

UNIVERSITY OF NAIROBI

SCHOOL OF LAW

**TITLE: JUDICIAL ENFORCEMENT OF THE RIGHT TO A FAIR TRIAL WITHOUT
UNREASONABLE DELAY UNDER ARTICLE 50 OF CONSTITUTION OF KENYA**

**A RESEARCH THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE
REQUIREMENTS FOR THE AWARD OF DEGREE OF MASTERS OF LAWS**

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DECLARATION

This thesis is my original work and has not been presented and is not currently been presented for a degree in any other university.

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DEDICATION

I dedicate this work to my wife Caroline Lelei Biomdo who has been a source of inspiration, and my children Vicky Biomdo, Vanessa Biomdo and Joe Biomdo Junior.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AU	African Union
CoK 2010	Constitution of Kenya 2010
CORD	Coalition for Reform and Democracy
ECHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the Former Yugoslavia
UDHR	Universal Declaration of Human Rights
UHRC	Uganda Human Rights Commission
UK	United Kingdom
UN	United Nations
USA	United States of America
WWII	Second World War

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CHAPTER ONE

INTRODUCTION

1.0 Background to the Study

The right to fair trial is a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms, especially the right to liberty and security of person.¹ It relates to the administration of justice in both civil and criminal proceedings. The administration of justice entails two aspects: the institutional, which comprises an independent and impartial court or tribunal; and procedural, which focuses on a fair and public hearing. In sharp contrast to civil cases where monetary damages are granted, criminal cases have stark and almost irreparable consequences such as death where the death penalty is awarded or lengthy imprisonment.² This calls for the need to ensure that the fundamental right to fair trial is protected and promoted in order to deliver justice to the accused.

The scope of the right to fair trial ranges from prohibition of torture during detention, to the right to an interpreter and the right to compensation and damages for injustice.³ It hence constitutes a fair and public hearing carried out by an independent and impartial tribunal or body. This has been echoed in Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR), which provides that, ‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights in a suit of law, everyone shall

¹ Legislation Online, ‘Fair Trial’ www.legislationonline.org/topics/topic/8 accessed 5 January 2015.

² Jennifer Smith and Michael Gompers, ‘Realizing Justice: The Development of Fair Trial Rights in China’ <<http://scholarship.law.upenn.edu/ealr/vol2/iss2/4/>> accessed 15 January 2015.

³ Ibid.

be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.⁴

The right to fair trial in criminal proceedings is synonymous with the trial process itself and has gained recognition for centuries through codification in various international, regional and national instruments.⁵ It has existed in the international arena as an integral part of the general scheme for the protection of human rights. It is recognized since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948,⁶ and its codification in the International Covenant on Civil and Political Rights (ICCPR) in 1966.⁷ Article 10 of the UDHR provides that, 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.'

The right to fair trial is also protected under article 6 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (ECHR));⁸ article 8 of the American Convention on Human Rights (ACHR); and article 7 of the African Charter on Human and Peoples' Rights (ACHPR). Elements of right to fair trial

⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI).

⁵ Scholastica Omondi, 'The Right to Fair Trial and the Need to Protect Child Victims of Sexual Abuse: Challenges of Prosecuting Child Sexual Abuse under the Adversarial Legal System in Kenya' (2014) 2 Journal of Research in Humanities and Social Science 38.

⁶ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A (III) (UDHR).

⁷ Busalile Jack Mwimali, 'Conceptualization and Operationalisation of the Right to a Fair Trial in Criminal Justice in Kenya' (Doctor of Philosophy, University of Birmingham 2012).

⁸ Article 6 of ECHR provides that, 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...'

are embodied as pre-trial rights, rights during trial and rights after trial.⁹ The right to fair trial must be protected throughout the trial to ensure justice prevails.

The right to a fair trial is considered as one of the most essential and fundamental human rights in all countries that respect the rule of law. Its applicability on a criminal charge does not start when charges are actually presented to court, but from the first contact between the suspect and State authorities that are involved in investigations.¹⁰ It embodies aspects of both institutional and procedural fairness in the determination of criminal cases in order to ensure achievement of justice.¹¹ This right does not exist in isolation but is anchored on and acts as a safeguard for other important rights such as the right to life, liberty, freedom from torture, cruel and degrading treatment.

The right to fair trial is not subject to any kind of limitation. The Human Rights Committee in its General Comment 13 on fair trial declared that certain aspects of the right to a fair trial under Article 14 could not be the subject of derogation even under emergencies.¹² The Committee was of a further opinion that under the principles of legality and the rule of law, the fundamental requirements of fair trial must be respected at all times. According to the African Union (AU)¹³, the general principles and guidelines applicable to legal proceedings are; public hearing, fair hearing,¹⁴ independent tribunal and impartial tribunal. In Kenya, Article 50 (1) of CoK 2010

⁹ Kayatire Frank, 'Respect of the right to a fair trial in indigenous African Criminal Justice Systems: The case of Rwanda and South Africa' (Masters Thesis, University of Pretoria 2004).

¹⁰ Frank (n 9).

¹¹ Rhona K.M Smith, *The essentials of human rights* (2005), Hodder Education, at 130.

¹² Ibid.

¹³ African Union, 'Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa' cite website

¹⁴ According to AU the essentials of a fair hearing are;

- (a) equality of arms between the parties to a proceedings, whether they be administrative, civil, criminal, or military;
- (b) equality of all persons before any judicial body without any distinction whatsoever as regards race, colour, ethnic origin, sex, gender, age, religion, creed, language, political or other convictions, national or social origin, means, disability, birth, status or other circumstances;
- (c) equality of access by women and men to judicial bodies and equality before the law in any legal proceedings;

contains similar provisions. It provides that, 'every person has the right to have any dispute that can be solved 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'. Although Article 24 of CoK 2010 provides for the limitations of fundamental rights and freedoms, the right to fair trial cannot be limited as expounded under Article 25. Under the said Article, the right is listed as one of the non-derogable rights.

The right to fair trial constitutes various safeguards. The underlying concept of fair trial lies in affording an accused person a fair and public hearing by an independent and impartial court established by law. It generally comprises the following basic fundamental rights: the right of access to court and, consequently, to be heard by a competent, independent and impartial tribunal; the right to 'equality of arms'; the right to a public hearing; the right to be heard within a reasonable time; the right to counsel; and the right to interpretation.¹⁵

In Kenya, Article 50 of the CoK 2010 provides for a fair and public hearing before a court or other independent and impartial tribunal or body. It also entitles every accused person to the right to a fair trial which includes the right to be presumed innocent until proven guilty; the right to be informed of the charge with sufficient detail to answer it; the right to have adequate time

(d) respect for the inherent dignity of the human persons, especially of women who participate in legal proceedings as complainants, witnesses, victims or accused;

(e) adequate opportunity to prepare a case, present arguments and evidence and to challenge or respond to opposing arguments or evidence;

(f) an entitlement to consult and be represented by a legal representative or other qualified persons chosen by the party at all stages of the proceedings;

(g) an entitlement to the assistance of an interpreter if he or she cannot understand or speak the language used in or by the judicial body;

(h) an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body;

(i) an entitlement to a determination of their rights and obligations without undue delay and with adequate notice of and reasons for the decisions; and

(j) an entitlement to an appeal to a higher judicial body.

¹⁵ FJ Doebller, *Introduction to International Human Rights Law* (CD Publishing, 2006).

and facilities to prepare a defence; the right to a public trial before a court established under the constitution; the right to have the trial begin and conclude without unreasonable delay; the right to be present when being tried, unless the conduct of the accused makes it impossible for the trial to proceed; the right to choose, and be represented by, an advocate and to be informed of this right promptly, the right to be assigned an advocate at state expense if substantial injustice would otherwise result; the right to remain silent and not testify during proceedings; the right to be informed of the evidence the prosecution intends to rely on and to have access to that evidence; the right to adduce and challenge evidence; the right to an interpreter without cost; the right to be tried for an offence known in law; the right not to be tried for an offence which an accused has either been previously acquitted or convicted; the right to the benefit of the least severe punishments and the right of appeal or review upon conviction.

The Kenyan judicial system is undergoing a lot of transformation in order to conform to the CoK 2010 spirit of ensuring a democratic society that respects the inherent human rights. Coupled with caseload, the judiciary has embarked on reforms to ensure that there are speedy trials. It has put in place both legal and structural mechanisms to ensure that the Bill of Rights is enforced. The promulgation of the CoK 2010 on 27 August 2010 brought with it a new wave of change and reforms.

CoK 2010 was supported by a majority of Kenyans who felt that it had brought changes that Kenyans had been waiting for decades. One of the key highlights in the CoK 2010 was the Bill of Rights which not only introduced socio-economic rights but also strengthened other rights. Article 50 (2) of CoK embodies specific rights that constitute the right to a fair trial including the right to have the trial begin and conclude within reasonable time protected under Article 50 (2) (e), which forms the discussion of this study.

The CoK 2010 aims at protecting the human rights of individuals by promoting the independence and impartiality of judiciary. The right to have a trial begin and conclude within reasonable time is usually affected by a broad range of factors which are core to the enjoyment of the right to fair trial. In the case of *Barker V Wingo*,¹⁶ the Supreme Court of the United States of America established that length of the delay; the reasons for the delay, failure to assert the right to trial within a reasonable time, and prejudice to the accused person are key factors to determine violation of right to fair trial within reasonable time. Reasonable time is measured by case to case approach from one jurisdiction to another.

The Kenyan Judiciary is one of the three State organs to which the sovereign power of the people of Kenya is delegated.¹⁷ It is bound by the national values and principles of governance in Article 10 of the Constitution, which include patriotism, national unity, sharing and devolution of power, participation of the people, social justice, transparency and accountability, among others. The High Court of Kenya has the authority to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.¹⁸

Delay in conclusion of cases has for a long time characterized the Kenyan Judicial system. Statistics show that in Kenya, there are cases which have been pending for up to 40 years¹⁹. The oldest case still pending in the Kenyan court system, HCCC No. 25 of 1969, was filed on 28 December 1969. There were 11 cases filed between 1960 and 1970; 39 lodged between 1971 and 1980 and 1,269 others filed between 1981 and 1990 that still remain pending or unconcluded.

¹⁶ *Barkerv Wingo*, 407 U.S. 514 (1972)

¹⁷ Article 3, CoK 2010.

¹⁸ Article 23(1), CoK 2010.

¹⁹ Kenyan Judiciary, *Court Case Delays: Impact Evaluation Diagnostic Study Report*, (Performance Management Directorate 2014) <http://www.judiciary.go.ke/assets/reports> accessed on 4 October 2015.

Statistics further show that 426, 580 cases filed before June 2013 have been pending for more than one year²⁰. In recognizing this fact, the Constitution of Kenya 2010, under Article 159 sought to address the problem of delay in the conclusion of cases by providing that justice shall be administered without undue delay. This position is further buttressed by Articles 25 and 50 (2) (e) of the CoK 2010, that provide for a non -derogable right to have a trial begin and conclude without unreasonable. Furthermore, the CoK 2010, under Articles 21, 22 and 23 has made specific provisions for implementation and enforcement all right contained in the Bill of Rights, which demonstrates the importance and weight attached to this right.

This study analyses the judicial interpretation of the right to fair trial by focusing on the right to have a trial to begin and conclude within reasonable time. It aims at providing an understanding of the meaning of the right to have a trial begin and conclude without unreasonable delay by interrogating judicial interpretation of the right, effect of delay on a case and the remedies of such delays. It will also analyze the challenges that the Kenyan courts face in interpreting the right to have a trial begin and conclude within reasonable. The study's findings and recommendations seek to provide a basis for practical and workable proposals that will enhance efficiency in the justice sector.

1.2 Statement of Problem

The right to fair trial is a fundamental right that is protected by law against limitation or derogation. Since criminal proceedings are likely to lead to imprisonment, the trial process must be fair and just to ensure that only the guilty are convicted and punished. One of the key

²⁰ Ibid

safeguards on the right to a fair trial is the requirement that trials are conducted without unreasonable delays.

The Kenyan judiciary has recognised the importance of ensuring that criminal trials are conducted without unreasonable delays by introducing measures which are aimed at reducing case backlogs. These measures include hiring of additional judges and magistrates, introducing measures to ensure for accountability of judicial officers, introduction of the ‘judicial week’ concept where only criminal cases are prioritised and heard during that period; among others.

It is in this context that this study analyses the judicial interpretation of the right to fair trial without unreasonable delay. It interrogates the meaning and interpretation of the term ‘unreasonable delay’ as used in Article 50 (2) (e) of the CoK 2010 with a view to giving effect to this right. This study also considers the challenges of determining what is ‘reasonable time’ within which a case must be concluded and crafting an appropriate remedy for violation.

1.3 Justification of the Study

As already discussed, the right to fair trial is a vast concept that varies from one jurisdiction to another. In Kenya, the right to fair trial is one of the fundamental rights and freedoms recognised in the Bill of Rights under Article 50 of the CoK 2010 and which, under Article 25, cannot be limited or derogated from. Therefore, its full realisation will go a long way in promoting the aspirations of Kenyans of a timely, efficient and effective dispute resolution. Delay of cases directly affects justice and in some instances renders trials unfair. In order to promote its realisation, it is important to understand what the right to fair trial is all about and the impact of delays in a criminal trial. Case backlog continues to be a great impediment of justice since it directly affects the right to a fair trial without undue delay. This is evidenced by numerous

efforts which have been undertaken by the judiciary in addressing the issue of delays in conclusion of cases²¹.

The Kenyan judiciary has faced persistent difficulties in disposing large pending caseload. This situation has continued to affect the realisation of the right to a fair trial without undue delays. One of the key contributors of case backlog is the lack of a clear understanding of the judicial interpretation of the phrase “unreasonable delay”. The other lies in identifying the appropriate remedies in the event of an undue delay.

Justice is based on respect for the rights of every individual and as such, every government has the duty to bring to justice those responsible for violation of others’ rights. Trial aims at rendering justice to the victims and this constitutes a fair trial. This study is justified since it seeks to interrogate the meaning and development of the right to a fair trial, while focussing of how undue delay affects this right. It focuses on analysing the judicial interpretation of the right to have a trial begin and conclude without unreasonable delay under article 50 (2) (e) of the CoK 2010 and identifies the appropriate remedies that are awarded by Kenyan Courts in enforcing this right.

1.4 Literature Review

Despite its existence and recognition at international, regional and national level, there is no single agreed definition of what constitutes the right to fair trial. Ouguergouz²² discusses that the concept of the right to a fair trial is inevitably bound up with the concept of justice. He notes that there appears to be no definition of the right to a fair trial either in the international instruments

²¹ Court Case Delays: Impact Evaluation Diagnostic Study Report, published by Performance Management Directorate, 2014 <http://www.judiciary.go.ke/assets/reports> accessed on 4 October 2015.

²² Ouguergouz F, ‘ The African Chrater on Human and People’s Rights; A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa’ (2002) Martinus Nijhoff Publishers, the Hague

which recognise it or in the case-law of the international bodies protecting these instruments. However, the notion of the right to a fair trial can be understood in two distinct levels; the conceptual or structural level whose ingredients include independent, impartial, open and accessible judiciary and the technical sense, which is defined by reference to a number of procedural safeguards or requirements such as the right to be informed of a charge, right to counsel, right to a speedy trial. These two concepts, though distinct, complement each other.

Halstead takes the view that it is possible to have a fair trial despite flaws in the procedure.²³ He notes that there are circumstances where a conviction can be upheld even though some principles of the right to a fair trial have been violated. This view has created a gap since these principles are aimed at ensuring that no party is disadvantaged by having a right violated. Any violation is likely to give an advantage in favour of the violator. This will more often than not, affect the fairness of trial. Kameri - Mbote and Akech pointed out that some courts have taken the view that any violation of the right to fair trial, even at the pre – trial stage, is fundamental and affects the validity of the entire proceedings.²⁴ This entitles an accused to be acquitted. Halstead's perspective seeks to promote substantive justice by considering the effect of the right or its violation on the entire trial. However, he fails to consider how violation of some rights impact an accused person's ability to effectively defend himself and may, on its own render the entire trial unfair.

Kameri - Mbote and Akech's view that any violation is fundamental and entitles an accused to an acquittal is too much focussed on formal justice at the expense of substantive justice. This is because it is important to analyse the nature of a violation, its impact on a trial and the overall effect

²³ Halstead P, *Unlocking human rights* (Hodder education 2009).

²⁴ Kameri -Mbote PK and Akech M, 'Kenya: Justice sector and the rule of law' Johannesburg; Open society initiative for eastern Africa <<http://www.ielrc.org/content/a1104.pdf>> accessed 13 January 2014.

before determining the appropriate remedy. They also fail to take into account the various remedies that may address a violation, such as damages, enforcement of the right (for example the right to counsel), instead of an acquittal, especially where the violation does not affect the fairness of a trial.

Chadambuka,²⁵ analyses co-relation between the seriousness of an offence with which an accused is charged *vis a vis* the right to a fair trial within a reasonable time. She argues that where there is an inordinate delay in trial, the court should be more willing to find a violation of the right to trial within a reasonable time in cases where an accused person is charged with a serious offence than where the charge is minor.²⁶ Seriousness of the crime relates to the gravity of the alleged criminal wrongdoing and how heavy the possible penalties can be if one is found guilty. She bases the right to speedy trial on seriousness of offence. By focussing on the seriousness of the offence as the key determinant in enforcing this right, the writer fails to appreciate the other impacts such as loss of evidence or witnesses due to passage of time which often times, render a trial unfair and unjust irrespective of its seriousness.

Mwimali,²⁷ explores issues concerning the conceptualization and operationalisation of the right to a fair trial in the Kenyan criminal justice system. He argues that the problems facing the full realization of the right to fair trial are not entirely attributed to shortcomings in the formal law and cannot be fully addressed from the formal law perspective alone. It impacts factors outside the formal law such as poverty, illiteracy, corruption and cultural perceptions and contextual issues affect the enforcement of the right to fair trial. The right to have trial concluded within

²⁵ Zvikomborero Chadambuka, 'Serious Offences and the Right to Trial within a Reasonable Time' (2012) 9 Essex Human Rights Review 1.

²⁶ Ibid.

²⁷ Busalile Jack Mwimali, 'Conceptualization and Operationalisation of the Right to a Fair Trial in Criminal Justice in Kenya' (Doctor of Philosophy, University of Birmingham 2012).

reasonable time embodies a broad range of factors core to whether the enjoyment of the right to a fair trial in general is possible.²⁸ A legal system wrought with legal technicalities may lead to time wasting. He identifies factors that lead to delayed trials such as inept judicial officers, corruption, inadequate physical infrastructure and manpower as well as litigants themselves who may cause delays for various reasons. This literature is important as it gives an understanding of the factors which may lead to delays in conclusion of cases and hence a violation of this right. However he did not discuss in detail what is “a reasonable or unreasonable delay” so as to give rise to this right. He did not explore the factors which ought to be taken into account in interpreting this right and the appropriate remedies that may be awarded once a violation occurs.

Juwaki,²⁹ discusses the causes of delays in obtaining a speedy trial for prisoners in custodial remand in Zimbabwe. She analyzes section 18 (2) of the Zimbabwean Constitution under the Bill of Rights which provides that, ‘if any person is charged with a criminal offence, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time’. She concludes that there exists a large gap between what the law is in books and what is in practice in Zimbabwe. There are serious violations of the right to a speedy trial and there seems to be some deliberate neglect over the respect, protection and enforcement of the right.³⁰ She makes various recommendations to speed trials in Zimbabwe so that prisoners’ right to a fair trial is realized. These include increase in the number of courts that preside over criminal cases, increasing well-remunerated judicial personnel, computerization of court records, discipline of judicial officers who contribute to delays of trials, institutional resource capacitation of prisons, participation,

²⁸ Ibid.

²⁹ Yvonne Kudzai Juwaki, ‘Towards Trial of the Forgotten: An Enquiry into the Constitutional Right to a Speedy Trial for Remand Prisoners in Zimbabwe’ (Masters, Netherlands 2012).

³⁰ Ibid.

accountably and political non-interference.³¹ This work will be key in analyzing the right to fair trial. However, it has not analysed in detail the meaning of the right to a trial without unreasonable delay and how courts in Zimbabwe have interpreted and treated this matter. The work further failed to consider what remedies are available in law where a violation of this right occurs. This study seeks to address this gap.

Wahiu³² takes the view that the right to fair trial is fundamental to the rule of law as it seeks to check arbitrary and unaccountable power. It has firm foundations both in international human rights law and in constitutionalist practice, particularly where it is written as a specific guarantee in the constitution. He considers the right a peremptory norm that underpins the protection of other human rights and that failure to observe it undermines the enjoyment of all other rights. He also considers it to be an aspect of the natural justice rule which prohibits condemnation without a hearing. He notes that the right is concerned with both procedural fairness, such as the right to be informed of a trial, as well as substantive fairness. The work, however, does not consider how violation of this right affects the outcome of a trial.

Ried³³ explores the concept of right to have a fair trial without unreasonable delay. She observes that the reasonableness of the length of proceedings should be assessed in light of particular circumstances of a case, regard being had to three factors; the complexity of the case, the conduct of an applicant and the conduct of state authorities. The period to be taken into account in determining the duration of a case, starts from the time a formal charge is brought against an accused until the charge is finally determined or when the sentenced imposed becomes final.

³¹ Ibid.

³² Winluck Wahihu, 'Human Rights Litigation and Domestication of Human Rights Standards in Sub-Saharan Africa' (2007) AHRAJ casebook series, Volume 1.

³³ Karen Reid, 'A practitioners guide to the European Convention on Human Rights' (1998), Sweet and Maxwell, London.

This may be the date of the last appeal or issuing of judgement. In cases where a challenge is brought in ongoing proceedings, the period which has already elapsed since the laying of the formal charge should be considered. This period should exclude any periods which an accused absconds during proceedings. On the issue of complexity, she observes that factors which should be taken into account while analysing this concept include the subject matter of the case, the number of disputed facts, international elements in a trial, the number of witnesses or volume of evidence will be considered. This should, however, be balanced against the general principle of securing proper administration of justice by ensuring that trials are heard and determined expeditiously. With regard to the conduct of parties, she argues that only delays which are attributable to the State may justify a finding of failure to comply with the reasonable time rule. However, the work only considered three factors as the ones which should be used in determining whether the right to a fair trial without undue delay has been violated. These factors are not exhaustive. This study will analyse the other factors which are taken into account in interpreting this right in addition to what has been considered by the writer. It will also consider the appropriate remedies available in the event of violation of the right to a speedy trial and factors which influence the award of a particular remedy as opposed to another.

Bakayana³⁴ discusses the right to a speedy trial by the Uganda Human Rights Commission (UHRC), a human rights institution in Uganda mandated to protect and promote human rights. The right to fair hearing is one of the key rights enshrined by Uganda's Constitutions since 1962. Bakayana discusses the right to speedy trial as a safeguard to a fair trial. He analyses the key challenges that UHRC faces in promoting the right to a speedy trial. These challenges include legal dilemmas such as lack of legislative anchoring, limited staff for the tribunals, unlimited

³⁴ Isaac Bakayana, 'From Protection to Violation? Analyzing the Right to a Speedy Trial at the Uganda Human Rights Commission' (2006) 2 HURIPEC Working Paper.

adjournments, financial constraints and duplication of various human rights institution.³⁵ Bakayana provides a well-explained framework on institutional implementation of the right to a fair trial by safeguarding a speedy trial. His work will be useful in enriching the present study by making a comparison between Kenya and Uganda.

The literature reviewed in this work did not explore how the Kenyan judiciary has interpreted of the right to trial without unreasonable delay and the remedies awarded by Kenyan courts in case of violation of the right. This work seeks to fill these gaps by analysing and discussing the Kenya judicial interpretation of the right trial without unreasonable delay.

1.5 Theoretical Framework

The underlying theories that will underpin the study are the theories of justice and human rights. In defining the term, 'right to fair trial' one cannot fail to take into consideration philosophical concepts associated with the category of justice as well, if only for the adjective 'fair' placed before the word 'trial'.³⁶ The full realization of the right to fair trial leads to justice to the accused and victim. Theories of justice are a significant and abiding concern of moral, political, and legal theory that have exercised the minds of thinkers since Plato and Aristotle.³⁷ Whenever a human right is violated it leads to injustice. The concept of justice in itself in an intuitively understandable, and varies from one society to another. More often no distinction is made between justice in the legal sense, moral sense, ethical sense and sociological sense.³⁸ The

³⁵ Ibid.

³⁶ Piero Leanza & Ondrej Pridal, 'Justice and the Right to Fair Trial' <<http://www.search.ask.com/web?q=Piero%20Leanza%20%26%20Ondrej%20Pridal%2C%20E2%80%98%20Justice%20and%20the%20Right%20to%20Fair%20Trial%20E2%80%99&o=15570&l=dis&qsrc=2871>> accessed 3 January 2014.

³⁷ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd edn, Oxford University Press 2012).

³⁸ Ibid.38

different understandings of the concept of justice inevitably lead to different ideas of what it should entail: social order, the fair distribution of assets and values, righteous life, fair and just judicial activity, etc.³⁹

Aristotle acknowledged that the concept of justice is imprecise, and it consists of treating equals equally and unequals unequally in proportion to their inequality.⁴⁰ He recognized that the equality implied in justice could be arithmetical- based on the identity of the persons concerned, or geometrical- based on maintaining the same proportion. He distinguished between corrective or commutative justice and distributive justice.⁴¹ Corrective justice in his view was the justice of the courts which was applied in the redress of crimes or civil wrongs and it required that people be treated equally.⁴² Distributive justice on the other hand, is concerned with giving each according to his desert or merit and it was the concern of the legislator.⁴³ The theory of justice as espoused by Aristotle will be used in discussing the concept of the right to a fair trial since by recognising this right, the law seeks to ensure that justice is done. The both concepts of corrective and distributive justice will be used while analysing the appropriate remedies which are available in the event of breach or violation of the right to a fair trial without unreasonable delay.

Plato on the hand argued that a state has two key attributes: it is founded upon justice; and all citizens within it are happy.⁴⁴ Plato stressed on the value of education in order to attain justice in a society. This theory will be applied in discussing the conceptualization of the right to a fair trial. It will be used in understanding the development of the right and why many States have

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Wayne Morrison, *Jurisprudence: from the Greeks to Post-Modernism* (Cavendish Publishing Limited 1997).

accepted this right as fundamental in safeguarding the rule of law and attainment of justice. Justice brings equality and brings a sense of happiness and satisfaction.

John Rawls was the greatest contributor to political and legal theory of his time. In his book, *A Theory of Justice*, Rawls regards utilitarianism as an unsatisfactory means by which to measure justice.⁴⁵ He asserted that the primacy of justice is social order and the very fact of disagreements and arguments about justice indicates humankind's commitment to the pursuit of justice.⁴⁶ The conception of justice according to Rawl, demands; maximization of liberty, subject only to such constraints as are essential for the protection of liberty itself; equality for all, both in the basic liberties of social life and also in the distribution of other social goods; and fair equality of opportunity and the elimination of all inequalities based on both birth or wealth.⁴⁷ This concept is relevant to this study since fair trial safeguards are meant to protect the right to liberty and ensure fairness and equality in administration of justice.

Rawls argued that people in original position as rational individual decide on general principles that will define the terms under which they will live a society. The first principle being, 'each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all'.⁴⁸ The second principle being, 'social and economic inequalities are to be arranged so that they are both: to the greatest benefit of the least advantaged, consistent with the just savings principle; and attached to offices and positions open

⁴⁵ MDA Freeman, *Lloyd's Introduction to Jurisprudence* (8th edn, Sweet & Maxwell 2008).

⁴⁶ Morrison (n 41).

⁴⁷ Freeman (n 42).

⁴⁸ Wacks (n 43).

to all under conditions of fair equality and opportunity'.⁴⁹ People will therefore put liberty above equality as none is ready to risk and lose liberty when the veil of ignorance is removed.

The theory of justice will be relevant in this research in order to show how the right to fair trial is relevant in realizing justice to both the accused and victim. Everyone has equal rights and must enjoy adequate scheme of equal basic liberties. The judiciary must ensure that the constitution is defended against the vagaries of legislative activity. The theory will also be relevant in explaining the link between the right to fair trial and realization of justice in a just society. According to Rawls and Nozick there is a clear relationship between justice and rights. Rights are grounded in an equal concern and respect, and where a right is violated it leads to grave injustice. According to Dworkin, the protection of minorities is central to any theory of justice as majoritarianism can easily lead to the trampling of the rights of minorities.⁵⁰ The essence of theory of justice in this research is to show that a judge cannot reach a just decision without a fair trial in the first instance.

Lon Fuller in *Morality of Law*, who is the major proponent of Procedural Natural Law theory, suggests that when a system violates the idea of procedural law, it can no longer claim to be law.⁵¹ According to HLA Hart the concept of fairness plays a specific role within the general scheme of morality.⁵²

The distinctive features of justice and their special connection with law begin to emerge if it is observed that most of the criticisms made in terms of just and unjust could almost equally well be conveyed by the words 'fair' and 'unfair'. Fairness is plainly not coextensive with morality in general; references to it are mainly relevant to it in two situations in social life. One is and when we are concerned not with a single individual's conduct but with the way in which classes of

⁴⁹ Ibid.

⁵⁰ Freeman (n 42)

⁵¹ Lon Fuller, *Morality of Law* (Oxford University Press 2002).

⁵² HLA Hart, *The Concept of Law* (Oxford University Press 2002).

individuals are treated, when some broken or benefit falls to be distinguished among them. Hence what is typically fair or unfair is a 'share'. The second situation is when some injury has been done and compensation for redress is claimed.

The concept of human rights has been described as one of the greatest inventions of civilization, which can be compared in its impacts on human social life.⁵³ The natural law theory led to the natural rights theory, is the theory mostly associated with modern human rights theory. The chief exponent of the natural rights theory was John Locke, who developed his philosophy within the framework of seventeenth century during the Age of Enlightenment.⁵⁴ John Locke in his *Second Treatise of Government* claimed that everyone had natural rights to life, liberty and property and that government was a trust established to protect these rights through the rule of law.⁵⁵

The philosophical foundations of human rights can be traced during the Age of Enlightenment in Europe and its rationalistic doctrine of natural law which recognized individual human beings as subjects endowed with rights against the society and placed them at the centre of legal and social systems.⁵⁶ Over the centuries the idea of human rights has passed through three generations. The first generation comprises the seventeenth and eighteenth century, mostly the negative civil and political rights.⁵⁷ The second generation consists essentially of the social, economic and cultural rights while the third generation are primarily collective rights.⁵⁸ The right to fair trial falls under the first generation of rights which are civil and political rights.

⁵³ Alan Gerwith, *Reason and Morality* (University of Chicago Press 1978).

⁵⁴ Jerome J Shestack, 'The Philosophical Foundations of Human Rights' in Janusz Symonides (ed), *Human Rights: Concept and Standards* (Dartmouth Publishing Company Limited 2000).

⁵⁵ Ibid.

⁵⁶ Manfred Nowak, *Introduction to the International Human Rights Regime* (The Raoul Wallenberg Institute of Human Rights Library Vol 14, Brill Academic Publishers 2003).

⁵⁷ Wacks (n 34).

⁵⁸ Ibid.

Human rights are a broad area of concern but their potential subject-matters ranges from questions of torture and fair trial to social, cultural and economic rights.⁵⁹ The focus of the human right theory is on the life and dignity of human beings.⁶⁰ Human rights possess a number of important characteristics such as being universal, inalienable, legally binding, and based on the inherent dignity and equal worth of all human beings.

The human rights theory confers the state with the obligation to protect, respect and fulfil all human rights.⁶¹ It encapsulates that each human right has specific content and claims. It is not just an abstract slogan. They are corresponding obligations of the duty bearer who has traditionally been considered to be state.⁶² This theory is key to this research as it helps to explain the evolution of the right to fair trial under international human rights law and state's obligations towards its realisation.

1.6 Research Objectives

1.61 General objective

The general objective of this study is to analyse the Kenyan Judiciary interpretation of the right to have a trial without unreasonable delay.

1.62 Specific Objectives

1. To explore the concept of the right a fair trial in criminal proceedings.
2. To analyse the Kenyan judiciary's interpretation of the right to have a trial without unreasonable delay.

⁵⁹ James Crawford, *Brownlie's Principles of Public International Law* (8th edn, Oxford University Press 2012)

⁶⁰ Nowak (n 51).

⁶¹ Ibid.

⁶² Ibid.

3. To discuss the major challenges courts in Kenya have faced in interpreting right to have a trial begin and conclude without unreasonable delay.
4. To examine the judicial remedies available upon violation of the right to trial without unreasonable.
5. To make recommendations for reforms in order to reduce instances of violation of the right to fair trial.

1.7 Research Questions

1. What is the meaning of the phrase “trial without unreasonable delay?”
2. What are the challenges facing courts in interpreting the right to have a trial without unreasonable delay.
3. What remedies are available to under Kenyan laws once the right to have a trial without unreasonable delay has been violated?

1.8 Research Hypothesis

The major challenge that courts face in interpreting the right to a fair trial without unreasonable delay is to determine the meaning of reasonable time and what remedy is appropriate in case of violation.

1.9 Research Methodology

This study is desk-based. The study will rely on both primary and secondary sources of data. Primary data include case law, legislation, policy papers and reports made by the government of Kenya and other credible organizations that have conducted inquiry into the situation under

study. Secondary data will include books, articles, journals, conference papers and information from the Internet on the right to fair trial with specific focus on the right to have a trial begin and conclude without unreasonable delays.

1.10 Chapter Breakdown

This study has five chapters.

Chapter 1 introduces the topic under study. It sets out the agenda of the study, the research questions, problem statement, objectives, the methodology to be employed, hypothesis, and justification of the study, background of the study and research methodology.

Chapter 2 discusses the concept of right to fair trial. It traces the origin and development of the right to a fair trial within the universal scheme of human rights protection and follow with a general investigation of the values enshrined within its scope. It also discusses the doctrine of trial to be concluded within reasonable time.

Chapter 3 examines the judicial interpretation of the right to a trial without unreasonable delays. It discusses some of the key cases and decisions in this area and analyses judicial interpretation of this right. It also analyses constitutional provisions on the right to fair trial.

Chapter 4 analyses the key challenges faced by courts and other judicial bodies in interpreting what constitutes ‘unreasonable delay’ and crafting an appropriate remedy in the event of a violation.

Chapter 5 contains a summary of findings and provides recommendations.

CHAPTER TWO

CONCEPTUALIZATION OF THE RIGHT TO A FAIR TRIAL

2.1 Introduction

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. This chapter discusses the philosophical foundations of the right to fair trial and its normative content. It traces the historical development of the right, from the first written code of laws founded on *Lex duodecim Tabularum* - the Law of the Twelve Tables - to the present time, which is governed by treaties, international legal instruments and national legislation. It also seeks to provide an understanding of the normative content of the right to fair trial.

2.2 Concept of Right to a Fair Trial

The term 'fair trial' is a legal and ethical concept used to describe the procedural rules of a court and the treatment of those accused of a crime.⁶³ It connotes that an accused person's rights during trial must be protected by the court in order to promote justice. The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms, the most prominent of which are the right to life and liberty of the person.⁶⁴ When an accused person stands trial on criminal charges he or she is confronted with the machinery of state.

⁶³ WiseGeek, 'What is a Fair Trial?' <<http://www.wisegeek.com/what-is-a-fair-trial.htm>> accessed 2 February 2015.

⁶⁴ Lawyers Committee of Human Rights, *What is a Fair Trial?: A Basic Guide to Legal Standards and Practice* (Lawyers Committee of Human Rights 2000).

The definition of the right to fair trial becomes difficult due to the differences in criminal law and civil law in various states. There is no standard definition of the right to fair trial that applies to all the states. Every state has its own definition in accordance to the domestic legislation and application of international law and customary international law.

The right to a fair trial, in accordance with the interpretation given by the European Court of Human Rights in the case of *Bönisch v. Austria*,⁶⁵ is a basic principle of the rule of law in a democratic society and aims to secure the right to a proper administration of justice. In this case, the complainant, a Viennese butcher, was convicted of an offence under the Austrian Food Hygiene Code after a finding that smoked meat produced by his company contained excessive quantities of water and a cancer-provoking substance. The Regional Court had appointed as an expert the Director of Australia Federal Food Control Institute. The said Director had taken meat samples from the complainant's company, tested them and the prepared a report which was relied upon by the prosecuting authorities to lay the charges against the complainant. The complainant objected to the appointed of the Director of the Institute as the court expert on this ground but his objections were disallowed by the Regional Court. The Regional Court relied on the report prepared by the expert to convict the complainant. Upon referral to the European Court of Human Rights, the court held that there was no equality of arms which resulted in unfair hearing⁶⁶. The principle of equality of arms is a larger element of the right to fair trial. Equality

⁶⁵ *Bönisch v. Austria* (1991) 13 E.H.R.R. 409; [1986] E.C.H.R. 8658/79

⁶⁶ The European Court of Human Rights held that there was no equality of arms due to the dominant position held by the director of the Institute who was appointed court expert since he was allowed to examine defence witnesses and the accused yet he was in essence the complainant. The court further held that the principle of equality of arms inherent in the concept of a fair trial required equal treatment as between hearing the director and persons who were called in whatever capacity by defence.

of arms involves giving each party the reasonable possibility to present its cause, in those conditions that will not put a party in disadvantage against his or her opponent.⁶⁷

The right to a fair trial is linked with the concept of fairness that lacks a standard definition that can be applied internationally. Understanding the concept of fairness is key in understanding the rationale of the right to fair trial. Judge Shahabuddeen, in the case of *Prosecutor v Slobodan Milošević*⁶⁸, argued that, ‘the fairness of a trial need not require perfection in every detail. The essential question is whether the accused has had a fair chance of dealing with the allegations against him’.

Central to the concept of fairness is the power exercised by the court towards the individual. The standards upon which a trial is to be assessed in terms of fairness are numerous, complex and evolving. In order to determine the fairness of a trial, the court should adopt the laws of the country in which the trial is being held, the human rights treaties to which that country is a party, and norms of customary international law.⁶⁹

Judge Robinson of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of *Prosecutor v Kanyabashi*⁷⁰ held that:

One of the objects, if not the fundamental object, of the Statute and Rules (of the ad hoc tribunals) is achieving a fair and expeditious trial... Trial Chambers have on occasion highlighted the achievement of a fair and expeditious trial as the fundamental purpose of the Statute and Rules.⁷¹

⁶⁷ Elisa Toma, ‘The Principle of Equality of Arms: Part of the Right to Fair Trial’ <<http://www.internationallawreview.eu/fisiere/pdf/06-Elisa-Toma.pdf>> accessed 18 February 2015.

⁶⁸ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-AR 73.4.

⁶⁹ Lawyers Committee of Human Rights (n 59)

⁷⁰ *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR – 98 42-T.

⁷¹ Gwynn MacCarrick, ‘The Right to a Fair Trial in International Criminal Law (Rules of Procedure and Evidence in Transition from Nuremberg to East Timor)’ <<http://www.isrcl.org/Papers/2005/MacCarrick.pdf>> accessed 6 February 2015.

2.3 Historical Development of the Right to a Fair Trial

The right to a fair trial emerged with the contemporary human rights. However, the framework for its operation in the municipal laws precedes the international human rights system. It has existed in diverse legal systems predating the international order and the United Nations. The roots of the basic principles of the right to a fair trial can be traced all the way back to the *Lex Duodecim Tabularum*—the Law of the Twelve Tables—which was the first written code of laws in the Roman Republic around 455 B.C.⁷² These laws contained the right to have all parties 'present at the hearing, the principle of equality amongst citizens and the prohibition of bribery for judicial officials.⁷³ From ancient times, traces of individual principles underlying fair trial in criminal processes were outlined in a number of texts including the Code of Hammurabi, the Bible and the Quran, among other documents.⁷⁴

The Magna Carta was also a historical development of the right to fair trial. The Magna Carta proclaimed that, 'No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed—nor will we go upon or send upon him—save by the lawful judgment of his peers or by the law of the land'.⁷⁵ The Treaty of Arbroath of 1320,⁷⁶ articulated the notion of equality for all, a principle that was later replicated in other developing democracies, such as France and the twelve American colonies of the British Empire. It is argued that the United States Declaration of Independence is linked to the Treaty of Arbroath.⁷⁷ The notion of equality

⁷² Judge Patrick Robinson, 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY' (2009) 3 Berkeley JL Int'l L Publicist 1

⁷³ Ibid. In modern times these principles refer to the right to be heard and to defend oneself, the right to be subject to the rule of law, and the right to have one's case adjudicated by an independent and impartial tribunal.

⁷⁴ Busalile Jack Mwimali, 'Conceptualization and Operationalisation of the Right to a Fair Trial in Criminal Justice in Kenya' (Degree of Doctor of Philosophy, University of Birmingham 2012).

⁷⁵ The British Library, 'Magna Carta' <<http://www.bl.uk/magna-carta>> accessed 2 February 2015.

⁷⁶ This was a declaration of Scottish Independence sent by 51 Scottish nobles and magistrates as evidence of a contract between Robert the Bruce and his subjects.

⁷⁷ Robinson (n 68).

for all citizens in terms of fair trial rights has been interpreted to mean both the general prohibition of discrimination and the promise of equality between the parties in the modern jurisprudence.⁷⁸

In 1791, the United States 6th Amendment to the United States Constitution which provided a criminally accused person the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation against one; to be confronted with the witnesses against one; to have compulsory process for obtaining witnesses in one's favor; and to have the assistance of counsel for one's defence.⁷⁹ The French Revolution played a great role in the historical development of the right to fair trial. Articles 6 through 9 of the French Declaration of the Rights of Man, adopted in 1789, require a presumption of innocence and prohibit detention unless determined by law.

The philosophical foundations of the modern right to fair trial can be traced during the Age of Enlightenment in Europe and its rationalistic doctrine of natural law which recognized individual human beings as subjects endowed with rights against the society and placed them at the centre of legal and social systems.⁸⁰ During this period the political focus of government began to shift from shift away from an all powerful sovereign and towards the will of the people, and the limits of governmental power began to be restructured accordingly.⁸¹ The term 'human rights' was

⁷⁸ Stefan Trechsel, *Human Rights In Criminal Proceedings* (Oxford University Press 2005).

⁷⁹ Ibid.

⁸⁰ Manfred Nowak, *Introduction to the International Human Rights Regime* (The Raoul Wallenberg Institute of Human Rights Library Vol 14, Brill Academic Publishers 2003).

⁸¹ Robinson (n 68).

rarely used before the Second World War until when the UN declared in its UN Charter preamble its determination to reaffirm faith in fundamental human rights.⁸²

After the second World War (WWII), the right to fair trial was codified. The 1948 United Nations Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly in December⁸³, provides in Article 10 that, ‘everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him’. In 1950, the European Convention for the Protection of Human Rights and Fundamental Freedoms was adopted. It provided in Article 6 that an accused person is entitled to a fair and public hearing within a reasonable time period, to prompt information on the trial in a language which he understands, to confront witnesses testifying on behalf of the prosecution, to order the appearance of witnesses to testify on his behalf, and to legal assistance.

In 1966 the International Covenant on Civil and Political Rights (ICPPR) was adopted and entered in force in 1976.⁸⁴ Article 14 of ICPPR provides for the right to a fair trial and affords the minimum rights of an accused person. Article 8 of American Convention on Human Rights, adopted in 1969 provides the full spectrum of rights to a criminally accused person, comparable to the European Convention.⁸⁵ Article 7 of African Charter on Human and Peoples’ Rights, contains many of the rights included in other human rights instruments, such as the right to an appeal, the presumption of innocence, and the right to be tried within a reasonable time period by

⁸² Michael Freeman, ‘The Historical Roots of Human Rights Before the Second World War’ in Rhona KM Smith and Christien van den Anker (eds), *Essentials of Human Rights* (Hodder Arnold 2005).

⁸³ The Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810.

⁸⁴ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) UNGA Res 2200A (XXI).

⁸⁵ Robinson (n 68) .

an impartial court or tribunal. Currently the right to fair trial has received universal recognition in national constitutions and its values seemingly unquestionable and non-derogable.⁸⁶

In Kenya, the right to fair trial was recognized in Section 77 of the Constitution of Kenya (repealed). Under the said Section, an accused person in a criminal trial was entitled to a fair hearing within a reasonable time by an independent and impartial court established by law. He/she was also entitled to other protections such as the presumption of innocence, the right to be informed in a language he/she understands the nature of the offence charged, the right to be given adequate time and facilities to mount as defence, the right to counsel and the right to an interpreter⁸⁷. These rights were also enshrined in the international legal instruments which had been ratified by Kenya⁸⁸. However, the said provisions lacked sufficient Constitutional protection and could be derogated at will⁸⁹. This position subsisted from 1963 when Kenya got independence until 2010 when Constitution of Kenya, 2010 (CoK 2010) was enacted.

Under the CoK 2010, the right to fair hearing is enshrined in Article 50. The said right embodies fair hearing rights that include the right to be tried without unreasonable delay. Article 25 of the CoK 2010 sought to address the shortcomings experienced in the repealed Constitution by providing that the right to fair trial under Article 50 is non-derogable. The CoK 2010 further provides mechanisms for enforcement of fundamental rights and freedoms under the Bill of Rights⁹⁰.

⁸⁶ David S Weissbrodt, *The Right to a Fair Trial Under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights* (Martinus Nijhoff 2001)

⁸⁷ Section 77 (1) and (2) of the Constitution of Kenya (repealed)

⁸⁸ Article 10 of the UDHR, Article 9 of the ICCPR and Article 7 of the ACHPR

⁸⁹ Section 86 (2) and(3) of the Constitution of Kenya (Repealed) provided that the bill of rights could be derogated under the authority of disciplinary laws such as the Police Act (repealed) and Armed Forces Act (repealed)

⁹⁰ Article 23 of the CoK 2010 bestows the authority to enforce any provision under the Bill of Rights upon the High Court of Kenya and empowers it to award appropriate remedies in case of violation

The CoK 2010 recognized treaties and other international legal instruments ratified by Kenya as part of the sources of laws in Kenya under Article 2 (5) and (6)⁹¹. This has ensured that Courts in Kenya are bound to refer to and apply these instruments as part of Kenyan laws when adjudicating over disputes and interpreting legal provisions such as the right to a fair trial without unreasonable delay.

2.4 The Normative Content of the Right to a Fair Trial

The normative content of the right to fair trial entails the protection of key rights enjoyed by the accused and guaranteed in the legal framework. It entails the various safeguards as guaranteed in the international and domestic framework. It also entails the right to a fair hearing before an independent and impartial court of law or tribunal. The scope of fair trial in criminal matters varies from one jurisdiction to another. However fair trial guarantees must be observed from the moment the investigation against the accused commences until the criminal proceedings, including any appeal, have been completed.⁹²

The Lawyer's Committee on Human Rights argues that the right to fair trial can be grouped into three categories: the pre-trial procedures; the actual trial; and the post-trial procedures.⁹³ This distinction can be blurred in fact, but the violations of human rights during one stage can have diverse effects on another stage. It also varies from one jurisdiction to another. In the United Kingdom, for instance, it has been held that the scope of protection of the right to a fair trial under Article 6 of the European Convention comes into play as soon as a criminal charge is

⁹¹ There are differing views as to whether Kenya is a monist or dualist state by virtue to provisions of Article 2 (5) and (6) of the CoK 2010. However, courts are now bound refer to international legal instruments and apply international standards contained in these instruments as part of laws of Kenya when adjudicating over matters.

⁹² Lawyers Committee on Human Rights

⁹³ Ibid.

brought against an individual; and it remains in place until the charge is determined.⁹⁴ This position was also adopted by the European Court of Human Rights in the case of *Escoubet v. Belgium* where it was held that the right to fair trial did not cover the pre-charge phase of prosecution.⁹⁵ This case concerned the immediate but temporary withdrawal of the driving license of a motorist who, following a road accident was suspected by the police of drunken driving.⁹⁶

The pre-trial proceeding encompasses different rights enjoyed by the accused keeping in mind that an accused has to be presumed innocent until proven guilty by a court of law. Pre-trial rights include: prohibition of arbitrary arrest and detention;⁹⁷ right to know the reasons of arrest;⁹⁸ right to legal counsel; right to prompt appearance before a judge to challenge the lawfulness of arrest and detention;⁹⁹ the prohibition of torture and the right to humane conditions during pre-trial detention; and prohibition of incommunicado detention. These rights are usually referred to as the rights of arrested persons. The CoK 2010, under Article 49, recognises rights of an arrested person which fall under this category¹⁰⁰.

Upon completion of the pre-trial proceedings, which comprises the rights of an arrested person, the person is brought before a court of law to face the actual trial. In order to ensure that an accused person faces a fair trial during an actual trial, there are some rights which must be

⁹⁴ Paul Mahoney, 'Right to Fair Trial in Criminal Matters under Article 6 ECHR' (2004) 4 Judicial Studies Institute 107.

⁹⁵ [1999] E.C.H.R. 26780/95

⁹⁶ Ibid.

⁹⁷ Article 9 (1), ICCPR.

⁹⁸ Article 9(2), ICCPR. The reasons for arrest and explanation of other rights such as the right to counsel must be given in a language the accused understands.

⁹⁹ An arrested person has to be brought promptly before the court. In most cases it is within 24 hrs from the time of arrest.

¹⁰⁰ Rights of an arrested person under Article 49 of the CoK 2010 include the right to be informed promptly the reasons for the arrest, the right to remain silent, right not to be compelled to make any confession or admission that could be used in evidence against the person, right to be brought before a court within 24 hours of arrest, right to be charged or informed reasons for continued arrest, right to be released on bail or bond.

protected. The rights that encompass a fair trial during actual trial are well encapsulated under Article 14 of ICCPR. It specifically provides for equality before the courts and for the right to a fair and public hearing by a competent, independent and impartial tribunal established by law, regardless of whether a criminal trial or a suit at law is involved.

During trial the court must also observe the rights of accused person. These rights include: the right to presumption of innocence;¹⁰¹ the right to prompt notice of the nature and cause of criminal charges; the right to adequate time and facilities for the preparation of defence;¹⁰² and the right to trial without undue delay.¹⁰³ The right to defend oneself in person or through legal counsel; right to examine witness; right to an interpreter; prohibition on self-incrimination; prohibition of retroactive application of law; and prohibition of double jeopardy are also key rights protected during the actual trial.¹⁰⁴ These rights have been embodied in the Kenyan legal system under Article 50 of the CoK 2010 and form the basis for all criminal trials.

The post-trial rights are the rights an accused person is entitled to after trial. These rights include: the right to appeal and the right to compensation of miscarriage of justice. Article 14 (5) of ICCPR grants the accused the right to have his or her conviction and sentence reviewed by a higher court or tribunal through an appeal.

The right to a fair trial also requires that the procedures be carried out fairly, within the law, in public and adjudicated upon by an independent and impartial tribunal established under the law. This has been anchored in the UDHR, ICCPR, national constitutions and other regional instruments protecting the right to fair trial. Article 50 (1) of the Cok 2010 has embodied this

¹⁰¹ The burden of proof lies with the prosecution and the accused has a benefit of doubt. The presumption of innocence must be maintained throughout the whole trial phase.

¹⁰² Article 14(3) (b), ICPPR.

¹⁰³ Article 14 (3) (c), ICPPR.

¹⁰⁴ Lawyer Committee for Human Rights (n 59).

principle by providing that every person has a right to have any dispute decided in a fair and public hearing before a court or another independent and impartial tribunal or body.

The principle of equality of arms is inherent in the concept of fair trial. Equality of arms implies that every person must be granted equal access before the court or tribunal. The African Commission on Human and People's Rights in its communication regarding *Advocat San Frontiers v. Burundi*¹⁰⁵ noted that:

the right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial.

The concept of the right to fair trial requires that the proceeding be conducted by an independent and impartial court or tribunal established by law.¹⁰⁶ The rationale is to avoid biasness and unfairness that would result if a political or administrative body would be hearing a criminal case. The court's competence refers to the appropriate personal, subject matter, territorial or temporal jurisdiction of a court in a given case. Independence eludes separation of powers between the judiciary and other arms of government to avoid interference and undue influence. Impartiality refers to the court's conduct and bearing on the outcome of the case.

2.5 Conclusion

The term 'fair trial' is a legal and ethical concept used to describe the procedural rules of a court and the treatment of those accused of a crime. It is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. It entails the various safeguards as guaranteed in the international and domestic framework. It also entails the right to a fair hearing before an

¹⁰⁵ *Advocat San Frontiers v Burundi* (Communication No. 231/99)

¹⁰⁶ Article 14 (1), ICCPR.

independent and impartial court of law or tribunal. Its scope in criminal matters, however, varies from one jurisdiction to another.

This right has existed in diverse legal systems predating the international order. Currently, the right to fair trial has received universal recognition in national constitutions and its values seemingly unquestionable and non-derogable.

CHAPTER THREE

JUDICIAL INTERPRETATION OF THE RIGHT TO A FAIR TRIAL WITHOUT UNREASONABLE DELAY UNDER THE CONSTITUTION OF KENYA 2010

3.1 Introduction

The right to a fair trial, which encompasses the right to have trial begin and conclude without unreasonable delay, is protected under the Bill of Rights in the CoK 2010. This chapter analyses the constitutional protection of the right to fair trial without unreasonable delay under the Constitution of Kenya 2010. It interrogates how the judiciary has interpreted the meaning of a trial without unreasonable delays and seeks to understand, through analysis of relevant case law, the meaning of “unreasonable delay” and what factors are to be considered before it can be said that a trial has delayed in a manner that is unreasonable. This chapter will also analyse pre-trial delays vis a vis delays that occur during trial in order its impact in interpreting the right to a trial without unreasonable delays under article 50 (2) (e) of the CoK 2010.

3.2 The Constitutional Protection of the Right to a Fair Trial without Unreasonable Delay

The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social and cultural policies.¹⁰⁷ Article 19 (2) of CoK 2010 articulates that, ‘the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individual and communities and to promote social justice and the realization of the potential of all human beings’. Article 50 of the said Constitution provides for the right to fair hearing and a fair trial of an accused person. This is one of the fundamental rights under the Bill of Rights that is non-

¹⁰⁷ Article 19 (1) CoK.

derogable by dint of article 25 and hence it cannot be limited under any circumstance. Under article 50 (2) (e), an accused person has a right to have a trial begin and conclude without unreasonable delay. This right is further buttressed by the guiding principles on the exercise of judicial authority which provide, in article 159 (2), that in exercising judicial authority, courts and tribunals shall be guided by the principle that justice shall not be delayed and is to be exercised without undue regard to procedural technicalities.¹⁰⁸ The High Court has been granted the jurisdiction, in accordance with article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights.¹⁰⁹

The right to trial within a reasonable period is a key ingredient of the right to fair trial in article 14 of the ICCPR as well as the right to be heard in article 7 of the ACHPR. Constitutional protection of the right to fair trial gives it the strongest legal protection as the constitution is the supreme law of the land, and any act violating its provision can be declared unconstitutional by a court of law. In most countries, the constitution as the supreme law of the land embodies the values, morals, aspirations and individuals' contractual obligations with the state.

The right to a fair trial without unreasonable delay has been recognized by numerous international and regional legal instruments such as the UDHR, ICCPR, ACHPR and ACHR. The right has also attained the status of *Jus Cogen* and is widely accepted as part of international

¹⁰⁸ Article 159 (2) (b) and (d) CoK 2010.

¹⁰⁹ Article 23 (1), CoK 2010; Parliament shall also enact a legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications on violations of human rights.

customary law. These laws form part of Kenyan laws by dint of article 2 (5) and 2(6) of the Constitution of Kenya 2010¹¹⁰.

The situation was different under the repealed Constitution, which did not provide for direct application of international law as part of Kenyan law except through incorporation, either by new, amended or existing legislation. In the case of *Rono v Rono & Another*,¹¹¹ the Court of Appeal, which by then was the highest court, extensively examined the applicability of international laws in the domestic context prior to the enactment of the CoK 2010 and made the following conclusions:

There has, of course, for a long time, been raging debates in our jurisprudence about the application of international laws within our domestic context. Of the two theories on when international law should apply, Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated. In civil law jurisdictions, the adoption theory is that international law is automatically part of domestic law except where it is in conflict with domestic law.

This position has changed and international law forms part of law in Kenya¹¹². This means that international law must now be taken into consideration in interpreting the right to fair trial.

In interpreting any right under the Bill of rights, the courts are required to adopt an interpretation that most favours enforcement of the particular right or freedom.¹¹³ The recognition of the right to fair trial under Article 25 of CoK 2010 as a fundamental right that may not be limited under any circumstance is an explicit indication that the CoK 2010 seeks to secure the rights of individuals and assert the obligation of courts to ensure both substantive and procedural fairness

¹¹⁰ Article 2 (5) of the CoK 2010 provides that the general rules of international law shall form part of the laws of Kenya. Under Article 2 (6), any treaty or convention ratified by Kenya shall form part of the law of Kenya.

¹¹¹ [2005] KLR 538

¹¹² In *Re The Matter of Zipporah Wambui Mathara*, the superior court held that by virtue of the provisions of Section 2 (6) of the Constitution of Kenya 2010, international treaties, and conventions that Kenya has ratified, were imported as part of the sources of the Kenyan Law and thus the provisions of the ICCPR which Kenya ratified on 1st May 1972 were part of the Kenyan law

¹¹³ Article 20, CoK 2010

in the dispensation of justice.¹¹⁴ In the case *Coalition for Reform and Democracy & Another v Republic of Kenya & Another*,¹¹⁵ Judge Odunga stressing on the importance attached on the right to fair trial in Article 50 of the CoK 2010 held that:

... It must be remembered that Article 50 of the Constitution is one of the “protected” Articles by Article 24 and hence cannot be limited.

In this case the petitioners, Coalition for Reform and Democracy, had moved to court to challenge the enactment of a law which sought to limit, among others, article 50 of the CoK 2010 by introducing a Clause in the Evidence Act which provided that the prosecution may withhold information and evidence it sought to rely on from an accused in a terrorism related trial.

Echoing the wording in Article 26 of the ICCPR and Article 3 of the ACHPR, the Constitution guarantees equality before the law in Article 27, which states, ‘Every person is equal before the law and has the right to equal protection and equal benefit of the law’. A right of fair trial to be judicially enforced the accused must be brought before a court or tribunal established by law. The principle of equality is also an important feature of the right to fair trial. The Human Rights Committee, while explaining the fair trial principle, noted that the requirements of equality of arms in adversarial proceedings would not be met where the accused is denied the opportunity personally to attend the proceedings or where he is unable properly to instruct his legal representative.¹¹⁶

¹¹⁴ Eva Maina Ayiera, ‘Justice be our Shield and Defender: Local Justice Mechanisms and Fair Trial Rights in Kenya’ (Danish Institute of Human Rights 2013).

¹¹⁵ Petition Nos. 628 & 630 of 2014 [2015] eKLR.

¹¹⁶ *Communication No. 289/1988*.

3.3 The Right to have a Trial Begin and Conclude without Unreasonable Delay.

Once an accused person appears before the court after an arrest and pleads not guilty to the charge, the stage is set for the court to hear the case with a view of determining or establishing whether the complaint against the accused is true. The CoK 2010 envisages that an accused person has the right to have a trial begin and conclude without unreasonable delay. CoK 2010, however, does not define what unreasonable delay constitutes. According to Amnesty International Manual on the right to a fair trial,¹¹⁷ there are two sets of standards that require criminal proceedings be completed within a reasonable time. The first set applies only to people detained before trial while the second set of standards, applies to everyone charged with a criminal offence, whether or not detained.¹¹⁸

3.3.1 Pre-Trial Delay

One of the contentious issues that has been before the Kenyan Court in whether article 50 (2) (e) of the CoK 2010 envisioned pre-trial delays as an aspect of the right to a trial to begin and conclude within reasonable time. In cases where accused persons argued that delay to be prosecuted occasioned a violation of their right to a speedy trial, regional courts have considered whether the pre-trial delay occasioned prejudice to the accused leading to unfair trial. In the case of *Wernhoff v Germany*,¹¹⁹ it was held that prolonged delays in bringing detained individuals to trial, resulting in longer pre-trial detention, exacerbate overcrowding in detention facilities and may lead to conditions that violate international standards. Under international law, the reasonableness of time between arrest and trial is determined on a case by case basis. In the case

¹¹⁷ Amnesty International, *Fair Trial Manual* (2nd edn, Amnesty International 2014).

¹¹⁸ *Ibid.*

¹¹⁹ (2122/64), European Court (1968)

of *Sextus v Trinidad and Tobago*,¹²⁰ a man charged with capital murder, was held for more than 22 months before trial, the Human Rights Committee reiterated that, in cases involving serious charges where the accused is denied bail by the court, the accused must be tried in as expeditious a manner as possible. Wahiu argues that:

A basic rule in criminal law is that a person will be arrested only upon reasonable suspicion of having committed an offence, and when the arresting authorities, frequently the police, have sufficient evidence against the person to make out a *prima facie* case at trial. A case can therefore be made that a procedure that permits police to arrest and detain a person at the stage in their investigations when they have no evidence against him or her, or the evidence is not sufficient to commit him or her to trial is arbitrary, overbroad, prejudicial or oppressive, hence unlawful.¹²¹

Under article 49 (f) of the CoK 2010, an arrested must be presented before a court of as soon as reasonably possible but not later than twenty-four hours after being arrested or if the twenty-four hours ends outside the ordinary courts hours on a day that is not an ordinary court day, the end of the next court day. CoK 2010 provides a limited period within which an accused person should be brought before a court of law upon arrest. This right is based on the presumption of innocence and liberty contained in articles 50 (2) (a) and 49 of the CoK 2010, which requires that the detention should be an exception and should not last longer than is necessary in a particular case. In cases where there is delay before prosecution of criminal offences, courts have held that there are no limits to the prosecution of serious criminal offences except where there are limitations imposed by statute.

¹²⁰ HRC, UN Doc. CCPR/C/ 72/D/818/1998 (2001)

¹²¹ Wahiu (n 96).

3.3.1.1 Pre trial delay under the Constitution of Kenya (repealed)

The period before the enactment of the CoK 2010 saw courts declare cases null and void where an accused was not arraigned within the prescribed time.¹²² In the case of *Ann Njogu and 5 others v Republic*,¹²³ Justice Onesmus Mutungi held that at the tick of 60th minute of the 24th hour, if the applicants have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of their fundamental and constitutional rights. This was later endorsed in the case of, *Gerald Macharia Githuku v Republic*,¹²⁴ where the court in affirming his appeal, stated that even though a delay of three days did not cause the accused any prejudice and although the evidence showed that he was guilty as charged, nevertheless the failure by the prosecution to abide by the requirements of the constitution could not be disregarded. This was likely to invite mischief in that criminals would collude with corrupt police officers to hold them for longer by a day or two and immediately buy them acquittals.¹²⁵ Kiage argues that application of the doctrine of delay equals to acquittal leads to a perverse subversion of the judicial process and has a dangerous potential for undermining both the law enforcement effort of curbing crime and the public confidence in the administration of justice and the rule of law.¹²⁶

In the case of *Githunguri v Republic (Githunguri Case)*,¹²⁷ Mr Githunguri was in 1984 charged before the Chief Magistrate, Nairobi with four counts of allegations of contraventions of the Exchange Control Act, Cap 113 Laws of Kenya (now Repealed). Two of the offences were

¹²² Republic v James Njuguna Nyaga, Criminal Case No.40 of 2007; Republic v Amos Karuga Karatu, [2008] eKLR Criminal Case No. 12 of 2006.

¹²³ HM Misc. Application No.551 of 2007.

¹²⁴ [2008] eKLR (Criminal Appeal No. 119 of 2007).

¹²⁵ Kiage.

¹²⁶ Kiage (n).

¹²⁷ [1986] KLR 1.

alleged to have been committed in 1976 and the third in 1979. The fourth Count was an alternative to the third Count. He was charged nine years after the alleged commission of the offences and six years after the completion of investigations and four years after the Attorney General had communicated his decision to him that he would not be charged. He made a Judicial Review application in the High Court seeking a prerogative order prohibiting the Chief Magistrate from further continuing to hear the criminal case. He argued that the Attorney General had decided to proceed with the prosecution notwithstanding, that in an earlier Reference to the High Court sitting as a Constitutional Court; the High Court had held that the prosecution of the Applicant was in the circumstances stated, vexatious and harassing, an abuse of the process of the Court and contrary to public policy.¹²⁸ The High Court in holding that the right to fair trial and to a trial within reasonable time as required by Section 77 (1) of the Constitution of Kenya (repealed) had been violated stated that:

...The delay is so inordinate as to make the non-action for four years inexcusable in particular because this was not a case of no significance, and the file of the case must always have been available in the Chambers of the Attorney-General. It was a case which had received notable publicity, and the matter was considered important enough to be raised in the National Assembly.¹²⁹

In *Republic v Attorney General & Another Ex Parte Ngeny (Ngeny Case)*,¹³⁰ Mr. Ngeny sought to challenge a delay of nine years before the mounting of his prosecution. The High Court, while upholding the petitioner's claim, held that it was important to determine the cause of delay and where no explanation is given, the delay will be deemed inordinate and an abuse of the constitutional rights of a petitioner.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ (2001) KLR 612.

3.3.1.2 Pre trial delay under the Constitution of Kenya 2010

The trend changed upon enactment of the Cok 2010. Courts began to consider other remedies which were deemed sufficient to address the violation of the fundamental right, such as award of damages, declaratory rights, rather than acquittals or stay of proceedings¹³¹. This period also saw a shift from enforcing formal justice through strict adherence to legal and procedural technicalities to promotion of substantive justice.

The precedent set in Githunguri and Ngeny cases, although decided under the repealed constitution, have been considered by courts in determining whether pre-trial delay constitutes the protection afforded under article 50(2) (e) on right to fair trial. In the case of *Joshua Chelelgo Kulei v Republic & 9 others (Kulei Case)*,¹³² instituted under the new CoK, the petitioner claimed that his prosecution was delayed first, by failure to initiate prosecution for 15 years after the alleged offence and delay of up to 3 years after charging and taking plea before the hearing could start. The petitioner also argued that that he could not expect a fair trial and justice within reasonable time in view of his being charged alongside persons who have not been produced in Court since 27th January 2010 when the charges were presented to Court. The petitioner was also constrained to take a plea while awaiting the availability of interested parties leading to delay in the commencement of trial. Due to this delay, he claimed that the delay caused him total imbalance because the evidence he would have relied on to prove his innocence had been disposed of from the relevant company and banking records. Also due to passage of time, his recollection of the events in which the criminal case was founded had faded and it would thus be

¹³¹ *Republic VPC George Okelo & Another* [2012]eKLR Criminal Case 28 of 2011

¹³² [2014] eKLR (Petition No.66 of 2012).

in the interests of justice that the charges be dismissed as the delay was unjustifiable, unexplained and inexcusable.¹³³

The respondents in objecting to the arguments set by the petitioner stated that, the right to fair trial protected under article 50 (e) of CoK does not refer to delays in investigations but is only available during the trial process itself and time begins to run after the charging of the accused persons.¹³⁴ They argued that even where unreasonable delay has been proved, barring the prosecution from prosecuting an accused person even before a trial begins, deprives the court an opportunity to ascertain the real effect of delay on the outcome of the case. They further argued that this will have far-reaching and radical implications on the administration of justice.¹³⁵ They relied on the case of *Julius Kamau Mbugua V Republic (Mbugua Case)*,¹³⁶ where it was held that a trial within a reasonable time guaranteed under section 77(1) of the repealed constitution relates to the whole of the judicial process starting when a person is charged and ending at the determination of the trial. The court in rejecting the petitioner's argument held that the petitioner had failed to demonstrate irreparable prejudice that he might have suffered. On the issue of whether Article 50 (2) (e) applied to pre-trial delay, the court held that:

Given this definition, it is imperative to note that Article 50 operates as soon as someone becomes an accused person and that the said person has the right to have the trial begin and conclude without unreasonable delay. In my view, although Article 50(2)(e) does not expressly deal with pre-trial delays, it must be construed as providing careful thought for procedural protections.

Article 9 (3) of the ICCPR, require an accused who is detained pre-trial to be released from detention pending trial if the time deemed reasonable in the circumstances is exceeded. However, release from pre-trial detention because trial proceedings have not started or finished

¹³³ Ibid para 19.

¹³⁴ Ibid para 41.

¹³⁵ Ibid para 44..

¹³⁶ [2010] eKLR.

within a reasonable time does not mean that charges must be dropped. In *Martin v Tuaranga District Court (Tuaranga Case)*,¹³⁷ the Court held that:

...the right to trial without undue delay, it is not a right not to be tried after undue delay. Further, to set at large a person who may be, perhaps patently is, guilty of a serious crime, is no light matter. It should only be done where the vindication of the personal right can be achieved in no other satisfactory way. An alternative remedy may be an award of damages.

In Kenya, the question as to the fate of an accused person who has been detained for longer than the expected constitutional period is dependent on which remedy is to be given by the court.¹³⁸ The remedy has always been for the prosecution to explain the delay whether reasonable or not.¹³⁹ In the case of *Eliud Nyaga v Republic*,¹⁴⁰ the court was unable to hold that the prosecution had been given a reasonable opportunity to explain the delay but had failed to take advantage of the opportunity and therefore there was no explanation for the delay.

3.3.2 The Right to have Trial Begin and Conclude without Unreasonable Delay

This comes into play when the actual trial commences. The International Criminal Court in the case of *Prosecutor v Jean-Pierre Bemba Gombo*,¹⁴¹ held that the need for expedition cannot justify courts taking measures that are inconsistent with the rights of the accused or with the fairness of the trial generally. Unreasonable delay may impair the quality and availability of evidence, for example as witnesses' memories fade, witnesses become unavailable or evidence disappears, degrades or is destroyed.¹⁴² The petitioner in the *Kulei Case* raised this issue when he argued that due to passage of time, his recollection of the events in which the criminal case was

¹³⁷ (1995) 2LRC 788

¹³⁸ Peter Kiage, *Criminal Litigation in Kenya* (Law Africa 2004).

¹³⁹ *Ibid.*

¹⁴⁰ Criminal Appeal No. 182 of 2006.

¹⁴¹ (ICC-01/05-01/08-1386), ICC Appeals Chamber (3 May 2011) para 55.

¹⁴² *Ibid.*117

founded had faded and it would thus be in the interests of justice that the charges be dismissed as the delay was unjustifiable, unexplained and inexcusable.¹⁴³

Courts in Kenya and other jurisdictions have faced the challenge of determining what constitutes ‘unreasonable delay’ that may warrant infringement of the right of an accused to have his or her trial conclude within reasonable time. What constitutes a ‘reasonable time’ is judged according to the circumstances of the individual case. The court will consider several factors in determining whether a trial has been concluded within reasonable time in accordance with article 50 (2) (e) of CoK. In *Republic V Pc. George Okelo & Another*,¹⁴⁴ the court held that the individual right of the accused must be balanced against society’s interest in bringing those suspected of committing crimes to account for them. Although the right to fair trial is not limited under the CoK 2010, the Court has to adopt an interpretation that favours the enforcement of the right or fundamental freedom.¹⁴⁵

In the case of *John Njoroge Chege v Director f Public Prosecutions*,¹⁴⁶ the petitioner had been charged with three counts of corruptly soliciting a benefit under the Anti-Corruption and Economic Crimes Act, 2003 in Nairobi Anti-Corruption Case No. 5 of 2013 – Republic v John Njoroge Chege. During the course of proceedings, the complainant filed an affidavit sworn on 17th January 2014 withdrawing all the complaint. Counsel for the petitioner, submitted that the matter ought to be withdrawn in accordance with section 240 of the Criminal Procedure Code and that the delay in concluding the issue before the Magistrate’s Court violated the petitioner’s right to a fair and expeditious trial under Article 50 of the Constitution. Judge Majanja in dismissing this application held that:

¹⁴³ Ibid.126

¹⁴⁴ Ibid.140

¹⁴⁵ Article 20 (3) (b), CoK.

¹⁴⁶ [2014] eKLR, Petition No. 150 of 2014

For delay to constitute a violation of Article 50(2)(e) of the Constitution, the petitioner must demonstrate that the delay is “unreasonable”... It noted that the general approach to the determination whether, the right has been violated is not by a mathematical or administrative formula but rather by judicial determination where the court is obliged to consider all the relevant factors within the context of the whole proceedings.

In *Mbugua Case*,¹⁴⁷ it was held that, the right to a trial within a reasonable time guaranteed by Section 77 (2) of the repealed constitution is related to the trial process itself and is mainly designed to ensure that the accused person does not suffer from prolonged uncertainty or anxiety about his fate. The court has to ensure that the right to a speedy trial is observed. In the case of *Paul Kipkorir Tanui v Republic*,¹⁴⁸ in rejecting the petitioners’ argument that his right to have his trial concluded without unreasonable delay held that:

Article 50(2)(e) of the Constitution requires a trial to be concluded without delay. I am unable to hold in this case that there was *unreasonable* delay. The assault took place on 29th June 2010. Plea was taken on 1st July 2010. The trial was conducted in the month of July 2010. Judgment was delivered on 30th November 2010.

Also in the case of *George Taitumu v Chief Magistrates Court, Kibera & 2 others*,¹⁴⁹ the petitioner argued that his right to fair trial under article 50(2)(e),(j) and (4), 47 (1) and 157 of the Constitution were violated by the manner in which the proceedings were conducted. The petitioner argued that Article 50(2) (e) of the Constitution which entitles an accused to have the trial begin and conclude without unreasonable delay was violated as result of the prosecution seeking adjournments without good reason until the court had to grant the last adjournment. The court in rejecting this argument held that:

The petitioner was charged in August 2013, the hearing commenced in January 2014 and the petitioner discharged thereafter. I do not consider the period taken unreasonable delay in light of Article 50(2)(e) of the Constitution. I also take into account that the petitioner was free on bail terms. The duty of the court is look at all the circumstances of the case.

¹⁴⁷ [2010] eKLR, Criminal Appeal No. 50 of 2008.

¹⁴⁸ [2015] eKLR (Constitutional Petition No. 4 Of 2012) para 13.

¹⁴⁹ [2014] eKLR Petition No. 81 of 2014

The petitioner's rights and fundamental freedoms on the one hand and the public interest in ensuring that where offences are alleged they are prosecuted to the full extent of the law.

In *Andrew Kibet Cheruiyot & another v Medical Practitioners & Dentists Board & 2 others*¹⁵⁰ the court had to determine whether a delay of 11 years was so inordinate as to result in violation of the petitioners' right to trial within a reasonable time contrary to article 50(2)(e). Distinguishing this case from the facts of *Githunguri case* which the petitioners relied on, the court held that:

The petitioners and the Interested Party knew that a complaint had been made against them and, given that there had been no communication to them that it had been resolved or withdrawn or found to have no merit, they cannot claim to be in a situation similar to that of the applicant in *Githunguri case*.¹⁵¹

The court went on to determine whether the inquiries before the PIC formed part of the trial process so that the petitioners could allege violation of Article 50(2)(e) on the right for the trial to proceed without unreasonable delay. The court held this in the negative and stated that:

It is only after the Board commences an inquiry in accordance with the mandate under section 20 of the Act that the 'trial' can be said to have commenced. As the Court of Appeal observed in the case of Julius Kamau Mbugua (*supra*), the protection under Article 50 (2) are trial related. They do not cover the period preceding the laying of charges and commencement of the trial. Thus, while there was a delay in the commencement of the proceedings, I do not find that such delay as predated the commencement of the inquiry in 2011 was such as can be said to be a violation of Article 50.¹⁵²

3.4 Conclusion

The right to a fair trial without unreasonable delay envisions both pre-trial and actual trial delays. There is no formal definition of what amounts to unreasonable delay. This is determined on a case by case basis depending on the facts and circumstances of a particular case. In the case of pre trial delays, long delays which are beyond the prescribed statutory limits will normally be

¹⁵⁰ [2014] eKLR, Petition No 260 of 2013

¹⁵¹ *Ibid* para 81.

¹⁵² *Ibid* para 85.

deemed to amount to unreasonable delay unless justifiable reasons for the delay are given by the prosecution.

With regard to actual trial delays, factors to be considered in determining whether the right has been violated include the length of the delay, reasons for the delay, failure to assert the right, nature of the offence, societal expectations and the prejudice to the accused.

The Kenyan courts have taken different approaches in interpreting the right before and after the enactment of the Constitution of Kenya 2010. In the period preceding the enactment of the Constitution of Kenya 2010, violation of the right to a fair trial without unreasonable delay entitled one to an acquittal or bar to proceedings. This was the trend set in various cases discussed above. The same approach was taken with regard to pre - trial delays. Kenya Courts held that any delay beyond the mandatory time set by law was a violation of the right to fair trial and entitled one to an acquittal irrespective of any other factors. The courts focussed on formal justice without interrogating the nature of the right, the nature of the violation, societal expectations and the effect of the violation on the entire trial. This position, however, changed with the enactment of the Constitution of Kenya 2010. Kenyan courts began examining the violation with a view to determining its prejudicial effect on an accused. The courts considered factors such as the length of the delay, nature of the offence, the nature of the right, the prejudicial effect of a violation on the accused, and whether it rendered the entire trial unfair. The courts' focus shifted to determining which remedies were appropriate in the event of a violation of the right and started awarding damages, declaratory reliefs instead of an acquittal or injunction. From the decisions, acquittals were a measure of last resort and were awarded where the delay, be it pre-trial delay or actual trial delay, rendered the entire proceedings unfair and prejudiced to right of an accused to a fair trial.

CHAPTER FOUR

DETERMINING “REASONABLE TIME” AND CRAFTING APPROPRIATE REMEDIES.

4.1 Introduction

Enforcement of the right to have a trial without unreasonable delay depends on the determination of what is ‘a reasonable time’. As noted in the previous chapter, what is ‘a reasonable time’ varies from case to case, jurisdictions and is dependent on various factors. This presents a challenge to courts which are tasked with the role of determining the reasonableness of time in a criminal case and crafting an appropriate remedy when a violation occurs. This chapter analyses the Courts’ approaches to these two issues while in interpreting and enforcing the right to a fair trial without unreasonable delay.

4.2 Determining reasonableness of time

Judicial bodies, in interpreting the right to fair trial within reasonable time, are in most cases faced with the challenge of determining the period to be taken into consideration and whether that period is reasonable. The standard to be considered to determine reasonable time will vary from one society to another and will depend on the facts of individual cases. This also differs from one jurisdiction to another depending on many factors prevailing in that jurisdiction. However, the concept of what is reasonable time is vague since it is impossible to say how long is too long. Instead, the courts have opted to adopt a balancing test approach which is applied on a case by case basis.

The lack of standard guidelines on what factors are to be taken into account has created a challenge on judicial officers faced with this issue. This is demonstrated by the different considerations that courts in various jurisdictions face whilst interpreting this right. In the ECHR case law for instance, the fact that the procedure exceeded the reasonable length of the proceeding (objectively determined upon the beginning date and the finishing date of the proceeding), and the State is not able to offer an acceptable explanation, is in itself sufficient to find a breach of the reasonable time requirement.¹⁵³

In New Zealand in the case of *Martin vs. Tauranga District Court*,¹⁵⁴ the accused had made an application in the trial court for an order on grounds of delay and contended that no indictment should be presented on the three assault charges against him and prayed for directions that he should be discharged or granted an order of stay. The application was dismissed by the trial court. An application for Judicial Review to quash the decision of the trial court was similarly dismissed. The court of Appeal of New Zealand in allowing the appeal and staying the indictments held that, 'it was not suggested in argument that there is or could be an international norm of what constitutes undue delay expressed in terms of a specific period of weeks or months. Some recognition has to be given to the circumstances of a particular society'.¹⁵⁵

In the ECHR, no time limits have been laid down in determining what time is reasonable from the moment a trial starts until its determination. However, court uses the following criteria: the complexity of the case;¹⁵⁶ the behaviour of the applicant; the behaviour of the national (judicial)

¹⁵³ Istavan Varga, 'Breach of the Reasonable Time Requirement in Hungarian Law and in the Practice of the European Court Of Human Rights'

¹⁵⁴ [1995] 2 LRC 788

¹⁵⁵ Ibid.

¹⁵⁶ Complexity issues can be due to the nature of the facts to be established, the number of accused persons and witnesses, international elements and the intervention of other persons in the procedure.

authorities; and whether there is a reason for special diligence.¹⁵⁷ The conduct of judicial authorities should ensure that all those who play a role in the proceedings do their utmost to prevent unnecessary delay. In the Canadian case of *R v Morin (Morin Case)*,¹⁵⁸ Justice Sopinka held that:

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

In this case the accused was charged with impaired driving and with operating a motor vehicle while having a blood alcohol level which exceeded the legal limit on January 19, 1988. Her trial was set for March 28, 1989, 14 months later. On her scheduled trial date the accused brought a motion to stay the proceedings pursuant to section 24(1) of the Canadian Charter of Rights and Freedoms, arguing that the 14 month delay in bringing her to trial infringed her right to be tried within a reasonable time under section 11(b) of the Charter. A stay was entered with respect to the impaired driving charge for unrelated reasons on the basis that the accused had not been tried within a reasonable time. The Court of Appeal allowed the Crown's appeal and restored the conviction. The majority court in the *Morin Case* went ahead to consider the relevant factors. The relevant factors identified included: length of delay; waiver of time period; the reasons of delay including inherent time requirements of the case, actions of the accused, actions of the crown and limits on institutional resources; and prejudice to the accused.¹⁵⁹

¹⁵⁷ Martin Kuijer, 'The Right to a Fair Trial and the Council of Europe's Efforts to Ensure Effective Remedies on a Domestic Level for Excessively Lengthy Proceedings' (2013) 13 Human Rights Law Review 777.

¹⁵⁸ [1992] 1 SCR 771.

¹⁵⁹ Ibid.

In United States of America, the Supreme Court of the United States of America, in the case of *Barker V Wingo*,¹⁶⁰ established that length of the delay; the reasons for the delay, failure to assert the right to trial within a reasonable time, and prejudice to the accused person are key factors to determine violation of right to fair trial within reasonable time.

This criteria has been adopted by Kenyan courts in determining the issue of what constitutes ‘reasonable time’ under Article 50 (2) (e) of the CoK 2010. In the case of *John Njoroge Chege vs Director of Public Prosecutions*¹⁶¹ the court held that in determining whether the right to a fair trial without unreasonable delay has been violated, the court must consider all relevant factors within the context of the whole proceedings.

4.3 Crafting Appropriate Remedy

What happens when a court rules that the accused’s right to a have a speedy trial has been violated? The next step is to identify an appropriate remedy. Article 23 (3) of the CoK grants a court the power to grant appropriate remedy in the event any violation of human rights are proven. In the case of *Darmalingum v State*,¹⁶² the Privy Council held that the normal remedy for a failure of reasonable time guarantee is to quash a conviction which was also the remedy for breach for fair hearing and independent and impartial court guarantees. The issue of whether a remedy of stay of proceedings should be available where the right to have a trial without undue delay has been a contentious one. Justice Hard Boys in the *Tauranga Case*,¹⁶³ viewed that a stay of proceedings may be acceptable as appropriate ultimate remedy where, despite other measures

¹⁶⁰ *Barkerv Wingo*, 407 U.S. 514 (1972)

¹⁶¹ [2012] eKLR Criminal case 28 of 2011

¹⁶² [2000] 5 LRC 522.

¹⁶³ Tauranga Case para 805.

such as bail, expediting the trial, the delay continues to be undue and not otherwise. He stated that:

I see no reason to vindicate the right of one who allows the process to run its full course without objection or complaint and then asserts the right only at its culmination. The international jurisprudence teaches us that there is no obligation on an accused to hasten the trial; that is the obligation of the state. Nonetheless I do not think that a person should be entitled to plead undue delay unless he or she has taken such earlier opportunity as there may have been to protest at the delay up to that point. For then realistic anticipatory remedies can be provided.¹⁶⁴

McLachlin, J. in the *Morin case*, said in essence, that, in considering the factors which bear on the determination whether the right has been violated the true issue at stake is the determination of where the line should be drawn between the conflicting rights of the accused and societal interests.¹⁶⁵ He argued that:

On one hand stands the interest of society in bringing those accused of crimes to trial, of calling them to account before the law for their conduct....When those charged with criminal conduct are not called to account before the law the administration of justice suffers....On the other side of the balance stands the right a person charged with an offence to be tried within a reasonable time... In the final analysis, the judge before staying charges, must be satisfied that the interest of accused and society in a prompt trial outweighs the interest of society in bringing accused to trial.¹⁶⁶

In *Flowers vs. The Queen* [2000]¹⁶⁷ the Privy Council distinguished *Darmalingum* and said that an appellate court is entitled, in public interest to take into account the fact that defendant is guilty of a serious crime in deciding whether to quash the conviction for infringement of right to trial within a reasonable time. In *Tuarang Case*, Richardson J held that, 'the choice of remedies should be directed to the values underlying a particular right. The remedy or remedies granted should be proportional to the particular breach and should have regard to other aspects of public

¹⁶⁴ Ibid para 805 b.

¹⁶⁵ *Morin Case*

¹⁶⁶ Ibid.

¹⁶⁷ [2000] 1 WLR 2396

interest'.¹⁶⁸ In this case the indictments were stayed for breach of the right to be tried within reasonable time.

The remedy of stay of proceedings of a criminal case can only be granted where it can be proven that it is an abuse of the court process and the accused would suffer prejudice. In the *Mbugua Case*, the court in consideration the issues of stay of proceedings relied in the jurisprudence from the ECHR and held that:

...proceedings should only be stayed where it would amount to an abuse of the process of the court to proceed with the prosecution; and, that in other situations the court had alternative remedies including marking the fact that there has been a contravention; taking into account the contravention in any sentence imposed or making an award for compensation, if a defendant is acquitted.¹⁶⁹

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

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

¹⁶⁸ [1995] 2 LRC 788

¹⁶⁹ [2007] eKLR

In Kenya, a court may grant appropriate relief including declaration of rights, injunctions, and conservatory order.¹⁷⁰ Other jurisdictions have always crafted remedies such as stay of proceedings, acquittal or pecuniary damages. In the famous Canadian case of *Morin Case*,¹⁷¹ the Supreme Court, particularly Justice Sopinka, in his leading judgment exhaustively considered the relevant principles applicable to an application for stay of proceedings for infringement of the right to be tried within a reasonable time.

In the Kenyan land mark case of *Albanus Mwasu Mutua v R*,¹⁷² it was held that unexplained violation of a constitutional right will normally result in an acquittal irrespective of the nature of, and, the strength of evidence which may be adduced in support of the charge. That decision was taken further in the case of *Ann Njogu and 5 others vs Republic*¹⁷³ case where the High Court held, in essence that, a prosecution after the constitutional and fundamental rights have been violated is “*illegal and null and void*”. The decision was taken even further in *Republic vs. George Muchuki Kangu* where the High Court, Nyeri, held, among other things, that upon discovery of constitutional violation the court had no jurisdiction to continue hearing an illegality or nullity.

The case of *Julius Kamau Mbugua vs Republic*¹⁷⁴ drifted from this position. It was held that:

Lastly, had we found that the extra judicial detention was unlawful and that it is related to the trial, nevertheless, we would still consider the acquittal or discharge as a disproportionate, inappropriate and draconian remedy seeing that the public security would be compromised. The breach could logically give rise to a civil remedy – money compensation as stipulated in Section 72 (6). That is the appropriate remedy which the appellant should have sought in a different forum. It is in the public interest that the trial should be conducted to its logical conclusion.

¹⁷⁰ Article 23(3), CoK.s

¹⁷¹ [1992] 1 SCR 771.

¹⁷² Criminal Appeal No 120 of 2004.

¹⁷³ HM Misc. Application No. 551 of 2007 (unreported)

¹⁷⁴ [2010] eKLR

In *Thomas Muriithi Nyawira v Republic*,¹⁷⁵ the accused had been charged with the offence of robbery with violence and handling stolen goods. He was convicted and sentenced to death. On appeal he argued that his rights to a fair trial under Article 50(2) of CoK had been violated. He argued that his trial was concluded within unreasonable delay of three years and no reason had been given for such delay. The Court found out that the appellant's constitutional right to fair trial were violated in that he was not taken to court within the stipulated time under Article 49(1)(f), was never supplied with witness statement thereby breaching his rights under Article 50(2)(c) and did not have his trial begin and concluded without unreasonable delay. It was held:

Notwithstanding the fact that the appellant was properly connected to the offence based on the evidence on record we find that the violation of his rights was so fundamental that it affected the entire trial rendering it a nullity.

In *Republic V PC George Okelo & Another*,¹⁷⁶ the accused was charged with murder of a woman while still in custody, a crime that had been committed 9 years before he was charged. He brought a constitutional application before the High Court to challenge the charges. He sought three declaratory orders; his right as to a fair and just trial had been violated; there could not be a fair trial for an offence allegedly committed way back in June 2004; and the court to declare that the applicants' rights as per chapter 4 of the Constitution of Kenya had being infringed and conservatory order be issued. The court in refusing to grant him the remedies held that:

The accused's assertion of their right to a fair trial is seriously undermined by the failure to demonstrate prejudice. But even if they succeeded, their right must be juxtaposed against the deceased's right to life under article 26(1) of the Constitution and the "societal need to ensure that the enjoyment of rights and fundamental freedom by any individual does not prejudice the rights and fundamental freedoms of others,"... In short the

¹⁷⁵ [2014] eKLR CRIMINAL APPEAL NO. 85 OF 2011

¹⁷⁶ [2012] eKLR Criminal Case 28 of 2011

individual right must be balanced against society's interest in bringing those suspected of committing crimes to account for them.¹⁷⁷

The accused person has to prove a violation of his rights and that the delay would cause him prejudice. In the case of *John Njoroge Chege v Director Of Public Prosecution*,¹⁷⁸ the accused was not able to prove an infringement of his fundamental rights and freedoms as stipulated in the CoK 2010. Based on this the court was not able to grant him any relief and only directed the magistrate to deal with the proceedings in accordance with the law. Judge Majanja held that:

The history of the case I have recounted shows that the adjournments of the case were grounded on reasons amplified by the parties... Any further delay in the trial is occasioned by the fact that the accused chose to move this Court for relief for the alleged violation of its rights. The delay therefore is not the kind contemplated under Article 50(2) (e) of the Constitution.

4.4 Conclusion

The interpretation of the right to have a fair trial without unreasonable delay under the CoK 2010 has faced two challenges. This is determining what constitutes either a "reasonable or unreasonable time" and crafting an appropriate remedy in case of violation. Kenyan courts have generally held that in determining what amounts to unreasonable delay, the Kenyan courts will consider factors such as the length of the delay, factors surrounding the delay and its prejudicial effect to the accused.

With regard to crafting an appropriate remedy, the Kenya courts have generally held that the nature of the violation will be balanced against the individual's right to a fair trial and the societal needs. The Kenyan courts will not stay proceedings or acquit an accused except in cases where the delay causes prejudice to the accused person and interferes with his/her right to a fair

¹⁷⁷ Ibid para 30.

¹⁷⁸ [2014] eKLR Petition No. 150 OF 2014

trial. In all other instances, Kenyan courts have held that other remedies such as damages, declarations will be sufficient in all other instances.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

The right to a fair trial is a norm of international human rights law designed to protect individuals from the unlawful and arbitrary curtailment or deprivation of other basic rights and freedoms. It entails the various safeguards as guaranteed in the international and domestic framework that promotes a fair and public hearing before an independent and impartial court of law or tribunal established by law. It aims at advancing justice in both civil and criminal proceedings by setting out minimum standards which must be respected and observed by a court of law or other tribunal established by law while adjudicating over disputes. It is considered to be a key pillar in every democratic state which respects human rights and the rule of law.

The term ‘fair trial’ is a legal and ethical concept used to describe the procedural rules of a court and the treatment of those accused of a crime.¹⁷⁹ It is a basic principle of the rule of law in a democratic society and aims to secure the right to a proper administration of justice. It connotes that an accused person’s rights during trial must be protected by the court in order to promote justice.

The right to fair trial has existed in diverse legal systems predating the international order and the United Nations. The roots of the basic principles of the right to a fair trial can be traced all the way back to the *Lex Duodecim Tabularum*—the Law of the Twelve Tables—which was the first written code of laws in the Roman Republic around 455 B.C. The philosophical foundations of

¹⁷⁹ WiseGeek, ‘What is a Fair Trial?’ <<http://www.wisegeek.com/what-is-a-fair-trial.htm>> accessed 2 February 2015.

the modern right to fair trial can be traced during the Age of Enlightenment in Europe and its rationalistic doctrine of natural law which recognized individual human beings as subjects endowed with rights against the society and placed them at the centre of legal and social systems. After the Second World War, the right to fair trial was codified in international, regional and national legal instruments such as the UDHR, ICCPR, ECHR, ACHR, ACHPR, Constitutions and national laws.

The right to fair trial constitutes a public hearing by an independent and impartial or body established by law. It consists various safeguards and aims at protecting interrelated rights such as the right of access to court and, consequently, to be heard by a competent, independent and impartial tribunal; the right to ‘equality of arms’; the right to a public hearing; the right to be heard within a reasonable time; the right to counsel; and the right to interpretation. The scope of fair trial in criminal matters varies from one jurisdiction to another. However fair trial guarantees must be observed from the moment the investigation against the accused commences until the criminal proceedings, including any appeal, have been completed. In Kenya, this right has been codified in the Constitution of Kenya 2010 under Article 50 as one of the fundamental rights which is non-derogable and cannot be limited.

One of the key ingredients of the right to a fair trial is the right to have trial begin and conclude without unreasonable delay. This right, which is recognised under international, regional as well as national constitutions, has attained the status of *Jus Cogen* and is widely accepted as part of international customary law. The purpose of the right to a fair trial without undue delay is to expedite trial. It is designed to ensure that the accused knows his fate within reasonable time and is not held by state for a longer period than necessary. Under international law, the reasonableness of time between arrest and trial is determined on a case by case basis. The

Constitution of Kenya 2010 under Article 50 (2) (e) has recognised this right as one of the fundamental safeguards bestowed against an accused during criminal proceedings.

The right to a fair trial without unreasonable delay has been interpreted to apply in two sets of standards; during pre-trial detention and during the actual trial. Whether the right applies during pre-trial is a contentious issue. In cases where accused persons argued that delay to be prosecuted occasioned a violation of their right to a speedy trial, the courts have considered whether the pre-trial delay occasioned prejudice to the accused leading to unfair trial. In the case of *Wernhoff v Germany*,¹⁸⁰ it was held that prolonged delays in bringing detained individuals to trial, resulting in longer pre-trial detention, exacerbate overcrowding in detention facilities and may lead to conditions that violate international standards. In Kenya, in the case of *Githunguri v Republic*,¹⁸¹ the Applicant had been charged for an offence which had occurred nine years ago, the high Court held that his right to fair trial and to a trial within reasonable time had been violated due to the passage of time since commission of the offence and date of formal charging.

With regard to delays which occur during actual trial, what constitutes a ‘reasonable time’ is judged according to the circumstances of the individual case. The court will consider several factors in determining whether a trial has been concluded within reasonable time, such as the nature of the crime, duration it has taken, societal interests and prejudice to the accused. The courts have a duty to consider all the circumstances of the case in determining whether the right to a trial without undue delay has been violated.

There is no international standard for measuring reasonable time. In determining whether the right to have a trial within reasonable time has been violated, the general approach is not by

¹⁸⁰ (2122/64), European Court (1968)

¹⁸¹ [1986] KLR 1.

mathematical or administrative formula but by judicial determination whereby the court has to balance the rights of the accused and society interests. The reasonability of delay will depend on a case-by-case basis taking into consideration various factors such as the complexity of the case. The concept of reasonableness is a value judgment to be considered in particular circumstances of each case and in the context of domestic legal system and the economic, social and cultural conditions prevailing.

The remedy for violation of the right to fair trial within reasonable time varies from jurisdiction to jurisdiction. Public interest is key when crafting an appropriate remedy where a violation of the right to have a trial within reasonable time has been violated. The courts would consider whether delay would be prejudicial to the accused.

The remedy of stay of proceedings or acquittal can only be considered by court where it is determined that the breach is so severe that a fair trial cannot be held. It must be shown that despite other measures in place expediting the trial, the delay remains undue. In Kenya, a court may grant appropriate remedies such as declaration of rights, injunctions, conservatory order or an order for compensation. Other jurisdictions have crafted remedies such as stay of proceedings, acquittal or pecuniary damages.

5.2 Recommendations

5.2.1 Providing a statutory definition of the right to a fair trial without unreasonable delay

Even though the right to a fair trial without unreasonable delay has been recognised under Article 50 (2) (e) of the Constitution of Kenya 2010 as one of the fundamental human rights, it has not been defined either under the 2010 Constitution or national legislation. This means that

its meaning and scope has been left to interpretation by courts. This has made it difficult for both litigants and courts to enforce the right since it requires research and analysis of various court decisions in order to find the meaning. It is recommended that Parliament should consider defining the scope of this right in legislation in line with the generally accepted guidelines deduced from judicial precedents. This will provide an appropriate guidelines and set legal parameters within which this right is to be interpreted and applied. For instance;

“Unreasonable delay” means any delay which;

- a) is beyond the time limit set by law or where there is no time limit, beyond one year from the date of plea until final determination;
- b) results from or is caused by an act or omission by a party to a case that results in delay of a case; and
- c) is likely to cause prejudice to a party to the case,

provided that where a court has, by a certificate issued in writing and signed by the presiding officer, certified that a case is of a complex nature owing to the number of witnesses involved, nature and length of evidence, complexity of the case or any other justifiable grounds, the time period indicated above shall be deemed to be extended for another one year. No court may issue more than one certificate in the same case except with express authority by the Chief Registrar of the Judiciary.

5.2.2 Issuance of legal guidelines through practice directions

One of the key challenges facing the judiciary in interpreting and enforcing this right is determining the reasonableness of time. This is compounded by a lack of clear guidelines on

what factors are to be considered while dealing with this issue. This can be resolved through issuance of appropriate practice directions by the Chief Justice. Practice directions are highly recommended as an immediate and achievable measure to address this gap since they do not require legislation and are issued by the Chief justice as guidance to judicial Officers and litigants.

5.2.3 Setting time frames in criminal cases

Whereas it is generally difficult to determine how long a case will take from filing to conclusion, setting time frames within which certain matters are to be done will greatly reduce delays. This include setting timelines on how long a party should take comply with certain requirements, such as finding an advocate, supply of evidence by the prosecution, regulating the number of adjournments etc. This method was employed in civil practice through the Civil Procedure Rules made under the Civil Procedure Act (Chapter 21 Laws of Kenya), which for instance provides under Order 7 rule 1 that a defendant shall file a defence within fourteen days after service of summons to appear and must serve a copy of the defence within fourteen days after filing.

This may be done through amendment of various legislation such as the Criminal Procedure Code, the Evidence Act and/or issuance of appropriate practice directions by the Chief Justice.

5.2.4 Strict enforcement of the right to fair trial without unreasonable delay

The CoK 2010 contains various provisions which seek to eliminate undue delay and ensure that trials are conducted expeditiously, while observing and safeguarding all other rights. These provisions include article 159 (2) which provides that justice must be administered without undue delay, article 49 which prescribes the time within which an arrested person must be presented before court, article 50 (2) (e) which provides for the right to have a trial begin and

conclude without unreasonable delay, article 25 which recognizes the right to fair trial under article 50 as non – derogable and article 23 which gives the High Court jurisdiction to enforce any violation of a right or fundamental freedom. However, this has not addressed the problem of delay of cases, partly due to lack of strict enforcement of the right. Courts still shy from awarding appropriate remedies, such as damages, declaratory orders, where a violation has occurred, instead opting to focus on whether the delay has occasioned prejudice to the accused. This has led perpetuation of the culture of tardiness and impunity which encourages violation of rights since the people responsible know they will not be held accountable. Strict enforcement of the right through award of appropriate remedies will keep all concerned in the administration of justice alert and alive to the law since any transgression will lead to repercussions.

5.2.5 Conducting regular public awareness campaigns

One of the factors which contribute to violation of the right to a fair trial without unreasonable delay is ignorance. Many litigants, especially accused persons in Kenya are not aware of the existence of the right and hence cannot seek to enforce it. It is recommended that the government, through the department of justice, should embark on conducting public awareness campaigns to educate the public of the right to a fair trial especially the right to have a trial without unreasonable delay. This will inform the general public of their legal rights and enable them to demand strict enforcement. In the long run, it will also address the problem of case backlog which has continued to affect the Kenyan judiciary and which contribute to delay in cases since courts will always prioritise old cases and neglect new cases.

The recommendations above are meant to ensure that trials are heard and determined expediently. This will ensure that justice is administered without unreasonable delay in

conformity with article 50 of the Constitution of Kenya 2010. Continuous public education and awareness will enhance litigants' ability to defend the right to speedy trial and demand appropriate remedies in case of violation. Enforcement of the right will enhance observance of the law by all parties' involved and reduced cases of breach or violation.

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