

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga CJ & P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 23 OF 2019

—BETWEEN—

JOSEPH LENDRIX WASWAAPPELLANT

—AND—

REPUBLIC.....RESPONDENT

*(Being an appeal from judgment of the Court of Appeal sitting at Kisumu
(Githinji, Okwengu & J. Mohammed, JJ.A) in Criminal Appeal No.
132 of 2016 dated 21st May, 2019*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This Petition of Appeal is dated 3rd July 2019 and was filed on 9th July 2019. The Appellant has appealed under Article 163(4) (a) of the Constitution and Rules 3, 9 & 33 of the Supreme Court Rules, 2012 challenging the decision of the Court of Appeal which upheld the decision of the High Court which permitted the Counsel engaged by the victim of the crime to participate in the trial of the Appellant on specified terms. He seeks declarations that the Ruling of the High

Court that was upheld by the Appellate Court, is inconsistent with Articles 259 (1), 10, 20 (1), 20 (2), 20(3) 20 (4) of the Constitution; and that the exercise of the full power of a Court as provided by the *Criminal Procedure Code (CPC)* by a victim or his representative is inconsistent with Articles 50 (1)& (2) and 157 of the Constitution.

B. BACKGROUND

[2] The genesis of this matter is a Ruling of the High Court at Bungoma (*Ali-Aroni, J*) delivered on 17th August, 2017 in *Criminal Case No. 34 of 2014*, where the Appellant is charged with the offense of murder contrary to Section 203 as read with Section 204 of the *Penal Code*. After nine witnesses for the prosecution had testified, Mr. George Marunga, counsel for the family of the deceased (*the victim*) made an oral application for leave to actively participate in the proceedings. He relied on Article 50(7) and (9) of the Constitution and the Sections 4(2)(b), 9(1) & (2) of the *Victim Protection Act, 2014 (VPA)*.

[3] The learned Judge considered the oral arguments made by the respective parties, the written submissions, relevant provisions of the Constitution, the VPA, and case law. She observed that the *law has shifted the traditional parameters of a victim in a criminal case* and therefore a victims' counsel can no longer be considered a passive observer in criminal proceedings. However, she noted, persuaded by case law, that '*his participation cannot be active and parallel to that of the prosecutor*'.

[4] Additionally, she observed that the '*VPA gives the parameters of the victim's involvement during trial to include; the victim's views and concerns at various stages as the Court may determine either directly by the victim or his/her representative; at plea bargaining; at the level of sentencing or where a decision is likely to affect the right of the victim and not throughout the trial and parallel to the prosecution*'.

[5] Consequently, the learned Judge allowed the participation of the Counsel watching brief limited to the following instances: *on submission at the close of the prosecution case whether there is a case to answer; final submission should the accused be put on his defence; on points of law should such arise in the course of trial, and upon application at any stage of the trial for the consideration by the Court.*

[6] Aggrieved by that ruling, the Appellant preferred an appeal to the Court of Appeal; *Criminal Appeal No. 132 of 2016*. The Appellant faulted the trial Court for: *inter alia*, failing to apply the words “protection”, “rights”, “welfare” in Article 50 (9) of the Constitution in their proper perspectives, introducing a non-existent right and unrecognized fundamental right and freedom; elevating the position of a Counsel watching brief to a status equal to the constitutional office of Director of Public Prosecution (DPP); acting in ignorance or in subversion of Article 157 of the Constitution and thereby amending Article 157 (6) of the Constitution; concluding that powers of the DPP are to be exercised collegially with Counsel watching-brief, and, failing to acknowledge that Sections 329 A -329 E of the CPC wholly and completely addresses the rights of a victim in the context of a criminal trial.

[7] The Judges of Appeal found that the appeal, in essence, concerned *the rights of a victim of an offence during the trial process and in particular whether or not the deceased’s father and family are entitled to the rights that were granted by the trial judge.*

[8] The Appellate Court determined that it is the intention of the Constitution, that the constitutional rights of an accused person to a fair trial, should be balanced with the statutory rights of the victim of the offence - as stipulated in VPA and further that the rights of the victim of crime should be exercised without prejudice to enumerated rights of an accused person to a fair trial. The Court also held that the Constitutional and statutory role of the DPP to conduct the prosecution was therefore not affected by the intervention of the victim in the process.

[9] In addition, they held that a victim of an offence or his advocate or representative may exercise the powers of the Court under section 150 of the CPC with the permission and directions of the trial Court and this was not incompatible with the right of a fair trial of an accused person or with the exercise of the prosecutorial powers of the DPP.

[10] Consequently, in their judgment dated 21st May, 2019, the Appellate Judges being satisfied that the impugned rights given by the trial Court to the victim of the offence (the father of the deceased) were in conformity with the Constitution and the VPA, upheld the ruling of the trial Court and dismissed the appeal in its entirety.

[11] Aggrieved by the decision of the Court of Appeal, the Appellant filed this Appeal raising six (6) grounds to wit: *That the learned Judges of Appeal erred, misapplied and gravely misconstrued the Constitution:*

- a. *On the rights of an accused person and the victims of an offence in their interpretation and application of Article 50 of the Constitution to the effect and import that Article 50(9) recognized the rights of victims of offences and that the constitutional rights of an accused to a fair trial should be balanced with the statutory rights of the victim as stipulated in the VPA;*
- b. *On the right of an accused and victim of an offence in their interpretation and application of Article 50 of the Constitution to the effect and import that the Constitution and the VPA now gives a victim of offence a right to a fair trial and right to be heard in the trial process to assist the Court and not the prosecutor, in the administration of justice so as to reach a just decision in the case having regard to public interest; and that the right of the victim to be heard persists throughout the trial process and continues to the appellate process;*
- c. *In their interpretation and application of Article 157 of the Constitution to the effect and import that the constitutional and statutory role of the DPP*

to conduct prosecution is not affected by the intervention of the victim in the process;

- d. In finding that it is not incompatible with the right of a fair trial of an accused person or with the exercise of the prosecutorial powers of the DPP if a victim of an offence, either in person or through his advocate is allowed to exercise the full power of the court in the manner provided by Section 150 of the CPC so long as the safeguards in the proviso thereto are observed;*
- e. Taking into account matters which they ought not to have and failed to take into account matters which they should have; and*
- f. In finding that a victim of an offence or his advocate or representative may exercise the plenitude of powers of the court under Section 150 of the Code with the permission and directions of the Court, without setting the full parameters of the extent of the victim's participation in the trial process.*

C. SUBMISSIONS

i. The Appellant

[12] The Appellant's written submissions were filed on 22nd November 2019. The Appellant submits that this Court ought to interpret the Constitution and statutory provisions in a liberal and progressive manner in accord to Articles 259(1), 259(3), 10,19,20, and 21 of the Constitution.

[13] The Appellant urges that no constitutional provision is superior or inferior to another. He submits that each constitutional Article is complimentary and must be read as an integrated and cohesive whole. He buttresses this assertion with the decision of the Supreme Court of the United States of America in ***South Dakota vs. North Carolina*** 192 US 268 (1940) L ED, the Kenyan Appellate decision in ***Dennis Mogambi Mong'are vs. Attorney General & 3 others***, Civil Appeal No. 123 of 2012, and ***Tinyefuza vs Attorney general of Uganda***,

Constitutional Petition No. 1 of 1997 (UGCC3) by the Court of Appeal of Uganda. The Appellant, therefore, submits that Articles 50(1) and (2), and 50(9) of the Constitution must be considered harmoniously as an integrated whole and that the rights of victims do not supersede those of the accused.

[14] The Appellant contends that the interpretation by the superior Courts of Articles 50(1) & (2), 50(9) of the Constitution together with the provisions of the VPA and Section 150 of the CPC produced an absurd result because it presupposes that the victim's rights are more relevant than the accused person's rights.

[15] The Appellant submits that the rights of an accused person under Article 50 (1) of the Constitution cannot be limited so as to accommodate the interests of victims. He faults the Appellate Court for taking into account matters which they ought not to have, and failed to take into account matters which they should have when they attempted to strike a balance between the rights of a victim and that of an accused in a criminal trial, amounted to limiting the accused's right to fair trial which contravenes Article 25 (c) of the Constitution.

[16] It is the Appellant's case that the Court of Appeal failed to consider the purpose and effect of the VPA. To support this argument, Counsel for the Appellant relies on the decision by the Supreme Court of Canada in *R vs Big Drug Mart Ltd.*, [1985] 1 S.C.R 295 (The queen vs Big M. Drug Mart Ltd, 1986 LRC (Const.)332; *Ng Ka Ling & another v The Director of Public Immigration* (1999) 1HKLRD 315; and *Centre for Rights Education and Awareness Case*. He submits that one of the primary legislative objectives of the VPA is to provide for protection, support services, reparation and compensation for victims, and connected purposes.

[17] The Appellant contends that the Superior Courts' interpretation of Section 9 of the VPA contradicts the letter and spirit of Article 50(1) & (2) of the Constitution, and the purpose of the VPA. The Appellant cites Article 2(4) of the Constitution, *Marbury v Madison*, 5 US (1Cranch)137, and *Attorney General of the*

Gambia vs Jobe (1985) LRC to urge the Court to interpret Article 50 of the Constitution in a manner that reconciles the rights of an accused to a fair trial and the rights of victims in the criminal justice system. It is contended that if the right of an accused to fair trial and the right of a victim to participate in a criminal trial are put side by side, both cannot be given effect at the same time. This Court is urged to uphold and affirm the rights of an accused to fair trial since this does *the least damage to the constitutional framework*.

[18] Learned Counsel for the Appellant submits that the learned Judges of Appeal interpreted and applied Article 50(9) of the Constitution without reference to the guiding principles set out in Articles 259(1), 10, 20(1), 20(2), 20(3) and 20(4) of the Constitution. Counsel asserts that the Court's interpretation failed to give effect to the spirit and purpose of the Constitution, especially that of presumption of innocence until proven guilty. To augment his arguments, the Appellant cites a decision of the Supreme Court of Nigeria ***Bakare vs State*** 1985 2NWLR, the decision by the Court of Appeal ***in Ndegwa vs Republic*** [1985] eKLR 534 and Articles 50(7) & (9) of the Constitution. The Appellant argues that the Court of Appeal, in upholding the decision of the High Court, qualifies the victim as a secondary prosecutor therefore undermining the principle of equality of arms and occasioning injustice to the accused.

[19] It is the Appellant's case that section 150 of the CPC does not obligate victims to disclose any evidence in their possession to the defence prior to the trial. This, Counsel urges, prejudices the accused since the victim comes in as an independent party with new evidence and the accused has less time to review the evidence and prepare their defence accordingly.

[20] The Appellant submits that the learned Judges of Appeal interpreted Article 50(9) of the Constitution as read together with Section 150 of the CPC without reference to Article 50(2) (j) of the Constitution which provides for the right of an

accused person to be informed in advance of the evidence the prosecution intends to rely on and to have reasonable access to that evidence.

[21] Counsel further submits victims are not required to disclose exculpatory evidence in their possession which may be to the detriment of the accused person who might otherwise benefit from it.

[22] The Appellant submits that the Court of Appeal erred in finding that the victim's participation does not in any way interfere with the DPP's powers as conferred under Article 157 of the Constitution. The Appellant asserts that the office of the DPP is well equipped to discharge its mandate to safeguard the interest of a victim. The Appellant concludes his submissions by stating that it will be prejudicial for the Court to allow victims to actively participate in criminal trials as co-prosecutors with the ability to file or make submissions in the terms outlined by the trial Judge.

ii. The Respondent

[23] In response to the Appeal, the DPP filed written submissions on 17th February 2020 opposing the Appeal.

[24] The DPP submits that the interpretation and application of the Constitutional and statutory provisions by both the High Court and the Court of Appeal regarding the victim's right to a fair trial was in accord with Article 259 of the Constitution and the prevailing judicial precedents.

[25] He urges that both Superior Courts appropriately applied the principles set out in case law namely: ***Paul Ssemogerere and Others vs The Attorney General***, Constitutional Appeal No. 1 of 2002 [2004] UGSC10; ***Ndyanabo vs. Attorney General*** [2001] 2 EA 485, ***Tinyefuze vs Attorney General of Uganda*** Constitutional Petition No. 1 of 1996 [1997] 3 UGCC; ***Ekuru Aukot vs The Independent Electoral & Boundaries Commission & 3 others*** [2017]eKLR; ***Kigula and others vs Attorney General*** [2005]1EA132; and ***Re***

the Matter of the Interim Independent Electoral Commission [2011] eKLR.

[26] The DPP submits that the High Court rightly considered the provisions of the Constitution, particularly Articles 27, 50(1), (7) & (9), together with those of the VPA, and the prevailing precedents. He contends that the trial Court was satisfied: that the VPA was enacted pursuant to Article 50(9) of the Constitution; that one of the objectives under section 3 of the VPA was to recognise and give effect to the right of the victims of crime; and that section 4(a) of the VPA obligates a Court to ensure that every victim is as far as possible heard before any decision affecting him is made.

[27] The DPP contends that the orders by the High Court allowing the victim's counsel to actively participate in the trial were not to operate in a vacuum or open-ended as contended by the Appellant. Instead, they were qualified and could only be exercised upon meeting certain conditions including making an application to the Court for appropriate consideration and determination.

[28] The DPP submits that the Court of Appeal properly traced the origin and recognition of the victim's right to a fair hearing to the United Nations General Assembly Resolution No. A/RES/40/34 of 29th November, 1985 and a decision from the Supreme Court of India: Criminal Appeal NOS.1281-82 of 2018 ***Mallikarjun Kodagali (Dead) represented through Legal Representation/Appellants vs State of Karnataka & others.***

[29] Counsel contends that even before the promulgation of the Constitution, the victim's rights were recognized under Sections 137 and 329 (c) of the CPC. Upon promulgation of the Constitution, he submits, Article 50 (9) of the Constitution entrenched the rights of victims of crime pursuant to which Parliament enacted the VPA. He, therefore, urges that the Appellate Court properly construed Articles 10, 48, 50, 20, 21, 25, 157 and 159 of the Constitution as read with the VPA, and

Section 150 of the CPC and was satisfied that the impugned orders were in conformity with the Constitution.

[30] The DPP submits that the victim's rights are recognized under Article 50(1) and 50(9) of the Constitution pursuant to which the VPA was enacted to ensure an impartial trial while protecting the accused person's right to fair trial. He contends that the Courts below interpreted and applied the law on the rights of the victims of crime as expressed in the Constitution and statute and did not create or attempt to create non-existent rights as alleged by the Appellant.

[31] The DPP urges that although Article 157 of the Constitution creates an independent office with prosecutorial powers, the DPP's office does not enjoy absolute prosecutorial powers. Counsel submits that the exercise of such powers is subject to the Court's control with emphasis being on the public interest, the interest of the administration of justice, and the need to prevent abuse of the legal process as is envisaged under Article 157(11) of the Constitution.

[32] Counsel urges that Section 150 of the CPC is to the effect that the trial Court is conferred with powers to intervene in certain circumstances as the dictates of justice may require so as to administer justice and ensure that no party suffers prejudice in the proceedings. He asserts that it does not imply that the trial Court will take over the investigations or prosecution of a case as contended by the Appellant.

[33] Additionally, the DPP contends that the Court's powers under Section 150 of the Criminal Procedure Code are subject to the proviso therein under which the Court ensures that no party is prejudiced should the Court intervene. The DPP urges that Section 150 of the CPC as read with Section 9(2) (b) of the VPA allows the Court to ensure that no party suffers prejudice and as such there is no conflict with Article 157 of the Constitution.

[34] The DPP submits that no provision in the Constitution has elevated the rights of the accused person to those of the victim of the offense and vice versa. Consequently, the DPP prays for the dismissal of the Petition.

iii. Victim's/Complainant's submissions

[35] The victims oppose the appeal. Through their advocate, they filed written submissions on 6th February, 2020. The victims submit that the Superior Courts' interpretation of Article 50 of the Constitution was in accordance with Articles 2 (5) 50 (c), 50 (7) 50 (9) of the Constitution, and the provisions of the VPA.

[36] They also urge that the Courts correctly interpreted and applied Articles 20(2), 20(3)(b) of the Constitution in accordance with existing case law: ***Ndyanabo vs Attorney General [2001] EA Tanzania Court of Appeal; Kigula & Others vs Attorney General (2005) 1EA 132, the Uganda Court of Appeal; Hiralal Ratanlal vs Sito Air 1973 SC 1034, Supreme Court of India, and Direct United States Cable Co. vs The Anglo-American Telegraph Co. (1877)2A.C.***

[37] Learned Counsel for the victims submits that the Appellant has not demonstrated how his rights will be prejudiced by the participation of a victim who is equally entitled to a bundle of rights and fundamental freedoms.

[38] The Victims submit that by dint of the provisions of Section 9(2) (a) (b), 9(3) and (10) (a) (b) (c) of the VPA, the victim has the right to be heard at any stage of the proceedings in a trial and his views taken into account before a decision is arrived at. Counsel contends that the proviso to Section 9(2) (b) of the VPA allows safeguards with regards to the participation of the victim.

[39] Counsel urges that owing to the uniqueness of disputes that come before the Courts, only individual trial Courts can exercise the discretion on the manner and extent to which a victim is supposed to participate in a trial. Counsel argues that to

give general parameters on the participation of a victim in a trial will amount to impeding the victims from realizing their rights and fundamental freedoms particularly with regard to the right to a fair trial as contemplated under Article 50 of the Constitution.

[40] The victims submit that they have a right to fair trial too and cite a decision from the Supreme Court of India, **Zahira Habibulla H. Sheikh & another vs State of Gujarat & others** 446-449 of 2004 to support this submission. The victims conclude by urging that the impugned rights accorded to them were in conformity with the Constitution and the VPA.

D. ISSUES FOR DETERMINATION

[41] The following issues fall for determination by this Court

- a. *What is the extent of a victim's participation in a criminal matter?*
- b. *What ought to happen when a constitutional issue arises in a criminal trial of which trial ought to be disposed of expeditiously?*

E. ANALYSIS

- a. ***What is the extent of a victim's participation in a criminal matter?***

[42] The bone of contention between the parties is whether a victim can actively participate in a criminal trial without prejudicing the accused person's right to a fair hearing and without interfering with the prosecution's prosecutorial powers.

[43] Counsel for the Appellant urges that the superior Courts both limited the Appellant's right to a fair trial as enshrined in Article 50 of the Constitution by balancing it with the victim's right to participate in a trial. Counsel submits that this is contrary to the purpose and effect of Section 9 of the VPA, Article 50(1) &

(2) of the Constitution, existing case law, and disregards the guiding principles set out in Articles 259(1), 10, 20(1), 20(2), 20(3) and 20(4) of the Constitution.

[44] Further, counsel argues that the Court of Appeal's interpretation elevated the victim into a *secondary prosecutor* contrary to Article 157(6) of the Constitution. Also, the Appellant urges that the Appellate Judges erroneously interpreted Article 50(9) of the Constitution as read together with Section 150 of the Criminal Procedure Code without reference to Article 50(2) (j) of the Constitution. The DPP and the Victim, on the other hand, support the interpretation and application given by the High Court and upheld by the Court of Appeal.

[45] The Appellant's apprehension, no doubt, stems from the fact the State controls the investigation, prosecution and punishment of crime and that it does so in the interests of the public, which include vindication for the victim. A philosophical reason why the State takes over the prosecution and punishment of offenders is the belief that criminal law should serve the interests of society as a whole, and not the individual victim.

[46] We observe that because the overriding element of State control inevitably pits the power of the State against the accused, the necessity of protecting the accused's rights within this power imbalance, arises, to ensure that there is '*equality of arms*'. However, this may inadvertently eclipse the recognition of the victim's inherent interest in the response by the criminal justice system to the crime. Our very progressive Constitution has captured and addressed all these scenarios.

[47] The right to fair hearing is provided for under Article 50(1) of the Constitution and the attendant rights of an accused person are set out in Article 50(2) of the Constitution. Article 50 (1) of the Constitution provides:

“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.” [emphasis supplied]

[48] The Constitution also recognizes victims of offences. Article 50(9) of the Constitution provides:

“Parliament shall enact legislation providing for the protection, rights and welfare of victims of offences.”

In addition to this Constitutional underpinning, the VPA was enacted deliberately in 2014 to give effect to Article 50(9) of the Constitution. Thus, the rights of victims in a trial process also have statutory underpinning.

[49] Section 2 of the VPA defines a victim as ‘*any natural person who suffers injury, loss or damage as a consequence of an offence*’. The objects and purpose of the VPA as stipulated under Section 3 is to recognize and give effect to the rights of victims of crime. Section 4 sets out the general principles that guide the Court in dealing with a question of the rights and welfare of a victim. Section 4(2)(b) provides that a Court must ensure that ‘*every victim is, as far as possible, given an opportunity to be heard and to respond before any decision affecting him or her is taken*’.

[50] Section 9 of the VPA is instructive because it provides for the victim’s rights during the trial process in the following terms:

9. (1) A victim has a right to-

(a) be present at their trial either in person or through a representative of their choice;

(b) have the trial begin and conclude without unreasonable delay;

(c) give their views in any plea bargaining;

(d) have any dispute that can be resolved by the application of law decided in a fair hearing before a competent authority or, where appropriate, another independent and impartial tribunal or body established by law;

(e) be informed in advance of the evidence the prosecution and defence intends to rely on, and to have reasonable access to that evidence;

(f) have the assistance of an interpreter provided by the State where the victim cannot understand the language used at the trial; and

(g) be informed of the charge which the offender is facing in sufficient details.

(2) Where the personal interests of a victim have been affected, the Court shall-

(a) permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court; and

(b) ensure that the victim's views and concerns are presented in a manner which is not-

(i) prejudicial to the rights of the accused; or

(ii) inconsistent with a fair and impartial trial.

(3) The victim's views and concerns referred to in subsection (2) may be presented by the legal representative acting on their behalf.

[51] Although the adversarial criminal trial process is a contest between the State, represented by the DPP, and the accused, usually represented by defence counsel and the traditional role of victims in a trial is often perceived to be that of

a witness of the prosecution, it is without doubt, that flowing from both the Constitution and the VPA and in particular section 9(2)(a) of the VPA, *that a victim too, has the right to participate in criminal proceedings.*

[52] The participation of victims in criminal trial proceedings, though a novel trend in our laws, is in accord with international developments that have embraced the place of victims in the trial process. Our Constitution under Articles 2(5) and (6) permits us to apply the general rules of international law and also provides that any treaty or convention ratified by Kenya forms part of the law of Kenya.

[53] The role of a victim in a criminal trial is recognized in the **United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)**. In this Declaration, it is evident that in the context of the criminal justice system, it is a central obligation of governments to comply with the victim's rights to access to justice and fair treatment, restitution, compensation and assistance.

[54] Clauses 4-6 of the Declaration states:

“4. Victims should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.

5. Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms.

6. The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;

(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;

(c) Providing proper assistance to victims throughout the legal process;

(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;

(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

[55] Under **Article 68(3)** of the **Rome Statute**, of the International Criminal Court (ICC) victims before the ICC are granted far-reaching rights. This Article provides:

Article 68

“Protection of the victims and witnesses and their participation in the proceedings

.....

3. Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.”

[56] In light of the large degree of discretion accorded to the judges conducting the trial, the practice of the ICC has developed to allow victims: (i) to make an opening and closing statement (this is also in consonance Rule 89(1) of the ICC Rules of Procedure and Evidence); (ii) to attend and participate in hearings and status conferences through written submissions and oral argument; (iii) to introduce evidence and challenge admissibility of evidence with leave of the Court; and (iv) to question witnesses and/or the accused under the strict control of the Court. Where there are a large number of victims admitted to participate in the proceedings, the Court can limit the number of lawyers representing them pursuant to Rule 90 (2)-(4) of the ICC Rules of Procedure and Evidence.

[57] Of persuasive value is the approach in other jurisdictions that allow victims participation in a criminal matter, such as **Canada** which has the **Canadian Victim Bill of Rights Act** enacted on July 23rd 2015. This Act provides for four principal rights to victims of crime: Information, Protection, Participation and Restitution. A victim can exercise these rights while an offence is being investigated or prosecuted, or while the offender is subject to the corrections or conditional release process.

[58] On the right to Participation, **section 14** provides that *‘every victim has the right to convey their views about decisions to be made by appropriate authorities in the criminal justice system that affect the victim’s rights under the Act and to have those views considered’*. **Section 15** provides that *‘every victim has the right to present a victim impact statement to the appropriate authorities in the criminal justice system and to have it considered’*.

[59] Pursuant to **section 20**, these rights are to be construed and applied in a manner that is reasonable in the circumstances, and in a manner that is not likely to (a) interfere with the proper administration of justice, including (i) by causing interference with police discretion or causing excessive delay in, or compromising or hindering, the investigation of any offence; and (ii) ***by causing interference with prosecutorial discretion or causing excessive delay in, or compromising or hindering, the prosecution of any offence;*** (b) interfere with ministerial discretion; (c) interfere with the discretion that may be exercised by any person or body authorized to release an offender into the community; (d) endanger the life or safety of any individual; or (e) cause injury to international relations or national defence or national security.

[60] The concept of *‘secondary prosecutor’* argued by the Appellant is popular in **Germany**, a civil law jurisdiction with an inquisitorial system. According to Germany’s Code of Criminal Procedure, the State (Public Prosecutor) has to prosecute every criminal offence (*Offizialprinzip*). However, Germany’s Victim Protection Act (*Opferschutzgesetz*) of 18 December 1986, creates an exception to this rule because it provides for a legal institution known as *Nebenkläger* (*Private Accessory Prosecution*). This allows the victim under stipulated circumstances to participate in criminal proceedings independently of the public prosecutor.

[61] Private Accessory Prosecutions are governed under §§ 395- 402 of Germany’s Code of Criminal Procedure. § 395 outlines who has a right to join as a

Private Accessory Prosecutor. For instance, only those who are *directly* injured by the crime are entitled to join as private accessory prosecutors. In the case of capital crimes, the close relatives of the deceased victim can also join as private accessory prosecutors.

[62] A victim can only join the proceedings upon application to the Court and only when the Public Prosecutor has preferred charges. A victim can join at any stage of the proceedings. The victim has procedural rights (§§ 397 – 401), which are otherwise assigned to the Public Prosecutor; however, the victim practices them completely independently. *Nebenkläger* only applies to certain criminal offences which are specified by the law. The *Nebenkläger* allows the victim to participate actively in the proceedings, to contribute to solving the crime and to play a role in the prosecution of the perpetrator.

[63] It is apparent from Germany’s criminal procedure, and is to be expected, that where there is an intention to make a victim a *secondary or independent prosecutor*, the law will unequivocally provide for the same.

[64] The emerging picture therefore, is that the criminal justice processes should empower victims and that their voices should be heard –not only as witnesses for the prosecution but as rights holders with a valid interest in the proceedings and the outcome of the cause. How then does our own legal regime recognize victims as rights holders? Article 259(1) & (3) of the Constitution is instructive on how to construe their rights under Article 50 (9) of the Constitution. It provides:

“Construing this Constitution.

259. (1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and

fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

.....

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking....”

[65] Furthermore, the Constitution provides under Article 20(3) that:

“In applying a provision of the Bill of Rights, a court shall—

a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”

[66] These constitutional provisions read together with the VPA affirm that victims have rights in the Kenya criminal justice system. These rights are stipulated in section 9 of the VPA. Also, Article 27 of the Constitution provides that *every person is equal before the law and has the right to equal protection and equal benefit of the law*. Both the Constitution and the VPA seek to ensure the fairness of justice procedures applied to both the victims and accused particularly on the right to a fair hearing, timeliness, respect, dignity, and neutrality.

[67] The Trial Court being an impartial entity that oversees the progress of a case, has the ultimate function of determining the accused's guilt or innocence. Its aim is to establish the truth. The purpose of criminal proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in conduct which

amounts to an offence and, on that account, is deserving of punishment. Thus, the rights of the accused cannot be considered in isolation without regard to those of the victim. Victims too have a legitimate interest in the Court's exercise of its jurisdiction. The Criminal Justice system should cultivate a process that inspires the trust of both the victim and the accused.

[68] Considering the rights of the accused, the victim, and society as a whole in a criminal trial is not only fair, pragmatic but also constitutionally viable. This has been acknowledged in various jurisdictions. In ***Attorney-General's Reference (No. 3 of 1999)*** [2001] 2 AC 91 [118], the House of Lords was dealing with a question of law involving the proper construction of section 64(3B) of the Police and Criminal Evidence Act 1984. One of the issues that came for consideration was fairness of a trial. Lord Steyn observed:

“The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.”

[69] This decision was cited with approval by House of Lords in ***R v H*** [2004] 2 AC 134. Herein, the Lords made pertinent observations on ‘a fair trial’. They noted at paragraph 11 that ‘*fairness is a constantly evolving concept*’ and that ‘*it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another*’. They observed that although the focus of Article 6 of the European Convention is on the right of a criminal defendant to a fair trial, this has to be

exercised within the framework of the administration of the criminal law and ‘requires that the trial process, viewed as a whole, must be fair’. They noted at paragraph 12 that ‘the European Court has repeatedly recognised that individual rights should not be treated as if enjoyed in a vacuum’ in its decisions in ***Sporrong and Lönnroth v Sweden (1982) 5 EHRR 35, 52, para 69; Sheffield and Horsham v United Kingdom (1998) 27 EHRR 163, 191, para 52.***

[70] We agree with these sentiments. The trial Judge must protect the rights of all parties involved in criminal proceedings. There is a public interest in ensuring that trials are fair. This interest can be served by safeguarding the rights of the accused, the objectivity of the prosecution and, by acknowledging the victim’s interest. The rights of the accused should be secured and fulfilled. So too the public interest. The rights of victims, properly understood, do not undermine those of the accused or the public interest. The true interrelationship of the three is complementary.

[71] Therefore, we fail to see how the ‘participatory rights of the victim’ violate the ‘fair trial’ rights of the accused. A victim *can* participate in a trial in person or via a legal representative. So then, *who determines the manner and extent of a victim’s participation in a trial?*

[72] Once a victim or his legal representative makes an application to participate in a trial, it is the duty of the trial Court to evaluate the matter before it, consider the victim’s views and concerns, their impact on the accused person’s right to a fair trial, and subsequently, *in the judge’s discretion*, determine the extent and manner in which a victim can participate in a trial. Since participatory rights are closely related to the rights of the accused and the right to a fair and expeditious trial, they should be granted in a judicious manner which does not cause undue delay in the proceedings and thus prejudice the rights of the accused.

[73] Discretionary pronouncements of a Court, as we have stated in several decisions, form an integral part of a Court’s jurisdiction and should not be interfered with unless an Appellate Court is satisfied that the exercise of that discretion was improper and, therefore, warrants interference. So, for instance, a Court must be satisfied that the Judge in exercising discretion misdirected herself or himself and has been clearly wrong in the exercise of the discretion and that as a result, there has been injustice. In the instant case, we see no need to interfere with the trial judge’s discretionary pronouncements.

[74] At this point, we feel compelled to make a few observations on the powers of the DPP. Article 157(1) of the Constitution establishes the office of DPP. The State’s prosecutorial powers are vested in the DPP under Article 157 of the Constitution. That office, under sub-article 10, neither requires the consent of any person to institute criminal proceedings nor is it under the direction or control of any person or authority. These provisions are also replicated in Section 6 of the **Office of the Director of Public Prosecutions Act, 2013**. This office is the sole constitutional office with the powers to conduct criminal prosecutions.

[75] In interpreting how the DPP exercises his powers, *Lenaola J* (as he then was) in *Republic v Director of Public Prosecutions ex parte Meridian Medical Centre Ltd & 7 Others Petition No. 363 of 2013* expressed himself as follows:

“I also agree with the submission of Mr. Kilukumi that the decision to prosecute is a quasi-judicial decision which should not be taken lightly given the penal consequences inherent in any criminal proceeding ... There is also no doubt that the office of the DPP should exercise its mandate and discretionary power to prosecute within constitutional limits and the independence of his office.”

[76] We agree with this view and adopt it as the correct position in law. We are of the view that the victim has no active role in the decision to prosecute, or the determination of the charge upon which the accused will finally be tried. This is the sole duty of the DPP. While the victim of a crime can participate at any stage of the proceedings as deemed appropriate by the trial Judge, a victim or his legal representative does not have the mandate to prosecute crimes on behalf of the DPP. The DPP must at all times retain control of, and supervision over the prosecution of the case. As such, the constitutional and statutory powers of the DPP to conduct the prosecution is not affected by the intervention of the victim in the process.

[77] Additionally, a victim cannot and does not wear the hat of a *secondary prosecutor*. When victims present their views and concerns in accord with section 9(2) (a) of the VPA, victims are assisting the trial Judge to obtain a clear picture of what happened (to them) and how they suffered, which the Judge may decide to take into account. Victim participation should meaningfully contribute to the justice process. It must be noted, however, that this does not mean that the Court's judgment will follow the wishes of the victim. The trial Judge will, of course, take into account the law, facts, all the different interests, and concerns, including the rights of the defence and the interests of a fair trial to arrive at a sagacious decision.

[78] Conscious that this is a novel area of law for our criminal justice system and recognizing our mandate, under Section 3 of the Supreme Court Act as the Court of final Judicial Authority, we are of the view that the following *guiding principles* will assist the trial Court when it is considering an application by a victim or his legal representative to participate in a trial and the manner and extent of the participation:

- a. The applicant must be a direct victim or such victim's legal representative in the case being tried by the Court;***

- b. The Court should examine each case according to its special nature to determine if participation is appropriate, at the stage participation is applied for;***
- c. The trial Judge must be satisfied that granting the victim participatory rights shall not occasion an undue delay in the proceedings;***
- d. The victim's presentation should be strictly limited to "the views and concerns" of the victim in the matter granted participation;***
- e. Victim participation must not be prejudicial to or inconsistent with the rights of the accused;***
- f. The trial Judge may allow the victim or his legal representative to pose questions to a witness or expert who is giving evidence before the Court that have not been posed by the prosecutor;***
- g. The Judge has control over the right to ask questions and should ensure that neither the victim nor the accused are not subjected to unsuitable treatment or questions that are irrelevant to the trial;***
- h. The trial Court should ensure that the victim or the victim's legal representative understands that prosecutorial duties remain solely with the DPP;***
- i. While the victim's views and concerns may be persuasive; and no doubt in the public interest that they are acknowledged, these views and concerns are not to be equated with the public interest;***

j. The Court may hold proceedings in camera where necessary to protect the privacy of the victim;

k. While the Court has a duty to consider the victim's views and concerns, the Court has no obligation to follow the victim's preference of punishment.

b. What ought to happen when a legal or constitutional issue arises in a criminal trial to avoid delay in the determination of the case?

[79] The Appellant was charged with murdering the deceased on 30th August 2013. The trial commenced sometime in September 2014, *almost six (6) years ago*. The trial was *paused* at an advanced stage because an oral application was made by the victim's legal representative to *actively participate* in the matter. The trial judge then made a ruling which resulted in the interlocutory appeal before the Court of Appeal and that is now before us.

[80] The right to have a trial commence and conclude without unreasonable delay is an accused person's constitutional guarantee under Article 50(2) (e) of the Constitution. A victim also has the right to have the trial begin and conclude without unreasonable delay under Section 9(1) (b) of the VPA. In addition, Article 159 (2) (b) obligates Courts not to delay justice.

[81] Further, treaties and international instruments that Kenya has ratified such as the African Charter on Human and People's Rights, Rome Statute of the ICC, and the International Covenant on Civil and Political Rights (ICCPR) contain similar provisions, that bind us in all criminal justice procedures and processes.

[82] Article 7 (d) of the African Charter on Human and People's Rights grants individuals *'the right to be tried within a reasonable time by an impartial Court*

or tribunal. Article 67 (c) of the Rome Statute of the ICC guarantees an accused person the '*right to be tried without undue delay*'.

[83] Article 14(3)(c) of the ICCPR entitles an accused person, as a minimum guarantee to be "*tried without undue delay*". The Human Rights Committee, in **General Comment No. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007, CCPR/C/GC/32**, has explained that the right of the accused to be tried without undue delay, provided for by Article 14 (3) (c), is not only designed to *avoid keeping persons too long in a state of uncertainty* about their fate and if held in detention during the period of the trial, *to ensure that such deprivation of liberty does not last longer than necessary* in the circumstances of the specific case, but also to *serve the interests of justice*. The General Comment further states that what is reasonable has to be assessed in the circumstances of each case.

[84] The benefits of an expeditious trial cannot be gainsaid. A speedy trial ensures that the rights of the accused person are secured; it minimizes the anxiety and concern of the accused; it prevents oppressive incarceration; and it protects the reputation, social and economic interests of the accused from the damage which flows from a pending charge. It also protects the interests of the public, including victims and witnesses, and ensures the effective utilization of resources. Additionally, it lessens the length of the periods of anxiety for victims, witnesses, and their families and increases public trust and confidence in the justice system.

[85] Therefore, in conformity with the Constitution, Courts should shun situations where an accused's right to a fair trial is prejudiced by virtue of undue delay. Courts possess the power to take appropriate action to prevent injustice. This power is derived from the public interest that trials are conducted fairly and that as far as possible the accused is tried without unreasonable delay the end goal being to achieve prompt justice in criminal cases.

[86] The question then arises, what happens when a legal or constitutional issue, as in the instant case, arises within a criminal trial? Should the trial Court reserve the issue for determination by an appellate Court? Or should the trial Court determine the interlocutory issue and should any of the parties be aggrieved by such a decision reserve the right of appeal pending final judgment? Or should parties proceed with the interlocutory appeal?

[87] There is no provision in both the Constitution and the CPC for interlocutory criminal appeals. The Constitution under Article 50 (q) provides that every accused person has the right, '*if convicted, to appeal to, or apply for review by, a higher Court as prescribed by law.*' Similarly, the CPC under sections 347 and 379 (1) & (2) only allows appeals by persons who have been convicted of an offence. However, pre-constitution 2010, the Court of Appeal did allow an interlocutory appeal in ***Thomas Patrick Gilbert Cholmondeley v Republic, Criminal Appeal no. 116 of 2007 [2008] eKLR*** but *cautioned* against an unfettered right of appeal. The Court observed:

“In ordinary criminal trials, there is generally no interlocutory appeals allowed for section 379 (1) of the Criminal Procedure Code allows only appeals by persons who have been convicted of some offence. The Appellant has not been convicted of any offence..... But the basis of this appeal, as far as we are concerned is that the learned Judge made an order in the course of the trial which violated the appellant’s fundamental rights guaranteed by section 77 of the Constitution... The appellant had two choices. He could have chosen to wait until after the determination of the charge against him and if he was convicted, he would be entitled to appeal on all aspects of the trial. Secondly, he had the option to appeal under section 84 (1) of the Constitution. He chose to

exercise this option and it is to be noted that the trial Judge readily allowed him to appeal. The Judge must have been aware that his decision touched on the fundamental rights of the appellant guaranteed by the Constitution and hence he (i.e. the Judge) readily agreed to stop the trial and allow the appellant to exercise his right of appeal under section 84 (7) of the Constitution. It was for these considerations that we held the appellant had a right of appeal to the Court and that we, therefore, had jurisdiction to hear his appeal.

We would, nevertheless, sound a caution against the exercise of the undoubted right of appeal under section 84 (7) of the Constitution. First the fact that a trial Judge has made an adverse ruling against an accused person in a criminal trial does not and cannot mean that the Judge will inevitably convict. The Judge might well acquit in the end and the adverse ruling, even if it amounted to a breach of fundamental right, falls by the wayside and causes no harm to such an accused. The advantage of that course is that the long delay in the hearing of the charge is avoided and in the event of a conviction the matter can be raised on appeal once and for all. In the present appeal the delay has spanned the period from 25th July, 2007 to date, nearly one year. The trial before the learned Judge will, however, resume and go on to its logical conclusion. We think it is against public policy that criminal trials should be held up in this fashion and it is our hope that lawyers practising at the criminal bar will appropriately advise their clients so as to avoid such unnecessary delays. We would add that in future if such appeals are brought the

Court may well order that the hearing of the appeal be stayed pending the conclusion of the trial in the High Court. (emphasis ours)

[88] The High Court reiterated the Appellate Court's views in *John Njenga Kamau v Republic*, Criminal Appeal No.63 of 2014 [2014] eKLR where *Kimaru J* delivered himself thus:

“The Criminal Procedure Code does not envisage a situation where an accused or the prosecution may appeal to this court from an interlocutory ruling made by the trial court in the course of the trial. This court's considered view is that the reason why such appeals are not allowed is deliberate and is not a lacunae in the law. If parties to a criminal trial were allowed to appeal against any interlocutory ruling made during trial, there is a possibility that parties to such trials, especially accused persons, may use the appeal process to frustrate the hearing and conclusion of the criminal case.”

[89] Even when the High Court allows an interlocutory appeal in the interests of justice, the sentiments that interlocutory appeals may occasion unnecessary delay are echoed. In *Sheila Kinya Maingi v Republic*, Criminal Appeal No. 388 of 2008 [2016] eKLR, *Kimaru J* stated:

“Although the prosecution justifiably opposed the interlocutory appeal, this court is of the considered opinion that for the interest of justice, the said two witnesses should be recalled for the purpose of the Appellant's counsel to cross-examine them. However, this court is concerned that the Appellant's trial has been delayed on account of this interlocutory appeal. In criminal cases, it is good practice that an accused person who is aggrieved by an interlocutory

decision made during trial should await the conclusion of the trial, and if convicted, challenge that decision in a substantive appeal to the High Court. Interlocutory appeals from decisions of trial courts have justifiably been discouraged because if they were to be entertained, then it would infringe on the accused person's constitutional right to fair trial under Article 50(2)(e) of the Constitution that behooves the court to begin and conclude the trial of such an accused person without unreasonable delay."

[90] In *Maur Abdalla Bwanamaka v Director of Public Prosecutions & another*, Petition no. 23 of 2018 [2019] eKLR, *Ogola J* was grappling with a petition that sought to invalidate a statutory provision that limits interlocutory appeals. He noted at paragraphs 21 and 22:

"21. The other factor for the Court to consider is that of reasonableness of the provision challenged. In the view of this Court, discouraging interlocutory appeals in criminal matters is a positive step towards ensuring strict compliance with the provision of Article 50 of the constitution of Kenya, 2010 which requires that criminal trials open and conclude without unreasonable delay.

.....

22. It is the view of this Court that the said Sections do not restrict or reduce access to the court to the point of rendering the right of appeal redundant. Allowing interlocutory Criminal Appeals would unnecessarily clog the system with the resultant effect of delays in conclusion of criminal trials. The petitioner is not without recourse since upon conclusion

of the criminal matter he will have an automatic right of appeal to the High Court on matters of both Law and fact.”

[91] In the instant matter, the delay of over six years in our opinion, defeats the intention of the framers of the Constitution and of Parliament to have criminal trials concluded expeditiously. The guarantee to have a criminal trial conducted without undue delay relates not only to the time by which a trial should commence but also the time by which it should end, judgment rendered and any applicable appeals or reviews completed.

[92] Therefore, although criminal trials are not timebound like election petitions, there is need to have them determined expeditiously in line with the constitutional prescriptions. In the election petition of ***Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others*** SC. Application No. 16 of 2014; [2014] eKLR (***Nick Salat Case***), we affirmed the significance of time as a component in the dispensation of justice, hence the maxim: *Justice delayed is justice denied*. We emphasized that it is a litigant’s legitimate expectation that when they seek justice that the same will be dispensed timeously.

[93] We have also stated that the right of appeal against interlocutory decisions is available to a party at a later date when the final decision of an election Court has been delivered. In ***Anuar Loiptip v Independent Electoral & Boundaries Commission & 2 others***, Petition No. 18 as consolidated with Petition No. 20 of 2018; [2019] eKLR, (***the Loiptip case***) we held that while there is a right to appeal an interlocutory decision, *this right is delayed for good order and in keeping with timelines of election petition matters*. We concluded that a person seeking to appeal against an interlocutory decision must file their *intended Notice of Appeal within 14 days of the decision, in line with Rule 75 of the Court of Appeal Rules*.

[94] Flowing from the above, we are of the view that the right of appeal against interlocutory decisions is *available to a party in a criminal trial* but ***should be deferred***, and await the final determination by the trial Court. A person seeking to appeal against an interlocutory decision must file their intended Notice of Appeal *within* 14 days of the trial Court's judgment. However, exceptional circumstances may exist where an appeal on an interlocutory decision may be *sparingly* allowed. These include:

- a. Where the decision concerns the admissibility of evidence, which, if ruled inadmissible, would eliminate or substantially weaken the prosecution case;***
- b. When the decision is of sufficient importance to the trial to justify it being determined on an interlocutory appeal;***
- c. Where the decision entails the recusal of the trial Court to hear the cause.***

F. FINAL ORDERS

[95] Consequently, upon our findings above, the final orders are that;

- (i) Petition of Appeal No 23 of 2019 dated 3rd July 2019 is hereby dismissed.***
- (ii) For the avoidance of doubt, the determination in Criminal Appeal No. 132 of 2016 (Githinji, Okwengu & J. Mohammed, JJ.A) is hereby upheld.***
- (iii) In view of the inordinate delay of the original murder trial, occasioned by Appeals relating to an interlocutory matter, we direct that the substantive***

matter be heard and determined on the basis of priority.

(iv) Each party shall bear their costs of the Appeal.

[96] Orders accordingly.

DATED and DELIVERED at NAIROBI this 4th day of September, 2020.

.....
D. K. MARAGA
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

.....
M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA