.

In that case, the Supreme Court observed that as a consequence of the decision in **R vs. Morin,** successful challenges in Canada based on violation of trial within a reasonable time had markedly declined and are highly unlikely to succeed unless the accused demonstrates serious prejudice (see page 241 paragraphs b – c).

In **Sanderson vs. The Attorney General, Eastern Cape**, 1998 (2) S.A. 38 CC., the applicant made an application in the High Court seeking in the main an order of permanent stay of criminal proceedings and an order of permanent prohibition against the Attorney General from reinstating any prosecution in respect of the charges on the ground that his right to speedy trial under **Section 25 (3) (a)** of the Interim Constitution of the *Republic of South Africa, 1993, Act 200 of 1993* had been infringed. The application was dismissed after which he appealed with leave to the Constitutional Court of South Africa. The relevant part of the Interim Constitution came into operation on 27th April, 1994 and remained in force until it was replaced on 4th February, 1997 by the final Constitution – *The Constitution of the Republic of South Africa, 1996*. **Section 35 (3) (d)** of the final Constitution which replaced **Section 25 (3) (a)** now provides in part:

"Every accused person has a right to a fair trial, which includes the right –

(a) ……

(b) ……

(c) ……

(d) To have their trial begin and conclude without unreasonable delay".

The appeal which was decided on the basis of the Interim Constitution was ultimately dismissed. The judgment of the Constitutional Court was delivered by Kriegler, J. with which the other member of the Court concurred. Regarding the test for establishing whether the delay was reasonable, Kriegler, J. said, in part:

> **"The qualifier, "reasonableness" requires a value judgment. In making that judgment courts must be constantly mindful of the profound societal interest in bringing a person charged with a criminal offence to trial and resolving the liability of the accused. Particularly when the applicant seeks a permanent stay, this interest will loom very large. The entire inquiry must be conditioned by the recognition that we are not atomized individuals whose interests, are divorced from those of the society. We all benefit by our belonging to a society with a structured legal system; a system which requires the prosecution to prove the case in a public forum. We also have to be prepared to pay a price for our membership of such a society, and accept that a criminal justice system such as ours inevitably imposes burdens on the accused. But we have to acknowledge that these burdens are profoundly troubling and incidental. The question in each case is whether the burdens borne by accused as a result of delay are unreasonable. Delay cannot be allowed to debase the presumption of innocence and become in itself, a form of extra-curial punishment".**

That case was followed by the same Constitutional Court in **Wild vs. Hoffert** No. 1998 (3) SA 695 CC.

MEANING OF "CHARGED":

In *Attorney General's Reference (No. 2 of 2001)*, [2001] 1 WLR 1869, the Attorney General of England sought the opinion of the Court of Appeal on two questions, namely:

> **"(1) Whether criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in article 6 (1) of the Convention for the protection of Human Rights and Fundamental Freedoms in circumstances where the accused cannot demonstrate any prejudice arising from the delay.**
>
> **(2) In the determination of whether, for purposes of article 6 (1), a criminal charge has been heard within a reasonable time, when does the relevant time period commence".**

Incidentally **Section 6 (1)** of the European Convention has become domestic law of England through *Human Rights Act, 1998* as scheduled thereto.

Regarding the second question, the Court of Appeal disagreed with the contention that an interrogation constituted a charge and held that although the jurisprudence of the *European Court of Justice*, does not confine a *"charge"* far purpose of Section 6 (1) to precisely the circumstances which in domestic jurisprudence would amount to a charge ordinarily under domestic jurisprudence, the *"commencement of commutation in determining whether a reasonable time has elapsed will start when the defendant is either charged or served with summons as a result of information being laid before a magistrate"*.

Re-Mlambo [1993] 2LRC 28, the Supreme Court of Zimbabwe construed the word *"charged"* in **Section 18 (2)** of the Constitution of the Republic of Zimbabwe which is identical to our **Section 77 (1)** to mean that time begun to run from the start of the impairment of an individual's interests in the liberty and security of his person.

In **Darmalinghum vs. State** (supra), it was common ground, and, the Privy Council agreed, that, the relevant period commenced upon the arrest of the appellant and not later when a decision to prosecute was made. It is noteworthy however, that in both **Re-Mlambo** and **Darmalingum** the courts relied on

the jurisprudence of the European Court of Human Rights which has given the word *"charged"* in article 6 (1) of the Convention an expanded meaning.

In **Sanderson**, Kriegler, J. while observing that the word *"charged"* is now omitted from **Section 35 (3) (d)** of the Constitution stated that the word *"charged"* derives much of its content and meaning from the particular context in which it is used and that the word is ordinarily used in South Africa Criminal Procedure as generic noun to signify the formulated allegation against an accused.

STANDARD OF PROOF:

We now turn to the standard of proof of infringement of the right to trial within a reasonable time. In **Darmalingum**, the Privy Council stated that the wording in **Section 10 (1)** of the Constitution of Mauritius and article 6 (1) of the convention is not material (see page 530 paragraph e).

In **Dyer vs. Watson** [2004] 1 AC 379, lord Bingham referring to article 6 (1) of the Convention said at page 402 paragraph 52 that the threshold of proving a breach of reasonable time requirement is a high one and not easily crossed while Lord Hope on his part said at page 409 paragraph 80:

> **"Although the Strasbourg court (***i.e. European Court of Human Rights)* **does not lay down any minimum periods of delay, it is possible to find guidance in its decisions to support the proposition that a relatively high threshold must be crossed before it can be said that in any particular case that a period of delay is reasonable".**

That a high threshold has to be crossed in order that a delay may be categorized as unreasonable was reiterated by Lord Clyede who also added in **R v. Lord Advocate** [2003] 2 LRC 51 at page 86 paragraph 92:

> **"The Convention seeks to identify a common minimum standard of protection applicable internationally to the states parties to the Convention. The period itself must give rise to real concern. The complexity of the case, the conduct of the accused and the manner in which the case has been handled by the administrative and judicial authorities have then all to be assessed. An unreasonable time is one which is excessive, inordinate and unacceptable. Under the jurisprudence of European Court of Human Rights, the element of prejudice is not an essential ingredient of the violation".**

Lord Clyde further stated, among other things, that the violation of any rights contained in article 6 (1) must be decided within the context of the whole proceedings and should also be raised at the earliest stage.

On his part, Lord Hope in the same case at page 82 paragraph 76 said that the concept of reasonableness implies that a relatively high threshold has to be crossed and that among the factors to be taken into account in deciding where the threshold lies is the public interest.

In **R vs. Morin** Sopinka, J. recognized that the right to a trial within a reasonable time can be abused and transformed from a protective shield to an offensive weapon in the hands of the accused and stated that the right must be interpreted in a manner which recognizes the abuse which may be invoked by some accused.

In the same vein Lord Rodger in **Dyer vs. Watson** observed at page 431 paragraph 157 that in reality an accused person may have no real interest in having the charge against him determined promptly and may invoke article 6 (1) of the Convention, not in order to benefit from its fulfillment, but rather in the hope of benefiting from its breach by avoiding being convicted.

APPROPRIATE REMEDY:

Section 84 (1) permitted a person who alleged that right to a trial within a reasonable time, among

other rights, had been contravened to apply to the High Court for a redress and by **Section 84 (2)** on such application, the High Court:

> **"may make such orders issue such writs and give such directions as it may consider appropriate".**

The Chief Justice has in accordance with Section 84 (6) made Practice and Procedure Rules – *The Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the individual) High Court Practice and Procedure Rules, 2006* prescribing, among other things, that an application to the High Court for relief should be by way of Petition.

In **Darmalingum** the Privy Council (Lord Steyn) held that the normal remedy for a failure of reasonable time guarantee is to quash a conviction which was also the remedy for breach for fair hearing and independent and impartial court guarantees.

In **Flowers vs. The Queen** [2000] the Privy Council distinguished **Darmalingum** and said that an appellate court is entitled, in public interest to take into account the fact that defendant is guilty of a serious crime in deciding whether to quash the conviction for infringement of right to trial within a reasonable time. The Board said specifically at page 2415 paragraph B:

> **"…… in deciding whether the defendant's conviction should be quashed because of the lengthy period of delay their Lordships are of the opinion that they are entitled to take into account the considerations that he has been proved on strong evidence to be guilty of murder in the course of armed robbery, that this type of offence is very prevalent in Jamaica and that it poses a serious threat to the lives of innocent persons".**

In **Martin vs. Tauranga** the indictments were stayed for breach of the right to be tried without undue delay, Cooke P holding that a standard remedy under the Bill of Rights for undue delay should logically be a stay (page 796 – paragraph c). In that case, however, the appeal was conducted on the assumption that stay was the appropriate remedy and no other remedy was suggested and stay was granted on that basis.

However, Richardson, J. said at page 799 paragraph e –

> **"where the delay has not affected the fairness of any ensuing trial through; for example unavailability of witnesses or the dimming of memories of witnesses so as to attract consideration under Section 25 (a), it is arguable that the vindication of the appellant's rights does not require the abandonment of trial process; that the trial should be expedited rather than aborted and the breach of Section 25 (b) should be met by an award of monetary compensation. That would also respect victims' rights and the public interest in the prosecution to trial of alleged offenders".**

He continued below at paragraph h:

> **"The choice of remedies should be directed to the values underlying a particular right. The remedy or remedies granted should be proportional to the particular breach and should have regard to other aspects of public interest".**

On his part, Hardie Boys, J. referring to view expressed by Judges in Canada in essence, that, once there has been undue delay; for a court to embark on a trial would be a further violation of the right, made his famous observation at page 804 paragraph h, thus:

> **"These imminent judges went so far as to put the proposition in terms of jurisdiction. With respect, I doubt the logic. The right is to trial without undue delay, it is not a right not to be tried after undue delay. Further, to set at large a person who may be, perhaps patently is, guilty of a serious crime, is no light matter. It should only be done where the vindication of**

the personal right can be achieved in no other satisfactory way. An alternative remedy may be an award of damages".

Observing that the infringement of the right to trial without undue delay comes as the culmination of a gradual process of which the accused is fully aware and that delay often suits the accused, Hardie Boys J. continued at page 805, paragraph b:

"I see no reason to vindicate the right of one who allows the process to run its full course without objection or complaint and then asserts the right only at its culmination. The international jurisprudence teaches us that there is no obligation on an accused to hasten the trial; that is the obligation of the state. Nonetheless I do not think that a person should be entitled to plead undue delay unless he or she has taken such earlier opportunity as there may have been to protest at the delay up to that point. For then realistic anticipatory remedies can be provided".

In his view, a stay of proceedings may be acceptable as appropriate ultimate remedy where, despite other measures such as bail, expediting the trial, the delay continues to be undue and not otherwise.

Under the Common Law, the stay of proceedings upon an indictment on ground of prejudice resulting from delay, even where the delay is unjustifiable, can only be employed in exceptional circumstances and only where the defendant shows on a balance of probabilities, that, owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held. In other words, that the continuance of the prosecution amounts to a misuse of the process of the court *(Attorney – General's reference (No. 1 of 1990)* [1992] 1QB 630.

As to whether criminal proceedings may be stayed on grounds of violation of the reasonable time requirement in article 6 (1) of the Convention which was the first question in A.G.'s Ref. *(No. 2 of 2001)* the English Court of Appeal held that the court on request of defendant has to provide the appropriate remedy but in general, proceedings should only be stayed where it would amount to an abuse of the process of the court to proceed with the prosecution; and, that in other situations the court had alternative remedies including marking the fact that there has been a contravention; taking into account the contravention in any sentence imposed or making an award for compensation, if a defendant is acquitted.

In **Dyer vs. Watson** Lord Hutton after pointing out the conflict in **Darmalingum and Flowers** on the question whether unconstitutional delay should lead to conviction arrived at after delay being quashed, stated at page 419 paragraph 121:

"The judgments of the European Court, as I read them, suggest that where there has been unreasonable delay in breach of article 6 (1) the court does not taken the view that a conviction after such delay must automatically be quashed".

In **Mills vs. HM Advocate** [2002] 5 LR C 366 Lord Steyn who delivered the judgment, in **Darmalingum** considered the observation of Lord Hutton and agreed with him saying at page 377 paragraph 18: d:

"Lord Hutton is right: it was wrong to say that the normal remedy is the quashing of the conviction".

He added further on at page 378 paragraph 20: b:

'In my view Darmalingum must be regarded as modified as I have indicated'.

In **Mills vs. H.M. Advocate** it was held that quashing a conviction was not the normal remedy for breach of the trial within a reasonable time in article 6 (1) of the Convention.

In the Canadian case of **R vs. Potvin** [1993] 2 SCR 880 McLachlin J. observed that quashing of the

conviction for appellate delay might seem inappropriate given that one would be releasing, not a person presumed innocent as at pre-trial stage but a convicted felon who has not served his or her sentence adding:

> **"To release a convicted killer into society for example, without having served his or her sentence, solely because the appeal he or she chose to bring took more time than reasonable would be to grant a remedy which far outstrips the wrong and which overlooks the important societal interest in the safety and security of members of public".**

In **Sanderson** the Constitutional court of South African in considering whether permanent stay of criminal proceedings was an appropriate relief in relation to **Section 7 (4) (a)** of the Interim Constitution which enjoined the court to grant an "*appropriate relief*" said in part.

> **"Even if the evidence he has placed before the court had been more damning, the relief the appellant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of delay on the outcome of the case – is far reaching. Indeed it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will be seldom warranted in the absence of significant prejudice to the accused.**

And added:

> **Ordinarily and particularly where the prejudice alleged is not trial related, there is a range of "appropriate" remedies less radical than barring the prosecution. These would include a mandamus requiring the prosecution to commence the case, a refusal to grant the prosecution a remand, or damages after an acquittal arising out of the prejudice suffered by accused. A bar is likely to be available only in a narrow range of circumstances, for example, where it is established that the accused has probably suffered irreparable prejudice as a result of delay".**

Lastly, it is expedient to refer to the Kenya case of **Githunguri vs. Republic** [1984] KLR 1 which illustrates what constitutes an infringement of both the right to a fair trial and trial within reasonable time requirement under **Section 77 (1)** and the enforcement of the two rights.

In that case, the applicant (Githunguri) was in 1984 charged before the Chief Magistrate, Nairobi with four counts alleging contraventions of *Exchange Control Act* (now repealed). Two of the offences were alleged to have been committed in 1976 and the third in 1979. The fourth count was an alternative to the third count. The applicant was charged nine years after the alleged commission of the offences and six years after the completion of investigations and 4 years after the Attorney General had communicated his decision to the applicant that he would not be charged.

The applicant made a Judicial Review application in the High Court seeking a prerogative order prohibiting the Chief Magistrate from further continuing to hear the criminal case on the ground that the Attorney General had decided to proceed with the prosecution notwithstanding, that in an earlier Reference to the High Court sitting as constitutional court the High Court had held that the prosecution of the applicant was in the circumstances stated, vexatious and harassing, an abuse of the process of the court and contrary to public policy. In the absence of any rules of procedure, the High court converted the application to one under **Section 84 (1)** for enforcement of the infringement of rights to fair trial and to trial within a reasonable time and held that both rights had been infringed and granted an order of Prohibition.

The court made some important and relevant observations on the limitation of the two rights. We will refer two of them.

Firstly, the court said at page 13 paragraph 30 – 35:

> **"There is no time limit to the prosecution of serious offences except where a limitation is**

imposed by statute. There is no such statutory limitation imposed in respect of the four charges. In so far as the time factor is concerned the Attorney General is therefore free to prosecute provided he does not offend the fundamental rights conferred by Section 77 (11) as protected by Section 84 (1) of the Constitution …..".

And secondly at page 20 paragraph 30, the court said:

"We speak in the knowledge that rights cannot be absolute. They must be balanced against other rights and freedoms and the general welfare of the community".

In that case, the court construed *"fair hearing"* as meaning *"square deal"* and also as being synonamous with *fair trial* and granted an order of Prohibition because it was satisfied that the applicant would not get a fair trial.

The court said in part at page 21 paragraph 12 – 25:

"We are of the opinion that two indefeasible reasons make it imperative that this application must succeed. First as a consequence of what has transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute has been lost in this case, the applicant having been publicly informed that he will not be prosecuted and property restored to him. It is for these reasons that the applicant will not receive a square deal as explained and envisaged in Section 77 (1) of the Constitution".

SUMMARY:

The following broad principles emerge from the consideration of the Commonwealth and international jurisprudence on the right to a trial within a reasonable time which we will endevour to restate, thus:

(i) The trial within a reasonable time guarantee is part of international human rights law and although the right may not be textually in identical terms in some countries the right is qualitatively identical.

(ii) The right is not an absolute right as the right of the accused must be balanced with equally fundamental societal interest in bringing those accused of crime to stand trial and account for their actions.

(iii) The general approach to the determination whether, the right has been violated is not by a mathematical or administrative formula but rather by judicial determination whereby the court is obliged to consider all the relevant factors within the context of the whole proceedings.

(iv) There is no international norm of "reasonableness". The concept of reasonableness is a value judgment to be considered in particular circumstances of each case and in the context of domestic legal system and the economic, social and cultural conditions prevailing.

(v) 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. However, the court may make a determination on the basis of the facts emerging from the evidence before it without undue emphasis on whom the burden of proof lies.

(vi) The standard of proof of an unconstitutional delay is a high one and a relatively high threshold has to be crossed before the delay can be categorized as unreasonable.

(vii) Although the procedure for raising a violation of the right varies from one jurisdiction to the other, the violation of the right should be raised at the earliest possible stage in the proceedings to

enable the court to give an effective remedy otherwise the right may be defeated by the doctrine of waiver where applicable.

(viii) The purpose of the right is to expedite trial and is designed principally to ensure that a person charged should not remain too long in a state of uncertainty about his fate.

(ix) The right is to trial without undue delay. It is not a right not to be tried after undue delay except in Scotland and it is not designed to avoid trials on the merits.

(x) (a) The remedy for the violation of the right varies from jurisdiction to jurisdiction. In some jurisdictions such as Canada and New Zealand it seems that permanent stay of proceedings is the normal remedy for violation of the right.

(b) Under the Common Law and under the jurisprudence of European Court of Human Rights, a permanent stay of proceedings is considered a draconian remedy only granted where it is demonstrated that the breach is so severe that a fair trial cannot be held.

(c) In most of the Commonwealth countries with Bill of Rights and a Constitution based on West Minister model, and, in South Africa the remedies are flexible – courts can grant any relief it considers appropriate in the circumstances of the case.

(d) In some jurisdictions, where the applicant is already convicted the quashing of a conviction is not considered a normal remedy and the court could take into account the fact that the applicant has been proved guilty of a crime, the seriousness and prevalence of the crime and design an appropriate remedy without unleashing a dangerous criminal to the society.

INTERELATION OF S.72(3) (b) and S.77 (1):

It is plain from the marginal note to **Section 72** that the section protected the right to personal liberty. **Section 72 (1)** provided that no person shall be deprived of his personal liberty save as may be authorized by law in the specified cases, the relevant one being (e), – that is, upon reasonable suspicion of having committed or being about to commit a criminal offence under the law. By **Section 72 (3) (b)** a suspect so arrested or detained and who is not thereafter released had to be taken to court *as soon as reasonably practicable* and if he is not taken within 24 hours, if arrested or detained for non capital offence or within 14 days, if he is arrested for capital offence, then the section casted a burden on a person who alleges that any detention beyond the specified periods is still constitutional, of proving that the suspect was still brought before the court *as soon as is reasonably practicable*. The case of **Dominic Mutie Mwalimu vs. Republic** – illustrates the true construction of **Section 72 (3) (b)**.

By **Section 72 (5)**, if a suspect charged with a non-capital offence is placed in custody after being taken to court, he is entitled to a trial within a reasonable time and, if it is not feasible to hold a speedy trial he is entitled to be released either unconditionally or on reasonable conditions to attend trial in future. It is manifest that **Section 72 (3) (b)** as read with **Section 72 (5)** was intended to ensure that a suspect is not unreasonably deprived of his personal liberty either before or after he is taken to court. The rationale for the strict protection of the personal liberty of a suspect is that there is a presumption of innocence until he is proved or has pleaded guilty (**Section 77 (2) (a)**).

On the other hand, **Section 77 (1)** is part of the provisions of **Section 77** which are intended to secure the protection of the law – that is to ensure that Rule of Law prevails in the administration of criminal justice **Section 77 (1)** guaranteed any person charged with a criminal offence a fair, and speedy trial before a competent court. Unlike **Section 72 (5)** which guaranteed a speedy trial to only suspects held in custody and who are charged with non-capital offences. **Section 77 (1)** guaranteed speedy trial to every suspect – those in custody for capital offences and those on bail pending trial. The trial within a reasonable time guarantee in **Section 77 (1)** relates to the whole of the judicial process starting when a person is charged and ending at the determination of the trial. It refers to the duration or length of the trial process. In contract, Section **72 (3) (b)** relates to extra judicial incarceration before a person is

charged in court.

Section 72 (1) (e) has its counter-part in Article 5 (1) (c) of the *European Convention* which authorizes arrest for purposes of bringing the suspect before a competent authority on reasonable suspicion that the suspect has committed an offence.

Similarly, **Section 72 (5)** has its counter-part in Article 5 (3) of the *European Convention* which, like **Section 72 (5)** stipulates that the person so detained is entitled to trial within a reasonable time or to release which may be conditioned by guarantees to appear for trial. In **STÖGMÜLLER V. AUSTRIA** [1969] 1 EHRR 155, the European Court of Human Rights stressed the need for special diligence in the prosecution of defendants detained in custody and held that the detention of the applicant therein for 2 years and 7 months in remand pursuant to a court order had ceased to be reasonable, and, was in breach of Article 5 (3) of the European Convention, and, further allowed the applicant, should the occasion arise, to apply for just satisfaction.

In **Dyer vs. Watson** (supra) Lord Rodger at page 422 paragraph 138 observed that the reasonable time guarantee under Article 6 (1) and reasonable detention guarantee under Article 5 (3) were separate and stated:

> **"Article 5 (3) and 6 (1) show that the draftsmen of the convention chose to introduce separate quarantees as to the length of pre-trial custody and the length of criminal process from charge to determination".**

Lord Rodger contrasted Articles 6 (1) and 5 (3) with the Canadian Charter of Rights and Freedoms which only contains a single guarantee – the trial within a reasonable time guarantee.

In **STÖGMÜLLER V. AUSTRIA** (supra) the *European Court of Human Rights* distinguished the rights under the two Articles at page 191 paragraph 5, thus:

> **"On the one hand, there is no confusion between the stipulation in article 5 (3) and that contained in article 6 (1). The latter provision applies to all parties to court proceedings and its aim is to protect them against excessive procedural delays in criminal matters, especially; it is designed to avoid that a person charged should remain too long in a state of uncertainty about his fate. Article 5 (3), for its part, refers only to persons charged and detained. It implies that there must be special diligence in the conduct of the prosecution of the cases concerning such persons. Already in this respect the reasonable time mentioned in this provision may be distinguished from that provided for in article 6 …….".**

The underlying question arising in this appeal is whether an unconstitutional extra judicial incarceration by police before the suspect is charged in court either entitles the suspect not to be tried for the offence for which he was arrested, or, if tried, whether he is entitled to a discharge or acquittal. Simply put in another way, whether a breach of **Section 72 (3) (b)** by depriving a suspect of his personal liberty by police before being charged in court entitles the suspect to go scot-free for the offence allegedly committed or about to be committed. This is a fundamental question of great public importance.

As already indicated, it was held in **Albanus Mutua's** case that unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature of, and, the strength of evidence which may be adduced in support of the charge. That decision was taken further in **Ann Njogu's** case where the High Court held, in essence that, a prosecution after the constitutional and fundamental rights have been violated is *illegal and null and void*. The decision was taken even further in **Republic vs. George Muchuki Kangu** where the High Court, Nyeri, held, among other things, that upon discovery of constitutional violation the court had no *jurisdiction* to continue hearing an *illegality* or a *nullity*.

With respect that jurisprudence is peculiar to this jurisdiction and has no parallel in international jurisprudence. The contrary decision of Emukule, J. and his reasons for the judgment has already been

cited.

In our view, the right of a suspect to personal liberty before he is taken to court under **Section 72 (3) (b)** are clearly distinct from the rights of an accused person awaiting trial under **Section 77 (1)**.

The main difference is that the breach of right to personal liberty is not trial-related. It is a right to which every citizen is entitled. It is the function of the Government to ensure that citizens enjoy the right. The duty is specifically on the police where the suspect is in police custody. If, by illustration, police breach the right to personal liberty of a suspect by unreasonable detention in police custody there is a right to apply to the High Court for a writ of *Habeas Corpus* to secure release (see **Section 389 (1) (a)** of *Criminal Procedure Code* and **Section 84 (1)** of the Constitution).

In addition, **Section 72 (6)** provided a remedy by way of damages to a person who is unlawfully arrested or detained.

In contrast, the right to a trial within a reasonable time guaranteed by **Section 77 (2)** is trial – related. It is related to the trial process itself and is mainly designed to ensure that the accused person does not suffer from prolonged uncertainty or anxiety about his fate. The duty is mainly on the court which has the control of the trial to ensure that the right to speedy trial is observed.

In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused.

However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police *per se* is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by **Section 72 (6)** expressly compensatable by damages.

Furthermore, we respectfully agree with the decision of Emukule, J. in the **Republic vs. David Geoffrey Gitonga** that even where violation of right to personal liberty of a suspect before he is charged has been proved or is presumptive, the ensuing prosecution is not a nullity and that a prosecution would only be a nullity, if any of the circumstances stated in that case subsists. Indeed, **Section 77** prohibits a prosecution where a person has already been convicted or acquitted of the same offence (double jeopardy) or where he has been pardoned. Further, **Section 77** prohibited a conviction for an offence which did not constitute an offence when it was committed or where the offence is not defined and the penalty therefor prescribed in a written law. **Section 77** also stipulated that the court should be established by law and should be independent and impartial. Nor is it correct to say that the court has no jurisdiction to try a suspect after his rights to personal liberty have been breached by police before he was charged. The law gives jurisdiction to the criminal courts to try any person suspected of having committed a criminal offence subject to the constitutional safeguards. There is no law including the 1963 Constitution before repeal which bars such prosecutions or ousts the jurisdiction of the criminal courts in such cases. The issue of jurisdiction does not, with respect arise. It is presumptuous, to say the least, for the courts to usurp the law making function of the Legislature in such an important subject. We would respectfully adopt the epithet of Hardie Boys, J. in **Martin v. Tauranga** relating to the continuation of prosecution after undue delay already quoted and similar view of Sopinka, J. in **R. v Morin** that the right is not designed to avoid trials on the merits. Similarly, the right protected by **Section 72 (3) (b)** is to be taken to court as soon as reasonably practicable. It is not a right not to be taken to court after unreasonable delay.

In contrast, and by anology **Section 57 (2)** of *Scotland Act, 1998* provides, *inter alia*, that a member of Executive has no power to act incompatibly with any of the *Convention* rights.

In **R v Lord Advocate** the Privy Council by majority construed **Section 57 (2)** as prohibiting the prosecutor from continuing to prosecute the appellant once the appellant's right to trial within a reasonable time under **Section 6 (1)** of the European Convention had been breached. Even in that case, there were two powerful dissenting judgments.

Even if we were to agree that the extra judicial incarceration before a person is charged has a direct bearing on the subsequent trial, the detention must first be shown to be unreasonable using the same principles, standards and considerations including societal interest as apply to considerations of breach of trial within reasonable time guarantee as emerge from the Commonwealth and foreign jurisprudence restated above.

Lastly, had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would compromised. If by the time an accused person makes an application to the court, the right has already been breached, and the right can no longer be enjoyed, secured or enforced, as is invariably the case, then, the only appropriate remedy under **Section 84 (1)** would be an order for compensation for such breach. The rationale for prescribing monetary compensation in **Section 72 (6)** was that the person having already been unlawfully arrested or detained such unlawful arrest or detention cannot be undone and hence the breach can only be vindicated by damages. Again, we respectfully agree with Emukule, J. that breach of **Section 72 (3) (b)** entitles the aggrieved person to monetary compensation only. That is the relief that this Court gave in **Kihoro v Attorney General of Kenya** [1993] 3 LRC 390 for breach of right to personal liberty.

THE APPEAL:

The superior court did not determine the constitutional petition on the merits and did not therefore investigate the circumstances of the alleged unlawful detention or make a finding whether or not the detention was unlawful. The superior court dismissed the petition on the ground that it was brought over two years late and after the prosecution had closed its case. The court was of the view that the petition was brought as an afterthought and as an *"additional defence to counter the evidence on record"*. As Hardie Boys, J. said in **Martin v Tauraga** (page 805 – paragraph (b) there is no reason to vindicate the right of one who allows the gradual trial process to run its course without objection or complaint and then asserts the right at its culmination. In the circumstances of this case the appellant is deemed to have waived his right to seek enforcement of the right. Further as the trial judge found the purpose of the petition was to emasculate the trial.

Moreover, it was not shown that the alleged unlawful detention had any link or effect on the trial process itself or that it caused trial related prejudice to the appellant which affected the validity of the trial. The alleged unlawful detention occurred long before the appellant was charged. The alleged unlawful detention does not exonerate the appellant from the serious crime he is alleged to have committed. The breach could logically give rise to a civil remedy – money compensation as stipulated in **Section 72 (6)**. That is the appropriate remedy which the appellant should have sought in a different forum.

The prosecution having closed its case, and the trial court having found that the appellant had a case to answer it, is in the public interest that the trial should be conducted to its logical conclusion.

FORUM FOR CONSTITUTIONAL PETITIONS:

Before we conclude, it is expedient to deal with one procedural issue which is whether a petition under **Section 84 (1)** should have been filed in the criminal court conducting the trial or in an independent court.

In this case, the petition was filed in the criminal court which was conducting the trial after the prosecution had closed the case. The petition sought declarations relating to breach of **Section 72 (1), 72 (3)** and **Section 74 (1)** and general and exemplary damages. Although the petition was registered

separately from the criminal case file and was given a separate serial number, it is apparent that the petition was placed in the criminal case file and heard by the same court which was hearing the criminal case in presence of assessors with the result that the proceeding of the petition were just a continuation of the criminal proceedings.

It is apparent that some of the reliefs sought did not relate to the ongoing criminal trial. Further, as **Section 72 (6)** entitled a person unlawfully detained to damages, the relief that the appellant be discharged was incompetent.

Secondly, it was unprocedural to prosecute the petition in presence of assessors as they had no power to give opinions in an application of that nature.

From the foregoing, it seems that in the prevailing circumstances, the petition should have been heard independently of the criminal trial.

CONCLUSION:

In the final analysis and for the reasons stated the appeal is dismissed in its entirety with no orders as to costs.

The delay in delivering this judgment is regretted. The delay was caused by the extensive research necessitated by the state of local jurisprudence in a matter of great public interest coupled by exigencies of duty.

Dated and delivered at Nairobi this 8th day of October, 2010.

E. M. GITHINJI

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JUDGE OF APPEAL

P. N. WAKI

…….

JUDGE OF APPEAL

ALNASHIR VISRAM

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR