**Meme v Republic**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 24 June 2004

**Case Number:** 495/03

**Before:** Rawal, Njagi and Ojwang JJ

**Sourced by:** LawAfrica

**Summarised by:** C Kanjama

*[1] Constitution – Procedure – Joinder of interested parties – Principles to be applied – Applicant*

*sought declaration that Anti-Corruption Commission was unconstitutional – Whether natural justice and*

*public interest required that Anti-Corruption Commission be joined – Protection of Fundamental Rights*

*and Freedoms of Individual (Practice and Procedure) Rules 2001.*

*[2] Constitution – Right of fair trial – New courts established to fight corruption – Powers of*

*prosecution and investigation vested in new institutions – Whether constitutional – Whether*

*prosecutorial and investigative powers exclusively vested in Attorney-General and Commissioner of*

*Police – Nature of offence of abuse of office under Penal Code – Section 14(1) – Police Act (Chapter 84)*

*– Section 26 – Constitution of Kenya.*

*[3] Statute – Interpretation –Marginal note erroneous – Principle* de minimis non curat lex *– Whether*

*“special magistrates” created under anti-corruption statute unconstitutional – Section 3 –*

*Anti-Corruption and Economic Crimes Act (number 3 of 2003).*

*[4] Statute – Repeal and amendment – Whether previous statutory provision may be repealed by*

*implication – Fresh offence of “abuse of office” created in new anti-corruption statute – Whether*

*previous offence of “abuse of office” contained in Penal Code repealed.*

**JUDGMENT**

**Rawal, Njagi and Ojwang JJ**: The Applicant, who was the First Accused in anti-corruption case number 22 of 2003, came before this Court by originating summons filed under section 67(1) and 84 of the Constitution, and following procedure set out under the Protection of Fundamental Rights and Freedoms of the Individual (Practice and Procedure) Rules, 2001. The originating summons is dated 22 July 2003 and was filed on the same date. The Applicant moved the Court to determine eight questions stated to have a bearing on the interpretation of the Constitution of Kenya. These questions are as follows:

(i) Whether the so-called “Anti-Corruption Court” is a Court known to law and whether the same has been duly established by law in accordance with the provisions of the Constitution;

( ii) Whether the Magistrate serving at the Anti-Corruption Court is a Magistrate known to law, and whether the trial Magistrate can try the matter in the context of the Anti-Corruption and Economic

Crimes Act (Act number 3 of 2003);

(iii) Whether the accused is likely to be denied “the presumption of innocence” secured by section

77(2)(a) of the Constitution;

(iv) Whether having regard at all to the circumstances of the matter, the First Accused (that is the

Applicant) is likely to be denied a fair trial by an independent and impartial Court established by

law, and whether the charges against the First Accused are against the principles of natural justice;

(v) Whether the prosecutor is established by law to prosecute this matter, and whether section 26 of

the Constitution has been breached or is likely to be breached, to the detriment of the First

Accused;

(vi) Whether the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003) is unconstitutional in form and application;

( vii) Whether in the light of the enactment of the Anti-Corruption and Economic Crimes Act,

( a) Valid charges against the Applicant exist in law;

( b) The charges preferred against the First Accused are null and void;

( c) The charges preferred are based on impliedly repealed legislation;

( d) The High Court is the right court to try the Accused;

(viii) W hether the proceedings are an abuse of the process of the Court and, if so, whether any

Subordinate Court may try the matter.

It was the prayer of the Applicant that the eight questions be determined in such a way as to lead to the

issuance of two orders/declarations:

(a) That the trial of the First Accused is unconstitutional, null and void;

(b) That the constitutional rights of the First Accused have been infringed, and so a permanent stay be granted against proceeding with the case or otherwise continuing with prosecution.

Nine grounds are stated on the face of originating summons, to support the application, and the Applicant

has sworn an affidavit (dated 22 July 2003) in support. The nine grounds are as follows:

“(i) That the trial of the First Accused in Anti-Corruption case number 22 of 2003 in unconstitutional and null and void, as it is inconsistent with and contrary to the provision of section 77(1) of Constitution;

( ii) That the enactment of the Anti-Corruption and Economic Crimes Act (number 3 of 2003) which came

into effect on 2 May 2003 is illegal and unconstitutional as its effect is retroactive and retrospective, thus infringing upon the fundamental rights of the Applicant;

(iii) That the purported and unilateral establishment of the Anti-Corruption court by a judicial officer without any authority to so establish any form of Court in Kenya was illegal and unconstitutional;

(iv) That the appointment of the personnel to undertake the assignment of Anti-Corruption Magistrates is unconstitutional, as it is a breach of section 69 of the Constitution and the Magistrates’ Courts Act

(Chapter 10) Laws of Kenya;

( v) That the offence with which the Applicant is charged, stands repealed by implication, through the enactment of Anti-Corruption and Economic Crimes Act (Act number 3 of 2003) and as such the persistent prosecution of the Applicant is unconstitutional as it contravenes section 77(8) of the

Constitution;

(vi) That as at 2 May 2003 the Anti-Corruption and Economic Crimes Act 2003 defined “corruption” for the first time; the crime with which the Appellant is charged did not constitute corruption at the time

he was charged, the charge against the Applicant is thus rendered unconstitutional as it contravenes section 77(4) of the Constitution;

( vii) That the prosecution of the Applicant is illegal and unconstitutional as neither the Magistrate nor the

Prosecutor in the case has been officially gazetted as qualified to have the conduct of Anti-Corruption

case number 22 of 2003;

(viii) That the Magistrates’ Courts Act (Chapter 10, Laws of Kenya) has no provisions for establishment of

an “Anti-Corruption Court” or an “Anti-Corruption Magistrate”, and the two were established by the

former Chief Justice Bernard Chunga who had no constitutional mandate to do so, thus rendering the

appointments null and void and unconstitutional;

(ix) That section 3(1) of the Anti-Corruption and Economic Crimes Act 2003 states that only a judge can

hear Anti-Corruption cases and yet the current case has been brought before a Magistrate, and this is a

procedural impropriety and is an infringement of the rights of the accused person”.

**The depositions** The evidentiary basis to support the application is in the form of the Applicant’s affidavit dated 22 July 2003. It is appropriate to set out a fairly comprehensive summary of the Applicant’s depositions. (a) That on 9 April 2003 the Applicant was arrested without a warrant by police officers from the Anti-Corruption Police Unit (ACPU) following investigation which had been conducted earlier by the ACPU and in the course of which the Applicant had had to give a statement and to make a charge-and-caution statement; (b) That ACPU framed a charge with two counts of abuse of office contrary to section 101(1) of the Penal Code (Chapter 63), and the Attorney-General gave the consent to prosecute, by virtue of powers conferred upon him by section 101(3) of the Penal Code; (c) That on 10 April 2003 the Applicant was taken to the High Court central building in Nairobi, and to a Court-room on the second floor marked on the outside “Anti-Corruption Court number 3”, where he was formally charged with the offence; (d) That the Anti-Corruption Police Unit and the court registry have consistently referred to the Applicant’s case as “Anti-Corruption case number 22 o f 2003”, and the court before which he has appeared is learned Anti-Corruption Court; (e) That in the corridor leading to the said Courts, there are sign-boards bearing the words “Anti-Corruption Court number 3” and “Anti-corruption Court number 6”, in bold print, and the said Court has been set up as a section within the building with its own registry, chambers and court-rooms with the words “Anti-Corruption Court” prominently displayed in the Court building and its precincts, and there is another sign-board bearing the words “Anti-Corruption Court Registry”; (f ) That the Anti-Corruption Court is, to all intents and purposes, set apart from other Courts as shown by the sign-boards and labels and by the practice among judicial personnel and among prosecution officers; (g) That the Applicant’s counsel has advised him and he believes this advice, that the creation of the “Anti-Corruption Court” and the appointment of trial Magistrates this Court, was illegal as these arrangements were not made as required by law; and that the creation of the “Anti-Corruption Court” was done orally by the former Chief Justice Chunga; (h) That the Applicant has been given information by his advocate which he believes to be true, that there is to-date no constitutional and/or jurisdictional authority for the Chief Justice to create the “Anti-Corruption Court” and the same is unconstitutional, null and void;

(i) That the Applicant’s counsel whom he believes, has informed him that there was no constitutional and/or jurisdictional authority for the former Chief Justice to create a Court or to appoint the personnel to undertake the assignment of Anti-Corruption Magistrates, as there exists clear guidelines governing the appointment of Magistrates under the Magistrates’ Court Act (Chapter 10);

(j) That the Applicant has been informed by the Advocate whom he believes, that the Anti-Corruption and Economic Crimes Act 2003 came into effect on 2 May 2003 and is now the law governing the conduct of corruption cases in Kenya, and it is the first Act to define corruption, whereas the crime with which he the Applicant is charged, did not constitute corruption at the time of occurrence nor at the time the charge was laid; and that on account of this inconsistency, the charge against the Applicant is unconstitutional; (k) That the Applicant has been informed by his advocate whom he believes, that the enactment of the Anti-Corruption and Economic Crimes Act 2003 has by implication repealed the offence with which he the Applicant has been charged, and so the continued prosecution of the same is an infringement of his constitutional rights;

(l) That the Applicant has been informed by his advocate whom he believes, that the retroactive and retrospective sections of the Anti-Corruption and Economic Crimes Act 2003 are an infringement of his fundamental rights and freedoms; (m) That the Applicant has been informed by his advocate whom he believes, that the prosecution of his case is illegal and unconstitutional, as neither the Magistrate nor the prosecutor in the case has been officially gazetted as required by law to constitute the Anti-Corruption Court”. It is quite clear to us that slightly less than half of the deponent’s averments set out above are statements of a factual character. More of these averments are, in effect, the legal arguments of counsel being communicated through the Applicant, on the basis that he believes the legal advice to be true. Such a practice in the formulation of affidavits is to be deprecated, as it tends to lessen the weight of the factual information which goes into the proof of facts in issue, and at the same time it replicates material that may be controversial and which must later be presented as the submissions of counsel. So far as possible a deponent should only make depositions incorporating his perceptions, and leave contentious matters of submission to counsel.

**Basic facts** The basic facts forming the background to these proceedings may be recounted as follows. On 15 August 2001 the Government issued directives for the formation, within the Police Department, of an Anti-Corruption Unit, and on 13 September 2001 the Commissioner of Police acted on these directives by announcing the establishment of the Anti-Corruption Police Unit. The Unit was headed by a Senior Deputy Commissioner of Police, who was responsible to the Director of the Criminal Investigation Department for the efficient and effective performance of the Unit. The function of the Anti-Corruption Police Unit was stated as: “to investigate all corruption and corruption-related offences either at their own initiative and/or as directed by the Attorney-General and/or the Commissioner of Police”. The Anti-Corruption Police Unit (hereinafter referred to as “the ACPU”) took over all matters that were up to then being investigated by the Kenya Anti-Corruption Authority the life of which ended just before the establishment of the ACPU. Running parallel with the establishment of the ACPU was the Anti-Corruption Prosecution Unit, which was to be established within the Department of the Director of Public Prosecutions. On 26 March 2003 the Applicant was required by the ACPU to make a formal statement regarding the loss of the sum of KShs 51 million, which belonged to the Kenyatta Hospital where he was the Director between 1992 and 1998, which money was invested in Euro Bank, a bank which became insolvent. The Applicant duly made the statement, and subsequently, on 9 April 2003 the ACPU recorded a charge and cautionary statement of the Applicant. The charge set out two counts of abuse of office contrary to section 101(1) of the Penal Code (Chapter 63, Laws of Kenya). On 8 April 2003 the Attorney-General had executed a formal instrument giving the sanction to prosecute the Applicant as the First Accused, and the interested party in this case as the Second Accused. The first count read as follows: “Professor Julius Meme: On or about 3 December 1997 at Kenyatta National Hospital, Nairobi within the Nairobi area, being an officer employed in the public service to wit, Director of Kenyatta National Hospital, in abuse of the authority of the said officer, arbitrarily and in breach of the provisions of the State Corporations Act (Chapter 446, Laws of Kenya), relevant Treasury Circulars and without the sanction of the Kenyatta National Hospital Board, authorised the depositing of KShs 51 000 000 in Euro Bank Limited, an act which was prejudicial to the Kenyatta National Hospital Board”. And the second count read as follows: “Professor Julius Meme: On or about 27 February 1998 at the Kenyatta National Hospital Nairobi, within the Nairobi Area, being an officer employed in the public service to wit, Director of Kenyatta National Hospital, in abuse of the authority of the said office arbitrarily and in breach of the provisions of the State Corporations Act (Chapter 446), Laws of Kenya), relevant Treasury Circulars, and without the sanction of the Kenyatta National Hospital Board, authorised the rollover of a deposit of KShs 53 667 369-85 in Euro Bank Limited, an act which was prejudicial to the Kenyatta National Hospital Board”. When the First and Second Accused appeared before the Chief Magistrate’s Court on 18 June 2003 the trial did not proceed. This was because the accused persons promptly applied, by the virtue of section 67(1) of the Constitution, that their cases be referred to the High Court; and the Learned Magistrate, Mrs MA Odero ruled as follows: “the Court is convinced that the defence have raised questions that are serious and involve substantial matters of law (that should) be determined by the High Court. This application is not, in the Court’s view, merely frivolous or vexatious. The Court therefore allows this application and orders the matters raised to be referred to the High Court for determination”. Counsel for the Applicant, on that occasion, submitted to the Learned Principal Magistrate his framed issues for determination by the High Court. We have noticed, on close scrutiny, that it is precisely these issues, in substance, which have been articulated as points of submission, and simultaneously adopted in the Applicant’s affidavit of 22 July 2003 as factual material which he believes to be true as advised by his counsel. And we have already recorded our concern about the propriety of such an affidavit. The year 2001, as already noted, witnessed the establishment of the ACPU, and the Attorney-General was also expected to establish the Anti-Corruption Prosecution Unit. Going in tandem with these public, institutional anti-corruption initiatives was a judicial input, which took form with the launch of the “Anti-Corruption Court” on 25 April 2002, and in the same year there was a re-arrangement of subordinate court functions, so as to make specific provision for anti-corruption cases, by His Lordship the Chief Justice. The nature of the Anti-Corruption Court emerges clearly form the launching address of the Honourable B Chunga, the then Chief Justice. The Chief Justice stated the public object of the initiative as follows: “Corruption is a global issue with far reaching economic and social effects. It is only through the concerted and co-ordinated efforts of everyone, that the fight against corruption can be won. Every institution and individual has a role to play in this fight. The whole society of ours and the whole country has that role”. He then set out the role of the judiciary in the board object of combating corruption: “The Courts will be in the forefront in supplementing efforts towards the eradication of corruption”. But he set the scope for judicial contribution in a framework of the rule of law, thus: “Whereas the Courts will handle cases of corruption firmly our cardinal consideration will remain efficiency, fairness, expedition and, above all, the Rule of Law”. How was the Anti-Corruption Court to lie within the framework of the existing Court structure as set up under the Constitution and the ordinary law? The Honourable Chief Justice answered this question as follows: “Today, I am pleased to announce the establishment of an Anti-Corruption Court in Nairobi under the existing arrangement in the Subordinate Courts. The Court will exercise the jurisdiction set out in (the) provisions of various statutes with regard to Magistrate’s Courts. The establishment of this Court is purely administrative and on the same principle underlying the establishment of traffic Courts throughout the country as well as the creation of High Court divisions in Nairobi, namely, to speed up trials. These are administrative measures which I am, undoubtedly, empowered to take from time to time to improve judicial services and to enhance speed in the dispensation of justice”. The Honourable Chief Justice Chunga stated that there would, at the beginning, be two Anti-Corruption Courts in Nairobi, but that in the course of time, more such Courts would be established in other parts of the country where there were already normal court facilities. The Chief Justice stated that such expansion of the Anti-Corruption Court would be in line with on-going programmes for the expansion of judicial services to as many parts of the country as possible. The Honourable Chief Justice proceeded to name a Chief Magistrate and a Principal Magistrate to preside over the two Anti-Corruption Courts. The basis for the designation of those two Magistrates was stated as follows: “Both officers are senior and experienced Magistrates with proven, impeccable track records. I have no doubt they are squarely equal to the task ahead of them. What I ask for is the fullest co-operation from all players in the administration of criminal justice – the police, the prosecution, the prisons department, the bar and the general public, so that these Courts, and indeed, all other Courts, achieve their overall objective – speedy justice to all Kenyans”. The Honourable Chief Justice emphasised that the Anti-Corruption Courts were part of the regular Court system: “I do not, by these appointments ..., create a new class of Magistrates nor confer new jurisdictions. That I have no legal or constitutional power to do. The ranks of the Magistrates appointed remain what the Judicial Service Commission has conferred on them to-date and the jurisdiction remains what there is in the relevant statutes which prescribe criminal jurisdiction for Magistrates”. And which cases were to be heard by the Anti-Corruption Courts? Former Chief Justice Chunga referred this matter to a committee of judicial officers, and on the basis of the committee’s report, he stated that the cases to be brought before the Anti-Corruption Courts would be: (a) all cases under the Prevention of Corruption Act (Chapter 65, Laws of Kenya), now repealed (by section 70 of the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003); (b) some offences under the Penal Code (Chapter 63, Laws of Kenya); (c) some offences provided for under other legislation. The Chief Justice stated that it was not mandatory that all fraud cases be brought before the Anti-Corruption Courts, as they could very well be tried by Magistrates who were not serving in the Anti-Corruption Courts. He undertook to give more guidance on this matter through the issuance of a practice note, and noted that this was exactly the procedure which had been followed when the Commercial Division of the High Court was formed. In that case a committee had been set up, and on the basis of its recommendations, the Chief Justice then, the Honourable Mr Justice ZR Chesoni, issued a circular on the cases to be brought before the Commercial Division. Chief Justice Chunga thereafter issued a practice note on the subject, in the following terms: “Following the recent inauguration of Anti-Corruption Courts in Nairobi, it is hereby directed that the following classes of cases will be dealt with by the said Anti-Corruption Courts: (1) All cases under the Prevention of Corruption Act (Chapter 65, Laws of Kenya) whether jointly charged with counts under the statutes or otherwise. (2) All cases of stealing by persons in public service contrary to section 280 of the Penal Code (Chapter 63, Laws of Kenya). (3) All cases of false claims by persons employed in the public service contrary to section 100 of the Penal Code (Chapter 63, Laws of Kenya). (4) All cases of abuse of office contrary to section 101(1) and (2) of the Penal Code (Chapter 63, Laws of Kenya). (5) All cases of false certificates by public officers contrary to section 102 of the Penal Code (Chapter 63, Laws of Kenya). (6) All cases of fraudulent false accounting contrary to section 330 of the Penal Code (Chapter 63, Laws of Kenya). (7) All cases of conspiring to defraud contrary to section 317 of the Penal Code (Chapter 63, Laws of Kenya)”. It is within the framework of the said practice direction made by the Chief Justice that on 10 April 2003 the Applicant as First Accused and the Interested Party as Second Accused, were arraigned before the Anti-Corruption Court, being charged with offences under the Penal Code and appearing before a regular and duly qualified Magistrate who was serving within that Court. Later, on 30 April 2003 the Anti-Corruption and Economic Crimes Act (number 3 of 2003) was enacted, but it did not enter into force until 2 May 2003. Now it is only after the entry into force of Act number 3 of 2003 that the Applicant, on 22 July 2003 filed his constitutional reference by originating summons, challenging the entire process of his trial on a criminal charge; challenging the constitutionality of Act number 3 of 2003; impugning the constitutionality of the Anti-Corruption Court; disputing the jurisdiction of the trial Magistrates; challenging the legality of his trial before the Anti-Corruption Court; claiming that even charges otherwise proper under the Penal Code (Chapter 63), had been impliedly revoked; in effect, demanding that he be cleared of all criminal charges and all prosecution against him be terminated as a matter of constitutional right. And this, in substance, is the question that came before this Constitutional Court, and which we are today determining.

**Joinder of the Kenya Anti-Corruption Commission** The Court had, at the very beginning, to make an interim ruling on a chamber summons by the Kenya Anti-Corruption Commission dated 20 May 2004 and filed on the same day. This was a short application carrying just one substantive prayer: that the Applicant in the matter “be joined and added as a Respondent or other party to the Applicant’s originating summons dated and filed on 22 July 2003 in respect of the Constitutional Reference”. The basis of the application by the Kenya Anti-Corruption Commission to be joined in the proceedings was that, a determination of the questions raised in the present Applicant’s originating summons, would greatly affect the Commission, and thus it was “just and necessary that the Commission be permitted to be joined in ... as a Respondent, in order to enable the Constitutional Court to effectively and completely adjudicate upon, determine and settle all questions involved in the reference”. The Commission’s position was that it would be “directly affected by the outcome of reference no matter what it may be”. The Commission’s chamber summons application could not be heard on the first day, 24 May 2004; but it was heard on 25 May 2004 when Dr Githu *Muigai*, for the Commission, submitted that in the event the Commission was declared unconstitutional, as prayed by the originating summons of the Applicant, this would gravely affect current institutional arrangements for addressing the rampant scourge of questions such as: who may be joined; who may be served; who may file papers, etc. Dr *Muigai* submitted that this competence to determine who may be joined, or who may address the court, is an important power of the court which must be safeguarded. Counsel submitted that, unless there is a major prejudice to a particular party which is bound to be occasioned owing to another being joined in, then it will be right to allow joinder of the Applicant. Counsel invited the Court to issue new directions as to joinder of parties in constitutional references, on the basis of an analogy with the position applicable to judicial review proceedings under Order LIII, rule 3(2), which stipulates that leave granted for the commencement of such proceedings should be followed by a notice: “The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings”. We have seen clear merit in this proposition that in public law matters such as those falling under judicial review or constitutional reference, the High Court ought to satisfy itself that all persons who should be served with the trial papers and any supporting evidence, have been duly served. Counsel submitted, and we agree, that in public law applications of the type exemplified herein, it is desirable that the widest possible participation should be allowed. Dr *Muigai* proposed that in all situations, in such proceedings, where the interests of a party are likely to be affected, and consequently such a party has a genuine interest in joining in, the court should permit joinder where it is sought. This proposition was supported by the Supreme Court of Uganda case, *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] EA 55, in which the following pertinent remarks were made by Mulenga JSC: “In order for a person to be joined on the ground that his presence was necessary for the effective and complete settlement of all questions involved in the suit, it was necessary to show either that the records sought would legally affect the interests of that person and that it was desirable to have person joined to avoid a multiplicity of suits, or that the Defendant could not effectually set up a desired defence unless that person was joined or an order made that would bind that other person”. The foregoing passage spawns certain principles which are apposite to the joinder of parties in a constitutional reference such as the present one: (i) joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings; (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law; (iii) joinder to pre-empt a likely course of proliferated litigation. Mr *Alibhai* for the Kenya Anti-Corruption Commission urged that the discretion of the Court be exercised by virtue of Order I, rule 10(2), which provides as follows: “The court may at any stage of the proceedings, either upon or without the Application of either party, and on such terms as may appear to the court to be just, order that the name of any party ..., whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”. Counsel submitted that discretion accorded the Court by virtue of Order I, rule 10(2) should be exercised to join the Commission in the proceedings, on account of its major stake in the outcome of the constitutional reference. He noted that this approach already had the sanction of the Court, as exemplified by the case *Ruturi and another v Minister of Finance and another* [2001] 1 EA 253. Mr *Alibhai* submitted that since the constitutional reference was challenging the very foundation of the new institutional edifice for the fight against corruption, success by the Applicant in those proceedings would put the Kenya Anti-Corruption Commission out of business, and this would be contrary to the public interest; and in the circumstances, this was a fit case for the exercise of the Court’s discretion to join the Commission in the proceedings. Counsel submitted that the Constitution should be perceived as the foundation of the State and not a private matter; and hence the Applicant should not be allowed to appear to turn such an important constitutional matter into private litigation. He further submitted that the fact that the outcome of the constitutional reference could spell the death of the Kenya Anti-Corruption Commission, dictated that the Commission be accorded natural justice by being joined in and accorded a chance to speak for itself. The Director of Public Prosecutions, Mr *Murgor*, for his part stated that the Attorney-General fully associated himself with the chamber summons application by the Commission. Mr *Murgor* raised a concern, quite correctly in our view, that while the constitutional reference Applicant was disputing the Kenya Anti-Corruption Commission’s request to be joined in the proceedings, he had already joined in the Second Accused in Anti-Corruption Court case number 22 of 2003 as an interested party. The Learned Director of Public Prosecutions submitted that just as the said Second Accused had a genuine interest in the outcome of the constitutional reference, so was it also with the Kenya Anti-Corruption Commission. Mr *Bowry*, counsel for the Applicant in the originating summons, opposed the Kenya Anti-Corruption Commission’s application to be joined as a party to the proceedings; his main argument being that the Attorney-General’s appearance in the suit was sufficient for the protection of the public interest, and there was no need for the KACC to joined. Mr *Bowry* argued that the proceedings involved only the Accused and the State, and that this was essentially a criminal trial, with no role for interested parties. He further argued that, since the Applicant as the First Accused in criminal case number 22 of 2003 had been charged with a Penal Code offence, the joinder of the Kenya Anti-Corruption Commission as a party in the constitutional reference could only be a prosecutorial manipulation which was detrimental to the Applicant’s case. The Court, after considering the weight of the several submissions of counsel, made an interim ruling as follows: “The chamber summons application dated 20 May 2004 had a quite limited purpose; namely, to give consideration to the request by the Kenya Anti-Corruption Commission to be allowed to join the main proceedings, which is the originating summons dated 22 July 2003 in the capacity of a Respondent or other party. We have carefully considered the eloquent submissions of counsel on all sides, and formed a clear opinion on the appropriate decision. It certainly would take some time for us to set out a detailed ruling. To avoid any delay in the hearing of the main proceedings, we make the following orders: 1. T he Kenya Anti-Corruption Commission is permitted to be joined and added as a party having an interest in the main proceedings. 2. T he reasons for our decision shall be enumerated in the final judgment later”. It is necessary that we should give our reasons at this point for allowing the Kenya Anti-Corruption Commission to be joined as a party. We took note of the acknowledged fact that the investigations that led to the institution of criminal proceedings in the Anti-Corruption Court case number 22 of 2003 were conducted by the ACPU and, subsequently, by the Kenya Anti-Corruption Commission; of the fact that KACC was established under Act number 3 of 2003 and empowered (by section 73 of the Act) to take over the investigation functions hitherto conducted by the ACPU; of the fact that the KACC represented a new institutional arrangement designed to be part of the set-up for the protection of the public interest in relation to the scourge of corruption in public office; and of the fact that the very legality and indeed the existence of the KACC was being challenged by the Applicant. We considered these questions in the light of the case law brought to our attention, and the submissions made by counsel. Counsel also cited the Supreme Court of Canada case, *Her Majesty the Queen v Imre Finta* [1993] ISCR 1138, in which on a question of joinder of interest groups to ongoing proceedings, it was thus held: “Through either the people they represent or the mandate which they seek to uphold, these Applicants have a direct stake in Canada’s fulfilling its international legal obligations under customary and conventional international law. While the Court is often reluctant to grant intervener status to public interests groups in criminal appeals, exception can be made under its broad discretion where important public law issues are considered, as in this appeal”. We were satisfied that the Kenya Anti-Corruption Commission has demonstrated its legitimate interest in the originating summons proceedings, and accordingly we allowed the Commission’s joinder as a party. Our fundamental reasons for allowing joinder of the Kenya Anti-Corruption Commission were as follows. At a very basic level, this Court is empowered to draw from the Civil Procedure Rules in its exercise of powers under the Constitution of Kenya (Protection of Fundamental Right and Freedoms of the Individual) Practice and Procedure Rules (LN 133/2001). Now by virtue of Order I, rule 10(2), the court is empowered to direct joinder of parties in such a way as to “enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit”. Within this procedural framework, we considered it right that we should join the Kenya Anti-Corruption Commission, to the intent that its quite obvious stake in a constitutional reference that seeks to strike out the institutions set up to deal with the problem of corruption on public office, should be duly recognised. More fundamental, however, was our concern that constitutional litigation which touches on the public interest in such a central governance issue as corruption in public office, should not be restricted in its scope as a private matter, but should instead be opened up to all relevant stakeholders. We consider the Constitution as such a vital framework of governance that any litigation touching upon it, ought to involve any interested parties. So important is this principle that, in our view, the participation of interested parties in constitutional litigation should never be kept under the restrictions of any technical rules. As constitutional interpretations and litigation are important matters embraced by the High Court’s jurisdiction, we hold that this Court must retain a broad discretion for entertaining applications such as the one that has been brought by the Kenya Anti-Corruption Commission, by way of chamber summons. We have been quite clear in our minds, that the Kenya Anti-Corruption Commission ought to be joined as party, also for one basic reason that underlies the entire exercise of this Court’s jurisdiction: the principle of natural justice. We do not agree that the Kenya Anti-Corruption Commission could be subjected to circumstances leading to a possible death sentence, but without being allowed to speak. Natural justice, which is “an essential characteristic of any legal process” (page 127), simply means, to quote Professor JF Garner, *Administrative Law* (5 ed) (1979), that “the Judge must hear both sides, must give each party a chance to state his case, and any person who will or may be affected ... has a right to his day in court”. We have also taken into account the public interest. The functions of the Commission are set out in section 7 of the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003), and they include: investigating acts suspected to amount to corrupt conduct; investigating economic crime; assisting in the suppression of corruption; examining the practices and procedures of public bodies, with a view to limiting corrupt tendencies, etc. The success of such activities, as we recognise, will be in the best interests of the society at large. Consequently, we consider it to be only right that the Kenya Anti-Corruption Commission, which is entrusted with such an important public responsibility, should be accorded an opportunity to make its representations when its own existence is being challenged.

**The originating summons: submissions of counsel on the issues for determination** *(a) The Applicant’s case* As already noted, the Applicant when he appeared before the Principal Magistrate on 18 June 2003 had framed issues for determination as the gravamen of his constitutional reference. The Applicant then adopted those very same issues in the mode in which his counsel had framed them in his affidavit of 22 July 2003 as assertions of fact which he believed to be true. The course of submissions in court, however, has simplified the contentious issues and made it possible for us to see more clearly the real questions falling for determination. When the substantive proceedings began on 26 May 2004 Mr *Bowry* for the Applicant, of his own volition, made the assurance that he would not pursue any crusade against the anti-corruption struggle, but would endeavour to represent his client in the best way possible. He went ahead to challenge the constitutionality of the Anti-Corruption and Economic Crimes Act, 2003 (Act number 3 of 2003), in relation to the criminal case pending against the Applicant, Anti-Corruption Court case number 22 of 2003, even though he did acknowledge that the charges against the Applicant had been brought under the provisions of the Penal Code (Chapter 63), well before the enactment and entry into force of Act number 3 of 2003. Mr *Bowry* acknowledged that the criminal case against his client had been based on investigations conducted by the ACPU, under whose auspices prosecution had been instituted. He acknowledged that the Anti-Corruption Court, before which the criminal case had been instituted, had been set up by the Chief Justice before the enactment of Act number 3 of 2003, and that once the Act established the Kenya Anti-Corruption Commission, responsibility for investigations in relation to

Anti-Corruption case number 22 of 2003 was passed on to the Commission (section 73(1) of the Act).

Mr *Bowry* went on to argue that section 73(1) of the Anti-Corruption and Economic Crimes Act (Act

number 3 of 2003) was unconstitutional – because by this section, the powers of the Attorney-General and of the police were being transferred to a new agency. To support this submission, counsel cited the provision set out in section 26(4) of the Constitution, to wit:

“The Attorney-General may require the Commissioner of Police to investigate any matter which, in the

Attorney-General’s opinion, relates to any offence or alleged offence or suspected offence, and the

Commissioner shall comply with that requirement and shall report to the Attorney-General upon the investigation”.

In effect, counsel considered that the object of section 26(4) of the Constitution was to confer exclusive

powers of investigation and prosecution on two particular agencies of the State, namely the

Attorney-General and the Commissioner of Police; and consequently section 73(1) of Act number 3 of

2003 was, in his view, unconstitutional. Counsel indeed stated that had the investigations in question been conducted exclusively by the Anti-Corruption Police Unit, they could not have been challenged for unconstitutionality, because the hands of the Commissioner of Police were involved. Counsel extended challenge to other sections of Act number 3 of 2003, particularly section 7 which enumerated the functions of the Kenya Anti-Corruption Commission. The functions of the Kenya Anti-Corruption

Commission thus challenged were those set out under section 7(1)(*a*), (*b*), (*c*) and (*h*). Section 7(1) stipulates as follows:

“(*a*) To investigate any matter that, in the Commission’s opinion, raises a suspicion that any of the

following have occurred or are about to occur:

(i) conduct constituting corruption or economic crime;

(ii) conduct liable to allow, encourage or cause conduct constituting corruption or economic crime;

(*b*) To investigate the conduct of any person that, in the opinion of the Commission, is conducive to

corruption or economic crime;

(*c*) To assist any law enforcement agency of Kenya in the investigation of corruption or economic crime;

(*h*) To investigate the extent of liability for the loss of or damage to any public property and:

(i) To institute civil proceedings against any person for the recovery of such property or for

compensation; and

(ii) To recover such property or enforce an order for compensation even if the property is outside

Kenya or the assets that could be used to satisfy the order are outside Kenya”.

Mr *Bowry* maintained that the Constitution had vested such an investigative role exclusively in the

Attorney-General and the Commissioner of Police, and thus the Kenya Anti-Corruption Authority

(“KACA”) simply had no business dabbling in it. This argument occupied a considerable portion of counsel’s submission, even when he acknowledged that the Applicant had been charged under the Penal Code (Chapter 63) and not Act number 3 of 2003. We have preferred not to view the Applicant’s case as being, on that account, purely academic, but rather, to assess it on the merits and to render a decision on issues bearing on the Constitution as well as the ordinary law. Mr *Bowry*, in aid of his submission, set much store by the High Court constitutional case *Gachiengo v Republic* [2000] 1 EA 67. Although this case was decided by a three-judge Bench of this Court, counsel urged that, not only did it represent the authoritative legal position in Kenya, but we were in this case bound by it. Although we doubted that there was a basis for such a submission, we have preferred to seek out any findings of merit in the *Gachiengo* case which might be relied on by us, as we determine the outcome of these proceedings, bearing in mind the applicable facts and law. The Gachiengo case, the Constitution, and the legislative competence to make anti-corruption law The facts of the *Gachiengo* case were as follows: The two Applicants were charged before the Magistrate’s Court by the predecessor to the KACC, known as the Kenya Anti-Corruption Authority (“KACA”), with offences relating to abuse of office contrary to section 101(1) of the Penal Code (Chapter 63). Consent to prosecute was duly obtained from the Attorney-General, as required by section 101(3) of the Penal Code. When the matter came up for hearing, preliminary objections touching on the Constitution were raised, and the issue was referred to the High Court for determination. So far as is relevant to the present proceedings, the issues in the *Gachiengo* case were as follows: (i) Whether the Attorney-General’s consent to prosecute the Applicant was valid, and ( ii) Whether the establishment of KACA was contrary to the Constitution. It was urged for the Applicants that: KACA did not have the power to prosecute offences outside the Prevention of Corruption Act (Chapter 65) (now repealed by section 69 of the Anti-Corruption and Economic Crimes Act, 2003 (Act number 3 of 2003); and KACA was not under the Attorney-General’s control. Counsel representing KACA submitted that the validity of the Attorney-General’s consent was not a constitutional issue but one to be decided by the trial Magistrate, and that KACA as a prosecutorial body was subordinate to the Attorney-General, as it could only prosecute with his consent. The court in the *Gachiengo* case held as follows: (i) Sections 10 and 11B of the Prevention of Corruption Act were in direct conflict with section 26 of the Constitution, which provided that the Attorney-General was the principal legal adviser to the Government. ( ii) Sections 10 and 11b (5) curtailed the powers of the Commissioner of Police in an unconstitutional manner. The existence of KACA thus undermined the powers conferred on both the Attorney-General and the Commissioner of Police by the Constitution. The provisions establishing KACA were therefore inconsistent with the Constitution and by virtue of section 3 of the Constitution, those provisions were rendered void to the extent of that inconsistency. These holdings are more clearly perceived in the context of the words used by Mbogholi, Mitey and Mulwa JJ (at 71–72): “When section 11(*b*) was inserted into Chapter 65 the provisions of section 26 of the Constitution remained unamended. Under section 26 of the Constitution the Attorney-General is the principal legal adviser to the Government of Kenya. He has powers under the Constitution to institute and undertake proceedings against any person and to take over or discontinue criminal proceedings instituted or undertaken by any person or authority. Under section 26(4) the Attorney-General may require the Commissioner of Police to investigate a matter as relates to any offence. Section 11(*b*)(4) of Chapter 65 stipulates that in the performance of their functions the members of KACA shall have all the powers of a police officer of or above the rank of assistant superintendent of police. Section 11(*b*)(5) provides that the director of KACA may assume responsibility for any investigation or prosecution commenced by the police. Section 10 of Chapter 65 gives powers to the director of KACA to cause a police officer to investigate any bank account, share account or purchase account or any person ... From the foregoing, it is crystal-clear that section 10 and section 11B of Chapter 65 are in direct conflict with section 26 of the Constitution. Whether or not KACA purports to act under the direction of the Attorney-General in relation to prosecution, the exercise of powers under section 11(*b*) of Chapter 65 offends the Constitution. By alienating powers conferred upon him by the Constitution the Attorney-General was being escapist and it is a mark of abdication of responsibilities bestowed on him by the Constitution. He should not have abdicated his duty to render the desired legal advice. The powers of the Commissioner of Police have been curtailed by section 10 and section 3(*b*)(5) of (Chapter 5). That is unconstitutional”. The holding is more clearly set out in the following paragraph (at 74): “The end result of the foregoing is that, we uphold the submissions that the provisions in (Chapter 65) establishing KACA are unconstitutional and in conflict with the spirit and provisions of the Constitution especially section 26 thereof”. Mr *Bowry* for the Applicant did not however, attempt to persuade the Court that the Constitution requires the Attorney-General to personally or by his office, conduct all litigation in the country, or that the Commissioner of Police had a monopoly on all criminal investigations, and neither did he very well explain the operation of investigations and prosecutions that are provided for in a different manner in many statutes in force. Therefore, we have been unable to consider ourselves bound by the *Gachiengo* case. Mr *Bowry* admitted, and rightly, with respect, that the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003) is not on all fours with the repealed Prevention of Corruption Act (Chapter 65) which had provided for KACA. In particular counsel acknowledged that the new Act provides for investigatory, but not prosecutorial functions entrusted to the Kenya Anti-Corruption Commission. But he still maintained, on the authority of *Gachiengo*, that all criminal investigations in the country must, under the Constitution, be attributed to the Commissioner of Police and no one else; and consequently he maintained that it was unconstitutional for KACC to exercise investigative functions as provided for under sections 7 and 73 of Act number 3 of 2003. Mr *Bowry* submitted that the formulation of a Bill bearing the title “The Constitution of Kenya (Amendment) Bill of 2003” published in the *Kenya Gazette Supplement* of 15 January 2003 which Bill was then not taken through Parliament, proved the unconstitutionality of the Anti-Corruption and Economic Crimes Act of 2003 (Act number 3 of 2003). The said Bill had sought to introduce a Chapter VIIIA into the Constitution, entitled “Corruption and Economic Crime”, and in this Chapter provisions were to be made for interpretations; establishment of the Kenya Anti-Corruption Commission; functions of the Commission; Director and staff of the Commission; Deputy Director of the Commission; independence of the Commission and of its Director; establishment of an advisory board; functions of the advisory board; independence of the advisory board; powers exercisable against corruption and economic crime; and powers of Parliament to prescribe any further matters. Attached to this unlegislated Bill was a Memorandum of Objects and Reasons prepared by the Minister for Justice and Constitutional Affairs which stated as follows: “The principal object of the Bill is to make provision in the Constitution for the establishment of the Kenya Anti-Corruption Commission and to invest the Commission with constitutional powers of investigation and prosecution of offences of corruption and economic crime by public officers”. Mr *Bowry* called the Court’s attention to an opinion expressed by Prof Kivutha Kibwana in the *Daily Nation* of 14 February 2003 in the aftermath of the publication of the Constitutional Amendment Bill aforesaid. The author’s opinion went as follows: “To demonstrate NARC’s commitment to waging the Anti-Corruption war and to fulfil one crucial Bretton Woods condition for resuming aid, the governing party has proposed three maiden Anti-Corruption laws. These are: the Constitution of Kenya (Amendment) Bill, the Anti-Corruption and Economic Crimes Bill and the Public Officer Ethics Bill which all promise an effective fire-power for combating corruption. “... The following are the highlights of the legal Anti-Corruption agenda: (i) The Constitution of Kenya (Amendment) Bill, 2003 endeavours to lay down a constitutional framework for the Anti-Corruption legislative agenda; ( ii) An effective investigatory framework for corruption offences is established, and an independent commission to tackle corruption issues proposed; (iii) For the first time in Kenya’s legal history, corruption and economic offences are defined; (iv) An appropriate punishment for corruption is provided for, including forfeiture ... of unexplained assets and stolen public funds and compensation to affected person”. Counsel has relied on this opinion to argue that as the Constitutional Amendment Bill did not become law while the Anti-Corruption and Economic Crimes Act did, this Act is necessarily unconstitutional. In Mr *Bowry*’s own words: “If this Constitutional Bill had seen the light of day and become law, I would have no problem, as it is, Act number 3 of 2003 is unconstitutional”. We have, however, found Mr *Bowry*’s submission on this issue to be both unduly broad and rather conjectural. As already noted, the prosecution of the Applicant, which is the bone of contention in these proceedings, falls squarely within the framework of the Penal Code (Chapter 63), the constitutionality of which has not been impugned. Secondly, counsel has presented hardly any cogent argument demonstrating that the non-legislation of Constitution of Kenya (Amendment) Bill while the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003) was duly enacted, necessarily compromised the constitutionality of the latter. Such is an argument, with respect, purely of form, whereas we would have preferred a specific indication of the elements in the Act which ran afoul of identified provisions of the Constitution. This has not been done and so the Court cannot uphold the argument. Counsel for the Applicant challenged the mode of transfer of powers from the Anti-Corruption Police Unit to the Kenya Anti-Corruption Commission, under section 73 of Act number 3 of 2003. He argued that since at some stage the ACPU was the investigator, the transfer of its functions meant that the KACC was exercising investigative powers, and that this was unconstitutional because these powers are a monopoly of the Commissioner of Police. Now the establishment of the ACPU was done by the Commissioner of Police on 13 September 2001 and the relevant directive reads as follows: “The function of the Anti-Corruption Police Unit is to investigate all corruption and corruption-related offences either at their own initiative or as directed by the Attorney-General and/or the Commissioner of Police”. It is quite clear that the ACPU’s functions centred on investigation; and thus we are unable, with great respect, to see the basis of Mr *Bowry*’s argument. Mr *Bowry*’s submission regarding the exercise of prosecutorial powers was sought to be fortified by citing the case *Gachiengo v Republic* [2000] 1 EA 67 but we thought it was better to identify specific facts or events to show that, indeed, the ACPU was exercising prosecutorial powers, and that these were transferred to the KACC. Counsel for the Applicant challenged section 5(1) of the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003) on the contention that it was in conflict with section 27 of the Constitution. Section 5(1) aforesaid provides as follows: “A special Magistrate may, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstance within his knowledge relating to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof and any pardon so tendered shall be a pardon for purposes of section 77 (6) of the Constitution”. Section 77(6) of the Constitution stipulates: “No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence”. Now, does that notion of pardon come within the terms of section 27 of the Constitution? We do not, with respect, think so. Section 27 bears the marginal note “prerogative of mercy”, and empowers the President acting on the advice of the Advisory Committee on the Prerogative of Mercy (section 28), to do the following: “(a) grant to a person convicted of an offence a pardon, either free or subject to lawful conditions; (b) grant to a person a respite, either indefinite or for a specified period, of the execution of a punishment imposed on that person for an offence; (c) substitute a less severe form of punishment for a punishment imposed on a person for an offence; (d) remit the whole or part of a punishment imposed on a person for an offence or of a penalty or forfeiture otherwise due to the Republic on account of an offence”. It is quite plain to us that no conflict exists between the provisions of section 5(1) of Act number 3 of 2003, which section is concerned to achieve efficiency in the process of taking evidence in relation to charges of corruption, and section 27 of the Constitution which relates to the President’s dispensation of mercy for persons already bearing the brunt of punishment meted out by the courts. Counsel for the Applicant impugned Act number 3 of 2003 on the basis that section 3 thereof makes provision for the designation of special magistrates to try cases of corruption. While as correctly pointed out by Mr *Bowry*, the marginal note to the said section 3 has a malapropism, the content of the section is clear: “(1) The Judicial Service Commission may, by notification in the *Kenya Gazette*, appoint as many special Magistrates as may be necessary for such area or areas or for such case or group of cases as may be specified in the notification to try the following offences, namely: ( *a*) a ny offence punishable under this Act, and ( *b*) a ny conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in paragraph (*a*). (2) A person shall not be qualified for appointment as a special Magistrate under this Act unless he is or has been a Chief Magistrate or a Principal Magistrate or an advocate of at least ten years’ standing”. Counsel’s argument was that any appointment thus made under section 3(1) of Act number 3 of 2003 was a nullity because it was establishing a new, unknown category of magistrates called special magistrates, not to mention the fact that the marginal note to the section read: “Power to appoint special judges”. Mr *Bowry* made much of this marginal note, and submitted that it was unconstitutional to appoint “special judges”. He cited in aid, *In the Estate of Visram and Kurji Karsan v Shankerprasad Maganial Bhatt and others* [1965] EA 789, in which the Court of Appeal held: “The marginal notes to sections in Kenya Acts should be considered when interpreting the Act and in particular the Court should have regard to the word “patent” in the marginal note to section 99 of the Evidence Act of 1963”. Our understanding is that the above authority was counsel’s basis for impeaching section 3 of the Act number 3 of 2003; but since the content of that section is squarely concerned with magistrates, we think the term “judges” in the marginal note was an error, indeed a minor one to which we shall apply the well known principle of law, *de minimis non curat lex*. It will fall to the Attorney-General and the Kenya Law Reform Commission to ensure a rectification of such errors. Although counsel conceded that section 69 of the Constitution duly empowered the Judicial Service Commission to make appointments of the various categories of magistrates, he still maintained that it was unconstitutional to name some magistrates “special magistrates,” because this created the impression that they were the purveyors of a certain category of justice entirely different from justice as commonly known, a category of justice that was imbued with an objectionable stigma. In Mr *Bowry*’s own words: “This legislation is likely to create a doubt in the mind of any person about these (that is the Anti-Corruption) Courts”. This attack on the position of special magistrates to dispense justice at the Anti-Corruption Courts, quite clearly, was a generalised assault not just on the magistrates and the Courts themselves, but also on the entire regime of the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003). In our view, an attack so broadly aimed should not lend itself to the Court’s concurrence; firstly because counsel has a duty to prosecute the case only on the basis of the specific grievances of his client; secondly because the legislative mandate of Parliament, which is clearly spelt out in section 30 of the Constitution, ought in principle to be given fulfilment, of course, subject to the constitutional document itself; and thirdly, because the fulfilment of Parliament’s legislative mandate necessary entails the establishment of new institutions of implementation, such as the Kenya Anti-Corruption Commission and the parallel support structures within the Court and the police. Mr *Bowry* devoted a substantial part of his submission to the notion that the Anti-Corruption Courts represent a new set of arrangements in the administration of justice which introduces bias and stigma in the path of persons such as his client. He cited facts such as the corridor signs leading to the Anti-Corruption Court; the differentiations in the registry units, with one dedicated to anti-corruption cases; the different numbering systems for the files, *et cetera*. Counsel submitted that the effect of these innovations was to change the wonted concept of criminal jurisprudence. He contended that the term “special magistrate” was not used in the Constitution, and so his client was reluctant to appear before a new breed of magistrates, before whom justice would be unavailable. He objected to the provisions of section 4 (bearing the marginal note “special magistrates”) which provides in sub-section (3): “When trying any case, a special magistrate may also try *any offence other than an offence specified in this Act* with which the accused may, under the Criminal Procedure Code, be charged at the same trial”. Mr *Bowry* argued that this provision gives the special magistrate more powers than other magistrates. In his words: “An accused appearing before a special magistrate is exposed to bias, viewed from the standpoint of the accused”. Counsel’s attack on Act number 3 of 2003 also focussed on section 58, which relates to presumptions made in the course of trial. The section reads: “If a person is accused of an offence under Part V an element of which is that an act was done corruptly and the accused person is proved to have done that act the person shall be presumed to have done that act corruptly unless the contrary is proved”. Mr *Bowry* argued that section 58 was unconstitutional because it had the effect of eroding the presumption of innocence. Counsel also attributed unconstitutionality to the fact that the offence in section 101 of the Penal Code (Chapter 63), with which the Applicant was charged, was abuse of office, and this same offence was replicated in section 46 of Act number 3 of 2003 which bore the marginal note “Abuse of Office” and specifically stipulated: “Any person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence”. Mr *Bowry* contended that the apparent replication of the Penal Code offence under Act number 3 of 2003, and the fact that the forum of trial was the Anti-Corruption Court, necessarily meant that the Penal Code offence had been repealed, and the only offence now in place was the anti-corruption one which, because of the flaw in the legal framework allegedly introduced by an unconstitutional Act, an unconstitutional Anti-Corruption Court and unconstitutional special magistrates, was therefore a nullity and so the Court should declare the Applicant a free man. Mr *Bowry* was obviously making a quite eloquent point, even though he did not, with respect, take the Court through its essential logic. If an offence was described as abuse of office under section 101 of the Penal Code, did this bar the use of that description in any other of the numerous parliamentary enactments that prescribe offences? And of course, as already remarked in this judgment, we have found some difficulty with a generalised line of attack on a duly enacted statute which is designed to achieve a clear goal of public interest, such as the Anti-Corruption and Economic Crimes Act number 3 of 2003. Counsel submitted that while “abuse of office” was the typification of the offence facing the Applicant under both the Penal Code and Act number 3 of 2003, the penalties prescribed under the two statutes were different. Section 101 of the Penal Code (Chapter 63) thus provides: “(1) Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a misdemeanour. (2) If the act is done or directed to be done for the purpose of gain, he is guilty of a felony and is liable to imprisonment for three years”. He argued that one of the abuse of office provisions (that in Act number 3 of 2003) had the effect of repealing the other. In aid of this argument, counsel cited *Craies on Statute Law*, (7 ed) (1999) page 366: “Where two Acts are inconsistent or repugnant, the latter will be read as having impliedly repealed the earlier. The Court leans against implying a repeal, ‘unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied. Special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together”. In our view, the foregoing passage would not support counsel’s argument that the Penal Code offence brought against his client has been repealed by section 46 of the Anti-Corruption and Economic Crimes Act (number 3 of 2003). In the alternative, we have taken note that part of the Applicant’s case is that the Act number 3 of 2003 is unconstitutional; but if it is, then surely it could not repeal the offence provided for in section 101 of the Penal Code (Chapter 63); and the result is that whatever the case may be, the offence under section 101 of the Penal Code remains valid in law. Counsel for the Applicant further disputed the possibility that the charge against the Applicant under the Penal Code could be sustained any further, by submitting that a Penal Code offence could not be tried outside the framework of the Criminal Procedure Code. He argued that the word “investigate” as understood under section 3(1) of the Criminal Procedure Code (Chapter 75) contemplates only the Penal Code offences; and therefore “investigation” such as might have been conducted within the framework of Act number 3 of 2003, did not fall in line with any possible prosecution under the Penal Code (Chapter 63). In the words of Mr *Bowry*: “Investigation by the Anti-Corruption Police Unit was alright. But now the investigative process has shifted. Investigation is a continuing process, and involves taking additional statements, etc. The predicament of the Applicant is that if he had been charged in ordinary courts, and not in the Anti-Corruption Courts, we would have had no problem with it. Section 3(1) of the CPC is breached. My client should have been charged only within the framework of that section. KACC has no business investigating a Penal Code offence. KACC’s investigative powers are unconstitutional. The lack the powers, but they are pretending to have them. As KACC lacks investigative powers, its actions are constitutionally void”. From the submission of counsel, it is quite clear that, not only does the Applicant seek the nullification of Act number 3 of 2003, but he also seeks free release from the net of the Penal Code offence set out in section 101. In effect, the burden of the submissions on the legal technicalities surrounding the criminal offences, as set out in both the Penal Code (Chapter 63) and the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003), is to arrive at a declaration that the Applicant be spared any form of trial whatever. Counsel addressed the Court on the term “corruption” as defined in section 2 of Act number 3 of 2003. “Corruption” is defined as: “(*a*) any offence under any of the provisions of section 39 (bribing agents), 44 (bid rigging), 46 (abuse of office) and 47 (dealing with suspect property): (*b*) bribery; (*c*) fraud; (*d*) embezzlement or misappropriation of public funds; (*e*) abuse of office; (f ) breach of trust; (*g*) an offence involving dishonesty: (i) in connection with any tax, rate or impost levied under any Act; or (ii) under any written law relating to the elections of persons to public office”. He contended that the effect of this new definition of corruption was to give a new complexion to an old offence, with enhanced punishment, and with lower standards of evidence. He challenged in particular section 57 of Act number 3 of 2003, which relates to “unexplained assets”. Section 57(1) states that: “unexplained assets may be taken by the Court as corroboration that a person accused of corruption or economic crime received a benefit”. From this line of attack on new legislative arrangements for addressing the scourge of corruption in public office, it was quite clear to us that the operative constitutional norm had become the forum for resolving conflicts between new and old values. Counsel was clearly taking the position that the constitutional norm must always erect safeguards around accrued property, and that it was illegal and unconstitutional to so interpret the Constitution as to create space for accountability questions regarding property claims. To validate his submission in this regard, counsel saw as the final word the content of section 77(1) and (2) of the Constitution. The relevant provisions read as follows: “(1) If a person is charge with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law. (2) Every person who is charged with a criminal offence– ( a) s hall be presumed to be innocent until he is proved or has pleaded guilty”. Mr *Bowry* for the Applicant urged that the criminal proceedings be terminated. He challenged the Anti-Corruption Courts as illegal and submitted that his lordship the Chief Justice had no authority to set up such Courts. Counsel argued that the mere fact of bringing the Applicant before the Anti-Corruption Court had contaminated the Applicant with a foul judicial process which will at all times deny him the appearance of justice in the matter in question. Mr *Bowry* contended that the trial of the Applicant amounted to a misuse of the criminal process, and on this point he cited Andrew L-T Choo’s article entitled “Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited”, published in *Criminal Law Review* [1995] pages 864–874. At pages 866–67 the author writes: “The courts regard misuse of the criminal process, or evidence that the prosecution has been launched for an improper purpose, as being capable of justifying a stay of proceedings. *Mala fides* on the part of the prosecution may justify a stay in the interest of protecting the moral integrity of the criminal process, even if there is no suggestion that a fair trial is rendered impossible by the actions of the prosecution. Conversely, the lack of *mala fides* has often been cited as a reason for not invoking the abuse of process doctrine”. Mr *Bowry* argued that the enactment of Act number 3 of 203 was an afterthought, which was intended to legalise the prosecution of the Applicant before the Anti-Corruption Courts which had been set up by the Chief Justice. However, the cogency of this argument was, in our view, unclear, as counsel did not endeavour to demonstrate that Parliament, when it enacted the anti-corruption law, was not just performing its required mandate of law-making as authorised under section 30 of the Constitution; nor indeed did he contend that the action taken by the Chief Justice was any different from that of seeking better management arrangements for the trial process. Indeed, counsel’s submission on this point appeared somewhat cryptic; in his words: “The legislation was made for the purpose of dealing with a particular class. My client took the brunt of that abuse. The Chief Justice had no business setting up Courts for the purpose of dealing with corruption. This was a discriminatory exposure to injustice for a particular part of the country. An offence of abuse of office is converted into an offence of corruption. My client was branded a corrupt person”. *(b) The Respondent’s case* Mr Murgor, the Director of Public Prosecutions, opened the Respondents’ case by presenting his opposition to the constitutional reference. He began by showing a flaw in the setting for the Gachiengo case the principal authority which the Applicant had sought to rely on: namely that an unfounded supposition had been given currency in that case, that some rivalry in the exercise of the investigative and prosecutorial jurisdiction existed between the Attorney-General and KACA (the predecessor of the KACC), and further, that the Attorney-General had not been accorded an opportunity to be heard. The DPP indicated that, in the instant case, both the Attorney-General and the KACC were appearing in their separate capacities, but that there was no competition between the two for the exercise of any powers under the Constitution, the Criminal Procedure Code or the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003). Mr *Murgor* submitted, quite contrary to the contention of Mr *Bowry*, that the Anti-Corruption Courts were not at all a new class of courts, but had been set up as a management device by the Chief Justice, entirely within the existing arrangements in the court system. Mr *Murgor* stated that the Chief Justice had taken this action in the same way as he has done in the past, establishing the various operational Divisions of the High Court, to provide better case management and to ensure more effective administration of the courts. He noted that no new class of magistrates had been created, and the very same magistrates who are duly appointed by the Judicial Service Commission, by virtue of section 69 of the Constitution, are the ones who have been named to perform the special tasks of presiding over the Anti-Corruption Courts. Mr *Murgor* noted that the Chief Justice had set out some of the relevant matters falling within the jurisdiction of the special magistrates and some of the relevant matters are provided for under the Penal Code, others in the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003), and yet others are provided for in the other statutes. The Director of Public Prosecutions stated that the charges against the Applicant, which were the reason for the constitutional reference, were the subject of prosecution by the Honourable the Attorney-General, rather than by KACC, and the charges were being brought under section 101 of the Penal Code, rather than under Act number 3 of 2003. The charges in question were filed in the registry of the Chief/Resident Magistrate in charge of the Anti-Corruption Court. The conduct of prosecution was in the hands of Ms Emily *Kamau* and Mrs Alice *Ondieki*, both Principal State Counsel in the Attorney-General’s chambers. The presiding magistrate was Mrs Maureen Odero, the Principal Magistrate responsible for work at the Anti-Corruption Court. The Anti-Corruption Courts had been established by the then Chief Justice, Mr Justice Bernard Chunga in his administrative capacity, as provided for in section 13(2) of the Magistrates’ Courts Act (Chapter 10), on 25 April 2002. Mr *Murgor* addressed the Applicant’s case under the following headings, coinciding with the trial issues as earlier defined: (i) whether the Anti-Corruption Court is a Court known to law, and whether it is consistent with the Constitution of Kenya; ( ii) whether the trial Magistrate in Anti-Corruption Court criminal case number 22 of 2003 is a Magistrate known to law, and whether the Magistrate can try the matter in the context of Act number 3 of 2003; (iii) whether the accused is likely to be denied the presumption of innocence secured by section 77(2)(a) of the Constitution; (iv) whether the Applicant is likely to be denied a fair trial by an independent and impartial Court, and whether the charges against the accused are against the principles of natural justice; (v) whether the prosecutor has lawful authority to prosecute the matter, and whether section 26 of the Constitution has been breached, to the detriment of the Applicant; (vi) whether the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003 is unconstitutional in form and application; ( vii) whether, following the enactment of Act number 3 of 2003, (a) valid charges against the Applicant still exist; (b) the charges preferred against the Applicant are null and void; (c) the charges are based on impliedly repealed legislation; (d) the accused can be tried in the Subordinate Courts; (viii) w hether the proceedings in the trial Court are an abuse of Court process. On the first two issues, that is (i) whether the Anti-Corruption Court is a court known to law and consistent with the Constitution, and (ii) whether the Magistrate is known to law and is able to try the matter under Act number 3 of 2003, Mr *Murgor* made the following submissions. The Anti-Corruption Courts are part and parcel of Kenya’s subordinate court system, and in particular part of the Magistrates’ Courts Act (Chapter 10). These Courts were expressly so designated by the former Chief Justice, when he set them up. The magistrates presiding in these Courts derive their jurisdiction from the said Act and not from the Chief Justice, and besides, they could still try other matters by virtue of the jurisdiction conferred by statute. This position remained the same even after Act number 3 of 2003 created the positions of special magistrates. There is justification in the selection of matters to be tried by the Anti-Corruption Courts: they invariably share the common element of fraud upon the public of the Government, and they raise the need for trial by experienced magistrates. On this account, the Applicant’s contention that if he is tried, then he be tried only in the ordinary Magistrate’s Court, lacks merit. Mr *Murgor* further submitted that if indeed there was a stigma attaching to “Anti-Corruption Courts”, then it would attach also to the well established Chief Magistrate’s Court at the Nairobi Law Courts which tries criminal cases only even though no complaint has been raised about this. On the next two issues, namely (i) whether the constitutional presumption of innocence will be negated, and (ii) whether fair trial and natural justice will be denied, Mr *Murgor* made submissions as follows. While the Constitution (section (2)) does indeed guarantee presumption of innocence until guilt is proved, this is not inconsistent with the mode of proof well recognised at common law, in which, even as the legal burden remains constant, the evidential burden keeps shifting and when and to the extent this falls upon the accused, as dependent on the particular kind of case, it is only right and lawful that the accused should discharge and parry off that burden. Whether the Applicant will be found guilty or not is a matter to be determined by the trial court after the prosecution has adduced its evidence. At the trial, the accused is accorded facilities for the preparation of his case, including the right of access to witness statements (subject to lawful exceptions), the right to examine the prosecution’s witnesses, and the right to present his evidence in his defence and also call witnesses. The Anti-Corruption Courts are an integral part of the subordinate court system. The Attorney-General has the constitutional responsibility of preferring criminal charges against any person reasonably suspected of having committed a criminal offence; and arraignment in court of persons suspected to have committed an offence is part of the criminal justice system. Mr *Murgor* submitted, and quite correctly, with respect, that the Applicant’s contention that the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003) has shifted the burden of proof from the prosecution to the defence, and hence violated the Applicant’s right to be presumed innocent until guilt is proved, is a rather extravagant one, in view of the fact that the Applicant is charged with the offence of abuse of office under the Penal Code and not under Act number 3 of 2003. As regards the fifth issue, that is, whether in the light of section 26 of the Constitution the Prosecutor in the Anti-Corruption Court has lawful authority to prosecute, the Director of Public Prosecutions, quite correctly, with respect, submitted that the Applicant’s claim lacks a foundation, as the Attorney-General is the one prosecuting the case, through the State Counsel from his chambers. The mere fact that Act number 3 of 2003 provides for the punishment of corruption does not imply that the pending prosecution is being undertaken by the Kenya Anti-Corruption Commission. On the sixth issue, that is “whether the Anti-Corruption and Economic Crimes Act is unconstitutional”, Mr *Murgor* made the following submissions. The Act in question was enacted by Parliament pursuant to its legislative power as granted under section 30 of the Constitution of Kenya. This legislative measure was taken in recognition of the fact that corruption and kindred offences have become a serious threat to the development of the country, and commensurate sentences were imposed, to deal with the mischief. We are in agreement with the learned Director of Public Prosecutions, that a blanket charge of unconstitutionality such as is claimed by the Applicant, is improper, and a more convincing case could be made by isolating the provisions impugned as unconstitutional, and demonstrating how they relate to the criminal case that led to these proceedings. The Director of Public Prosecutions observed, correctly, in our view, that there was no conflict between the provision in section 5(1) of Act number 3 of 2003, on the one hand, and section 27 of the Constitution, on the other: “In any event, the powers given to the Special Magistrates are exercisable before conviction, whereas the prerogative of mercy by the President is exercisable after conviction”. With regard to KACC’s power of investigation under Act number 3 of 2003, Mr *Murgor* submitted, and we are in agreement, that investigative powers are not the preserve of the Commissioner of Police under the Constitution. The Commissioner of Police derives investigative powers from the Police Act (Chapter 84), and not from the Constitution. There are indeed other bodies which are involved in investigative duties preparatory to criminal law enforcement, and they derive their mandate from the respective enactments setting them up; and this applies for instance to the Immigration Department; the Kenya Revenue Authority; the local authorities; and public health officials. Section 26(4) of the Constitution stipulates that the Attorney-General can direct the Commissioner of Police to carry out investigations and to report back to him; and this does not demonstrate that the powers of investigation belong exclusively to the Commissioner of Police; and we also note that there is no express provision vesting such powers in him in the Constitution. With regard to the seventh issues, that is whether today valid charges still exist against the Applicant and whether the Applicant may be tried in the subordinate courts, Mr *Murgor* made submissions as follows: The Applicant had been charged under section 101(1) of the Penal Code (Chapter 63), and that provision of the law remains in force and has not been repealed expressly or impliedly. While it is true that Act number 3 of 2003 does create an offence known as “abuse of office”, its content is different from that of abuse of office as provided for under section 101 of the Penal Code. The two categories of the offence of abuse of office are different from each other. We agree with Mr *Murgor*’s submission that, under the Penal Code, prejudice is a necessary ingredient of the offence, whereas under Act number 3 of 2003, prejudice is not a necessary ingredient. The fact that Act number 3 of 2003 has created a similar offence does not imply that this Act repealed section 101(1) of the Penal Code. Parliament is to be presumed to have known of the existence of the offence under the Penal Code (Chapter 63), when it made a provision of an offence of a similar description under Act number 3 of 2003. Mr *Murgor* cited in support of his submission the work *Principles of Statutory Interpretation* (7 ed) by GP Singh J. The earned author thus writes: “There is a presumption against a repeal by implication; and the reason (for) this rule is based on the theory that the Legislature while enacting a law has complete knowledge of the existing laws on the same subject-matter, and therefore, when it does not provide a repealing provision, it gives out an intention not to repeal the existing legislation”. Mr *Murgor* acknowledged that it is an established principle of constitutional law that one is not to be punished twice for the same offence; and consequently the Applicant, who has only been charged under the Penal Code, should not seek to rely on the hypothesis of a possible application to himself of Act number 3 of 2003, and only for the purpose of avoiding the processes of the criminal law. For emphasis, Mr *Murgor* referred also to *Halsbury’s Law of England* (4 ed) Volume 44(1). The following passage at paragraph 1299 is relevant: “An intention to repeal an Act or enactment may be inferred from the nature of the provision made by the later enactment. Repeal by implication cannot be prohibited, but such an implication is found by the Courts with reluctance because the precision of modern drafting means that necessary repeals are usually effected expressly. The rule is, therefore, that one provision repeals another by implication if, but only if, it is so inconsistent with or repugnant to that other that the two are incapable of standing together”. Bearing the same tenor and effect is the East Africa Court of Appeal case *Ismail v Republic* [1963] EA 55. Section 77(8) of the Constitution provides that “No person shall be convicted of a criminal offence unless that offence is defined, and the penalty therefor is prescribed in a written law”. Mr *Murgor* submitted that this provision would clearly give legitimacy to the charges pending against the Applicant. The offence of abuse of office is duly provided for under the Penal Code (Chapter 63), and the penalty therefor expressly prescribed. It was further submitted that even if it were to be held that section 101(1) of the Penal Code had been impliedly repealed by section 46 of the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003), such repeal could not affect the charges now facing the Applicant; for, under section 23(3)(*e*) of the Interpretation and General Provisions Act (Chapter 2) a repeal does not invalidate an investigation or proceedings on acts committed prior to the repeal. In *Republic v Fisher* [1969] 1 All ER the English Court of Appeal had to deal with a similar situation, and thus held (at 102): “It is not disputed that the Appellant committed this offence on 28 October 1967, nor is it disputed that it he was amenable to the criminal law he was properly convicted an punished. Does the Criminal Law Act 1967 operate to give an amnesty to the Appellant and all like him who for one reason or another had not been indicated before 1 January 1968?” The Court went on as follows (at 103) “We are satisfied that the offence did exist at the time the Appellant committed it, and that the statutory provisions providing for its indictment and punishment remain in force. We conclude by saying that without the clearest words we cannot think that Parliament intended that accessories after the fact to serious crime ... in the latter part of 1967 should not be guilty of any offence”. On the basis of such authority, Mr *Murgor* submitted, and we would agree, that section 101(1) of the Penal Code which creates the offence of abuse of office, is still the law of the land, and the charges are therefore valid. The Learned Director of Public Prosecutions submitted that the Applicant was properly before the subordinate court trying him; that the Magistrate’s jurisdiction was derived from the Magistrates’ Courts Act (Chapter 10); and there was no merit in the Applicant’s claim that he could only be tried by the ordinary Magistrate’s Court or only by the High Court relying on section 3(1) of Act number 3 of 2003. Mr *Murgor* submitted that even if it was assumed that there was a conflict between section 101 of the Penal Code (Chapter 63) and section 46 of the Anti-Corruption and Economic Crimes Act, this would be a straightforward matter of conflicting statutory provisions and would not be a proper matter for constitutional reference. The Court of Appeal has had occasion to rule on this kind of matter in *Oweggi v Republic* criminal application number 5 of 1993 Nairobi: “According to the Applicant his plea for Constitutional Court was made pursuant to section 67(1) of the Constitutional Court was made pursuant to section 67(1) of the Constitution. (That section) can only be invoked where any question as to the interpretation of the Constitution itself arises in any proceedings in any Subordinate Court. As far as we can discern from the record, no question arose in the Magistrate’s Court as to the interpretation of the Constitution, and which section was to be interpreted. What arose in the Magistrate’s Court was the alleged conflict between section 80 of the Advocates Act and section 283 of the Penal Code. A conflict between two Acts of Parliament is not a matter requiring the interpretation of the Constitution”. It is not our finding that section 101 of the Penal Code and section 46 of Act number 3 of 2003 are in conflict, nor that the latter has repealed the former. On the eighth issue, whether the trial proceedings before the subordinate court are an abuse of court process, the Director of Public Prosecutions made submissions as follow. An abuse of the Court’s process would, in general, arise where the Court is being used for improper purposes, as a means of vexation and oppression, or for ulterior purposes; that is to say, court process is being misused. The proceedings, in such a case, should be shown to be frivolous, vexatious or harassing, or groundless and not based on law. But in the instant case it is common cause that investigations into the alleged offence had been conducted, culminating in the arraignment of the Applicant in Court, with specific charges laid. The Learned Director of Public Prosecutions submitted, and quite correctly, with respect, that the burden lay on the Applicant to demonstrate *mala fides* on the prosecution’s part, or to show clear instances of prejudice or unfairness towards the Applicant. Mr *Murgor* submitted, again correctly, with respect, that the Applicant, in order to demonstrate that the criminal proceedings in question are an abuse of court process, would have to show the nexus between his claim and the enforcement of the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003); that he was being subjected to a system of justice that was guided by procedures repugnant to the procedures in operation in the Courts in general; or that he was being prosecuted under the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003) when this should not be so. Mr *Murgor* submitted that the Applicant has neither vindicated himself on those terms, nor shown how his constitutional rights have been breached. Mr *Murgor* submitted that the Applicant had raised only generalised complaints, but then contended that these are not a sufficient basis for challenging the very constitutionality of the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003). Mr *Murgor* submitted and with considerable justification, with respect, that it was precisely such broad-based grievances that had loomed large in the primary case the Applicant was relying on *Gachiengo v Republic* [2000] 1 EA 67. Dr Githu *Muigai* for the Kenya Anti-Corruption Commission, was in substantial agreement with Mr *Murgor* when he submitted that every constitutional reference must satisfy a certain threshold criterion, namely that it must bear a constitutional question; but there were serious doubts whether the originating summons was based on a constitutional question, rather than just a general complaint. He cited case law to demonstrate that anyone alleging breach of any of the fundamental rights provisions (sections 70–83) of the Constitution, must state his case with sufficient particularity. This was held in *Matiba v Attorney-General* miscellaneous application number 666 of 1990. The Learned Judges, Bosire J (as he then was) and Mango J thus held: “In our case ..., the Applicant did not indicate at all the provisions of the Constitution he considers which have been infringed by the detaining authority in relation to him. Nor can we infer the provision he alleges has been infringed in relation to him. It is none of those stated in section 84(1). The language of section 84(1) does not permit a construction to include grounds other than those stated therein. The Section has clear and unambiguous language. An Applicant must allege in his application a violation of any of the provisions of section 70 to 83 (inclusive) before the Court can have jurisdiction to entertain his complaint”. Counsel saw a clear departure from this requirement of precision, in the presentation of the Applicant’s case. The litany of complaints in the originating summons failed to show a nexus between the Applicant and the alleged unconstitutionality of the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003). Counsel considered that the only valid question which the Applicant could have raised was this: In the manner in which the charges were framed, would the accused get a fair trial? Yet the Applicant had placed hardly any material before the Court which would found a valid concern. It had been held in *Njoya and others v Attorney-General and others* [2004] LLR 4788 (HCK) that any complaint in a constitutional reference must be referable to the complainant personally and it was not tenable for the Applicant to argue a case on behalf of the wider populace. Counsel submitted that when the Applicant challenges the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003) for want of constitutionality, the argument boils down to seeking compliance with the *Gachiengo* test; yet, it was submitted, that case had not only paid scant regard to existing authority, but had proceeded on the basis of general grievances. Dr *Muigai* submitted that it was essential for the Court to make a clear departure from the decision in the *Gachiengo* case: the main reason being that that case has created the constitutional fiction that the Commissioner of Police has a monopoly of investigation into criminal acts. It was submitted that there were not less than 20 Acts of Parliament which entrusted powers of investigation to persons other than the Commissioner of Police and counsel gave as examples the following: “(a) the Kenya Railways Corporation Act (Chapter 397), section 78(1) of which vested prosecutorial powers in an authorized officer of the corporation; (b) the Radiation Protection Act (Chapter 243), section 17 of which entrust prosecutorial powers to the Chief Radiation Protection Officer of Radiation Protection Officers authorised by him; (c) the Mining Act (Chapter 306), section 87 of which entrusts prosecutorial powers to the Commissioner of Mines and Geology or any officers of the Mines and Geology Department; (d) the Wildlife (Conservation and Management) Act (Chapter 376), section 54 of which entrusts prosecutorial powers to wardens (subject to the consent of the Attorney-General); (e) the Fisheries Act (Chapter 378), section 21 of which entrusts prosecutorial powers, subject to the directions of the Attorney-General, to Authorized Officers who may be Fisheries Officers; (f ) the Kenya Ports Authority Act (Chapter 295), section 28 of which vests prosecutorial powers in an employee authorized by the managing Director; (g) the Income Tax Act (Chapter 470), sections 114 and 117 of which vest prosecutorial powers in the Commissioner of Income Tax or Officers authorized by him, subject to the directions of the Attorney-General; (h) the Value Added Tax Act (Chapter 476), sections 46 and 55 of which vest prosecutorial powers in authorized officers; (i) the National Social Security Fund Act (Chapter 258), section 39 of which empower officers of the NSSF to conduct prosecution before Magistrates’ Courts; (j) the Immigration Act (Chapter 172), section 16 of which empowers and Immigration Officer to conduct prosecutions before a Subordinate Court; (k) the Local Government Act (Chapter 265), section 208 of which empowers the local authority to conduct prosecutions; (l) Employment Act (Chapter 226), section 50 of which authorises officers to conduct criminal prosecution, subject to the powers of the Attorney-General; (m) the Regulation of Wages and Conditions of Employment Act (Chapter 229), section 23 of which authorises a labour officer or labour inspector to prosecute for offences under the Act”. Against this background, Dr *Muigai* drew our attention to the following passage which appears at page 72 of the *Gachiengo* case: “The provisions of section 3 of the Constitution are quite clear in that, if any other law is inconsistent with other law shall, to the extent of the inconsistency, be void. KACA is not a department in the office of the Attorney-General. It is a body corporate ... The existence of KACA undermines the powers (and) authority of both the Attorney-General and the Commissioner of Police as conferred on them by the Constitution. Consequently we find and hold that, the provisions establishing KACA are in conflict and inconsistent with the Constitution”. Dr *Muigai* submitted and, with respect, correctly, that the major assumption in the *Gachiengo* case is that the Attorney-General has a monopoly of prosecution; and this assumption cannot be a correct interpretation of section 26 of the Constitution, and even the regular practice over the years does not bear it out. Counsel submitted, and correctly in our view, that, while all criminal prosecution takes place at the discretion of the Attorney-General, he is by no means the sole and exclusive prosecutor. From time to time, Parliament creates special prosecutors, and these will discharge their responsibilities under the control and supervision of the Attorney-General. Dr *Muigai* questioned the authority and indeed the practical validity of the *Gachiengo* case on one novel ground. That the common wisdom on good governance today has raised the imperative of providing legislation and enforcement institutions to combat corruption in public office and to suppress this social malaise to the greatest extent possible – a commitment which has been fully recognised at the international level with the recent adoption of the United Nations Convention against Corruption (2003). Counsel stated that Kenya was the very first signatory to the Convention. It is to be noted that one of the many regional inspiring instruments for the Convention was the African Union Convention on Prevention and Combating Corruption, adopted by the Heads of State and Government of the African Union, on 12 July 2003, Dr *Muigai* submitted that the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003) represented Kenya’s authoritative commitment, under its constitutional arrangements, to the cause of suppressing corruption in public office. Dr *Muigai* cited specific examples of the Anti-Corruption initiative, in several other countries, and submitted that the statutory scheme established tended to be quite similar, and yet no concerted efforts to nullify such progressive legislation has been reported from the other countries. Among the examples he gave were: Botswana, with its Corruption and Economic Crime Act of 1994 (Act number 13 of 1994); Singapore, with its Prevention of Corruption Act of 1960 (Chapter 241); Malawi, with its Corrupt Practices Act of 1995 (Act number 18 of 1995); Zambia, with its Anti-Corruption Commission Act of 1996 (Act number 42 of 1996); the Federal Republic of Nigeria, with its Corrupt Practises and other Related Offences Act of 2000; Lesotho, with its Prevention of Corruption and Economic Offences Act of 1999; and the Federal Democratic Republic of Ethiopia, with its Proclamation number 235 of 2001, the Federal Ethics and Anti-Corruption Commission Establishment Proclamation. Not only have so many other countries, sharing a common constitutional tradition with Kenya, established corruption-control agencies, but they have also established agencies to investigate the offence. Counsel referred us to section 39 of Botswana’s Corruption and Economic Crimes Act of 1994. It thus provides: “(1) If, after an investigation of any person under this Act, it appears to the Director that an offence under Part IV has been committed by that person, the Director shall refer the matter to the Attorney-General for this decision. (2) No prosecution for an offence under Part IV shall be instituted except by or with the written consent of the Attorney-General”. Counsel submitted that there is a general practice in the Commonwealth, that large group of countries bound together in particular by the common law heritage, and of which Kenya has always been a member, to have in place an anti-corruption statute and a set of institutional arrangements for combating corruption. He invited the Court to take judicial notice of this fact; and we are in agreement and duly take judicial notice. Dr *Muigai* submitted that, while the Constitution, by its section 26, has donated to the Attorney-General the power to control criminal prosecutions, he has no monopoly in this regard. He further submitted that although the Kenya Anti-Corruption Authority makes no claim to the power to prosecute, a charge of unconstitutionality could not be maintained if Parliament were to grant to KACC the power to prosecute. In this regard, he indicated a patent flaw in the *Gachiengo* case, which held that KACA had no authority to conduct prosecutions, when indeed, the Attorney-General himself had, in writing and by gazettement, named the officers of KACA who were conducting prosecutions under the applicable legislation. We are entirely in agreement with the line of submissions adopted by counsel. There is, in our view, a plain interpretation to be attached to the wording of section 26(3) of the Constitution. This section, in the relevant part, reads: “The Attorney-General shall have power in any case in which he considers it desirable so to do: (*a*) ... (*b*) to take over and continue any such criminal proceedings that have been instituted undertaken by another person or authority; and (*c*) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person or authority”. The plain meaning of section 26(3)(*b*) and (*c*) is, in our view, that some person or authority other than the Attorney-General could very well, and quite lawfully, undertake prosecutions; save that such action will always remain subject to the control of the Attorney-General. It becomes plain, as submitted by counsel and as we ourselves see it, that the *Gachiengo* case rested on a misconception, both in terms of construction and of principle; and with the utmost respect, we would depart from the position taken by the Learned Judge in that case. We believe we are fortified in this preference by the basic meaning to be derived from section 26(4) of the Constitution, which provides: “The Attorney-General may require the Commissioner of Police to investigate any matter which, in the Attorney-General’s opinion, relates to any offence or alleged offence, and the Commissioner shall comply with that requirement and shall report to the Attorney-General upon the investigation”. Section 26(4), it is clear to us, by no means claims to be the authoritative law defining the power to investigate crime. The prescription of that section is, in our view, both limited and episodic, and only provides an investigatory recourse for the Attorney-General in case of need. Otherwise, the duties and powers of the Police Force are set out in an ordinary statute, the Police Act (Chapter 84, Laws of Kenya), and section 14(1) of this Act provides as follows: “The force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime the apprehension of offenders, and the enforcement of laws and regulations with which it is charged”. There is, as far as we are able to ascertain, nothing in the Constitution or the ordinary law to lend credence to the hypothesis that the investigation of crime, as things stand today, is the exclusive responsibility of the Police Force. On the position of the Anti-Corruption Courts, Dr *Muigai* submitted that they were a vital arsenal in the expeditious disposition of corruption cases, and were essential to the proper functioning of the Kenya Anti-Corruption Commission. On this account, counsel argued, a challenge against the Anti-Corruption Courts was inherently a challenge to the effectiveness of the Commission. Counsel submitted that the attack on the Anti-Corruption Courts was not well-founded. Section 65(1) of the Constitution empowers Parliament to establish subordinate courts, with jurisdiction conferred by law subject to the Constitution; and the Constitution (section 69) has vested in the Judicial Service Commission the power to make appointments. Counsel submitted that the Anti-Corruption Courts were an integral part of the regular court system, and that the label “Anti-Corruption Court” should not be seen to represent a novel class of courts. In support of this argument, counsel cited the Privy Council case from Jamaica, *Hinds and others v Queen* [1976] 1 All ER 353. The label “Gun Court” had come into being in that case, and on an argument much like that made by the Applicant in the present case, it was thus held (*per* Lord Diplock) (at page 361): “Where, under a Constitution on the Westminister model, a law is made by the Parliament which purports to confer jurisdiction on a court described by a new name, the question whether the law conflicts with the provisions of the Constitution dealing with the exercise of the judicial power does not depend on the label (in the instant case “The Gun Court”) which the Parliament attaches to the Judges when exercising the jurisdiction conferred on them by the law whose constitutionality is impugned. It is the substance of the law that must be regarded, not the form. What is the nature of the jurisdiction to be exercised by the judges who are to compose the court to which the new label is attached? Does the method of their appointment and the security of their tenure conform to the requirements of the Constitution applicable to judges who, at the time the Constitution came into force, exercised jurisdiction of that nature?” Counsel submitted that against the principle enunciated in the *Hinds* case, it is clear that the magistrates in the instant case referred to as “special magistrates” are normal judicial officers appointed under the authority of an Act of Parliament. The Anti-Corruption Courts are courts of convenience for dealing with the problem of corruption. They have no special rules of evidence or procedure. The term “Anti-Corruption Court” is only a label used for convenience. There was clear common cause in the compelling submissions of learned counsel. Mr *Alibhai* brought to our attention the case of *Republic v Carr-Briant* [1943] 2 All ER 156, a most relevant decision on burden of proof in corruption-related offences. The purpose was to respond to the submission made for the Applicant, that the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003) failed the test of constitutionality because it reversed the burden of proof, to the detriment of accused. In the *Carr-Briant* case, the Appellant was charged with the offence of corruptly making a gift or loan, as a reward for a favour from a public officer. The following words of Humphreys J are relevant (pages 158–159): “In our judgment, in any case where, either by statute or at common law, some matter is presumed against an accused person “unless the contrary is proved”, the jury should be directed that it is for them to decide whether the contrary is proved; that the burden of proof required is less than that required at the hands of the prosecution in proving the case beyond reasonable doubt; and that the burden maybe discharged by evidence satisfying the jury of the probability of that which the accused is called upon to establish”. Counsel submitted in line with the principle in the above passage, that the proof of corruption-related offences would naturally, from time to time, place the evidential burden of proof on the accused: because in the nature of corruption, only the accused knows how the assets in question would have been acquired. Mr *Alibhai* contested the argument for the Applicant that the notion of an Anti-Corruption Court invoked a stigma which would unfairly contaminate an accused person. He considered that trials for offences such as rape, or murder were infinitely more stigmatic than trials before an Anti-Corruption Court. *(c) The Applicant’s final submissions* Mr Bowry for the Applicant restated his original submissions, and attempted to show that even though there were several Acts of Parliament which authorised named persons to conduct criminal investigations, such investigations had to have the authority of the police. The import of this point, as a constitutional question, was not immediately clear, as it was already quite evident that the Commissioner of Police has exclusive investigatory powers.

**Summary and analysis** The Applicant, who had been arraigned before the Principal Magistrate at the Anti-Corruption Court, in Anti-Corruption case number 22 of 2003, successfully applied for a stay of the criminal proceedings and the reference of his case to the High Court, for the determination of issues presented as raising constitutional questions. What were these constitutional questions? Firstly, that the Anti-Corruption had no constitutional authority to try the Applicant. Secondly, that the Magistrate had no legal authority to conduct the case. Thirdly, that a trial as intended would deny the Applicant his constitutional right to be presumed innocent until proved guilty. Fourthly, that trial of the Applicant as proposed would not be trial before an impartial court, and the principles of natural justice would not be observed. Fifthly, that the prosecutor at the Anti-Corruption Court lacks lawful authority to conduct the prosecution. Sixthly, that the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003) is unconstitutional. Seventhly, that thanks to the enactment of the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003) which is alleged to be unconstitutional, the Penal Code offence in respect of which the Applicant had been charged, is impliedly repealed and therefore the charges should be terminated. Eighthly, that the intended criminal trial is an abuse of the process of the court and should be terminated. This Court is called upon to determine these questions and to decide what is to happen – whether the trial process before the Principal Magistrate is contrary to the Constitution and the law, and must be terminated and the Applicant let free; or whether the said trial is a lawful process of criminal justice conducted in accordance with the Constitution, and to be given the all-clear to proceed. Learned counsel have expended much learning and industry in placing the case for their respective clients before the Court. Their detailed submissions have been considered adequately and analysed as necessary; there is no need to repeat that task. However, we intend to recapitulate some of the issues which will provide the turning points leading to our final decision in these proceedings. The threshold issue is whether or not this constitutional reference was rightly made. Learned counsel Dr Githu *Muigai* has unequivocally submitted that the constitutional reference, at one remove, raises non-constitutional questions one notch too high; and at another remove engages this very busy Court in a purely academic exercise. He cited in support of his contention the very relevant case *Njeru v Republic* [1979] KLR 154 (number 1). The High Court in that case did set out considerations which should guide parties as they seek to file a constitutional reference in the High Court. In the words of Trevelyan and Hancox JJ (at 156). “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed”. We are in agreement and adopt this principle as the basis upon which all constitutional references must be founded. From such a position, we must state in our judgment that the application before us has not fully complied with that basic test. Counsel for the Respondents have submitted, and in our view, quite rightly, that the main thrust of the Applicant’s case is founded on generalised complaints without any focus on fact, law or the Constitution which is being invoked as the umbrella. Particularly relevant in this regard is the fact that the whole application turns on mere apprehensions about the scheme of the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003); yet the Applicant was never charged under that Act and there has never been any indication so far that he might be so charged. The charge against the Applicant is under section 101 of the Penal Code, a statute against which, as we understand it, the Applicant has no direct grievance. If the Applicant has no basis for questioning a charge so based, then there is a somewhat artificial leap from a Penal Code argument, to the impeachment of the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003). And in that event it follows that the challenge to Act number 3 of 2003 has nothing to do with any constitutional rights of the Applicant. We also found a rather strange circularity of reasoning by which the Applicant has attempted to found a lateral impeachment of the Penal Code charge against him, through discrediting the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003). Even as the Applicant maintains that Act number 3 of 2003 is unconstitutional, he would allow it, for reasons which are entirely unclear, such a minimum of validity as would have the effect of repealing by implication section 101 of the Penal Code; and the outcome should then be that the Applicant will not be tried under Act number 3 of 2003, nor under the Penal Code, section 101. This may be an ingenious argument, but this Court cannot allow it to prevail, because it entails a subterfuge that is, in effect, destined to undermine the process of justice, particularly in the domain of criminal law. The complaint that the Anti-Corruption Court has no constitutional authority to try the Applicant should be seen in the context of the foregoing analysis. But beyond that, this complaint, in our view, cannot be attached to any specific provision of the Constitution which could be said to prescribe a mandatory inhibition against such a court. On the contrary, it has been fully demonstrated through the submissions of counsel, as well as through case law – and in this regard we recall the case, *Hinds and others v the Queen* [1976] 1 All ER 353 – that the Anti-Corruption Court well and truly represents a normal and quite practical approach to the management of the court system, for the purpose of achieving the efficient disposal of cases. It has also been demonstrated to our satisfaction that the term “special magistrate” denotes no more than that some ordinary and regularly-appointed magistrates are being posted at the newly created magisterial set of courts called Anti-Corruption Courts, as a way to achieve greater efficiency in the trial of normal criminal matters which are in some way linked to fraud, particularly in relation to public assets. From the foregoing analysis it becomes obvious, as we see it, that the trial of the Applicant in the Magistrate’s Anti-Corruption Court is neither intended nor likely to deny him his constitutional and ordinary legal rights. Evidence will be adduced against him in the normal manner, which entails the three stages of evidence-in-chief, cross-examination and re-examination; he will be able to call his own witnesses, who will be examined in the same way; he will have access to counsel; and the legal burden of proof, which has to be established beyond reasonable doubt, will at all times rest on the prosecution, even though, of course, the evidential burden will keep shifting as is well recognised in this common law system. This is the typical case of the play of the rules of natural justice; and therefore, the complaint of the Applicant that he is likely to be denied a hearing attended with natural justice is, in our view, unfounded. The Applicant’s fifth ground for filing this constitutional reference is that the prosecutor before the Anti-Corruption Court lacks lawful authority. We are unable to accept this contention. The Applicant has himself made the case at length that in terms of the Constitution, prosecution is the exclusive responsibility of the Attorney-General. While we are, with respect, unable to agree with such a contention and instead hold that the Attorney-General under the Constitution has ultimate control of prosecution only, we have taken note that the officers who have the conduct of the criminal case against the Applicant are indeed officers serving at the State Law Office, under the direction and charge of the Attorney-General himself. Although we have already stated in our judgment that the Applicant’s case bears no relationship to the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003), we have to respond to his sixth issue in the constitutional reference, which contends that this Act is unconstitutional. We have received abundant evidence and submissions that the Anti-Corruption and Economic Crimes Act, together with its set of institutions, in particular the Kenya Anti-Corruption Commission, represents a progressive new philosophy about public stewardship, management of the public trust, and the protection of public resources as a crucial ingredient of good governance. We have considered a wide range of legislative measures put in place in different countries, for the purpose of protecting the public interest in prudent and accountable resource use. We have also taken note that Kenya has fully committed itself to the fight against corruption in public office, and has gone as far as adhering to regional and global conventions that seek to uphold ethics in the management and application of public resources. Such international commitments must be matched by effective domestic legal arrangements for implementation; and the most significant response Kenya has now adopted is to enact the Anti-Corruption and Economic Crimes Act (Act number 3 of 2003), with its attendant institutional arrangements for enforcement. Parliament in exercise of its powers under section 30 of the Constitution has elected to exercise this