REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 467 OF 2019

CONSOLIDATED WITH PETITION NO. 36 OF 2020

ISAAC NDEGWA KIMARU ON

BEHALF OF DICKSON NDONGAI ALIAS M'NGAI.....1ST PETITIONER

MAHAT MAOW GEDI.....2ND PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

OFFICE OF PUBLIC PROSEUCTIONS.....2ND RESPONDENT

JUDGEMENT

THE PETITION

1. The Petitioners through an amended Petition in the HC Pet No. 467/2019 filed together with supporting affidavit dated 4th February 2020 pray for the following orders:-

> ***a) That this Court declares that the failure by High Court and the Court of Appeal to hear Petitioners appeal violates Article 25(c) of the Constitution.***
>
> ***b) That, waiting for his appeal for 30 years is not reasonable and violates Article 50 (1) of the Constitution.***
>
> ***c) That this honourable Court declares that the time served by the Petitioner is sufficient and set the Petitioner at liberty forthwith.***
>
> ***d) That in the interest of justice, the Court do exercise its inherent powers to do justice to the applicant taking into account the period spent in custody.***

2. In the Petition No. 36 of 2020 now consolidated under Petition No. 467 of 2019. The Petitioners prays for the following orders:-

> ***i) That, this court declares that a fundamental right to a fair trial has been violated and therefore sets the Petitioner art liberty.***
>
> ***ii) That, in light of the circumstances which led to the Petitioner's failure to be heard on appeal that this Court considers the time I have spent in custody as sufficient sentence.***
>
> ***iii) That, this Court considers the vulnerability of the petitioner under Article 54 (1) of the constitution and sets the petitioner at liberty.***
>
> ***iv) That, in the interest of justice; the court to exercise its inherent powers to do justice to the applicant taking into account the period spent in custody.***

THE 1ST PETITIONERS CASE

3. The Petitioners bring up this Petition as aggrieved Kenyan Citizens who are seeking the enforcement, implementation and upholding of the Constitution of Kenya and the law made thereunder.

4. The 1st Petitioner was charged with an offence of attempted rape contrary to ***Section 141 of the Penal Code***. Defilement contrary to ***Section 145 of the Penal Code and Rape*** contrary to ***Section 140 of the Penal Code.*** That upon conviction the 1st Petitioner who sentenced to life imprisonment in count 1 and 3 and to 14 years imprisonment on count 2 on 16th November 1990 in Kiambu Criminal Case No. 5178 of 1990.

5. The 1st Petitioner filed ***High Court Criminal Appeal No. 1456 of 1990 Dickson Ngonga vs. Republic***, The High Court subsequently dismissed the appeal on 12/3/1991 in which Hon. Justice V. V. Patel held thus:

> ***"Kiambu Court's Executive Officer tells me that he cannot trace the filed for Criminal Case No. 5178 of 1990. In the circumstances, I have informed the appellant that he should write to the Attorney General, if he wished, to request His Excellency the President to exercise his power of mercy for his release. I note that the appellant has been in prison for the past eleven years."***

6. The 1st Petitioner contend that was a clear abdication of judicial duty by the Honourable Judge and in violation of ***Article 159(1) and 160(1) of the Constitution*** as the Court should have dealt with the matter then as this was its role and not the role of the executive.

7. The 1st Petitioner's effort to file an appeal to the Court of Appeal was frustrated when the High Court wrote to him through a letter dated 30th October 2001 informing him he was required to make an application to the Attorney General for a Presidential pardon. The 1st Petitioner therefore contend that he was never given an opportunity to be heard at the High Court. Secondly the 1st Petitioner had no proceedings and judgment to rely on.

8. The 1st Petitioner contend that he has not been subjected to equal benefit and equal protection of the law by the fact that he was not subjected to an appeal process as any other convict has been. The fact that the 1st Petitioner was referred to the Attorney General for Presidential pardon yet there is jurisprudence of how the Court has dealt with cases where Court records have been misplaced amounts to discrimination. It is 1st Petitioner's averments that is a violation of ***Article 27(1) 92) and (4) of the Constitution***. The 1st Petitioner further aver that he has been subjected to torture and inhuman and degrading treatment, urging it is wrong to subject one to wait for an opportunity to hear an appeal for three decades. It is contended that a presidential pardon leaves a person with very faint hope if there is any, meaning this subjects someone to psychological torture.

9. The 1st Petitioner case is that the stay in custody for the last 30 years is sufficient sentence taking into account that the current regime of sentencing where mandatory sentences has been abolished it is contended that in other jurisdictions where life sentence has been defined, life sentence does not mean natural life of a human being but ranges between 20 to 30 years.

THE 2ND PETITIONERS' CASE

10. The 2nd Petitioner herein was arrested and charged with the offence of attempted rape ***C/S 141 of the Penal Code in Criminal Case No. 99 of 2006*** at Wajir Law Court. Upon Conviction he was sentence to 30 years imprisonment on 22nd September 2006. He filed an Appeal to the High Court in Criminal Appeal No. 744 of 2007 at Nairobi. His Appeal has not been heard for the last 13 years.

11. The 2nd Petitioner urge that he has not been accorded the right to hear his appeal for the last 13 years, despite making efforts to have his appeal heard. He has further not been accorded the right to have his case re-evaluated to ensure that the trial was conducted in accordance to the law. The 2nd Petitioner herein is urged to be completely deaf and dumb. It is urged the inordinate delay in hearing the 2nd Petitioner's Petition is a clear violation of the Petitioner's right to a fair trial under ***Article 50(1) and (2) (e) of the Constitution***. It is the 2nd Petitioner's positon that in his current state he could not be able to follow up his case due to disability which puts him in place of disadvantage.

12. It is 2nd Petitioners' positon that he was sentenced under ***Section 141 of the Penal Code contrary to the Sexual Offences Act***, where the minimum sentence would have been a minimum sentence of 5 years. The sentence is contended to be excessive and a violation of the 2nd Petitioners' Bill of rights.

RESPONDENTS RESPONSE

13. The 2nd Respondent filed grounds of opposition being as follows:-

i) The Petitioner has failed to demonstrate how his fundamental rights have been violated by the 2nd Respondent.

ii) The Petitioner has not exhausted all avenues before coming to this Court.

ANALYSIS AND DETERMINATION

14. I have carefully considered the Petitioners petitions, the affidavit in support and annextures thereto, the 2nd Respondents' grounds of opposition; the parties rival submissions and oral submission and from the above the following issues arise for consideration:-

a) Whether the loss of 1st Petitioner's Court record denied him the right to appeal and whether the High court on appeal dealt with the matter the way it ought to have done?

b) Whether the 1st and 2nd Petitioners right of Appeal stand?

c) Whether subjecting the Petitioners to wait for their appeals for 30 years and 13 years respectively amounts to psychological torture and inhumane and degrading treatment and whether it is a violation of Article 29(d) and (f) of the Constitution?

d) Whether by referring the 1st Petitioner to the executive arm of the government upon loss of the Court records amounts to a violation of the doctrine of separation of powers and therefore a violation of Article 160(1) of the Constitution?

A. WHETHER THE LOSS OF 1ST PETITIONER'S COURT RECORD DENIED HIM THE RIGHT TO APPEAL AND WHETHER THE HIGH COURT ON APPEAL DEALT WITH THE MATTER THE WAY IT SOUGHT TO HAVE DONE?

15. The Reasons that caused the 1st Petitioner's appeal High Court Appeal No. 1456 of 1990 to delay is indicated by the Appellate Judge Hon. Justice V. V. Patel as he then was, on 28/8/2001 to have been non-availability of the Kiambu Court proceedings and judgment in ***Criminal Case No. 5178 of 1990 R vs. Dickson Ndongai***. The Appellate Court did not even hear the 1st Petitioner who was present but called the Kiambu Court's Executive Officer who informed the trial Judge that he could not trace the Court file in ***Criminal Case No. 5178 of 1990***. The Court did not even give the Executive Officer time to have the Court file traced but instead informed the 1st Petitioner that he should write to the Attorney general, if he wished, to request His Excellency, the President to exercise his power of Mercy for his release, noting the Petitioner had been in prison for eleven (11) years; thus as of 28/8/2001.

16. The Court file are always supposed to be in custody of the Court Registry and it is not duty or responsibility of the appellant to keep custody of the same. The Court erred in failing to give the Court Executive Officer time to trace and avail to the Court records and appellate the Court records, for the matter to proceed and be determined on merits.

17. ***Article 50(5)(h) of the Constitution*** provides that an accused person has the right to a copy of the record of the Proceeding within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law. It is therefore the responsibility and more so where the 1st Appellant had been sentenced to serve life imprisonment to ensure that proceedings were duly typed and availed to the 1st Petitioner. The Appeal herein was filed in 1990 and from the High Court Appeal record this matter was not set for either mention or hearing until after 11 years, thus on 10th August 2001. No explanation was given for such delay nor why the Court records could not be traced. Lack of explanation why Court records could not be traced is a serious matter for which the Executive Officer should have been given time to given an explanation but here none was sought by Court and none - was given.

18. In the case of ***Joseph Maina Kariuki v. Republic (2011) eKLR*** the Court of Appeal stated that:-

"Efforts have been made by the Judiciary staff and other groups to trace the lost records to no avail. It cannot be gainsaid that the High Court shares the blame in the disappearance of the Court record. It had the duty of ensuring that the court records were securely kept. It failed in that duty. We do not lose sight of the fact that the disappearance of the records was the work of criminals and the criminals must have had their accomplices in the High Court, in the Attorney General's office and the police department. The same cannot be said of the appellant. The appellant is in prison custody and it cannot be said that criminals went to the prison cell to steal a copy of proceedings relating to his trial. Of what benefit will those proceedings be to them? Be that as it may it is a fact that the record of proceedings cannot immediately be traced. The Constitution says that an accused person is entitled to a fair hearing, without unreasonable delay. He has exercised his constitutional right by filing these two appeals. Yes, he was supplied with a copy of the proceedings, but it is not that copy which was intended to facilitate the hearing of his appeal. The copy supplied to him was meant for his own use.

Efforts have been made by the Judiciary staff and other groups to trace the lost records to no avail. It cannot be gainsaid that the High Court shares the blame in the disappearance of the court records. It had the duty of ensuring.

We appear to have come to a dead end. We cannot proceed to hear the appellant's appeal in absence of the necessary copies of proceedings. And yet public policy demands that persons convicted of criminal offences be duly punished. The appellant cannot be punished unless his appeals are heard by an impartial court established under the law and are dismissed for lack of merit. The appeals cannot pend indefinitely, because such pendency of the appeals would work unfairness to the appellant."….

What final order should we make? The appellant's appeal was not heard. Had that been the case then we would have either affirmed the decision of the High Court or reversed it, or varied it or remitted the proceedings to the High Court with specific directions as considered appropriate, or ordered a new trial, or quashed the conviction and set aside any sentence passed against the appellant. (See rule 31 of the Court of Appeal Rules). The appeal having not been heard we cannot properly make any of the aforesaid orders. We shall be able to do so once the lost records are found and the appeal heard on its merits. We cannot allow the appellant to remain in prison indefinitely when it is not possible for his appeal to be concluded according to law. In the result the order which commends itself to us to make is that the appellant's conviction and sentence be and are hereby set aside, and the appellant be set at liberty forthwith." *(Emphasis added)*

19. In the instant Petition, I find that the 1st Petitioner had the right to have access to his Court records within a reasonable time upon his

conviction. The Kiambu Law Courts is to blame in the disappearance of the Court records and failure to furnish the 1st Appellant with Court records which to date, the Kiambu Law Courts cannot explain what become of the Court records. The 1st Petitioner's appeal having not been heard it cannot be said whether his conviction was correct or not nor can it be said the conviction would have been upheld or quashed without the Court records.

20. The loss of Court records is not a unique thing to courts and the courts of Appeal has severally addressed itself on this issue and has laid the responsibility of taking care of the Court records to the Court Officers and as such, the 1st Petitioner herein bearing no duty to ensure that the Court records are safe, I find that this is unfortunate for the 1st Petitioner as he never got any opportunity to have his first appeal heard as he did not get access to the Court records. This case is distinguishable from the case of ***Joseph Maina Kariurki v Republic (supra)*** as the Petitioner herein unlike the Appellant in ***Joseph Maina Kariuki v. Republic (supra)*** was never supplied with the Court records at any one point after his conviction.

21. The issue for consideration in view of the above is what then follows as regards the 1st Petitioner's appeal which could not be heard and determined on merit as the Court records could not be traced? The Court of Appeal did pronounce itself on such situation as stated herein above in the case of ***Joseph Maina Kairuki v. Republic (Supra)*** where the Court stated as follows:-

"We cannot allow the appellant to remain in prison indefinitely when it is not possible for his appeal to be concluded according to law. In the result the order which commends itself to us to make is that the appellant's conviction and sentence be and are hereby set aside, and the appellant be set at liberty forthwith." *(Emphasis added)*

22. I find, that if the Court records would have been availed at any stage before 28/8/2001 or within the past 30 years since the 1st Petitioner's conviction, then the Petitioner would have been heard in the exercise of his right of appeal. I find, the fact that this appeal has been pending for the last 30 years, that in my view portrays high degree of unfairness and the 2nd Respondent is not justified to urge that it could not be blamed for such delay; even when the matter came up for mention for the 1st time after 11 years from the date of conviction of the 1st Petitioner. It is much of a duty or responsibility for the prosecution as it is for an accused person to ensure matters are heard without undue and unreasonable delay.

23. In the instant Petition I find that the 1st Petitioner had no duty or responsibility to ensure that the Court records were safe as he did not have custody nor access of the same. There is no evidence that the 1st Petitioner had any participation in the disappearance or loss of the Court records and since his appeal still stands and has been pending for 30 years, as no final decision was made either dismissing or allowing the appeal, I find that the appeal cannot keep on pending indefinitely as such pendency of the appeal would be mockery of justice and would continue to inflict unfairness to the 1st Petitioner. I find that justice demands in such a situation that the appellant's conviction and sentence be set aside as the appeal cannot be concluded without the court records and 1st Petitioner be set at liberty forthwith.

B. WHETHER THE 1ST AND 2ND PETITIONERS RIGHT OF APPEAL STAND?

24. The 1st and 2nd Petitioners contend that their right of appeal still stand as both appeals had not been heard and determined todate. Once an appeal is duly filed, it is the duty of the appellate Court to re-evaluate the appeal and determine the same. An Appeal is a dispute that requires the Court to hear and determine the same. ***Article 50(1) of the Constitution*** clearly provides as follows:-

> ***"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."***

25. In addition to the above ***Article 165(3) (e) of the Constitution*** provides that the High Court shall have any other jurisdiction, original or appellate conferred on it by legislation.

26. An Appellate Court has a duty imposed on it by law to carefully examine and analyse a fresh the evidence or record and come to its own conclusion but this is not possible where Court record is unavailable. The duty of the appellate Court was clearly set out in the case of ***Isaac Ng'ang'a Kahiga alias Peter Ng'ang'a Kahiga v. Republic Criminal Case No. 272 of 2005 as follows:-***

> "In the same way, a Court hearing a first appeal (i.e. a first appellate Court_ also has a duty imposed on it by law to carefully examine and analyse afresh the evidence on record and come to its own conclusion on the same but always observing that the trial Court had the advantage of seeing the witnesses and observing their demeanor and the first appellant Court would give allowance of the same.

27. In the instant Petition, the 1st Petitioner was not accorded the right to have his appeal re-valuated for lack of Court records whereas the 2nd Petitioner's appeal has not been set down for hearing for a period of 13 years since the appeal was lodged. The duty to re-evaluate the Petitioners cases lies with the High Court independently and has to come with its own conclusion. The Petitioners are not to blame for such inordinate delay.

28. The 1st Petitioner upon conviction to life imprisonment on 16th November 1990, filed appeal No. 1456 of 1990 contesting his conviction and sentence in exercise of his constitutional right of appeal. The Appellate Court abdicated its duty and declined to make a decision which would have either set aside the conviction and sentence or ordered a retrial or upheld the conviction. This would have at least ensured justice to both the victim and the Petitioner. The Court however, instead ordered that the 1st Petitioner make an application for a presidential pardon. This in my view amounted to denying the 1st Petitioner an opportunity to have his appeal heard and determined on merits; and was against the principles of natural justice, that no one should be condemned unheard, as guaranteed under ***Article 50(8) (a) and (e) of the Constitution***

which provides that every accused person has the right to a fair trial and to have the trial begin and concluded without unreasonable delay

29. In view of the aforesaid, I find that the 1st Petitioner has clearly demonstrated that he was not accorded his right to a fair trial and his right to fair trial was violated and that violation still persists. The 1st Petitioner is therefore entitled to a proper remedy which in view of the circumstances of this case should be setting aside the conviction and sentence and setting the 1st Petitioner at liberty. This is informed by the fact that the Court's records are still missing and the appeal has not to-date been heard. The outcome of the appeal cannot be known without the Court records. Secondly sending the matter back for retrial after 30 years not only would be most unfair but almost impossible for lack of records and may be witnesses may no longer be available and ready to give evidence. The police file may on the other hand not be available or traceable.

30. As regards the 2nd Petitioner, he was convicted on 2nd September 2006 and sentenced to serve 30 years imprisonment for the offence of attempted rape. The 2nd Petitioner herein is noted to be dumb and deaf which condition was prevailing at the time of this trial. The 2nd Petitioner preferred High Court Criminal Appeal No. 744 of 2007. The 2nd Petitioners appeal has since been pending for 13 years todate. The 2nd Petitioner's Appeal pending for 13 years without being heard establishes the 2nd Petitioner's appeal pending for over 13 years since the same was lodged, is not only inordinately delayed but a violation of the Petitioner's right to a fair trial and the right to be heard on appeal without unreasonable delay.

C. WHETHER SUBJECTING THE PETITIONERS TO WAIT FOR THEIR APPEALS FOR 30 YEARS AND 13 YEARS RESPECTIVELY AMOUNTS TO PSYCHOLOGICAL TORTURE AND INHUMANE AND DEGRADING TREATMENT AND WHETHER IT IS A VIOLATION OF ARTICLE 29(D) AND (F) OF THE CONSTITUTION?

31. The Petitioners herein have been waiting for their appeals for 30 years and 13 years respectively. ***Article 50(2)(e) of the Constitution*** provides:

> ***"Every accused person has the right to a fair trial, which includes the right—***
>
> ***(e) to have the trial begin and conclude without unreasonable delay."***

32. Further ***Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental freedoms, (Convention)*** provides:-

> ***"In determination of his civil right 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."***

33. The Court of Appeal considering on interpretation of a ***"reasonable time"*** in the case of ***Charo Karisa Salimu v. Republic [2016] eKLR*** referred to the case of ***R vs. Morin (1992) 1 SCK 771*** where the Supreme Court held:-

> ***"Section 11 (b) of the Canadian Charter of Rights and Freedoms, for instance, provides in part that:***
>
> ***"11. Any person charged with an offence has the right***
>
> ***b. to be tired within a reasonable time;***
>
> ***This provision has been the subject of far-reaching judicial interpretation and innovation. In the famous Canadian Supreme Court case of R v. Morin (1992) S.C. R, 771, the court declared as a guide that the threshold of a reasonable time within which a criminal trial must be concluded in 8 to 10 months in the superior courts, (dealing with trials and appeals), from the date of accused is arraigned before the court that is a total of 14 to 18 months just this month, on 8th July 2016 the same Supreme Court, in Jordan v R, S.C.C 27 of 2016, where the appellant's trial had been delayed for 4 years between charges and the end of trial, by a majority of 5 – 4 set new framework under Section 11 (b) aforesaid, holding that it would be a rebuttable presumption of unreasonable delay if the accused person was to wait for his trial to be concluded for a period in excess of 18 months in cases tried in the provincial courts and 30 months for cases in the superior courts, thereby expanding the presumptive ceiling set in the Morin case (supra)…",*** *(Emphasis added)*

34. In the instant Petition, the Petitioners have never been invited to set a hearing date of their respective appeals notwithstanding the judiciary has set performance management initiative setting time frames for each level of court within which criminal trials and appeals must be heard and determined. It is indicated that the trial in ***Magistrate's Court*** must be determined within 360 days from the date the suspect is arraigned in court, similarly in the ***High Court 360 days*** and ***180 days*** in the ***Court of Appeal*** from the date of filing and ***90 days*** in the ***Supreme Court***. These are however performance targets that have no judicial ramification in case of breach. This Court is alive to the importance of timely dispensation of justice as one of the hallmarks of a free and democratic society, which draws parallel with the provisions of ***Article 50(2) (e) of the Constitution*** which ***"requires that trial begin and conclude without unreasonable delay",*** and as such the people of the Republic of Kenya through the Constitution expected the criminal justice system to take suspects to trial expeditiously as delays in criminal trials have far reaching ramifications to the accused person, the victim, the families, witnesses and even the general public. I find that ***Article 50 of the Constitution*** on fair hearing is an important safeguard to prevent any oppressive or abusive incarceration of an accused person or a convicted person.

35. The Court of Appeal while analysing the test that should apply when considering the test of ***"reasonable time"*** proceeded to apply decisions from other jurisdictions and specifically in the case of ***Julius Kamau Mbugua v Republic [2010] eKLR*** where the Court of Appeal

considered the following decisions:-

In ***Dyer vs. Watson [2004] 1 AC 379,*** Lord Bingham referring to ***Article 6(1) of the Convention*** said that 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."***

Further held:-

> ***"That a high threshold has to be crossed in order that a delay may be categorized as unreasonable was reiterated by Lord Clyde 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 has 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." …***
>
> ***"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 has 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."***
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> ***Albanus Mwasia Mutua vs. Republic – Criminal Appeal No. 120 of 2004 (unreported)*** The Court held:-
>
> ***"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."*** *(Emphasis added)*

36. Our Constitution guarantees the right to a fair trial which right cannot be limited as provided under ***Article 25(c) of the Constitution***. The 1st Petitioner has been waiting for his appeal for the last 30 years and this is by no means a short period; while the 2nd Petitioner has been waiting for hearing of his appeal for 13 years; this similarly cannot be said to be a reasonable period.

37. The Court of Appeal while interpreting what would have amounted to reasonable time adopted the Canadian interpretation whose time was set at about 4 years for the whole trial as an appropriate time that would fall within what would be reasonable. The court of appeal held that although these were only timelines that a Court would strive to achieve, the timelines must be reasonable since ***Article 50(2)(e) Constitution*** was meant to ensure that all the parties to a suit, these being the victims and the defendant get justice within a reasonable time.

38. Further while expressing the issue of reasonableness the Court was called to assess the interests of the victims and the prejudice that the appellant or a defendant would have. One of the factors to consider would be the time the delay has taken place and the prejudice on the defendant in this case the Petitioners. In the instant matter the period that the 1st and 2nd Petitioners have taken is a factor that is worrying. The prejudice on the Petitioners in this case is the fact that they have never been given the opportunity to hear their appeals and in this case it is important to underscore the importance of the appeal process given the gravity of the sentence imposed on the Appellants.

39. On considering the threshold that would be required to the issue whether a given period is reasonable, the court held the test would be a high one. It was held that an unreasonable time would be that which would be excessive, inordinate and unacceptable.

40. The 1st Petitioner's appeal has not been heard for the last 30 years since the same was lodged whereas that of the 2nd Petitioner has not been heard for the test 13 years since it was lodged. The period for which the Petitioners have been waiting for their respective appeals passes the test as the period is unreasonable, excessive, inordinate and unacceptable by all reasonable standards. ***Article 159 (2) (a) (b) of the Constitution*** clearly provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles; that justice shall be done to all, irrespective of status and justice shall not be delayed. This is why the constitution has provision to make justice accessible and within a reasonable time, for if delays are permitted, then it would be equitable to watering down the whole Constitution. Further it is of great concern taking into account that the 2nd Petitioner is dumb and deaf and his appeal should have been given priority given his vulnerability.

41. In view of the above, I find that the period the Petitioners have been waiting for their appeals is unreasonable; unjustified, inexcusable, and have been prejudiced. I find in view of the 30 years the 1st Petitioner has been awaiting for his appeal to be inordinate and as the Court records have been missing since 1990, a retrial would not be an option nor viable option. Secondly the two appeals have been pending for too long and I find that it would be untenable to further wait or pursue these appeals, which have been pending for 30, - 13 years respectively.

D. WHETHER BY REFERRING THE 1ST PETITIONER TO THE EXECUTIVE ARM OF THE GOVERNMENT UPON LOSS OF THE COURT RECORDS AMOUNTS TO A VIOLATION OF THE DOCTRINE OF SEPARATION OF POWERS AND THEREFORE A VIOLATION OF ARTICLE 160(1) OF THE CONSTITUTION?

42. The 1st Petitioners appeal High Court Appeal No. 1456 of 1990 was on 28th August 2001 referred back to the Executive by the High Court when the Court could not determine the case as the court records were unavailable. The Court did not in so doing determine the appeal on merits nor was the appeal dismissed.

43. The 1st Petitioner contend in referring the matter to the Executive the Appellate Court abdicated its duty and further violated the principle of separation of powers. ***Article 160 (1) of the Constitution*** provides for independence of the judiciary and provides thus:-

> ***"In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."***
>
> ***Article 159 (1) on Judicial authority provides that:-***
>
> ***"Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution."***

44. In the Case of ***A. O. O. & 6 Others v Attorney General & another [2017] eKLR*** the Honourable Justice Mativo while addressing the question of separation of powers borrowed from the decision In ***Reg. Vs Secretary of State for the Home Department Exparte Venables and Thompson 12 and Hinds vs The Queen where Lord Diplock*** held:

> ..What parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the constitution, discretion to determined the severity of the punishment to be inflicted upon an individual member of a class of offenders.

The honourable Mativo (J) further held:-

> ***"The constitution being the supreme law of the land separates the powers of the legislature, the executive and the judiciary. Judicial power is reserved to the judiciary. The imposition of a punishment in a criminal matter which includes the assessment of its severity is an integral part of the administration of justice and is therefore the exercise of judicial, not executive, power. In so far as section 25 (2) & (3) of the Penal Code [38] allows a person aged below 18 years to be detained at the presidents pleasure, thereby granting the president powers to determine sentence or when to release the person and requires a judicial officer to forward notes to the president, in my view it offends the principle of separation of powers and Article 160 (1) of the constitution of Kenya 2010."***

45. It is not in dispute that in case of the 1st Petitioner, that after the Court records went missing or could not be traced by the Kiambu Law Courts, the High Court handling the 1st Petitioners' appeal referred the matter to the Executive, so that the 1st Petitioner could make an application for a presidential pardon. The Appellate Court did not state on what provision of the law, the matter was so referred. This was contrary to ***Article 159(1) of the Constitution*** as the judicial authority is derived from the people and vests in and shall be exercised by the courts and tribunal established by or under the constitution. I find that judicial power vests only within the judiciary and by referring the 1st Petitioner's case to the Executive by the Appellate Judge, that was in itself a clear violation of the doctrine of separation of powers. It is noted that since 28th August 2001 the 1st Petitioner has been in the Executive hands and this resulted in delaying the hearing and determination of the 1st Petitioner's appeal which would have been heard through due process and determined in one way or the other. The Petitioner's hope of having the appeal heard has completely diminished following such unjustified referral of his appeal to the Executive. The Appellate Court clearly abdicated its duty and that is unconstitutional as that is a violation of the principle of separation of powers.

46. The Petitioners criminal appeals are still pending at the High Court at Nairobi for which the Petitioners are praying that this Court, which is not seized of the matters, to issue a declaration they are seeking that this Court do declare the period served by 1st Petitioner and 2nd Petitioner waiting for hearing of their respective appeals for 30 years and 13 years respectively are sufficient sentences. This Court is not the trial Appellate Court and cannot make any of the findings sought save to declare that the Petitioners rights to fair hearing have been violated for having been put in a situation in which they have been awaiting hearing of their appeals for 30 years and 13 years respectively. I find it is the duty of the Appellate Court, thus the High Court, Nairobi to promptly call for the aforesaid appeals and determine them without any further delay. It is for this reason that I find the appropriate action is to have a copy of this judgment forwarded to the Presiding Judge, Criminal Division, Nairobi, so as to call for the Petitioners' Appeals and act on the same.

47. ***The upshot is that the 1st and 2nd Petitioners petition is meritorious and I proceed to make the following orders:-***

> ***a) A declaration be and is HEREBY issued that the failure by the High Court to hear the 1st Petitioner's appeal for a period of 30 years and that of the 2nd Petitioner for 13 years is a violation of Article 25(c) of the Constitution on the right to a fair trial, which is fundamental Right and Freedom that may not be limited despite any other provisions in the constitution.***

b) An Order be and is hereby issued that the wait of the hearing of the Petitioners appeal by the 1st Petitioner for his appeal for 30 years and 2nd Petitioner for 13 years is unreasonable, excessive, inordinate, unjustified and unacceptable and violates Article 50(1) of the Constitution on fair hearing.

c) A declaration is HEREBY issued that the Petitioner fundamental right to a fair trial has been violated, and in the interest of justice and in exercise of this Court's inherent powers to do justice to the Petitioners taking into account the period spent in custody, I direct that the 1st and 2nd Petitioner's appeals pending in Nairobi High Court Criminal Appeals No. 1456 of 1990 - Dickson Ndongai v. Republic; (Nairobi) and HCCRA 744 of 2007- Mahat Maow Gedi v R. (Nairobi), be promptly placed before the Presiding Judge Criminal Division Nairobi for appropriate action.

d)To effect the respective orders herein above, I direct the above orders be extracted and forwarded to Presiding Judge Criminal Division, Nairobi and respective Courts where the criminals cases and appeals were initially lodged, thus:-

a) Kiambu Law Courts, Criminal Case No. 5178 of 1990 R vs. Dickson Ndongai;

b) HCCR Appeal No.1456 of 1990 Dickson Ndongai v. Republic; (Nairobi);

c) HCCR Application No.301 of 2007 Dickson Ndongai v. Republic; (Nairobi);

d) Wajir Law Courts, Criminal case No. 99 of 2006 R V. Mahat Maow Gedi;

e) HCCRA No. 744 of 2007 (NRB) Mahat Maow Gedi v R.

Dated and Signed at Nairobi on this 11th day of February, 2021.

Delivered electronically at Nairobi on this 25th day of February, 2021.

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J. A. MAKAU

JUDGE