CIVIL
146/=
KENYA SCHOOL OF LAW
LIBRARY
ACC No.
NAIROBI
10

The Law, the Procedures and the Trends in Jurisprudence on Constitutional and Fundamental Rights Litigation in Kenya

Ongoya Z. Elisha

1.INTRODUCTION

Courts, in the course of addressing their judicial minds to controversies and disputes in Constitutional cases, face issues that are inescapably "political" in that they entail a choice between competing values and desires, a choice reflected in the legislative or executive action in question which the court must either condemn or condone[1].

When courts decide Constitutional cases, they do more than interpret a statute. The Constitution is a charter containing the pact that is the "social contract"[2] and therefore, by its very nature a political document. Controversies that rage over the proper canons of interpreting the Constitution, therefore, conceal vital ideological, socio-political and economic views[3].
In the words of Robert A Kagan,

> "Decisions of Constitutional courts often are like volcanic eruptions, reshaping the landscape of political and administrative action, usually in small ways but occasionally in large ones... Constitutional litigation has also become a well-established form of political action... Political groups, having failed to get their way in legislatures or administrative agencies frequently ask courts to overturn legislative or administrative policies on the grounds that they violate principles inferred from Constitutional provisions. Judges sometimes agree and ask governments to take remedial measures."[4]

Professor Githu Muigai has captured the challenge of Constitutional interpretation in the words that:

> "First, the fact that the Constitution is both a political charter and a legal document makes its interpretation a matter of great political significance, and sometimes controversy. Second, the court's interpretation of the Constitution by way of judicial review is equally condroversial as it is essentially counter-majoritarian. A non-elected body reviewing and possibly overruling the express enactments and actions of the elected representatives of the people would raise the issue of legitimacy. Thirdly, however defined, the Constitution is an intricate web of text, values, doctrine, and institutional practice. It lends itself to different interpretations by different, equally well-

meaning people. Fourthly, the Constitution contains conflicting or inconsistent provisions that the courts are called upon to reconcile, and at other times the Constitution implicitly creates a hierarchy of institutions or values and the courts are called upon to establish the order of importance. Fifthly, at times, the Constitution is vague or imprecise or has glaring lacunae and the courts are called upon to provide the unwritten part."[5]

The above character of the Constitution makes the jurisprudence of the courts that exercise jurisdiction over Constitutional matters, and, therefore, the interpretadion of the Constitution, to be of specific concern to a student of the judiciary and the judicial process.

The capacity of courts to evolve a coherent and principled approach to the interpretation of the Constitution is absolutely essential for the legitimacy of the Constitutional democracy.[6] Certain scholars have championed the application of "neutral principles" in Constitutional adjudication. This approach opines that courts, in exercising their power of invalidation of laws on Constitutional grounds do not decide cases on general grounds of public policy or legislative criteria of importance. Courts are subject to a discipline of reasoning to which legislators are not bound: the disposition of Constitutional questions must be formulable in terms of some Constitutional principle that transcends the case at hand and is applicable to all comparable cases. Decisions cannot be *ad hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the instant fact situation.[7]

This paper seeks to provide guidance on the law and the decisions of courts in Kenya on the following issues;

a) The proper forum for determination of constitutional issues in Kenya;
b) The threshold test for a constitutional question in Kenya;
c) The rules of procedure in constitutional litigation in Kenya;
d) The jurisprudence of the courts on the interpretational approach to the constitutional text in Kenya;
e) The locus standi to espouse Constitutional matters in Kenya; and,
f) In a cursory manner, the emerging jurisprudence of the courts in Kenya on certain substantive Constitutional issues[8].

From the very outset, the paper makes the contention that many inconsistencies punctuate the positions that courts in Kenya have taken on each of the foregoing issues. In conclusion this paper proposes the possible

remedies to deal with the problem of shallow and inconsistent reasoning by the courts exercising jurisdiction over Constitutional questions.

1.1 Constitutional Litigation and Constitutional Questions Defined

Some scholars have sought to champion the sociological perspective that describes constitutional litigation as dispute processing which views litigation as a process in which a social or political conflict is transformed into a legal dispute and then back into a social or political conflict. From a functionalist point of view, constitutional litigation is viewed as the litigation process that serves or seeks to serve two functions: to protect fundamental rights of citizens and to supervise legislative activities of the government.[9]

A constitutional question, in the context of this paper, refers to the issues brought before court either seeking remedies set out under the Constitution or the controversies and disputes whose determination in one way or another involves interpretation and application of the provisions and the principles of the Constitution.

2. WHICH COURT(S) HAS/HAVE THE JURISDICTION TO ENTERTAIN AND DETERMINE CONSTITUTIONAL QUESTIONS IN KENYA?

To interrogate this question, it is imperative to examine the relevant sections of the law that establish and confer jurisdiction on various courts. In this section, this paper seeks to identify the jurisdiction vested in the courts and the law which the courts are called upon to enforce. The following Sections of the Constitution confer jurisdiction on issues of litigation relating to the Constitution:

2.1 The Unlimited Original Jurisdiction of the High Court

Art. 58(5) & 6c

Section 60 of the Constitution of Kenya confers upon the High Court of Kenya

> "unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by the Constitution or any other law".

From the foregoing edict, the High Court of Kenya has jurisdiction over Constitutional applications, within the broader categorization of jurisdiction

as either civil jurisdiction or criminal jurisdiction. This is because constitutional applications are essentially civil applications.[10]

In its Constitutional adjudication stream, the High Court is vested in more specific terms with four types of jurisdiction, namely; (a) supervisory jurisdiction, (b) reference jurisdiction, (c) Jurisdiction for the Protection of Property rights, and, (d) enforcement jurisdiction in respect of fundamental rights and freedoms.

2.2 Supervisory Jurisdiction of the High Court

This is the jurisdiction found in Section 65 as read with Section 123(8) of the Constitution. Section 65 of the Constitution is dedicated to the establishment of "other courts".[11] The Section empowers Parliament to establish courts subordinate to the High Court and courts-martial. The jurisdiction of a court so established is, subject to the Constitution, such jurisdiction and powers as may be conferred on it by any law.

Section 65(2) confers upon the High Court supervisory jurisdiction over any civil or criminal proceedings before a subordinate court or court-martial. The High Court is mandated to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts. The power to make rules on the practice and procedure of how this supervisory jurisdiction is exercisable is vested in the Chief Justice.

Section 123 of the Constitution of Kenya is the interpretation section of the Constitution. Subsection 8 of the said Section provides that "no provision of this Constitution that a person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law."

From the foregoing, it is clear that the High Court particularly is vested with supervisory jurisdiction over the subordinate court by virtue of Section 65 of the Constitution. It is also apparent that courts generally are vested with supervisory jurisdiction over persons and authorities regarding the legality or Constitutionality of the actions of those persons or authorities under Section 123(8) of the Constitution.

2.3 Reference Jurisdiction of the High Court

This jurisdiction is conferred by Section 67 of the Constitution of Kenya. The section makes provision for reference from subordinate courts where two conditions are met, to wit;

a) Questions of Constitutional interpretation arise in the course of proceedings, and,
b) The court forms the opinion that the question involves a substantial question of law.

The provision requires that subordinate courts *may*, and, if a party to the proceedings so requests *should*, refer Constitutional questions to the High Court for interpretation. When the High Court's reference jurisdiction is invoked, the High Court exercises its jurisdiction over the question referred and leaves for the court in which the question arose the duty to dispose of the case in accordance with the High Court's determination of the Constitutional question.

It is imperative to note that Section 67 of the Constitution does not vest the power to make rules in the Chief Justice or any other body on matters of practice and procedure relating to applications made under section 67 of the Constitution.

2.4 Jurisdiction of the High Court for Protection of Property Rights

The right to property is one of the fundamental rights guaranteed under the Constitution of the Republic of Kenya. The said right is protected by Section 75 of the Constitution of Kenya. By the instrumentality of Section 75(2) of the Constitution, every person having an interest or right in or over property which is compulsorily taken possession of, or whose interest in or right over any property is compulsorily acquired, has a right of direct access to the High Court for determination of two issues, namely;

a) the person's interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and
b) Prompt payment of that compensation:

There is a rider that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having

jurisdiction under any law to determine that matter.

Parliament has made provision in relation to the matter anticipated by the foregoing rider by instrument of the Land Acquisition Act.[12]

Section 75(3) of the Constitution vests in the Chief Justice the discretion to make rules with respect to the practice and procedure of the High Court or any other tribunal or authority in relation to the jurisdiction conferred on the High Court by subsection (2) or exercisable by other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which applications or appeals to the High Court or applications to the other tribunal or authority may be brought).

The Chief Justice has pursuant to the foregoing powers promulgated the Land Acquisition (Appeals to the High Court) Rules (Rules under Section 75 (3) ff the Constitution in Respect of Appeals under Section 29 of the Act).[13] These rules spell out in fine detail the procedure of appealing to the High Court from the decision of the Land Acquisition Compensation Tribunal established under Section 29 of the Land Acquisition Act.

The foregoing enforcement jurisdiction that is limited to property rights is in addition to the general enforcement jurisdiction under section 84 of the Constitution. This means that a party whose proprietary rights are violated in circumstances relating to land acquisition may file a claim to the tribunal and a subsequent appeal to the High Court and a second chance of appeal to the Court of Appeal. In the alternative, such party may proceed directly to the High Court under Section 84 of the Constitution.

2.5 Enforcement of Fundamental Rights Jurisdiction of the High Court

This jurisdiction is encapsulated in Section 84 of the Constitution of Kenya. It deals with enforcement of the fundamental rights and freedoms of the individual as provided for under Chapter V of the Constitution entitled *"Protection of Fundamental Rights and Freedoms of the Individual"*.

a) Section 84 (1) provides in its material parts that, if a person alleges that any of the provisions of Sections 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply

to the High Court for redress.

b) Section 84 (3) provides that if in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of Sections 70 to 83 (inclusive), the person presiding in that court may, *and shall if any party to the proceedings so requests*, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious.

c) Section 84 (6) of the Constitution confers upon the Chief Justice the power to make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under Section 84 (including rules with respect to the time within which applications may be brought and reference shall be made to the High Court).

The above cited sections leave no doubt that the High Court has a Constitutional mandate to determine questions requiring the interpretation of the Constitution.

2.6 The Duty of all Courts to Conform to (and, therefore, to apply) the Constitution

In addition to the foregoing Constitutional provisions, which vest various jurisdictions relating to Constitutional disputes, the Constitution is cited as a source of law for courts in the Republic of Kenya. Section 3 of the Judicature Act prescribes as follows:

> "**3.** (1) The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with—
> (a)The Constitution;
> (b) Subject thereto..."

The above provision of the law mandates every court of law in Kenya to be mindful, and, therefore, apply or seek to conform to the provisions of the Constitution in the exercise of their respective jurisdictions. It is only when a controversy arises in the interpretation or application of a particular section of the Constitution that the High Court is expressly vested with jurisdiction to resolve that controversy.

2.7 The jurisdiction of the Court of Appeal of Kenya in Situations Involving Constitutional Interpretation

The Court of Appeal of Kenya is established under Section 64 of the Constitution as a superior court of record. Under the said section, the

jurisdiction of the Court of Appeal of Kenya is "such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law." It follows that before a party prefers an appeal to the Court of Appeal in Kenya, he/she must satisfy him/herself that there is a law in place that confers appellate jurisdiction on the Court of Appeal over that question/issue. It is, therefore, often put that the Court of Appeal has no inherent appellate jurisdiction. The jurisdiction that the Court of Appeal of Kenya exercises must be donated by law. In situations of Constitutional litigation, section 84(7) of the Constitution vests in the Court of Appeal appellate jurisdiction over decisions of the High Court in the exercise of its enforcement jurisdiction under Section 84 of the Constitution. It is worthy of note that no similar jurisdiction is donated in respect of disputes arising out of the High Court's exercise of jurisdiction under Sections 65, and 67 of the Constitution.

There are, however, occasions when Constitutional issues could arise in proceedings with which the Court of Appeal is already seized. There are also situations where in the course of dealing with appeals arising from lower tier courts, Constitutional arguments that had hitherto not been raised in the said courts are raised at the Court of Appeal. How does the court of Appeal deal with those issues in Kenya?

In the case of *Rafiki Enterprises Vs Kingsway Tyres and Automart Ltd*[14], the question whether the position of an acting Court of Appeal Judge was Constitutional arose at the Court of Appeal. The appellate Law Lords resolved the question with the following statement of principle:

> "It would be ridiculous to argue that the Court of Appeal must refer the question to the High Court, wait for the court's determination, and then determine the appeal in accordance with the High Court's determination on the Constitutional issue. Hence our position is that if and when a matter touching on the interpretation of the Constitution arises in this court, the court must itself determine that issue as part of the problems of law it is called upon to deal in the exercise of its appellate jurisdiction."

Subsequent to this decision, the Court of Appeal implicitly applied the same reasoning in the case of Roy Richard Elirema and Anor Vs Republic[15]. A second appeal was made to the Court of Appeal by the appellants challenging their conviction by the Magistrate's Court on the ground that the trial was a mistrial and incompetent and, therefore, void *ab initio* because the conduct of the prosecution against the appellants was done by a police corporal which was contrary to section 85(2) of the Criminal Procedure Code.[16] The

appellants, therefore, contended that because of this incompetence, as a matter of law, on the part of the prosecution, there was a grave failure of justice and the trial court, therefore, lacked the jurisdiction to properly determine the matters raised in the case.

The Court of Appeal was being asked to grant a remedy on a fresh ground that had not been raised before any of the two preceding courts. The Court nonetheless went ahead and held that even though there existed shortcomings in the application, the points raised therein were clearly points of law which the court had to deal with and determine and it could not refuse to so deal with the matter because it was not raised in the two lower courts. That the Court of Appeal had jurisdiction to deal with the matter. According to the Court of Appeal;

> "It is also right to point out that the complaints now raised before us in the two grounds were not raised either before the trial Magistrate or before the Learned Judges of the High Court who heard and determined the Appellant's first appeals. Despite these shortcomings, the points raised are clearly points of law and we cannot avoid dealing with them. If, for example, the Magistrate had no jurisdiction to hear and determine the charges, we cannot refuse to deal with the matter because it was not raised either before the Magistrate or before the High Court; each court is presumed to know its jurisdiction and it cannot be a valid answer for us to tell the appellants that they ought to have raised these issues before the two courts below. Of necessity, we have to deal with the points of law raised for the first time before us."

The court went ahead to examine the fairness and impartiality of such a trial where the prosecution had been conducted by an incompetent prosecutor. The principles of impartiality and fairness of a trial are some of the lynchpins of section 77(1) of the Constitution in attempting to offer the accused person the protection of the law. The court held that where the prosecution had been conducted by an incompetent prosecutor, the accused person could not be said to have been afforded secure protection of the law since in such a case, the trial court had acted both as a trial court and a prosecutor, which is contrary to Section 77(1) of the Constitution.

2.8 Gazette Notice Number 300 dated 10th January 2007 and its Impact on the Jurisdiction to Determine Constitutional Issues

On January 10, 2007, the Hon the Chief Justice of the Republic of Kenya[17]

issued Gazette Notice No. 300 published in the Kenya Gazette of January 19, 2007[18]. The said Gazette Notice provided for "Practice Directions Relating to the Filing of Suits, Applications and Reference in Proper Courts". The authority under which the said Gazzete Notice was stated to be founded was Section 65(3) of the Constitution and Sections 11 to 18 of the Civil Procedure Rules[19]. The Gazette Notice provided, among others, that all Judicial Review proceedings under Order 53 of the Civil Procedure Rules and Constitutional applications and references must be filed at the Central Office Registry of the High Court in Nairobi *except where leave of the Chief Justice is obtained for filing in any District Registry*[20].

The net effect of the said Notice is to shrink the jurisdiction of the High Court to entertain constitutional questions to a jurisdiction vested in the High Court sitting at Nairobi except in situations where the leave of the Chief Justice is sought and obtained to move the High Court sitting out of Nairobi. No provision was made on how to move the Chief Justice for the leave, and, no guidelines were provided to guide the factors to consider the manner in which the Chief Justice would exercise his jurisdiction.

The legality, proportionality, rationality and validity of the said Gazette Notice is a subject of pending court proceedings challenging it, and therefore, the lesser the comments that this paper makes on that, the safer.

3. WHEN AN ISSUE BECOMES WORTH OF DETERMINATION BY THE COURT VESTED WITH JURISDICTION OVER CONSTITUTIONAL MATTERS AS OPPOSED TO ANY OTHER FORUM ESTABLISHED BY LAW OR ADMINISTRATIVELY IN KENYA- A THRESHOLD TEST QUESTION

Not every issue for determination by courts of law is a constitutional issue. In constitutional litigation, there is need to meet a threshold test for a question to be regarded as constitutional. This is intended to avoid raising purely statutory questions before the forum of the constitutional court.

In terms of judicial precedent, this requirement of meeting the threshold test has been considered in a number of cases commencing with *Anarita Karimi Njeru Vs Attorney General*[21](hereinafter referred to as the *Anarita Karimi Njeru* case), where the court held that:

> "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 reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."

The other cases that have taken cue from the *Anarita Karimi Njeru* case are; *Stanley Njindo Matiba Vs Attorney General*[22], *Kamlesh Mansukhlal Damji Pattni Vs Attorney General*[23], and *Meme Vs Republic & Anor*[24]

The Honourable Justice Khamoni has set out the rationale for insisting on the particularization of the section and even the subjection of the fundamental rights chapter of the Constitution alleged to be infringed. In the case of *Cyprian Kubai Vs Stanley Kanyonga Mwenda*[25] he held:

"An applicant moving the court by virtue of section 60, 65 and 84 of the Constitution must be precise and to the point not only in relation to the section, but also to the subsection and where applicable the paragraph of the section out of 70 to 83, allegedly contravened plus relevant act of that contravention so that the respondent knows the nature and extent of the case to respond to enable the respondent prepare accordingly and also to know the exact extent and nature of the case it is handling."

It is discernible from the foregoing that to meet the threshold requirement for a Constitutional reference, the "holy trinity" comprises of:

i) The precise complaint;
ii) The provision of the Constitution infringed;
iii) The manner in which the section is infringed.

4. THE PROPER APPROACH TO THE INTERPRETATION OF THE CONSTITUTION - TO BE LIBERAL OR TO BE RESTRICTIVE?

This issue had for some time remained (unnecessarily) controversial in the Kenyan constitutional litigation history.

Many jurisdictions with a common law tradition defined the approach that should be adopted while interpreting a constitutional text fairly long time ago. The Privy Council in the case of *Minister for Home Affairs and Another Vs Fischer*[26] while interpreting the Constitution of Bermuda stated that "a Constitutional order is a document *sui generis* to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation... It is important to give full recognition and effect to those fundamental rights and freedoms with a statement, which the Constitution commences."

Lord Wilberforce, while delivering the considered opinion of the Court observed;

> "A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

The foregoing has variously been described as a purposeful interpretation of the Constitution[27].

In spite of other jurisdictions allowing their citizens to draw the fruits of such purposeful interpretation of the Constitution a long time ago, in Kenya, the grasp was of a different character. For some time, courts insisted on interpreting the Constitution like any other statutory text. In *R Vs Elman*[28] the late Chief Justice Kitili Mwendwa expressed a basic conservative creed in Constitutional adjudication and interpretation when he stated that "in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment."[29]

In more recent times, however, there have been half hearted attempts by the judiciary in Kenya to disregard the *Elmann* doctrine of constitutional interpretation. There are instances where the courts have acknowledged that the Constitution ought to be interpreted purposively and not legalistically. Yet there have been cases where the same courts have insisted that the *Elmann* doctrine of constitutional interpretation is good law. In short, the Kenyan judiciary is yet to reach a consensus on whether to employ or disregard the *Elmann* principle. Every matter, therefore, depends on the judicial officer before whom the case is brought. Sometimes, the reasoning of the court depends on the day when the matter comes before even the same judicial officer. This state of affairs is jurisprudentially indefensible and intellectually unsound.

The recognition of the sanctity of the Constitution and its special character calling for special rules of interpretation was captured in the decision of the High Court of Kenya in the case of *Anthony Ritho Mwangi and Another Vs*

The Attorney General[30] where the court stated:

> "Our Constitution is the citadel where good governance under the rule of law by all the three organs of the state machinery is secured. The very structure of Separation of Powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs, namely the executive, and the legislature. The judiciary though seems to be omnipotent, it is not so, as it is obligated to observe and uphold the spirit and the majesty of the Constitution and the rule of law."

Further rejection of the *jurisprudence* in Elman was in the case of *Crispus Karanja Njogu Vs Attorney General*[31] in which the court held the view that Constitutional provisions ought to be interpreted broadly or liberally 'and not in a pedantic way i.e restrictive way.'[32]

In the case of *Rev. Dr. Timothy Njoya and 6 others Vs The Attorney General and 4 Others*[33] the three judges each considered the issue of the proper approach to Constitutional interpretation separately. Ringera J (as he then was) held that:

> "The Constitution is not an Act of Parliament and is not to be interpreted as one. It is the supreme law of the land; it is a living instrument with a soul and consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles. ... those to my mind, are the values and principles of the Constitution to which a court must constantly fix its eyes when interpreting the Constitution."

On her part, lady justice Kasango J held

> "I therefore reject the contention that the Constitution of Kenya is to be construed in the same way as any other legislative enactment. In this judgment I shall proceed to apply the rule of construction of the Constitution of Kenya in a broad and liberal manner."

Kubo J (dissenting) in the same judgment was of the persuasion that:

> "I would at this juncture like to say something about the *El Mann* doctrine of interpretation vis-à-vis the *Crispus Karanja Njogu* doctrine of interpretation. In my view they are not mutually exclusive. As I see it, *El Mann* did not lay down a rule carved in stone that a statute and a Constitution have to be interpreted in exactly the same way. The crux of *El Mann*, in my construction, lies in the following part of the quotation from *Craies on Statute Law*

> at 359: "The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used". This has to be read with the following part of the quotation from *Keshava Menon v State of Bombay* at 360: "but a court of law has to gather the spirit of the Constitution from the language of the Constitution".

If *El Mann* is given the interpretation indicated in the expressions cited above, its approach to interpretation of legal instruments, including the Constitution, is shorn of distinction from Crispus Karanja Njogu. And that is my interpretation of *El Mann*.

The failure of the three judges to concur on the proper approach to the interpretation of the Constitution reflects the doctrinal and philosophical shortcoming in the Kenyan judiciary. Professor Githu Muigai would call the problem, "a search for the philosophy of the law".

It is, nonetheless, apparent that the majority judgment in this case accepted the liberal approach as the proper approach to Constitutional interpretation. Although this judgment in many other respects has received mixed reactions from the Kenyan public, the foregoing restatements served as a departure from the so-called Elman doctrine.

In the same year that the Njoya case was determined, the High Court was confronted with issues that required it to satisfy itself as to the proper approach to Constitutional interpretation. This was in the case of *Ngare Vs Attorney General*[34]. The three judge bench made the finding that:

> "We have been asked to look at the issues raised in the originating summons and approach them liberally. We agree, matters of fundamental rights and alleged violations of these rights are serious issues and as was said by their lordships in the case of *Kuria wa Gathoni* (supra) the provisions relating to fundamental rights:
>
> > "were meant to assure the people of this country to come before this Court unhesitantly and without any constraint where there has been, there is, or there is a likelihood of a breach of rights enshrined in section 70 to 83 (inclusive) of the Constitution".
>
> We also take the view that in interpreting the Constitution, regard must be had to the language and the wording of the Constitution so that where there is clearly no ambiguity we have no reason to depart therefrom. Thankfully, in the instant case no ambiguity has been claimed. Ambiguity and inconsistency cannot be the same thing. The approach taken in *Republic Vs El Mann* shall, therefore,

> be our approach in this matter. We are not alone in taking that approach as the Constitutional Court in *Njoya and Others Vs Attorney General & Others* [2004] 1EA 194 only recently took the same approach and approved the decision in the case of Njogu Vs Republic [2000] LLR 2275.

It is apparent that looking at the judgment of *Njogu Vs Republic* and *Njoya Vs Attorney General* (majority decision) the court expressly departed from the *Elmann* decision. It demonstrates manifest jurisprudential weakness and patent episodic readership in the stream of constitutional interpretation of the Kenyan judiciary for the same court (differently constituted) to commit itself to the *Elmann* doctrine under the cover of the two decisions.

Further lack of doctrinal clarity on this issue emerges in the case of *R.M. (Suing Thro' Next Friend) J.K. Cradle (The Children Fund) Millie and G.A.O. VS the Attorney General*[35] (hereinafter referred to as "the Cradle Case) where the High Court revisited the applicability of the *Elmann* doctrine of Constitutional interpretation. In the court's own words:

> "In this regard while conceding that some of the reasoning in the case of *REPUBLIC v EL MANN 1969 EA* 357 have been substantially overtaken especially in the interpretation of the Constitution, one important principle remains intact, that the words of the Constitution or a statute should be accorded their natural and ordinary sense. This is the path we have chosen in the circumstances of this case. ... Of course the El Mann principles have quite rightly been buffeted or shaken by the powerful winds of broad and purposive approach in interpreting the Constitution together with the living tree principle of interpreting the Constitution but except in exceptional cases where these two approaches apply the above principle still reigns supreme. The situation where a living spirit has to be injected into the Constitutional provisions, include, where the language used is likely to lead to unjust situations. Even where the living tree principle of construction is invoked the nourishment given must originate from the roots, the trunk and the natural branches. The court would not be entitled to disregard the roots, the trunk and the natural branches in the name of giving flesh to the Constitution, or to graft in, its own artificial branches. The living tree is sustained by the tree and any graftings are likely to be rejected.
>
> By all means let the courts be innovative and take into account the contemporary situation of each age but let the innovations be supported by the roots.

In this regard we endorse fully the presumption of Constitutionality which was powerfully expressed by the Supreme Court of India in the *Hamdarddawakhana v Union of India Air* 1960 554 where the respected Court stated:

> "In examining the Constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment."

What the court appears to have been saying was that the *Elmann* doctrine was partly applicable and partly not applicable in Constitutional interpretation in Kenya. That was an ambivalent position. What, however, is outrightly not satisfactory is the court's reliance on the case of *Hamdarddawakhana* which was expressly concerned with the interpretation of legislative enactments as opposed to the constitution. Such is the lack of doctrinal clarity that this paper bemourns.

What exactly does "a purposeful" interpretation of the Constitution mean? Ringera J (as he then was) seized the opportunity to address himself to this very pertinent question in the case of *Rev. Dr. Timothy Njoya and 6 others Vs The Attorney General and 4 Others*[36]. According to Ringera J, the Constitution must be interpreted with the purpose of giving effect to certain values and principles.

> "The court should not be obsessed with the ordinary and natural meaning of words if to do so would either lead to an absurdity or plainly dilute, transgress or vitiate Constitutional values and principles. And what are those values and principles? I would rank Constitutionalism as the most important. The concept of Constitutionalism betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other, none is supreme: the Constitution is supreme and they all bow to it. I would also include the thread that runs throughout the Constitution – the equality of all citizens, the principle of non-discrimination. The doctrine of separation of powers is another value of the Constitution. And so is the enjoyment of fundamental rights and freedoms. Those, to my mind, are the values and principles of the Constitution to which a court must constantly fix its eyes when interpreting the Constitution."

From the foregoing, one discerns the *jurisprudence* that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and, enjoyment of fundamental rights and freedoms.

The High Court has added further support to this position by the dictum that:
The dry bones approach to constitutional interpretation is to be tolerated only where it is evidently and crystal clear that the framers intended to retain the frames only. Otherwise it is the task of the court in each generation to give flesh and spirit to the bones.[37]

A cursory digest of the decisions from the courts tasked with interpreting the Constitution reveals that rarely, if at all, do courts set out these principles as their guiding principles in determining questions before them.

The above digest of various decisions reveals basic doctrinal weaknesses in the Kenyan judiciary. Yet the more the cases one looks at from the Kenyan judiciary, the gloomier the situation looks. The so-called "neutral principles" that are expected to guide Constitutional principles have been conspicuously ignored in the quest for the proper approach to Constitutional interpretation in Kenya.

The golden thread, however, is that courts have consciously or otherwise, attempted to lean towards the so-called liberal interpretation of the Constitution which is in consonance with trends in other progressive democracies.

5. RULES OF PRACTICE AND PROCEDURE REGARDING ESPOUSAL FOR DETERMINATION OF CONSTITUTIONAL QUESTIONS IN KENYA

Three jurisprudential epochs are manifest under this theme. First is the era when there were no rules of practice and procedure in respect to the litigation of constitutional questions (hereinafter referred to as the "No Rules Era".) The Second is the era when the first set of rules were promulgated (hereinafter referred to as the "Chunga Rules Era"). The third era is when the second set of rules were promulgated (hereinafter referred to as the "Gicheru Rules Era").

5.1 The No-Rules Era

For some time, the High Court of Kenya took the suspect position that, in the absence of rules of practice and procedure promulgated under Section 84(6) of the Constitution by the Chief Justice, one could not approach the Constitutional court for the enforcement of fundamental rights and freedoms.

This was the position in the case of *Gibson Kamau Kuria Vs The Attorney General*[38]. In this case, the applicant who had his passport seized by the government through its agents had requested for the return of the same because he wanted to travel outside the country, which request was denied. He, therefore, made an application under Section 84(1) of the Constitution saying that the government's action was contrary to Section 81 of the Constitution, which guaranteed every individual the right to move freely and, therefore, his right to move freely in and out of Kenya.

The Court in dismissing this application stated that it lacked the jurisdiction to hear the matter since the Chief Justice had not made Rules of practice and procedure as envisaged by Section 84(6) of the Constitution. The court had this to say:

> Had there been Rules made under Section 84(6) on which advocates for the applicant conceived reliance, that might well have been to the advantage of the request for that which is termed Constitutional court.

The court further observed that the jurisdiction of Section 84 was subject to subsection (6) and since there were no operative Rules of Practice and Procedure of the High Court, such as in the instant case, there was a void in the search for certainty which is an all important aspect of jurisdiction whatever as to the entire section 84.

The same suspect jurisprudence was upheld and adopted by the High Court in the case of *Maina Mbacha and 2 Others Vs The Attorney General*[39] where the court divested itself of jurisdiction by stating that Section 84 of the Constitution was inoperative and the applicants' application under the subsection was, therefore, dismissed. The applicant in this case sought to have a Resident magistrate's Court restrained by way of prohibition from continuing to hear a case against them because that would infringe their fundamental rights as set out under Sections 72, 77, 79 and 82 of the Constitution. Mr. Justice Dugdale did not entertain any arguments as to jurisdiction. In a novel way of judicial decision making, he read a pre-

typed ruling during the mention of the case holding that section 84 of the Constitution was inoperative and dismissed the application. Attempts to have this ruling reviewed were also dismissed.

This "Section 84 is dead" jurisprudence has been a subject of academic and juridical criticism and rejection[40].

Later on, in the case of *Raila Odinga Vs Attorney General* the applicant had sought various declarations under Section 84 of the Constitution challenging his detention without trial. His application came to court by way of Originating Motion to which the state took a Preliminary Objection contending that the procedure was unknown in law and in the absence of prescribed procedure under Section 84(6) the applicant could only commence proceedings against the state by way of Plaint. Taking into account the fact that Section 84 was meant to afford quick and efficient redress for violation of fundamental rights, the court rejected the state's contentions. And relying on the case of *Olive Casey Jaundoo Vs Attorney General of Guyana*[41] the late Madan CJ ruled: 'In my opinion the procedure to commence an action by Originating Motion is known, it is recognized and it is additional to commencement of an action by plaint."

The experience of Kenya's neighbors in Tanzania reveals greater enthusiasm on the part of the judiciary to enforce fundamental rights and freedoms the absence of rules of practice and procedure notwithstanding.[42]

5.2 The Chunga Rules Era

After the lethargy on the part of successive Chief Justices to promulgate rules of practice and procedure in respect of the various enforcement sections of the Constitution, in the year 2001, Hon Mr Justice Benard Chunga, C.J (as he then was) promulgated The Constitution of Kenya [Protection of Fundamental Rights and Freedoms of the Individual] Practice and Procedure Rules 2001[43]. The rules were made pursuant to the rule-making discretion vested in the Chief Justice pursuant to Section 84(6) of the Constitution of Kenya. The said rules were popularly referred to as "the Chunga Rules". They envisaged and made provision for three circumstances under which one would move the High Court under Section 84 of the Constitution[44].

5.3 The Gicheru Rules

By the instrument of Legal Notice No. 6 of 2006 the Hon. Chief Justice Evan Gicheru promulgated the Constitution of Kenya (Supervisory Jurisdiction

and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006[45] (hereinafter referred interchangeably as the rules or the Gicheru rules).

The Gicheru rules, among other things, revoked the Chunga rules of 2001. The Gicheru Rules make provision for the Practice and Procedure of the High Court in the exercise of its supervisory jurisdiction under Section 65 of the Constitution, the interpretive jurisdiction under Section 67 of the Constitution and enforcement jurisdiction under Section 84 of the Constitution.

It is curious to note that the Hon Chief Justice purported to make rules of practice and procedure pursuant to section 67 of the Constitution whereas no such rule making power is donated under the said section of the Constitution. It would, therefore, appear that the rules made under Section 67 of the Constitution[46] were made in excess of the Chief Justices' rule making powers and an argument could be sustained that they are null and void for having been made *ultra vires* the powers of the maker.

5.3.1 Procedure in Respect of the Supervisory Jurisdiction of the High Court

The rules prescribe that a party who wishes to invoke the jurisdiction of the High Court under Section 65 of the Constitution moves the court by way of Originating Notice of Motion.[47] The motion should set out the concise grounds for the application, and should be supported by the applicant's affidavit[48]. The format of the Motion is spelt out in the schedule to the Rules[49]. Upon filing the Motion, the Registrar should place the motion before a judge for directions within seven days from the date of filing[50]. The High Court is also given the discretion, in exercise of the powers conferred by Section 65(2) of the Constitution, to move on its own motion[51].

Illustration 1: Format of the Originating Notice of Motion under Section 65(2) of the Constitution

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT .....

CONSTITUTIONAL APPLICATION NO. ..... OF .....

In the matter of an application under section 65

Between

A.B. (insert names of parties) ..... applicant

And

C.D. (insert names of parties)..... respondent

ORIGINATING NOTICE OF MOTION

TAKE NOTICE that on the day of , 20 at o'clock in the forenoon or so soon thereafter as can be heard, the above applicant/counsel for the applicant will move the Court for an Order that :

(State the concise grounds)

The application is supported by the annexed affidavit of sworn on the day of , 20

The address for service of the applicant is

DATED this day of , 20

Signed

Applicant/Advocate for Applicant

Drawn and filed by:

To be served upon:

5.3.2 Procedure in Respect of the Interpretive Jurisdiction of the High Court

To invoke the interpretive jurisdiction of the High Court, two situations are provided for under the Rules, namely, where the subordinate court, of its own motion forms an opinion that there is a question as to the interpretation of the Constitution, and, where a party to proceedings alleges that there is a question as to the interpretation of the Constitution. In the first situation, the rules provide that the court has the discretion to refer the question to the High Court in a prescribed format[52]. In the second case, the subordinate court is expected to first form an opinion whether the allegation involves a substantial question of law. The procedure is for the party to informally request the presiding officer of the court to refer the question to the High Court and the court to do so in a prescribed format[53]. In both cases, the subordinate court must concisely state the issues and its opinion and, within fourteen days refer the question to the High Court[54]. Upon receipt of the

reference, the Registrar should, within seven days, place the matter before the Chief Justice to constitute a bench in accordance with the provisions of Section 67(3) of the Constitution, unless there is an interlocutory matter in the reference, in which case the Registrar should place the matter before a judge for determination[55]. As already noted, the legal validity of the rules under the interpretive/reference jurisdiction of the High Court is highly questionable. So far, no question challenging the same has been raised for determination.

Illustration 2: Format of reference suo motu by the subordinate court to the High Court under Section 67 of the Constitution.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT .....

CONSTITUTIONAL REFERENCE NO. ..... OF .....

In the matter of section 67

In the matter of criminal/civil case no. of at court

between

A.B.(insert names of parties) ..... applicant and

C.D. (insert names of parties) .....respondent

To: The High Court of Kenya

Question(s) for interpretation of the Constitution by the High Court pursuant to section 67 of the Constitution.

1. On the day of , 20 a question(s) as to the interpretation of the Constitution arose.

2. (Briefly set out the opinion of the subordinate court on the point of law raised.)

3. Briefly set out the facts necessary to enable the High Court to properly decide the point of law raised.)

4. The question(s) for the decision of the High Court is (state the question(s).)

Dated this day of , 20

Magistrate/Presiding Officer

Illustration 3: Format of reference to the High Court on the application of a party from the Subordinate Court under Section 67 of the Constitution

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT .....
CONSTITUTIONAL REFERENCE NO. ..... OF .....
In the matter of section 67

In the matter of criminal/civil case no. of at court
between
A.B. (insert names of parties) ..... applicant
and
C.D. (insert names of parties) .....respondent

To: The High Court of Kenya

Question(s) for interpretation of the Constitution by the High Court pursuant to section 67 (1) of the Constitution.
1.On the day of , 20 a question(s) as to the interpretation of the Constitution arose.
2.The parties contend as follows (Set out, in consecutive paragraphs the specific issues contended by each of the parties referring where necessary to Acts or decided cases.)
3. (Briefly set out the opinion of the subordinate court on the point of law raised.)
4 (Briefly set out the facts necessary to enable the High Court to properly decide the point(s) of law raised.)
5.The question(s) for the decision of the High Court is
(state the question(s).)
Dated this day of , 20
Magistrate/Presiding Officer

5.3.3 Procedure under the Enforcement Jurisdiction of the High Court

As noted earlier, this is the jurisdiction vested in the High Court by section 84 of the Constitution. The jurisdiction is for enforcement of the fundamental rights and freedoms of the individual as contained in sections 70 to 83 (inclusive) of the Constitution of the Republic of Kenya. The situations anticipated by the rules are four and the same are as discussed below.

a) Where contravention of any fundamental rights and freedoms of an individual under sections 70 to 83 (inclusive) of the Constitution

is alleged or is apprehended

Although this situation as anticipated by the rules is broadly framed, when read in conjunction with other rules, it presents a situation where such an allegation or apprehension arises otherwise than in the course of any pending court proceedings either in the High Court or subordinate court. Under these circumstances, the application should be made directly to the High Court by way of petition in a prescribed format[56]. Such Petition must be supported by affidavit[57] to which shall be annexed any documents on which a party wishes to rely[58]. Rule 15 of the rules provides that such petition should, in a criminal case be served upon the Attorney General and in a civil case be served upon the Respondent within seven days of filing.

This rule presents some level of ambiguity when examined against the rest of the rules. As already indicated, the procedure of moving the High Court by instrumentality of a Petition is resorted to when a violation of the fundamental rights and freedoms of the individual is apprehended otherwise than in the course of pending proceedings. There are procedures specifically provided for when such an issue arises within the scope of pending proceedings. The person served with the Petition under Rule 15 aforesaid is expected to reply by way of a Replying Affidavit to which should be annexed any document to be relied upon. The Replying Affidavit is to be filed and served within fourteen days of service of the Petition[59]. The Petitioner has the discretion to file and serve a further affidavit within seven days of service of the Replying Affidavit[60]. Under the rules, within seven days from the date of service of the Replying Affidavit or further affidavit, whichever is later, the Registrar should place the matter before a judge for fixing a hearing date or directions. When the matter is placed before the judge, one of the directions that the judge may make relates to filing and service of written submissions.[61] In the event that the Attorney General or the Respondent as the case may be fails to file a response within the prescribed time, the Petitioner has the discretion to set down the matter for hearing and determination[62]. The rules also vest in the judge before whom the petition is placed to hear and determine an application for conservatory orders and such application is by way of a Chamber Summons supported by affidavit[63]. There is a further jurisdiction vested in the court to set aside the conservatory orders.

It is discernible from the foregoing that there is no requirement for reference of the matter to the Chief Justice for directions as to appointment of a judge, the allocation of the hearing date. In practice, however, judges of the High Court have routinely referred constitutional matters to the Chief Justice for

allocation of judges and hearing dates.

Illustration 4: Format of a Constitutional Petition for Enforcement of Fundamental Rights and Freedoms under Section 84(1) of the Constitution.

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT .....
PETITION NO. ..... OF , 20.....
In the matter of section 84 (1)
In the matter of alleged contravention of fundamental rights and freedoms under section (insert section)
between
A.B. (insert names of parties) ..... petitioner
and
C.D. (insert names of parties) .....respondent

To: The High Court of Kenya
The humble petition of A.B. (insert names of petitioner) of in the Republic of Kenya is as follows–

(The allegations upon which the petitioner(s) rely must be concisely set out, in consecutively numbered paragraphs.)
Your Petitioner(s) therefore humbly pray(s) that (Set out exact order(s) sought.)
Or that such other Order(s) as this Honourable Court shall deem just.
Dated at this day of , 20
Signed
Petitioner/Advocate for the Petitioner
Drawn and filed by:
To be served upon:

b) Where a Constitutional issue arises in a matter before the High Court

Under these circumstances, the Court seized of the matter is empowered by the rules to treat the matter as a preliminary point and hear and determine the same[64]. This prescription is not fully satisfactory, in fact, it raises a number of conceptual challenges. The first challenge relates to the very nature of a Preliminary Objection. A preliminary objection as described in the case of *Mukisa Biscuit Manufacturing Ltd Vs West End Distributors Limited*[65] raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. A constitutional matter, on the other hand, may be predicated on points of fact that form the basis of the Constitutional issue. Insisting that a party raises a matter as a preliminary

point, therefore, is very limiting. It presupposes that constitutional questions arising within the proceedings before the High Court do not, themselves, sometimes involve highly contested questions of fact.

c) Where in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of section 70 to 83 (inclusive)

The rules under this caption envisage a situation where the subordinate court, on its own motion, detects a Constitutional issue touching on the fundamental rights and freedoms of the individual. It also requires the subordinate court to form an opinion that the issue is not frivolous and vexatious. When these conditions exist, the rules vest in the presiding officer the discretion to refer the matter to the High Court in a prescribed format[66].

Illustration 5: Format where a subordinate court suo motu refers question for enforcement of fundamental rights and freedoms under Section 84(3) of the Constitution

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT .....
CONSTITUTIONAL REFERENCE NO. ..... OF .....
In the matter of section 84 (3)
In the matter of alleged contravention of fundamental rights and freedoms under section (insert section)
In the matter of criminal/civil case no. of at court
between
A.B. (insert names of parties) ..... applicant
and
C.D. (insert names of parties) ..... respondent

To: The High Court of Kenya
Question(s) for determination on the alleged contravention of section(s) of the Constitution of Kenya.
1.On the day of , 20 a question(s) arose as to the contravention of section(s) of the Constitution.
2. (Briefly set out the opinion of the subordinate court on the question raised.)
3. (Briefly set out the facts necessary to enable the High Court to properly decide the question(s) raised.)
4. The question(s) for determination by the High Court is (State the question(s).)
Dated this day of , 20

Magistrate/Presiding Officer

d) Where a party to proceedings in a subordinate court alleges contravention of his/her fundamental rights and freedoms

Under this caption, the rules envisage a situation where a party to proceedings (civil or criminal) makes an allegation of a contravention of his/her rights under sections 70 to 83 of the Constitution. The procedure requires that, first, the party applies informally to the presiding officer during the pendency of the proceedings that a reference to the High Court be made for purposes of determining the question[67]. The second step is for the presiding officer to satisfy himself/herself that there is merit in the allegation and that it has not been made frivolously or vexatiously, then grant the application. On granting the application, the presiding officer should frame the questions to be determined by the High Court in a prescribed form[68]. Within a period of twenty-one days from the date of framing of the questions the subordinate court ought to have referred the questions to the High Court[69].

Illustration 6: Format of a reference to the High Court under Section 84(3) of the Constitution on the application of a Party to Proceedings in the Subordinate Court.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT .....

CONSTITUTIONAL REFERENCE NO. ..... OF .....

In the matter of section 84 (3)

In the matter of alleged contravention of fundamental rights and freedoms under section (insert section)

In the matter of criminal/civil case no. of at court

between

A.B. (insert names of parties) ..... applicant

and

C.D. (insert names of parties) ..... respondent

To: The High Court of Kenya

Question(s) for determination of the alleged contravention of section(s) of the Constitution of Kenya.

1. On the day of , 20 a question(s) arose as to the contravention of section(s) of the Constitution.

2. The parties contend as follows: (Set out, in consecutive paragraphs the specific issues contended by each of the parties referring where necessary to Acts or decided cases.)

3. (Briefly set out the opinion of the subordinate court on the question raised.)

4. (Briefly set out the facts necessary to enable the High Court to properly decide the question(s) raised.)

5. The question(s) for determination of the High Court is (State the question(s).)

Dated this day of , 20

Magistrate/Presiding Officer

When the Registrar receives the reference he/she should place the matter before the judge within seven days to fix a hearing date and further directions[70]. During the tenure of the previous Chunga rules, an application filed under Section 84 of the Constitution within the framework of pending proceedings operated as an automatic stay of those proceedings pending the hearing and determination of the Constitutional issue. Under the Gicheru

rules, the High Court, may on an application by a party to the proceedings order that all further proceedings before the subordinate court shall be stayed pending the hearing and determination of the reference[71]. When questions are framed in a reference from a subordinate court, only those questions framed in the prescribed form are to be raised. As a matter of litigation strategy, it is, therefore, advisable that as many questions as reasonable are raised informally before the presiding officer.

Procedurally, where a party intends to rely on any reported or unreported case or quote from any book, such party should lodge with the court and serve copies of the reported or unreported case or quotation two days before the hearing[72]. The court is procedurally required to give priority to all applications and references to the High Court over all other cases and to hear and determine such applications and references expeditiously[73]. When the High Court hears and determines the Constitutional applications, it may on an informal application upon delivery of judgment or ruling grant a stay for fourteen days pending appeal. An appeal to the Court of Appeal under Section 84(7) of the Constitution is to be governed by the Court of Appeal rules[74].

5.4 Consequences of Non-Compliance with the Rules of Practice and Procedure in Constitutional Litigation in Kenya

Ordinarily, rules of procedure are regarded as the handmaiden of justice and not a master of the same. They ought to facilitate the realization of substantive justice and ought not to be an impediment to substantive justice. In Kenya, particularly in Constitutional litigation, the converse appears to be the position. The question of the consequence of failure to comply with the letter of the law under the Constitution of Kenya [Protection of Fundamental Rights and Freedoms of the Individual Practice and Procedure] Rules 2001 has been a subject of judicial consideration. In the case of *Livingstone Maina Ngare Vs the Attorney General & Anor*[75] *(the Ngare Case)*, the court noted thus regarding the applicability of the Rules:

> "It is our view, however, that once rules were made, then a party ought to follow those rules because:-
>
> i) S. 84(1) and S. 84(6) should be read together and not as Mr. Sichangi has done, selectively and to the exclusion of each other.
>
> ii) Whereas S. 84(1) is the section which protects the fundamental rights, S. 84(6) gives the procedure for approaching the High Court to enforce these rights.

iii)The Constitution specifically gave the Chief Justice the power to enact the rules and the Chief Justice did so under Legal Notice No. 133/ 2001. A party cannot now ignore these rules as if they did not exist. As Kubo J said in *William Kipruto Arap Chelashaw Vs Republic* (Supra) and we agree, 'procedural rules are not made for fun but for a purpose'

... we have said enough to show that access to the High Court under Section 84(1) has to be by way of the procedure set out under Section 84(6), and necessarily, therefore, the Rules should be applied."

Taking cue, the Court in *Wiliam Birir Arap Chelashaw Vs Attorney General & Anor*[76] *(the Chelashaw case)*, stated thus regarding non-observance of the strict letter of the rules:

"This brings us to the second question – in the event there is non-compliance of any of the said rules or all of them what is the effect of the said non-compliance or defects to the application? Would such non-compliance or defects be curable or fatal to the application? ... The power to make the said rules were conferred on the Chief Justice by our Supreme law of the land, the Constitution of Kenya. In his wisdom and discretion, he drafted and made the rules on 17th September 2001 and it became law on 21st September, 2001 vide Legal Notice No. 133 of 2001. It is our view that Rules made under constitutional powers are superior and stand above those made under say a statute. They should be given more regard and force. We have carefully perused the said rules and do not see any provision allowing departure or variation therefrom. The said Rules also by themselves do not appear to give any discretion to the court to vary its provisions, or suspend or waive their application.

It may be true that the High Court as a constitutional court exercises inherent jurisdiction under Section 60 of the Constitution and strictly has power to make orders to enforce constitutional rights and freedoms. However, it is our view that first the court must formally be moved for declarations and remedies that require departure or non-application of Rules made under the Constitution or show on the spot that the said rules are themselves in violation of the Constitutional provisions. ...

It therefore follows that if a party invokes Section 84 of the Constitution and comes to this court for protection, then he/she surely must respect the rules of practice and procedure established by the very Constitution to achieve this. ... In the case of the *Speaker*

of the National Assembly Vs Njenga Karume CA 92/92 which was referred to in the Ngare case the court of Appeal stated:

> In our view there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an act of parliament that procedure should be strictly followed.

We wholly agree with this principle of law."

The foregoing jurisprudence in its pure sense tends to raise the rules of practice and procedure in Constitutional cases to the level of fetish.

The same jurisprudence seems to be contradictory of the position taken in the case of *Nation Media Group Ltd Vs Attorney General*[77] (the *Nation Media Group Ltd* case) that

> "A Constitution court (sic) should be liberal in the manner it goes around dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice. The very Constitution that imposes a duty on this court to administer justice without undue regard to technicality (sic)."

Due to the ambivalence of positions taken by the courts in the *Ngare* and *Chelashaw* cases on the one hand and the *Nation Media Group Ltd* case on the other hand, it is imperative that a practitioner in the field of Constitutional litigation strives to pay homage to the rules of practice and procedure to avoid being unceremoniously driven out of the seat of judgment.

5.5 Is it Permissible to use the Procedure of Judicial Review to seek Enforcement of Constitutional Rights?

Is it permissible for a litigant to move the High Court on a question involving enforcement of constitutional rights by invoking the Judicial Review procedure?

A number of cases have been handled by the Kenyan courts on this issue. The more the cases in which the courts are granted an opportunity to adjudicate and make their jurisprudence known, the further from clarity the jurisprudence moves. This issue arose in the case of *Republic Vs Kenya Roads Board ex parte John Harun Mwau*[78]. The case sprang from the enactment of the Kenya Roads Board Act, No. 7 of 1999. The Act, among

other things, established a body known as the Kenya Roads Board and committees known as District Roads Committees. The applicant, a public spirited tax payer, commenced proceedings by way of Judicial Review seeking a prohibitory order prohibiting the implementation of the Act and declarations that the Act is unconstitutional. The applicant's argument was that the Act was unconstitutional and violated Section 82 of the Constitution in that the Act provided for only certain societies and organizations that may nominate representatives to be appointed members of the Board. It was further the applicant's case that that part of the Act which provided for sitting members of Parliament to be members of the District Roads Committees was unconstitutional since it conferred executive powers on legislators contrary to the doctrine of separation of powers and that it was unconstitutional for legislators to enact and enforce the laws. The respondents took issue with the procedural propriety of the proceedings, particularly the capacity of the court to subject legislative enactments to Judicial Review of administrative actions. In determining this issue, the court held that:

> "The remedy of Judicial Review is available as a procedure through which the applicant can come to court for the determination of any Constitutional issue including striking down of legislation which may be unconstitutional. Judicial Review has an entirely different meaning in Commonwealth countries, which have adopted the written supreme Constitutional system. ... Judicial Review in this sense means the power to scrutinize laws and executive acts, the power to test their conformity with the Constitution and the power to strike them down if they are found to be inconsistent with the Constitution. I am convinced that the Kenyan courts have been given such jurisdiction vide sections 60, 84 and 123(8) of the Constitution."

The doctrinal basis of this decision, viewed in its entirety, is suspect. One of the questions the court never applied its mind to in depth was whether "unlimited original jurisdiction in civil and criminal matters" as set out under section 60 of the Constitution includes the power of the High Court to grant orders in the nature of judicial review.

Looked at in its historical context, and having come at a time when no rules of practice and procedure had been promulgated under sections 65 and 84 of the Constitution, one finds justification in the general argument that in the absence of rules of practice and procedure, judicial review may be an available remedy.

In the case of *Republic Vs Hon. Chief Justice of Kenya & Others Ex Parte*

Roseline Naliaka Nambuye[79], the applicant, a judge of the High Court whose conduct was a subject of investigation by a tribunal, challenged the Constitutional propriety of her investigation. Her challenge was mounted in the nature of a judicial review application to quash the decision subjecting her to disciplinary proceedings. In dismissing her application, the court made a finding that:

> "The applicant has contended that there is a breach of her fundamental rights and freedoms under Section 77(10) and (11) of the Constitution. ..... For any alleged breach to be properly articulated an application by way of an Originating Summons is required by the Rules made under the Constitution and this is not what the applicant has done here – where the applicant purports to enforce such rights by way of a Notice of Motion seeking Judicial Review Orders of certiorari, mandamus and prohibition. Such an application is clearly defective under the law. Any relief under the Constitution should have been sought by way of Originating Summons as stipulated in Section 84 (1) and the Rules made under Section 84(6).
>
> ....
> ..... The applicant has failed to demonstrate that he has properly brought the application in accordance with the aforesaid or that what he seeks to achieve is amenable to judicial review. I find that there is no cause of action under the Constitution for the above reasons and the prayers sought must fail on this ground as well."

It is imperative to note that the Nambuye case was determined at a time when rules of practice and procedure had been promulgated by the Chief Justice to govern applications relating to enforcement of fundamental rights and freedoms spelt out under Sections 70 to 83(inclusive) of the Constitution. Looked at in light of this historical reality, perhaps one may find justification in the court's departure from the *Kenya Roads Board* case

The other case determined during the subsistence of the rules of practice and procedure was *Republic Vs Judicial Commission of Inquiry into the Goldenberg Affair Ex parte Hon Professor George Saitoti.*[80] The applicant sought judicial review orders to quash certain sections of the report of the Judicial Commission of Inquiry into the Goldenberg Affair[81]. The said sections had adversely mentioned the applicant for involvement into a mega corruption scandal at a time when the applicant served as the Minister for Finance. The report had made recommendations that the applicant be investigated and prosecuted for his involvement in the mega scandal. Among the grounds raised by the applicant was that his right to a fair trial

as protected by Section 77 of the Constitution was likely to be violated. On this contention, the court found that:

> "We concur with the applicant's counsel on their argument that there cannot now be a trial of the Applicant unaffected by the report and by the said errors and breaches of law by the Commissioners, which errors and breaches have been widely and serially publicized nationally as truth and law in the past three years. No fair trial can result. In a way, this has resulted in some shift of burden before the actual charging and has also seriously and adversely affected the presumption of innocence. This in our view violates Section 77(1) of the Constitution."

It is noteworthy that the applicant argued the breach of fundamental right within the wider framework of legitimate expectation as a ground for judicial review. Nonetheless, as a matter of principle, the court did not revisit the question whether judicial review was the best avenue for redressing the applicant's grievances for anticipated breach of his fundamental rights and freedoms when a clear procedure did exist under Section 84 of the Constitution.

This case was filed on March 3, 2006 when Rules of Practice and Procedure had been formulated under Section 84(6) of the Constitution. The foregoing inconsistency is not alien to Kenyan judicial decision making.

This paper takes the view that the principle in the *Nambuye* case was wrong jurisprudence. Actions that violate human rights could equally qualify as administrative mal-practices which warrant judicial intervention by way of judicial review or an action for enforcement under Section 84. An action for enforcement of fundamental rights and freedoms of the Constitution under Section 84 is available "without prejudice to any other action with respect to the same matter that is lawfully available". Logically, one of the lawful avenues for redress may be judicial review but the applicant can choose to go by either, or even both.

6.WHO CAN ESPOUSE A CLAIM IN A CONSTITUTIONAL DISPUTE IN KENYA? – THE QUESTION OF *LOCUS STANDI*

In recent times, the rules of *locus standi* in constitutional litigation have, in some instances, been interpreted liberally while in others they have been construed quite strictly, pedantically, and eclectically.

In the case of *Kenya Bankers Association & Others Vs Minister for Finance & Another* (No. 4) the court gave a most liberal approach to the question of *locus standi* when it stated:

> "As a general principle relating to this type of public interest litigation, we wish to state, that what gives *locus standi* is a minimal personal interest and such an interest gives a person standing even though it is quite clear that he would not be more affected than any other member of the population. With regard to representative suits be it organizations on behalf of their members, such as is the case here, or clubs societies and associations, we hold as a matter of principle, that representative organizational standing in court is permissible, provided that (a) the organization's members have standing to sue in their own right (b) the interests which the organization seeks to protect are germane to the organization's purpose (c) neither the claim nor the relief sought requires individual participation of members. .... in our very considered opinion carefully reached during our retirement to consider this case, like in human rights cases, public interest suits including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the precondition of being an aggrieved person and other technical objections, cannot bar the jurisdiction of the court, or let justice bleed on the alter of technicality. It is the fitness of things and in the interest of justice and public good, that litigation on constitutionality, entrenched fundamental human rights and broad public interest protection has to be viewed. Narrow pure legalism will not do. We cannot uphold technicality only to allow a clandestine activity to sneak through the net of judicial vigilance in the garb of legality."

On the other hand, in the case of *Timothy Njoya & 6 Others Vs Attorney General & 3 Others (No. 2)*[82] the High Court in a majority judgment opined that:

> "The scheme of protection of fundamental rights envisaged by our Constitution is one where individual, as opposed to community or group rights are the ones enforced by the courts. Section 84(1) of the Constitution is clear. ..... The emphasis is clear. Except for a detained person for whom someone else may take up the cadgels, every other complainant of an alleged contravention of fundamental rights must relate the contravention to himself, as a person. Indeed the entire chapter 5 of the Constitution is headed "Protection of Fundamental Rights and Freedoms of the Individual." There is no room for representative actions or public interest litigation in

matters subsumed by Section 70 – 83 of the Constitution."

Quite clearly, a student of the judicial process specializing in the constitutional litigation stream will be at pains to explain the point of departure in the two decisions above. It is yet another manifestation of lack of a philosophy of the law on *locus standi* in the judiciary in Kenya.

The case of *Patrick Ouma Onyango And 12 Others Vs The Honourable Attorney General And 2 Others*[83] was one where the question of the *locus standi* to espouse a Constitutional dispute on a matter of public interest was material.

The case was brought in the nature of a Constitutional reference for the enforcement of fundamental rights and freedoms under Section 84 of the Constitution of the Republic of Kenya. The case was further predicated upon Sections 1, 1a, 3, 8, 46, 47, 49, 56, 70 and 123(8) of the Constitution of the Republic of Kenya, Rules 9 and 11 of the Constitution of Kenya, (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules (the Chunga Rules), Sections 17, 27, 28, 28A and 28B(4) and (5) of the Constitution of Kenya Review Act (the Principal Act) as amended by Sections 4 and 5 of the Constitution of Kenya Review (Amendment) Act 2004 (the Consensus Act), Section 3A of the Civil Procedure Act (Chapter 21, Laws of Kenya) and all other enabling provisions of the law – whatever this last one was intended to mean. Primarily, the applicants sought to impugn the manner in which the process of overhauling the Constitution of the Republic of Kenya was being undertaken. The applicants purported to file the case on their own behalf and on behalf of all the people of Kenya.

An issue was raised whether the applicants had the *locus standi* to espouse the claim. To this the court held:

> "This Originating summons dealt with matters that are larger than the Constitution itself. This was a matter that was not anticipated and so no procedure is provided for anywhere in the Kenyan laws. The court dealt with this application under its inherent jurisdiction. The applicants have derived their standing in the matter from the very nature of the subject matter. *All Kenyans are interested in this case and are keenly awaiting its outcome. It is a matter of great public interest and it would have been impossible to get the consent of all Kenyans in order to file or regularize the Originating summons, given the nature of the orders sought and the time within which this application was to be heard and a determination made. It would have been impossible for the court to ask the*

> *applicants to comply with procedure if there was any.* The court preferred to go for the substance of the application rather than deal with technicalities.So that even though the objections raised and arguments by the applicants were valid and substantive, the court was reluctant to consider them and instead delved directly into the Originating summons."[Emphasis supplied]

The argument that the Originating Summons "dealt with matters that are larger than the Constitution itself" is not convincing. Indeed, courts being creatures of the Constitution and the law, cannot be heard to deal with extra - constitutional and/or extra-legal matters. Courts are not immune to dictates of Constitutionalism, the limiting of arbitrariness in the exercise of public power.[84] Be that as it may, the court's departure from the jurisprudence in the *Njoya* case without taking time to distinguish it only contributed to jurisprudential disharmony on the question of *locus standi* in constitutional litigation. Further departure from the jurisprudence in the *Njoya* case on the question of locus standi was witnessed in the case of *Rangal Lemeiguran & Others Vs The Attorney General & Others*[85] where the court took the position that:

> "There is nothing to prevent an individual or a group of individuals with a common grievance, alleging in one suit that their fundamental rights and freedoms under Section 70 to 83 (inclusive) of the Constitution have been infringed in relation to each one of them, and to them collectively...In this case, the applicants are not restricted to a person to seek a declaration that each and everyone of them, and their community represent or constitute a special interest in terms of Section 33 of the Constitution...It would be a violation of the right to self expression under Section 79 of the Constitution if either the Applicants were denied a right to be heard whether individually or in turns or chose to express themselves through one representative hence the applicants like a corporation have *locus standi* to bring this application"

It is noteworthy that to the best of our research, the Court of Appeal has not rendered itself on this issue of *locus standi*. What, therefore, remains is the disharmonious jurisprudence from the High Court. In terms of numbers, there is greater support for the permission to public interest litigation and representative action than the restriction to individual action in constitutional and fundamental rights litigation in Kenya.

7. THE SUBSTANTIVE CONSTITUTIONAL ISSUES THAT HAVE ARISEN IN KENYA AND THE POSITIONS THAT COURTS EXERCISING JURISDICTION OVER THE SAME ISSUES HAVE TAKEN

7.1 Existence of an Alternative Remedy is no Bar to Seeking Constitutional Remedy

In the case of *Anarita Karimi Njeru Vs R (No.1)*[86] the applicant, who had been charged with the offence of stealing by a person employed in the public service and who had been denied a chance to call a witness to testify in her favour in the matter, made an application under Section 84(1) seeking a declaration that the refusal by the trial court to adjourn the case to enable her to call a witness was a violation of her right to a fair trial under section 77 of the Constitution. She had applied for leave of the court to appeal out of time against her conviction by the trial court, which application was refused.

At the hearing of the application, the state counsel took a Preliminary Objection saying that the applicant had availed herself another remedy available to her and, therefore, she could not come to the High Court over the same matter. The court was, therefore, asked to determine the meaning of the phrase "without prejudice to any other action with respect to the same matter which is lawfully available" as envisaged by Section 84(1) of the Constitution.

The Court, in construing this phrase, concurred with the state counsel stating that the applicant could not adjudicate the same matter twice by moving the High Court to grant a remedy in that respect. The court had this to say:

> "Which leads us to conclude that you can apply under Section 84(1) before but not after you have taken other action, and it is to be observed that Section 84(1) says 'any other action' which is lawfully available; it does not say 'which was lawfully available."

It is most apparent that the High Court was wrong in a cardinal respect; by arguing that it should not be asked to adjudicate more than once on the same issue and that the right of access to the High Court under Section 84(1) is not meant to be the last remedy. This is because the rights under Section 84 are independent of any other remedy, which is available and the court's jurisdiction under this section does not depend upon any other remedy that is available to the applicant. The issue that was before the court was not a criminal application under any statute but rather a constitutional

application arising out of a criminal case in which the applicant was involved. The constitutional court, therefore, had the jurisdiction to hear, determine and grant such orders as it deemed fit so as to secure the protection of the rights of the applicant to have a fair trial as envisaged by Section 77 of the Constitution.

In yet another case, *David Mukaru Ng'ang'a Vs R*[87], the applicant filed a constitutional application under Section 84 of the Constitution seeking to restrain the police from illegally arresting, detaining or harassing him. Dugdale J. (as he then was), in dismissing the application stated that it could not succeed because the applicant had another remedy of prohibition under Order 53 of the Civil procedure Rules and, therefore, he could not succeed in an application for an order of prohibition under the Constitution. Moreover, the court stated that since the court's leave had not been granted to the applicant, the application before the court was not proper and it had to fail.

The judge made this finding in spite of the very wide remedial jurisdiction vested in the High Court under Section 84 of the Constitution to "make such orders, issue such writs and give such directions as it may consider necessary for the purpose of enforcing the rights and freedoms of the individual." The applicant was obviously entitled under Section 84 of the Constitution to bring a Constitutional application without prejudice to any other remedy he may have had in respect of the same matter – in this case, an order of prohibition.

It was clear that in spite of the clear words of Section 84 of the Constitution, the fact that the applicant had an alternative remedy was used to deny him remedy under Section 84 of the Constitution.This position by the High Court of Kenya contradicted opinions expressed by many other courts in other jurisdictions[88].

The Kenyan Court of Appeal in the case of *Rashid Allogoh Odhiambo and 245 Others Vs Haco Industires Ltd*[89] upheld the position in *Ramlogan Vs The Mayor of San Ferando*[90]. The appellants had served the respondent for periods of time ranging between two years to seventeen years without the respondent giving them letters of appointment and/or paying them decent wages and salaries. The applicant's commenced proceedings for enforcement of fundamental rights and freedoms contending that by retaining them as casual employees, the respondent had denied the applicants the right to earn a decent wage and to enjoy the minimum terms and conditions of employment. The appellants also contended that they had

been held in slavery and servitude. When the matter came up before the judges of the superior court, the judges held that the matters raised were really not constitutional as they merely concerned the situation between an employer and employee and that being so, they needed to be resolved in accordance with the provisions of Acts of Parliament dealing with the issues of employment. In reversing this finding, the Court of Appeal held that under *Section 84 (1) of the Constitution the availability of other lawful causes of action was no bar to a party who alleges a contravention of rights under the Constitution*. (emphasis supplied)

7.2 Accused Person's Right to Pre-Trial Disclosure by the Prosecution

In *George Ngothe Juma and Two Others Vs The Attorney General*[91] a reference was made to the High Court by the applicants seeking a declaration that where an accused person was charged with a criminal offence before a court of competent jurisdiction, he had a right of access to the prosecution's information relating to the charge especially the witness statements so that he can prepare his case properly. The applicant's contention was that this was a doctrine entrenched in sections 70 and 77 of the Constitution and goes further to protect the fundamental rights of the accused person to have the secure protection of the law.

The trial court had rejected the application by the accused person for the prosecution witness statements on the grounds that no such access was allowed by the subordinate court's practice and by Standing Order number 32 of the Police Standing Orders which does not allow access to police files. In the reference that followed, the High Court first dealt with what constituted affording an accused person adequate facilities to prepare his defence. The court sought to determine whether the withholding of the prosecution's exhibits and witness statements was good in law and whether it should be allowed to stand as such. The court arrived at the conclusion that for the accused person to be afforded a fair hearing, he must be afforded facilities to prepare his defence. The court also enunciated, in general terms, the elements of a fair hearing[92].

The court reached a finding that for the accused to be seen to have been afforded facilities to prepare his defence, he had to be given and allowed or afforded everything which promotes the ease of preparing his defence, examination of any witnesses called by the prosecution and securing witnesses to testify on his behalf. It further held that the pre-trial disclosure of material statements and exhibits is important in creating a democratic

and open society where litigants do not ambush their opponents in the court. The court, therefore, held that the accused persons were entitled to the copies of the witness statements as well as exhibits to be adduced by the prosecution and this, the court stated, gave life and practical meaning to section 77(1) and (2) of the Constitution. In the court's own words:

> "There can be no true equality if the legal process allows one party to withhold material information from his adversary, without just cause or peculiar circumstances of the case. ..... a fair hearing requires, by its nature, equality between contestants, subject to the supreme principles of criminal jurisprudence, requires that the presumption of innocence, and that the guilt of the accused be proved beyond any reasonable doubt. When one of the contestants has no pretrial access to the statements taken by the police from the potential witnesses, the contest can neither be equal nor fair."

The court put a rider that such a right was available subject to statutory limitations on disclosure and public interest immunity. As shall be demonstrated shortly, the court's reasoning in this case has not totally been immune from criticism.

At whose expense should the prosecution witness statements be made available to the accused person? This was the primary issue for determination in the case of *Republic Vs John Mutwiri Ngai*[93](hereinafter referred to as the "Mutwiri case"). The Respondent was an accused person in Chuka Principal Magistrates Court Criminal Case No. 337 of 2004.To facilitate his trial, the respondent made an application to the trial court to be provided with, by the prosecution, all the relevant witnesses' statements in the case. These were to include all the statements recorded from the witnesses who would or might be called to testify in the case against the Respondent. The prosecution did not oppose providing photocopies of the said statements. It simply stated that it was unable to provide the said statements because the funds provided for in the budget to do so were exhausted and it was, therefore, not only unable to provide but could not provide. Under those circumstances, argued the prosecution, the accused should pay for the services of photocopying to enable the Republic to supply the copies of the witness statements. The Republic stressed the fact that it was ready to supply the statements at any moment when the accused would pay for it and its position should not be misunderstood to mean that it was refusing to supply the same.

The trial magistrate, relying on the position taken by the High Court in the *George Ngothe Juma* Case ruled that the prosecution had no alternative

but to supply the respondent with the relevant statements without further delay. He further stated that it was not his concern whether the prosecution had funds or not. He expressed the view that the accused who was in remand had shown that he could not raise his own funds to pay for the photocopying of the statements. He believed that failure by the Attorney-General for whatever reason to supply the statements to the accused would amount to a breach of the accused person's basic rights to be facilitated with ample opportunity to defend himself as provided under Section 77 of the Constitution of the Republic of Kenya. The trial magistrate expressed his perception of the Attorney General's posture as one which discriminated against those who were poor and could not raise funds to buy the statements since such a situation would favour the rich while it oppressed the poor. Being dissatisfied with the ruling of the trial magistrate, the Attorney General preferred a criminal revision on the grounds that (a) Parliament in its budget of 2004/2005 financial year did not make any provisions for costs to be incurred by the Attorney General for making such photocopies as were required by the accused person; (b) the Republic would only supply witness statements to the accused person at the accused person's expense and not government expense; (c) the trial magistrate in Chuka SRM Criminal Case No. 337 of 2004 misunderstood HCCr Application Number 345 of 2001 in believing that the court held that the state must mandatorily supply such witness statements to the accused person upon request; (d) the Chuka court's ruling if adopted would make prosecutions come to a halt and was incapable of being executed; (e) the said trial magistrate court's ruling was contrary to the practice in subordinate courts in Kenya and was, therefore, unlawful.

Faced with the foregoing contentions, the High Court accepted the jurisprudence generally espoused in the case of *George Juma Ngothe Vs the Attorney General*. The Court, however, disagreed with the proposition in the *George Juma Ngothe* case that the right to pretrial disclosure was "subject to statutory limitations on disclosure and public immunity." The court further disagreed with a further proposition in the *George Juma Ngothe* case that the trial court had total discretion to decide whether or not to order disclosure on the following conditions:

> At the same time, however, we hold that this obligation to disclose is not absolute. It is subject to the discretion of the trial court, both with regard to denying disclosure and to the timing of disclosure. The discretion must be exercised judicially; there must be respect for sound principles, the law and certain facts shown to be present.
> ..
> (1) Where there are grounds for fearing that disclosing a statement might

lead to an attempt being improperly made to persuade a witness to make a statement retracting his original one, to change his story, not to appear at court or otherwise to intimidate him.
(2) where the statement is sensitive and for this reason it is not in the public interest to disclose it, eg.

a) One dealing with matters of national security;
b) One disclosing the identity of an informant and there are good reasons for fearing that his identity would put him or his family in danger;
c) One by or disclosing the identity of a witness who might be in danger of assault or intimidation if his identity is known;
d) One which contains details which, if they became known, might facilitate the commission of other offences or alert someone not in custody that he was a suspect;
e) One disclosing some unusual form of surveillance or method of detecting crime;
f) One containing details of private delicacy to the manner and/or might create risk of domestic strife.

According to the High Court in the *Mutwiri* case, the wording used in Section 77 (2) (c) and (e) of the Constitution, which are the foundation of pre-trial disclosure, is mandatory, and not discretionary. In other words, an accused person who is charged with a criminal offence *shall be given* adequate time and facilities for preparation of his defence and *shall be afforded* facilities to examine the witnesses called by the prosecution. Further, the Constitution does not make the provisions of Section 77(2) of the Constitution subject to any statutory limitations. The court found no justification in subjecting the provisions of Sectionn77 of the Constitution to any limitations. In the court's view, although the trial court had power and jurisdiction to manage and control a criminal trial before it "when it comes to a point where the accused applies to be supplied with the prosecution witnesses' statements, the court must order the supply of the same, as soon as possible, and in good time to enable the accused to adequately prepare his defence."

Having so found the High Court confirmed the findings of the Chuka Principal Magistrate's Court in Criminal Case Number 337 of 2004.

7.3 The Availability of the Remedy of "Bail Pending Arrest"

In the case of *Samuel Muciri W'njuguna Vs R*[94], the court adopted a liberal and purposeful approach to the interpretation of the Bill of Rights. In this case, a Constitutional reference had been brought to the High Court

pursuant to the provisions of sections 70,72,76,84(1) & (6) and 123 of the Constitution for *inter alia*, a declaration that the state had contravened the fundamental rights and freedoms of the applicant as provided under Sections 70,72 and 76 of the Constitution; a declaration that the remedy of anticipatory bail or bail pending arrest and charge was a Constitutional right and that it was lawfully available to persons under the Bill of Rights of the Constitution.

The applicant argued that under Section 84 of the Constitution, the High Court has a wide discretion and it can grant orders in respect of breach of fundamental rights and freedoms as provided by the Bill of Rights. In this regard, he argued that even though the right to anticipatory bail or bail pending arrest was not expressly and specifically stated in the Constitution, the High Court nonetheless has the power to grant it, it being a Constitutional right which should be granted in appropriate cases. Accordingly, where the arrest and prosecution of the individual is done for extraneous purposes, the court should be able to issue orders prohibiting the abuse of such powers and even grant him anticipatory bail. He, therefore, urged the court to grant him anticipatory bail considering the nature of his case where he had been charged with an offence on flimsy and fanciful grounds and was still being harassed by the police while the persons implicated in the offences against the person and property of the applicant were still at large and had not been arrested and charged in court.

The respondent objected to this application arguing that no such right existed under the Constitution and that anticipatory bail is a legal right and not a fundamental right. The respondent further argued that the High Court could not grant anticipatory bail when the same had not been specifically provided for by any statute.

The law, according to the respondent, envisaged that a person must first be arrested and brought to court before he can be granted bail unless one executes a police bond which is specifically provided for by law (the CPC). The court first addressed itself to the jurisdictional question as provided for under the Constitution at sections 60(1) and 84(1) and (2) and it came to the conclusion that indeed, it had powers under the Constitution to make such orders as shall enforce and secure the fundamental rights of the individual as provided for by sections 70-83 of the Constitution.

Having established that it had jurisdiction, the court went into the crux of the application, which was whether the court could grant anticipatory bail. On this issue, the court found that while it was true that the right to

anticipatory bail or bail pending arrest was not specifically provided for by statute, this right is envisaged by section 84(2) of the Constitution. It further stated that the High Court would be failing in its responsibility as mandated by section 84(1) of the Constitution to enforce the protection of fundamental rights and freedoms as provided for by the Bill of Rights if it were to wait for such a right to be put in the statutes. It further stated that this right should be granted with such conditions as are appropriate under the circumstances of every case.

In arriving at this conclusion, the court stated:

> "When the statute is silent, this court cannot become a toothless watchdog of the Constitution which we have sworn to defend. Furthermore, the Constitution having itself granted wide discretion to the High Court presumably to fill the gaps which the statutes left ...."

The court thus frowned upon the acts of the police of constantly harassing the applicant as violating the rights of the applicant as enshrined in sections 70, 72 and 76 of the Constitution for which anticipatory bail or bail pending arrest would issue.

This decision is of no mean jurisprudential significance because the court used its inherent powers and jurisdiction to grant a remedy that does not appear on the face of the Constitution or any of the diverse statutes. The court appreciated the nature of criminal matters, their effect of the enjoyment of fundamental rights and freedoms of the individual.

The supervisory powers bestowed upon the High Court, it has been demonstrated, could be used to act in cases where the executive abuses its powers to the detriment of the poor citizens. Such fundamental rights would be meaningless if the High Court were to abdicate its role of protecting their rights in the face of imminent threat from institutions and/or individuals.

7.4 The Power of the Attorney General to Enter a *nolle prosequi*

Crispus Karanja Njogu v AG[95] was a reference to the High Court under section 67(1) of the Constitution arising from the proceedings in *R v Crispus Karanja Njogu*[96] in the Chief Magistrates' Court at Nairobi in respect of the ruling dated 7th June 1999 of the Senior Resident Magistrate.

The applicant had been charged with the offence of making a document

without authority contrary to section 357(a) of the Penal Code. It was alleged that the applicant while the acting Senior Assistant Registrar (Examinations), Kenyatta University, had with intent to deceive or defraud, and without lawful excuse made certain documents, namely degree certificates purporting to be the degree certificates issued by Kenyatta University.

However, due to the unpreparedness and unwillingness of the Attorney General to prosecute the case, the case went on for almost one year without any hearing taking place and with more than nine adjournments. The Attorney General attempted to withdraw the case against the applicant under section 87A of the Criminal Procedure Code but the court rejected the application because according to the court there was no single convincing reason given for the withdrawal of the matter. The Attorney General thereafter entered a *nolle prosequi* dated 22nd March 1999. The accused, however, objected to the entering of the *nolle prosequi* citing the provisions of section 77 of the Constitution.

The applicant then made an application under section 67(1) of the Constitution seeking a reference to the High Court for the interpretation of several issues, among them, whether under section 26(3) of the Constitution the Attorney General's powers are absolute[97].

The court in agreeing with the accused person stated that it has the power to intervene where a *nolle prosequi* had been entered in a manner which is oppressive and intended to defeat justice. The court further stated that it is its duty to consider constitutional principles that are implied by the entry of a *nolle prosequi* and if it finds that the said principles and values are likely to be offended, it is entitled to reject it. The court had this to say:

> "We do not accept the proposition that a Constitution ought to be read and interpreted in the same way as an Act of Parliament. The Constitution is not an Act of Parliament. It exists separately in our statutes. It is supreme..... It is our considered view that Constitutional provisions ought to be interpreted broadly and liberally, and not in a pedantic way, that is in a restrictive way. Constitutional provisions must be read to give values and aspirations of the people. The court must appreciate throughout that the Constitution, of necessity, has principles and values embodied in it; that a Constitution is a living piece of legislation. It is a living document."

The court, therefore, held that section 82 of the Criminal Procedure Code

was inferior to the constitutional provisions and, therefore, it invalidated the *nolle prosequi*.

A similar issue arose in the case of *Kipng'eno Arap Ng'eny v AG and Another*[98] where the court was asked to interfere with the authority of the Attorney General in the prosecution of criminal offences and also the subordinate court's criminal jurisdiction. In this case, the applicant, was charged together with others with the offence of abuse of office during his tenure as the managing director of the defunct Kenya Posts and Telecommunications Corporation between 1991 and 1992 by arbitrarily commissioning professional consultancy services in respect of the African Regional Advanced Level Training Institute (AFRATI) project and thereby making the corporation to incur a loss of Kshs. 186,334,055.15.

When the now defunct Kenya Anti Corruption Authority (KACA) was outlawed, it was incumbent upon the Attorney General to decide how to deal with the prosecution that had been mounted by the said authority (KACA). The Deputy Public Prosecutor sought and got the court's consent to enter a *nolle prosequi* in the criminal proceedings after which the applicant was discharged. However, his liberty was short lived for hardly had he left the court precincts than he was re-arrested and charged afresh in the Chief Magistrates' Court in criminal case number 808 of 2001.

The applicant being dissatisfied with how the Attorney General had handled his case, made this application to the High Court seeking an order of certiorari to issue to quash the charge sheet in the Chief Magistrates' Court. He also sought an order of prohibition to prohibit the Attorney General from prosecuting or further prosecuting him in connection with the case.

The court found that it is necessary for the state to punish wrongs against the society. However, the court was emphatic that in the exercise of the Attorney General's powers, he must act with caution and ensure that he does not put the rights and freedoms of the individual in jeopardy without the recognized lawful parameters. It further stated that the court would interfere with the state's power to prosecute criminal cases if the prosecution is oppressive, vexatious and has no basis in law or an abuse of the process of the court. The court went further to state that a prosecution that does not accord with the individual's enjoyment of rights and freedoms is in the clearest of terms an abuse of the process of the court which warrants the court's intervention.

The court therefore granted the order of prohibition stating that the

applicant's rights under section 77(1) of the Constitution had been violated. It stated that the delay of four years was inordinate and inexcusable and, therefore, the applicant was not likely to be accorded a fair hearing within a reasonable time as envisioned by section 77(1) of the Constitution.

7.5 A Criminal Suspect's Right to be brought before Court within the Prescribed time under the Constitution of Kenya

A number of cases have been determined by both the High Court and the Court of Appeal on this issue. *Albanas Mutua Vs Republic*[99] went on a second appeal to the Court of Appeal. The appellant had been tried, convicted and sentenced to death in a Magistrate's court on a charge of attempted robbery with violence contrary to section 296(2) of the Penal Code. One issue taken on appeal was in relation to violation of Section 77 of the Constitution of Kenya. The fact was that the appellant had, prior to being arraigned before the trial magistrate, been detained in police custody for a period of 8 months. The appellant's argument was that such inordinately delayed detention of the accused person violated his right to be tried within a reasonable time with the consequence that the entire trial was a nullity. Before delving into the merits of the submission the court noted that:

> "We must admit that the matter has caused us some considerable thought and anxiety. On one hand is the duty of the courts to ensure that crime, where it is proved, is appropriately punished; this is for the protection of society; on the other hand it is equally the duty of the courts to uphold the rights of persons charged with criminal offences, particularly the human rights guaranteed to them under our Constitution."

Having set out the balance that the court ought to strike in dealing with issues concerning violation of fundamental rights and freedoms, the court went ahead to lay down the existing jurisprudence on the subject as follows:

> "In the case of *Ndede Vs Republic* [1991] KLR 567 the appellant had been arrested without a warrant on 29th September 1997and was held in detention *in communicado*, until 30th October 1997 when he was brought before a magistrate. The period of delay was just over thirty days and Ndele was not charged with an offence carrying the death penalty. He pleaded guilty before the magistrate and was sentenced to long prison terms. He appealed to the High Court against the conviction and sentence but the appeal against the conviction was struck out as being incompetent by virtue of

Section 348 of the Criminal Procedure Code which bars appeals from persons who have been convicted on their own pleas of guilty. The sentences were, however, reduced. Ndele next appealed to this court and the court, consisting of the late Mr Justice Gachuhi, J.A. the late Mr Justice Masime, J.A and Mr. Justice Omolo, Ag J.A (as he then was) held that Section 348 of the Criminal Procedure Code was not an absolute bar to appeals from persons convicted on their own admission and that as there was no explanation offered for the delay of some thirty days before Ndele was brought to court, the trial magistrate ought not to have accepted Ndele's plea of guilty. Ndele's appeal was allowed and his conviction quashed. It did not matter that before convicting Ndede the Deputy Public Prosecutor had stated the facts in support of their charges, that Ndede had admitted those facts and the facts themselves had disclosed the offences charged against him. The quashing of the convictions must have been on the basis that Ndede's Constitutional right given to him by section 73(3)(b) of the Constitution had been violated and he was entitled to an acquittal.

Then there are the cases concerned with the violations of the fair-trial provisions under Section 77 of the Constitution. First, is the case of *Kiyato Vs Republic* (1982-88) KAR 418 where the appellant was tried and convicted of the offence of robbery with violence under Section 296(2) of the Penal Code and sentenced to death. His first appeal to the High Court was dismissed and on his appeal to this court, it was held that as Kiyato had not been provided with an interpreter contrary to section 77(2)(f) of the Constitution, his appeal would be allowed. The nature and strength of the evidence adduced by the prosecution in support of their charge did not really count in such a situation.

Next is the recent case of *Swahibu Simbauni Simiyu and Another Vs Republic, Court of Appeal Criminal Appeal No. 243 of 2005 (Unreported).* The Constitutional violation alleged in that appeal was the language used in the trial and this court held that since section 77(2)(b) of the Constitution requires (every person charged with a criminal offence to be informed as soon as reasonably practicable in a language that he understands and in details, of the nature of the offence with which he is charged) .... "

Guided by the foregoing jurisprudential precedent, the court then went ahead to hold thus:

"At the end of the day, it is the duty of the courts to enforce the provisions of the Constitution, otherwise there would be no reason

for having those provisions in the first place. The jurisprudence which emerges from the cases we have cited in the judgment appears to be that an unexplained violation of a Constitutional right will normally result in an acquittal irrespective of the nature and strength of evidence which may be adduced in support of the charge.... The deprivation by the police of his right to liberty for a whole eight months before bringing him to court so that his trial could begin obviously resulted in his trial not being held within a reasonable time. The appellant's appeal must succeed on that ground alone."

Following the trend of *Albanus Mutua* case was *Gerald Macharia Githuku Vs Republic*[100]. The appellant had been charged, tried and convicted of robbery with violence contrary to section 296(2) of the Penal Code. The first appeal to the High Court had not been successful. The second appeal to the court of appeal raised the issue of violation of the accused person's right under section 72(3) of the constitution of Kenya. In the case, the appellant had been arraigned before the trial court after seventeen (17) days instead of the Constitutionally permissible "within fourteen days". The court, however, made the finding that:

"We have come to the conclusion, after a careful weighing of these two considerations in the light of the facts of the present case, that although the delay of three days in bringing the appellant to court, 17 days after his arrest instead of within 14 days in accordance with section 72(3) of the Constitution did not give rise to any substantial prejudice to the appellant and although, on the evidence, we are satisfied that he was guilty as charged, we nevertheless do not consider that the failure by the prosecution to abide by the requirements of section 72(3) of the Constitution should be disregarded. Although the offence for which he was to be charged was a capital offence, no attempt was made by the Republic upon whom the burden rested, to satisfy the court that the appellant had been brought before the court as soon as was reasonably practicable."

Emboldened by the position from the Court of Appeal, the High Court when faced with a question relating to violation of section 72(3), the right of an accused person to be brought before a court within a period of 24 hours for a non-capital offence, in the case of *Ann Njogu & 5 Others Vs Republic*[101] held that:

"I dare add that the said section is very clear and specific – that the applicants can only be kept in detention or cells for up to 24

> hours. At the tick of the 60th minute of the 24th hour, if they have not been brought before the court, every minute thereafter of their continued detention is an unmitigated illegality as it is a violation of the fundamental and constitutional rights of the applicants. ... upon determination that the constitutional rights of the applicants have been violated, any prosecution against them, or any of them, on the basis of the events for which attempted charges were being made this morning is null and void. And that is so and will remain so irrespective of the weight of the evidence that the police might have in support of their case. This is for the simple reason that such a prosecution would be based on an illegality and a null and void case."

During the subsistence of the foregoing jurisprudence, in *Samuel Ndungu Kamau & Another Vs Republic*[102] (hereinafter referred to as the *Samuel Ndung'u Kamau* case) the appellants had been charged, convicted and sentenced in the High Court for the offence of murder contrary to sections 203 and 204 of the Penal Code. They preferred appeals to the Court of Appeal. One of the grounds taken in support of the appeal was that the appellant had not been presented to the court within the period stipulated under section 72(3)(b) of the Constitution. This complaint was being taken for the first time before the Court of Appeal, the same not having been raised before the trial court. In dealing with this issue, the court held thus:

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

Clearly this was a strange jurisprudential departure from the previous positions taken by the court of appeal. Even stranger is the fact that some of the judges on the bench had been in previous cases where the courts had entertained the argument that breach of fundamental rights and freedoms *ipso facto* invalidated a trial and the subsequent conviction.[103] It is also jurisprudentially strange that the court never made mention, for purposes of

distinguishing, the names and jurisprudence of the antecedent decisions.

The *Samuel Ndung'u Kamau* case seems to have thrown a spanner in the works on the hitherto settled issue of whether it is permissible to take up a Constitutional/ human rights issue for the first time at the court of appeal when such issue had not been a subject of adjudication before the forum of the lower court.

7.6 Fundamental Rights and Freedoms *Vs* State Security

The instrumental case on this issue was *Reverend Bishop Samuel Muriithi Njogu & 5 Others Vs The Hon John Njoroge Michuki, Minister of State for Provincial Administration & Internal Security & 4 Others*[104]. The Petitioners commenced proceedings by way of Constitutional Petition seeking orders against the Attorney General, the Commissioner of Police, the Minister of State for Provincial Administration and Internal Security and two private citizens. The claims had their origins in a dispute over the leadership of the Full Gospel Churches of Kenya. Within the framework of the proceedings, the Petitioners sought conservatory orders whose net effect was to suspend the two private citizen respondents and 51other people from participating in the affairs of the Full Gospel Churches of Kenya. The petitioners and the Attorney General entered a consent granting the applicants the said orders. The two private citizen Respondents sought a setting aside of the consent orders on the grounds that:

a) The consent order affected people who were not parties to the said consent;
b) The alleged consent was not consent in law;
c) The consent affected parties who were neither parties to the consent, nor to the Constitutional petition;
d) The Petitioners had used the consent order to procure the police assistance to harass, intimidate and try to evict from their respective churches the 4th and 5th Respondents and their church members;
e) The consent order purported to bring into force orders made in another case, namely HCCC No 1236 of 2004 which order lapsed when the Judge expressly declined to extend it;
f) The operational rules, the Gicheru Rules of 2006, did not provide for filing of consent orders before the Deputy Registrar;

In reply the petitioners opposed the application for setting aside the consent. The court in making its findings held *inter alia* that;

"Security matters are largely non-justiciable and the court cannot

therefore stop any of the parties to the suit from entering into a consent with the 1st 2nd and 3rd Respondents. Consent can in law be entered into even in matters not arising from the subject matter. .... The fact that some of the parties to the suit are not parties to a compromise touching on law and order would not vitiate the compromise. The Judiciary itself is subject to the Bill of rights provision of the Constitution and it cannot properly be asked to unravel a compromise that purports to preserve law and order. This would be unconstitutional and a serious abdication of the Judiciary's responsibility under the Bill of Rights provisions. On the contrary the court has a positive obligation to uphold and to enforce such a compromise... Issues of law and order touch on all people including those not in the suit itself. Their inclusion cannot vitiate the compromise."

Obviously, the foregoing reasoning by the court presents a simplistic approach in enforcement of the law. What happens when the purported enforcement of law and order by the state is a veil intended to violate fundamental rights and freedoms of citizens? Well, this remains the jurisprudence for the time being on the issue.

7.7 The Procedure of Removal of a Judge from office in Kenya on the Ground of Misbehaviour

For a long time, this was not an issue worth a second thought in constitutional litigation. It was an unprecedented issue in the country. On March 19, 2003, following the assumption of the reigns of power by the newly elected government in Kenya, the Honourable the Chief Justice appointed the Integrity and Anti-Corruption Committee of the Judiciary (popularly referred to as "the Ringera Committee"[105]). The terms of reference of the Committee were to "investigate allegations of corruption in the judiciary and recommend disciplinary or other curative measures". The committee completed its task and presented its report to the Chief Justice on September 30, 2003. In the report, certain judicial officers were implicated in corruption, misbehavior and unethical practices. Under Section 62(5) of the Constitution of Kenya[106] the Chief Justice presented the findings to the president. This culminated into a suspension of some judicial officers and establishment of a tribunal established to investigate their conduct. The propriety of the procedure adopted in the run up to the suspensions and the treatment of the said judicial officers during their said suspension the subject of litigation processes that brought with them issues of constitutional interpretation. In the case of *Amraphael Mbhogoli Msagha Vs The Hon the*

Chief Justice & Others[107] the applicant raised questions whether the Chief Justice had powers in law to delegate the investigative powers to the Ringera Committee in forming an opinion whether a question for the removal of a judge from office had arisen.

In response to these issues, the court made findings that as the law stood a judge of the High Court of Kenya once appointed in the position continues to hold office until (s)he; retires at the prescribed age, resigns his office, dies in office, or, is removed from office. On the question of cessation of office by removal, the court noted that as the law stood a judge could only be removed from office for inability to perform his functions of judge (whether arising from infirmity of body or mind or from any other source), or misbehaviour. Such removal of a judge from office is preceded by a question of his removal arising, the appointment of a tribunal in terms of Section 62(5), and the tribunal carrying out an inquiry into the matter and reporting on the facts thereof and recommending to the president whether the judge ought to be removed.

The question which the judges conceded had been taxing related to how the question for the removal of a judge from office arises. To this question the judges held that "the Chief Justice can gather evidence in any way provided it is legal, and he only needs to satisfy himself that *prima-facie* there is an allegation of some wrong doing."

Having reached the foregoing findings, the court went on to make what were essentially *obiter dicta* on what legal/constitutional reforms were necessary regarding the question of removal of judges from office. The Court proposes the enactment of the "Judges' Inquiry Act" through which an opportunity would be afforded to the subject of investigations an opportunity to be heard prior to representations being made to the President to constitute a tribunal. Further, and in lieu thereof, the judges proposed that the following stages be legislated as the procedure:

Stage 1: Complaint of misconduct is received by the Chief Justice who satisfies himself that the misconduct or misbehaviour is a matter fit for reference to the Judicial Service Commission;

Stage 2: The Chief Justice refers the matter to the Judicial Service Commission to investigate the complaint – the investigation may be administrative or a Board of Inquiry and makes recommendations to the Chief Justice that the complaint raises sufficient grounds for representation to the president to appoint a Tribunal. A Judge is granted a right of hearing;

Stage 3: The judge having been confronted with the complaint by the Chief

Justice answers to the Judicial Service Commission during the inquiry stage;

Stage 4: Determination by the Judicial Service Commission that the judge be removed or the Judicial Service Commission dismisses the complaint and the matter ends there.

Stage 5: Section 62(5) of the Constitution now takes charge when the Chief Justice through the Judicial Service Commission makes a representation to the President that a Tribunal be set up and it starts the inquiry or the investigation.

7.8 Constitutional Rights Prescriptions – Minimalist or Maximalist in Nature?

Are the rights guaranteed under the Constitution the minimum guarantees of the treatment that a citizen should receive or do they constitute the maximum guarantees for a citizen? In the event that Parliament, for instance, in exercise of its legislative mandate or a Minister, in execution of the mandate for promulgating delegated legislation, makes provisions for a wider protection of the citizen than that guaranteed under the Constitution, would this be unconstitutional? These are the questions that attract attention when one analyses the jurisprudence of the court of Appeal in the case of *Kazungu Kasiwa Mkunzo & Another Vs Republic*[108](hereinafter referred to as the "*Kazungu Mkunzo* case") and the decision of the High Court in the case of *Rose Moraa (Suing thro' Next Friend) Josephine Kavinda & Another Vs Attorney General*[109](hereinafter referred to as "*the Cradle* case").

The *Kazungu Mkunzo* case brought into focus the relationship between the provisions of the Children Act dealing with protection of the law for children in conflict with the law and the provisions of the Constitution dealing with treatment of persons facing the criminal justice process. The court was called upon to interrogate the question whether the Child Offender Rules contained in the 5th Schedule to the Children Act[110] were Constitutional. Focus was specifically on two rules namely rule 10 and rule 12. Rule 10(4) provided that remand in custody for a child suspected to be in conflict with the law should not exceed six months in the case of an offence punishable by death or three months in the case of any other offence. In either of the cases the rules provided that such a child would be granted bail. Rule 12 on the other hand whose side note read "duration of cases" provided at paragraph 4 that where cases in respect of children involving capital offences are not completed within twelve months after the plea has been taken, the case shall be dismissed and the child shall be discharged and the child shall not be liable to any further proceedings for the same offence. In pronouncing themselves to the constitutionality of these rules, the Court

of Appeal stated:

> "We have anxiously gone through the Act and we do not find any provision authorizing the Minister to set time limits within which trials are to be held. The power to "generally make regulations for the better carrying out of the provisions of this Act" does not appear to us to give the Minister the power to set time limits within which trials are to be held. Such power would fly in the face of various laws including the Constitution itself. Section 77(1) of the Constitution merely provides that:-
>
> > "If a person is charged with a criminal offence then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent court established by law."
>
> The Constitution wisely does not set out what is a reasonable time because in determining that issue, the court would have to take into account, a whole lot of factors such as the diary of the court, the number of judicial officers available to hear such cases and such like factors. Then there are provisions dealing with bail with regard to offences carrying the death penalty. Section 72(5) of the Constitution provides:-
>
> > "If a person arrested or detained as mentioned insubsection 3(b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall, unless he is charged with an offence penishable by death, be released either conditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."
>
> So that under the Constitution of Kenya a person charged with an offence punishable by death is not entitled to be released on bail and the Constitution itself does not draw a distinction between children and adults, where a charge is punishable by death. This Constitutional provision is amplified by section 123 of the Criminal Procedure Code ...
>
> > It is clear to us that the Criminal Procedure Code does not authorize the release on bail of persons charged with three offences punishable by death namely; murder treason, robbery with violence and attempted robbery with violence. The 2nd appellant in this case was charged with the offence of robbery with violence. Under the Constitution, he was not entitled to

> be released on bail; nor was he entitled to be released on bail under the Criminal Procedure Code. Nor do these laws set out any time limits within which he was to be tried. As we have seen, the Children Act itself did not purport to define any period which would qualify as amounting to "without delay". It is the Child Offender Rules which purport to set time limits within which trial must be held or else the case be dismissed....
>
> Section 186(c) of the Children Act does not set any time limits within which trials must be completed. In any case even if the Act had made such a provision, that would be contrary to section 77(1) of the Constitution, which does not define what a "reasonable time" would be. Again the rules under consideration purport to allow the release on bail of children charged with offences punishable by death. Both the Constitution and the Criminal Procedure Code prohibit that. In the event we have come to the conclusion that rules 10(4) and Rules 12(2)(3) and (4) are....also contrary to sections 72(5) and 77(1) of the Constitution. Those rules being *ultra vires* the provisions we have set out, they are null and void and are of no effect. We so declare."

The Constitution at Section 77(1) guarantees every accused person the right to be afforded a fair trial "within a reasonable time". The Constitution, it would follow, prohibits a trial within "unreasonable time." Indeed, the prescription by the Constitution guarantees every accused person a speedy trial. Does the prescription by the Minister of twelve months in relation to trials in respect of children constitute unreasonable time or does it impede speedy trials. If it, as this paper submits, does not, how then is such a rule inconsistent with section 77 of the Constitution? Would such a section that is calculated to ensure that in Kenya, trials of children end at the shortest time possible be deemed to violate speedy trial procedures?

The Cradle case on its part was primarily concerned with the manner in which the Children Act[111] treated children born out of wedlock vis-à-vis those born within wedlock on the question of parental responsibility. A question arose whether the said provisions of the children Act were discriminatory for offering lesser protection to children born out of wedlock compared to those born within the institution of matrimony. In the course of argument, it was brought to the court's attention that the definition of discrimination under the Children Act was wider than the one under the Constitution.

The material parts of the Children Act provided that no child shall be

subjected to discrimination on the ground of *origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection* (Emphasis mine)[112]. On the other hand, the material part of the Constitution provides that

> " "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by *race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex* whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.[113]"

The court, while noting that the relevant section of the Constitution had not been impugned, stated that in so far as the relevant section of the Act purported to go contrary to Section 82 of the Constitution, it would be void to the extent of the conflict. This position of the court was in spite of the existing jurisprudence from Botswana, a commonwealth country in the case of *Unity Dow v Attorney General of Botswana*[114] that "I do not think that the framers of the Constitution intended to declare the categories mentioned in that definition to be forever closed. Other grounds or classes needing protection would arise."

The court held that following the jurisprudence from Botswana would amount to usurpation of the work of the Constitution framers. Further the court observed that in 1997, the country deliberately came up with a Constitutional amendment to include the classification of "sex" to the section so as to bring in line the constitutional provision, with the emerging jurisprudence contained in the relevant Convention. Failure to expand to other categories, the court concluded, was deliberate and it took into account the limitations already contained in Section 82 and in particular subsection 4. The court further held that reading into Section 82 of the Constitution other grounds of discrimination would amount to "unacceptable judicial activism".

The foregoing brings to the fore the attitude of the Kenyan judiciary whereby it treats the Constitutional prescriptions are the maximum guarantees to which no addition is acceptable.

8. IN LIEU OF CONCLUSION

It is virtually impossible to conclude a paper on the law, the procedures and the jurisprudence in constitutional litigation in a country like Kenya. The reasons for this are not hard to come by; the law is under constant alteration and calls for its overhaul abound, the procedures also keep being amended and the jurisprudence suffers unrivalled fluidity. Indeed, two difficult and unenviable questions inevitably confront a student of the judiciary and the judicial process within the stream of Constitutional litigation in Kenya, to wit;

a) What are the trends in the jurisprudence of the constitutional court in Kenya; and
b) What is the emerging jurisprudence of the constitutional court in Kenya?

The reasons for the difficulty are that, first, there are no clearly ascertainable trends except the trend of inconsistency and, second, there is no emerging jurisprudence except fledgling incoherent quasi juridical thoughts that emerge from courts of high positioning in Kenya's judicial hierarchy. At one point occasional flashes of wisdom seem to inform the decisions, at another point, timidity seems to punctuate the temperament of the judicial officer making the decision. The challenge remains how to correct the foregoing sad commentary on how to evolve a constitutional jurisprudence.

a) Dealing with the gate-keeper mentality – a case for judicial institutional reform

A major impediment to the realization of consistent and progressive jurisprudence on constitutional interpretation in Kenya has to do with questions of attitude. It is the case of judicial officers in the past "looking over their shoulders to note who is watching them" before pronouncing themselves in judgment one way or the other. It is a situation where a judicial officer views him/herself almost in the same manner as a police constable or a water-works inspector in relation to the executive.

In such cases, judicial officers did not have the institutional confidence to stand up and be counted in the evolution of sound jurisprudence regardless of the feelings that the executive arm of government may entertain. This problem begs for a structural/institutional reform solution.

The two pertinent challenges facing our judicial system are; the procedure of appointment of judges, and, the basic minimum qualifications for appointment of judicial officers. This has a direct pointer of where judicial

Another suspect institutional guarantee in Kenya is the concern regarding "internal democracy" within the judiciary. With the discretionary latitude that the Chief Justice wields vis-à-vis other judicial officers, there is a high likelihood that the executive arm of government may be tempted to use the Chief Justice to deal with judicial officers who exhibit such tendencies of independence that the executive dislikes.

Owing to the importance of constitutional jurisprudence, it is not proper to leave the question of constituting the constitutional division and bench to the individual Chief Justice. The temptation to "court pack" the division with perceived "gate keepers" is high. Establishing a Constitutional Court whose Constitution in terms of judicial officers guarantees the basic diversities that define the ideological terrain of the society such as ethnicity, race, gender, age bracket, political ideology, sexual/religious and other orientation may serve to enrich the jurisprudence emanating from the judiciary.

b) Continuous Judicial Legal Education – a case for comparative studies for judicial officers

Part of the problem with the judiciary is the question of "professional illiteracy". The concern here has to do with the age and scope of knowledge that judicial officers generally and those presiding over Constitutional matters specifically profess. Acquisition of cutting edge knowledge in emerging and comparative trends from other jurisdictions is critical to tackling the problem.

To achieve this, it is imperative that judicial officers in their own circles as peers and also in liaison with the Law Society of Kenya, should periodically and regularly organize seminars and workshops to exchange ideas on emerging trends in all areas of practice. This will, of course, include Constitutional litigation. During such forums, it is then possible for the jurisprudential and doctrinal weaknesses in "recent" decisions of the courts to be discussed without necessarily pointing accusing fingers. Such peer review mechanisms may encourage incisive thinking on the part of both judicial officers and legal practitioners appearing before them to evolve a strong body of thoughts that guide Constitutional litigation and adjudication in the Republic.

c) Tireless re-litigation against unsatisfactory jurisprudence – a case for resilience in litigation

This is a challenge to be born by litigants and legal practitioners. The

experience with the "Section 84 is dead" jurisprudence referred to earlier in this paper indicates that only resilience can sustain litigation in an area of law that has "political" and other value-laden undertones. In the premises, it is imperative that when situations present themselves, litigants and practitioners seize them to re-litigate suspect jurisprudence in accordance with evolving progressive standards until proper jurisprudence emerges.

d) Strengthening public interest litigation – a case for sharing the cost element

Experience shows that litigants with specific interests in litigation are not keen on broad jurisprudential issues. This tends to limit practitioners who would have otherwise desired to explore certain broader issues for the sake of growth of the law.

In such circumstances, it is necessary for a culture of public interest litigation to be evolved among the civil society operators and citizens generally to give these broad, and somewhat academic, issues a chance to be canvassed.

Endnotes

1 Herbert Wechster, Towards neutral principles of Constitutional law, 1959/60 HLR Vol 73 P. 15. See also Githu Muigai, The Judiciary in Kenya and the Search for a Philosophy of Law: The Case of Constitutional Adjudication, in, The International Commission of Jurists, Constitutional Law Case Digest Vol II, Nairobi, 2005 P. 159.

2 For a detailed discussion of the social contractarian theory as a basis of the Constitution, see John Mutakha Kangu, The Social Contractarian Conceptualization of the Theory and Institution of Governance, Moi University Law Journal, Vol 1 No. 2, 2007 P.1.

3 Githu Muigai, supra note 1.

4 Robert A Kagan, Constitutional Litigation in the United States, in Rogowski R and Gawron T (ed) Constitutional Courts in Comparison: The U.S Supreme Court and the German Federal Constitutional Court at P. 25 and 26.

5 Githu Muigai, Political Jurisprudence or Neutral Principles: Another Look at the Problem of Constitutional Interpretation, East African Law Journal, Vol. 1 2004, P. 1

6 See Generally Githu Muigai, ibid.

7 See Wechsler, Towards Neutral Principles of Constitutional Law, 73 Harvard Law Review,1 (1959). See also Richards D.A.J., Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Constitutional Adjudication, 11Georgia Law Review 1069 (1977)

8 In the context of this paper, a court exercising jurisdiction over Constitutional issues in Kenya refers to the following: The High Court, exercising its unlimited original civil and criminal jurisdiction and express jurisdiction over Constitutional issues as spelt out under the

Constitution of the Republic of Kenya.
The Court of Appeal exercising its appellate and "other" jurisdiction over disputes that raise Constitutional matters.
Courts subordinate to the High Court so far as those courts have made reference to, put into consideration or applied Constitutional provisions and or principles, and, further, so far as the law spelling out the sources of law in Kenya obliges the said court to apply the Constitution as part of their sources of law. The jurisprudence from such subordinate courts is however minimal and to this extent such decisions have not been referred to in this paper.

9 See Rogowski R and Gawron T, Constitutional Litigation as Dispute Processing: Comparing the US Supreme Court and the Gernam Federal Constitutional Court in Rogowski R and Gawron T (ed) Constitutional Courts in Comparison: The U.S Supreme Court and the German Federal Constitutional Court at P. 25 and 26.

10 On the face of it, therefore, section 60 of the Constitution of the Republic of Kenya does not confer upon the High Court original jurisdiction over proceedings in the nature of judicial review of administrative actions. Within the framework of the jurisprudence in *Commissioner of Lands Vs Kunste Hotel, Nakuru Court of Appeal, Civil Appeal Number 234 of 1995* where it was authoritatively restated that "in exercising the power to issue or not to issue an order of certiorari, the court is neither exercising civil nor criminal jurisdiction. It would be exercising special jurisdiction."

11 See side note to section 65 of the Constitution of Kenya

12 Chapter 295 of the Laws of Kenya. Section 29 of Chapter 295 of the Laws of Kenya provides for the right of access to the High Court and appeals to the Court of Appeal and its material parts states that;
(1) The right of access to the High Court conferred by section 75 (2) of the Constitution of an interested person shall be by way of appeal (exercisable as of right at the instance of the person interested) from the decision of the Tribunal.
(2) There shall be established a Tribunal to be known as the Land Acquisition Compensation Tribunal which shall consist of five members appointed by the Minister by notice in the
(7) A person interested who is dissatisfied with the award of the Commissioner may apply to the Tribunal in the prescribed manner for—
(a) the determination of his interest or right in or over the land; or
(b) the amount of compensation awarded to him under section 10; or
(c) the amount of compensation paid or offered to him under section 5, 9, 23, 25 or 26.
(8) The public body for whose purposes the land is acquired may apply to the Tribunal against—
(a) the amount of compensation awarded under section 10; or
(b) the amount of compensation paid or offered under section 5, 9, 23, 25 or 26.

(10) A party to an application to the Tribunal who is dissatisfied with the decision of the Tribunal thereon may, in the manner prescribed under section 72 (3) of the Constitution, appeal to the Court on any of the grounds of the application to the Tribunal and on any of the following grounds, namely—
(a) the decision of the Tribunal was contrary to law or to some usage having the force of law;
(b) the decision failed to determine some material issue of law or usage having the force of law; or
(c) a substantial error or defect in the procedure provided by or under this Act has produced error or defect in the decision of the case upon the merits.
(11) A party to an appeal under subsection (10) to the court who is dissatisfied with the decision of the court thereon may, upon giving notice of appeal to the other party or parties to that appeal within fifteen days after the date on which a notice of that decision has been served upon him, appeal to the Court of Appeal from the order made by the court; but an appeal to the Court of Appeal under this subsection may be made on a question of law only.

13 See Legal Notice No 111 of 1970, and Legal Notice 20 of 1971.

14 Nairobi Court of Appeal Civil Application No. Nai. 375 of 1996 (Unreported)

15 Mombasa Court of Appeal, Criminal Appeal Number 67 of 2002. The case is reported in [2003] KLR 537.

16 Section 85 of the Criminal Procedure Code provides in its material parts that only police officers of the rank not below that of an Assistant Inspector of Police was eligible for appointment as a public prosecutor.

17 J.E. Gicheru, Chief Justice.

18 The Kenya Gazette, Vol CIX – No 7, Nairobi, 19th January, 2007.

19 Sections 65(2) and (3) of the Constitution provide that: 65 (2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or court-martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts.; (3) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by subsection (2).

20 Practice Direction Number 4 of the Practice Directions Relating to the Filing of Suits, Applications and References in Proper Courts.

21 [1979] KLR 154.

22 Misc. Application No. 666 of 1990 in which Bosire J (as he then was) and Mango J (as he then was) thus held: "In our case ..., the applicant did not indicate at all the provisions of the Constitution he considers which have been infringed by he detaining authority 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 sections 70 to 83 (inclusive) before the court can have jurisdiction to entertain his complaint.... An applicant in an application under S 84(1) of the Constitution is obliged to state his complaint the provision of the Constitution he considers has been infringed in relation to him and the manner in which they are alleged to be infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the section. It is not enough to allege infringement without particularizing the details and the manner of infringement."

23 [2001] KLR 264 where the court held while approving the holding in the case of Anarita Karimi Njeru Vs The Attorney General that if a person is seeking from the High Court on a matter which involves a reference to the Constitution, it is important 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 said to be infringed.

24 [2004] 1 KLR 637 where it was held that "The threshold issue is whether or not this Constitutional reference was rightly made. Learned counsel ..... 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 court in a purely academic exercise. He cited in support of his contention the very relevant case *Anarita Karimi Njeru Vs Republic (No. 1) 1979 KLR 154*. 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 P. 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 provision 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."

See also the words of Benard Chunga C.J (as he then was) in the case of Nation Media Group Ltd Vs Attorney General High Court Misc Civil Application Number 821 of 2002, that "a person alleging violation or likelihood of violation of his or her Constitutional rights under Chapter V of the Constitution of Kenya must set out his or her complaint in the clearest possible manner. To do so, the following areas ought to emerge with sufficient clarity in the Application papers filed in Court:

(a) The nature of the alleged violation of the Constitutional Rights

(b) The person or persons or authority or Institution alleged to be responsible for the violation or likelihood of violation.

(c) The manner of the violation or likely violation

(b) The section of the Constitution which creates and gives the Constitutional right that is under violation or under threat of violation."

25 Nairobi High Court Miscelleneous Application Number 612 of 2002.

26 [1979] 3 ALL ER 21.

27 Similar positions emphasizing a purposive as opposed to a strict legalistic approach to Constitutional interpretation has been taken in a number of cases from other jurisdictions. These include; *Attorney General of Saint Christopher, Nevis and Anguilla Vs Reynolds*(1979)3ALLER 129 where the court stated that the Constitution should be interpreted broadly so as to conform to the protection of fundamental rights and freedoms contained in it. That a Constitution should be construed with less rigidity and more generosity than other Acts. Lord Diplock in the case of *A.G. of Gambia Vs Momodue Jobe*[1984] ALL ER 609 took a similarly purposeful approach in Constitutional interpretation when he said that a Constitution and in particular that part, which protects and entrenches fundamental rights and freedoms to which all persons in the state are entitled to is given a generous and purposeful construction. It is, therefore, important that any interpretation adopted by the court should be one, which infuses life in the fundamental rights and freedoms. This ultimately protects and promotes the enjoyment of fundamental rights and freedoms of the individual and breathes life to the provisions of the Constitution. In *Ndyanabo v Attorney-General* [2001] 2 EA 485, at page 493, the Court of Appeal of Tanzania had occasion to broach the issue. Samatta CJ wrote:

"We propose to allude to general provisions governing Constitutional interpretation. These principles may, in the interest of brevity, be stated as follows. First, the Constitution of the Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As was stated by Mr Justice EO Ayoola, a former Chief Justice of the Gambia... 'A timorous and unimaginative exercise of the Judicial power of Constitutional interpretation leaves the Constitution a stale and sterile document'.

Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed".

28 [1969] EA 357.

29 The case involved a charge against the appellant made under the Exchange Control Act. The applicant was compelled to give certain information in an official form which tended to incriminate him. He sought to rely on Section 77(7) of the Constitution as protecting him from self-incrimination. The court in rejecting that argument held that the appellant was only protected from self-incrimination at the trial itself

and not during interrogation.

30 Nairobi High Court Criminal Application No. 701 of 2001

31 Nairobi, High Court Criminal Application Number 39 of 2000.

32 In the words of the court, "Constitutional provisions must be read to give effect to the values and aspirations of the people. The court must appreciate throughout that the Constitution, of necessity has principles and values embodied in it, that a Constitution is a living piece of legislation. It is a living document."

Similarly, members of the tribunal of inquiry established to investigate the conduct of puisne judges in matter number 1 of 2004 had occasion to make a ruling raising, among other issues, the questions of Constitutional interpretation. In their ruling, tribunal members opined that "rules of interpretation incase of a Constitution which is not an Act of Parliament may, therefore, be different from those in case of an Act of Parliament. .. We will interpret the Constitution in a liberal and broad manner within the precincts of common sense and the object of the particular section"

33 Nairobi, High Court Misc. Civil Application Number 82 of 2004.

34 [2004] 2 EA 217

35 Nairobi High Court Civil Case No. 1351 Of 2002 judgment delivered on 1st day of December, 2006

36 Nairobi, High Court Misc. Civil Application Number 82 of 2004.

37 Rangal Lemeiguran & Others Vs The Attorney General & Others, H.C. Misc Application No. 305 of 2004

38 High Court Misc. Case No. 550 of 1988.

39 High Court Misc. Application No. 356 of 1989.

40 Kathurima M'Inoti, in the article *The Reluctant Guard: The High Court and the Decline of Constitutional Remedies in Kenya* in Kivutha Kibwana (ed) *Readings in Constitutional Law and Politics in Africa, A Case Study of Kenya,* Faculty of Law University of Nairobi, Nairobi, Kenya 550 et seq has given the following reasons why such jurisprudence is outrightly unsound:

The courts which arrived at those decisions did not have the benefit of full arguments by the parties. Two of those rulings were made while the courts were only expected to mention the case for purposes of allocation of judges for disposal after full argument. They, therefore, represent the worst instance of judicial ambush;

a) Those rulings are all one-judge opinions;

b) The decisions were in complete ignorance of a line of cases brought since independence under Section 84 which were heard and determined on merit notwithstanding the fact that no rules had been made under Section 84(6).

Since the "Section-84-is-dead" decisions, the High Court of Kenya continued to entertain applications brought under S 84 as if those decisions did not exist and without bothering to consider them as impediments;

The arguments in those decisions were very narrow, wrong and amounted

to saying that the enjoyment of fundamental rights in Kenya was granted by the Chief Justice rather than by the Constitution;

The decisions implied that since 1963 and contrary to official and governmental assertions, Kenya did not guarantee and respect the fundamental rights of its citizens because the Chief Justice had not made any rules under Section 84(6).

Even a literal reading of the Constitution itself makes the reasoning of the decisions untenable. Section 84(6) of the Constitution reads "The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this Section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court)." The operative word is may. As was stated in the case of Massy Vs Council of the Municipality of Yass (see John Saunders, Words and Phrases Legally Defined, 2nd Ed Vol 3 P227) "the use of the word 'may' *prima facie* conveys that the authority which has power to do such an act has an option either to do it or not to do it." It is not mandatory for the Chief Justice to make the rules, otherwise the Constitution could have used such terms as "shall' or "must". If the task of the Chief Justice is not mandatory, then it means that in the absence of the rules the right of access shall remain. It is also primarily because the making of the rules is not mandatory that successive Chief Justices never bothered to make the rules since independence.

Even decisions from other jurisdictions refute the reasoning of the "Section-84-is-dead" decisions. In the Nigerian case of Aoko Vs Fagbemi & Another *(Discussed in T.O Elias, Nigeria: The Development of Its Laws and Constitution, Stevens and Sons, London, 1967)* a woman who had not been judicially separated from her husband was found guilty of adultery by a customary court and sentenced to pay a fine. She applied to the High Court under Section 32(3) of the 1962 Constitution (equivalent to our Section 84) contenting that the customary court violated her right under Section 22(1) of the Constitution, not to be convicted of an offence unless it was defined and the penalty thereof prescribed by a written law. The most important aspect of the judgment was that Section 32(3) of the Nigerian empowered the Federal Parliament to enact rules of enforcing fundamental rights under the Constitution. No such rules had been made but the High Court approved the application in the absence of the enacted rules. The other decision was by the Privy Council in the case of Oliver Casey Jaundoo Vs The Attorney General of Guyana. This case involved Section 19(1) of the Constitution of Guyana which is identical to Kenya's Section 84(1). The applicant sought to enforce her fundamental rights to property using Article 19(1) of the Constitution. But as fate would have it, no rules had been made regarding practice and procedure under Article 19(6), just like in Kenya. The applicant filed an Originating Motion under Article 19(1) and the Respondent took a preliminary objection. The Privy Council ruled " The right to apply to the High Court for redress is by paragraph (1) of Article 19 conferred

upon any person who "alleges that any of the provisions of Article 4 to 17 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him." That right is expressed to be subject only to the provisions of paragraph (6). So long as nothing has been done by parliament, or by the rule making authority under the Supreme Court of Judicature Ordinance to regulate the practice and procedure upon such application, the right to apply to the High Court under paragraph (1) remains in their lordship's view, unqualified. ... The clear intention of the Constitution that a person who alleges that his fundamental rights are threatened should have unhindered access to the High Court is not to be defeated by the failure of Parliament or the rule making authority to make specific provision as to how that access is to be gained.

41 Ibid

42 It was not until 1984 that a Bill of Rights was incorporated in the Constitution of Tanzania. Although a bill of rights was enacted in 1984, it did not immediately usher in a new era. The justiceability of the package was postponed to March 1988. The reasoning at the time was that the government needed time to identify and weed out or recast those laws that were potentially inconsistent with the Constitution.

There was also unexplained delay to enact legislation for the purpose of regulating procedure for instituting proceedings before the High Court as required under Article 30(4). The legislation was no enacted until November 1994 and it did not come into force until January 1995, almost seven years after the Bill of rights became justiceable and more than ten years since its enactment. Meanwhile, Constitutional cases or proceedings were commenced in various registries of the High Court, but there was no uniform procedure. No suit is known to have been rejected on account of its mode of presentation but there seems to have been eagerness to get on with the business . Moreover, it was noted that Article 30(4) was only permissive – it did not mandate the state to enact legislation providing for necessary procedure. In the case of *Chumchua Marwa Vs Officeri/ Musoma Prison (*Misc. Criminal case No. 2 of 1988 (Mwanza Registry – unreported) which was heard six days after the Bill of Rights became justiceable, Justice Mwalusanya had this to say:

In my judgment the High Court may enforce the Bill of Rights without the requisite Rules of the court because the Article provides that the government "may" enact such rules of the court. So it is not a must that such rules are enacted prior to the enforcement of the Bill of Rights

The same position was taken in the case of *DPP Vs Daudi Pete* [1991] LRC (Const) where the Court of Appeal, in the first proceedings of a Constitutional nature to be before it stated:

...until Parliament legislates under para (4) the enforcement of the basic rights, freedoms and duties may be effected under the procedure that is available in the High Court in the exercise of its original jurisdiction, depending on the nature of the remedy sought.

When the legislation was finally enacted, the most significant innovation was the requirement for a panel of three judges to sit at the hearing

of petitions, and for every question except where the application is frivolous or vexatious which may be determined by a single judge – to be determined according to the opinion of the majority. The requirement has bred ground for some difficulty as it has not always been easy to find three judges who are not already committed, and needless to say, delay has been the inevitable consequence.

43 Legal Notice No. 133 of 2001

44 Where an accused person in a criminal case or party to a civil suit in a subordinate court alleges contravention of his fundamental rights or freedoms under Sections 70 to 83 inclusive of the Constitution in relation to himself; Where contravention of fundamental rights and freedoms is alleged otherwise than in the course of proceedings in a subordinate court or High Court; and, Where violation of fundamental rights and freedoms is alleged in any proceedings pending in the High Court.

45 These rules are ordinarily referred to as the "Gicheru Rules" in recognition of the Chief Justice who promulgated them. It is also arguable that the Rules were simply referred to as the Gicheru rules flowing from the fact that their title was too long and cumbersome hence a short format was necessary.

46 Rules 7 to 10 of the Gicheru Rules

47 Rule 2 of the Gicheru Rules.

48 Rule 4 of the Gicheru Rules.

49 See Rule 3 of the Gicheru Rules as read with Form A in the Schedule to the Rules.

50 Rule 5 of the Gicheru Rules.

51 Rule 6 of the Gicheru Rules.

52 See Rule 7 as read with Form B to the Giecheru Rules.

53 See rule 8 as read with Form C to the Gicheru Rules.

54 Rule 9 of the Gicheru Rules

55 Rule 10 of the Gicheru Rules.

56 See Rules 11 and 12 together with Form D in the schedules to the Gicheru Rules.

57 Rule 13 of the Gicheru Rules.

58 Rules 14 of the Gicheru Rules.

59 Rule 16 of the Gicheru Rules.

60 Rule 17 of the Gicheru Rules.

61 Rule 18 of the Gicheru Rules.

62 Rule 19 of the Gicheru Rules.

63 Rules 20 and 21 of the Gicheru Rules.

64 Rule 22 of the Gicheru Rules.

65 [1969] 1 EA 696 Where Law J.A is stated that "So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration." On his part, Newbold V.P stated that "A

preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

66 Rule 24 of the Gicheru Rules as read with Form E in the schedule to the Rules.

67 Rule 25 of the Gicheru Rules.

68 Rule 26 of the Gicheru Rules as read with Form F of the schedule to the Rules.

69 Rule 27 of the Gicheru Rules.

70 Rule 28 of the Gicheru Rules.

71 Rule 29 of the Gicheru Rules.

72 Rule 31 of the Gicheru Rules.

73 Rule 32 of the Gicheru Rules.

74 Rule 34 of the Gicheru Rules. The Court of Appeal Rules are the subsidiary legislation to the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya.

75 H.C. Misc. Cr. Appln No. 173 of 2003

76 Nairobi H.C. Misc. Criminal Application No. 898 of 2003

77 High Court MiscApplication Number 821 of 2002.

78 Nairobi, High Court Miscelleneous Application Number 1372 of 2000.

79 Nairobi, High Court Misc Application Number 764 of 2004.

80 Misc Civil Application Number 102 of 2006.

81 The Goldenberg Affair was a mega corruption scandal that involved siphoning of billions of shillings from the public through export compensation schemes for alleged export of Gold and Diamond. The company that was used as the conduit for the scandal was known as Goldenberg International Limited hence the description of the scandal as the Goldenberg Affair.

82 [2004] 1 KLR 261

83 High Court Misc. Civil Application No. 677 of 2005 (O.S)

84 For a detailed discussion on the doctrine of Constitutionalism see J Mutakha Kangu, Constitutionalism: A Comparative Analysis Of Kenya And South Africa, a paper presented on the occasion of Continuing Legal Education of the Law Society of Kenya at the Imperial Hotel in Kisumu, Kenya on December 15, 2007.

85 H.C. Misc Application No. 305 of 2004

86 [1979] KLR 154

87 High Court Misc. application No. 112 of 1990.

88 In the case of Maharaji vs Attorney General of Trinidad and Tobago (1978) 2AllER 670 the Privy Council in construing Section 6(10) of the Constitution of Trinidad and Tobago, the equivalent of Kenya's Section 84, observed that "The right to apply to the High Court for redress conferred by S. 6(1) [read S 84(1)] is expressed to be without prejudice to any other action with respect to the same matter which is lawfully available. The clear intention is to create a new remedy whether there

is already some other existing remedy or not." In Oliver Casey Jaundo Vs Attorney General of Guyana (1971) AC 972 the Privy Council ruled that Section 19(1) of the Constitution of Guyana (equivalent of Section 84) was a "a newly created right of access to the High Court to invoke a jurisdiction which was itself newly created." The Supreme Court of India in Kharak Singh Vs State of Uttah Pradesh (1963) SOAIR1295 considered circumstances under which it could be moved for purposes of enforcing the fundamental rights in the Constitution of India. The Court made the following observations "The fact that by the state executive or the state functionary acting under a pretended authority gives rise to an action at common law or even under a statute and that the injured citizen or person may have redress in the ordinary courts is wholly immaterial and we would add irrelevant to considering whether such action is an invasion of a fundamental right. An act of the state executive infringes a guaranteed liberty only when it is not authorized by a valid law or by any law in this case, and any such illegal act would obviously give rise to a cause of action – civil or criminal- at the instance of the injured party for redress. It is wholly erroneous to assume that before the jurisdiction of this Court under Section 32 could be invoked, the applicant must either establish he has no other remedy adequate or otherwise or he has exhausted such remedies as the law affords and has yet not obtained proper redress, for when once it is proved to the satisfaction of this court that by state action the fundamental right of a petitioner under Article 32 has been infringed, it is not only the right but the duty of this court to afford relief to him by passing appropriate orders in that behalf." In K.K. Kochuni Vs State of Madras (cited in See H.M. Seeuki, Constitutional Law of India, A Critical Commentary, Tripathi, New Delhi, 1968, P. 624) Chief Justice Das of India set the pace in this case when in his memorable words he stated "Neither the existence of an adequate alternative remedy nor the fact that the petition raised disputed questions of fact justified the rejection of a petition under Article 32 if it established a *prima facie* case of actual or threatened violation of fundamental rights. This view might encourage persons to proceed under Article 32 instead of filing suits, but that was no reason for denying the fundamental rights conferred by Article 32(1) if a *prima facie* case of violation of fundamental rights was made out." In Ramlogan Vs the Mayor, Alderman and Burgesses of san Ferando (1986) LRC 377 the court was considered an application for enforcement of fundamental rights under Section 14(1) of the Constitution. The respondent argued that the application under the Constitution was an abuse of the process of the court since the ordinary process of the law gave the applicant ample redress. Rejecting that argument, the court stated; "The application is well within the ambit of the provisions contained in the Constitution for protection of rights to property. While it is true that the applicant may have been able to pursue her claim by way of Judicial review and also in private law by an action for trespass to property, there is nothing to prevent her from invoking the fundamental rights provision in the Constitution. By section 14(10)

of the Constitution, she is entitled to do so without prejudice to any other action lawfully available to her. I rule therefore that the instant proceedings have been properly instituted."

89 Court of Appeal, Civil Appeal No. 110 of 2001.

90 Supra note

91 Nairobi High Court Misc. Application No. 345 of 2001

92 The elements enunciated by the Court were:

(a) Where the accused's legal rights are safeguarded and respected by law;

(b) Where a lawyer of the accused's choice looks after his defence unhindered;

(c) Where there is a compulsory attendance of witnesses, if need be;

(d) Where allowance is made of a reasonable time in the light of all prevailing circumstances to investigate, properly prepare and present one's defence;

(e) Where an accused's witnesses, are not intimidated or obstructed in any improper manner;

(f) Where no undue advantage is taken by the prosecutor or anyone else or by reason of technicality or employment of a state as an engine of injustice;

(g) Where witnesses are permitted to testify under rules of court within proper bounds of judicial discretion; and under the law governing testimony of witnesses;

(h) Where litigation is open, justice done, and justice seen to be done by those who have eyes to see, free from secrecy, mystery and the mystique.

93 Meru High Court Criminal Revision No. 3 of 2005

94 Nairobi H.C.Misc. Criminal Appln No. 710 of 2002

95 High Court Civil Case No. 39 of 2000 (Unreported)

96 Nairobi Chief Magistrate Criminal Case number 707 of 1998

97 Other issues included:

i.) Whether the court is entitled to know the reasons why the Attorney General seeks to enter a *nolle prosequi*;

ii.) Whether a subordinate court is entitled to entertain an application to enter a *nolle prosequi* under section 82(1) of the Criminal Procedure Code after it had rejected an application under section 82A of the Criminal Procedure Code;

iii.) Whether the court has inherent powers and duty to secure the protection of an accused person in such a case;

iv.) Whether the court is invested with powers under section 123(8) of the Constitution to, inquire into the manner of exercise of the Attorney General's powers under section 26(3) of the Constitution;

v.) Whether the court can prohibit the Attorney General from exercising powers conferred by section 26(3) of the Constitution; and

vi.) Whether the court can prevent the exercise of the said powers which are detrimental to public policy and which amounts to an abuse of the process of the court.

98 High Court Civil Case No. 406 of 2001. (Unreported)

99 Nairobi, Court of Appeal Criminal Appeal No. 120 of 2004, decision

delivered on July 7, 2006.

100 Nairobi, Court of Appeal, Criminal Appeal Number 119 of 2004,decision delivered on April 27, 2007

101 High Court Misc Criminal Application Number 551 of 2007

102 Nairobi, Court of Appeal Criminal Appeal Number 223 of 2006, decision delivered on December 14, 2007.

103 Mr Justice O'Kubasu who sat in this bench had been one of the judges signatory to the unanimous decision of Gerald Macharia Githuku Vs Republic. Judge Deverell who sat on the bench in the unanimous decision in this case had been one of the judges signatory to the unanimous decisions in both the Gerald Macharia case and the Albanua Mwasya Mutua Vs Republic case.

104 High Court Constitutional Petition Number 681 of 2006.

105 The committee was so called because the chairman of the committee was Justice Aaron Gitonga Ringera.

106 The said Section provides that

If the Chief Justice represents to the President that the question of removing a puisne judge under this section ought to be investigated, then-

(a) the president shall appoint a tribunal which shall consist of a chairman and four other members selected by the preside from among persons –

(i) who hold or have held the office of judge of the High Court or judge of appeal; or

(ii) who are qualified to be appointed as judges of the High Court under Section 61(3); or

(iii) upon whom the president has conferred the rank of Senior Counsel under Section 17 of the Advocates Act; and

(b) the tribunal shall inquire into the matter and report on the facts thereof to the president and recommend to the president whether that judge ought to be removed under this section.

107 High Court Misc Application Number 1062 of 2004.

108 Mombasa, Court of Appeal, Criminal Appeal No. 239 of 2004

109 High Court Civil Case No. 13510f 2002.

110 Act No.8 of 2001

111 Ibid

112 See Section of the Children Act, Act No.8 of 2001.

113 See Section 82 of the Constitution of the Republic of Kenya.

114 1992 LRC 623