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# Criminal Litigation 2008
## Lesson 3

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- ARREST
- Working Definition-
- Physical apprehension
- Confining
- Restraining of the body of a person with a view to detention
- It is a forcible restraint on a person's liberty either on the basis of a warrant of arrest or power donated by law.
- Arrest is the beginning of imprisonment.
- Process Of Arrest

Police Officers (including administration officers) conduct arrests as part of maintaining law and order; to prevent crime and launch investigations of offences. The process of arrest is governed by the **Constitution (Section 72), Criminal Procedure Code (section 21-42) and Police Act (Section 14 and 34)**

- Criminal Procedure Code
- **Section 21**- Police officer will touch/confine body of person. unless there is submission by word or action.
- If there is resistance or attempts to evade arrest all means necessary may be used.
- Greater force than is reasonable in the particular circumstances will not be justified
- Criminal Procedure Code
- **Section 24** - the person arrested shall not be subjected to more restraint than is necessary to prevent his escape.
- **Section 25** - when a person is arrested and cannot legally be admitted to bail or cannot furnish bail, the officer may search the suspect and place all recovered articles in safe custody.
- **Section 27** – Women suspects are searched by women officers.
- Arrest without a warrant By a Police Officer
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**Section 29 – A police officer can arrest without warrant if the persons are ;**

- **suspected of committing cognizable offenses;**
- **felonies;**
- **breach of the peace;**
- **obstruction of police officers executing their duties;**
- **possession of suspected stolen property;**
- **deserter from the armed forces;**
- **possessors of implements of house breaking; and**
- **persons found in highways and streets in hours of darkness and suspects he is there for an illegal purpose**

- A person reasonably suspected of an offence outside Kenya and is to be extradited
- **Possession of any implement of housebreaking**
- **Released convict in breach of supervision order (repealed)**
- **Reasonably suspected to have a pending warrant of arrest.**
- 1) Arrest by Magistrate
  2) Arrest By Private Person
- **Section 38 &39-** Magistrates are conferred powers to arrest if offenses are committed in there presence and direct the arrest of persons whom they may issue warrants against.
- **Section 34 & 35** a private person may arrest any person on reasonable suspicion or commission of a cognizable offence
- The owner of property that is damaged may arrest the suspect. A private person shall hand over the suspect to the police officer or police station without delay
- Arrest with a warrant (S100-107 CPC)
- **S102 - The warrant of arrest shall be under the hand of judge or magistrate issuing it. It must be in writing and signed, have the seal of the court, state the offense preferred and the names of the suspect, and the person (s) to execute it.**
- **S102(3) - The warrant stays in force until it is executed or cancelled by the court.**
- **S103- court may direct security to be taken if the charge is not murder, treason or rape**
- **S104 - The warrant may be directed to one or generally to police offices to execute.**
- **S106 – The warrant shall indicate the names of the police officer to execute it, but if not possible another officer may execute it. Normally, warrants are sent to in charge of police station or units**
- **Warrants are issued to suspects in private prosecutions or those who have jumped police/court bail/bond or where new charges are preferred.**
- **They are issued to witnesses who refuse to come to court to testify after summons are issued (S146-147 CPC).**
- **Warrants are issued to sureties who do not comply with court orders**

## Conditions of Arrest

- Reasonable force be used when a person resists arrest.
- It is necessary to inform the person the reason for arrest
- While in detention, the suspect is entitled to legal representation upon request and visitation by relatives.
- International Standards of Arrest
- **Universal Declaration on Human Rights 1948. Article 3** prescribes guarantee to personal liberty.
- **International Convention on Civil and Political Rights** (ICCPR) 1966. **Article 9** provides; "no-one shall be deprived of his liberty except on such grounds and in accordance with such procedure established by law."

## National Laws on Arrest

- Constitution of Kenya Section 72 (1) states: "No person shall be Deprived of his personal liberty save as may be authorized by law....."
- Section 72 (2) states;
- A person who is arrested or detained shall informed as soon as reasonably practicable,in a language he understands, of the reasons for arrest.

Section 72(3) states;

A person who is arrested or detained..... shall be brought to court as soon as is reasonably practicable, and where he is not brought before a court within 24 hours of his arrest, or within14 days of his arrest upon reasonable suspicion of having committed an offence punishable by death, the burden of proving that the person was arrested and brought to court as soon as is reasonably practicable shall be on the person alleging that the provisions of this subsection have been complied with."

**Criminal Procedure Code Section 36 states;**

"When a person has been taken to custody without a warrant for an offence [other than those offences punishable by death], if it does not appear practicable to bring that person before the appropriate subordinate court within 24 hours. Unless the offence appears to be of a serious nature, [the person may be released] on executing bond, otherwise he shall be brought to court as soon as practicable."

- Pre-arraignment detention: Case-law

The jurisprudence emerging from the High Court and Court of Appeal is contradictory as to when and how the question of the legality of the intervening period between arrest ,detention up to arraignment is determined.

- The courts are unanimous that if the suspect has not been brought to court within the lawful period, the prosecution must account for the delay to the satisfaction of the Court. If the reasons are not satisfactory, or no explanation is advanced, then the suspect is discharged and proceedings declared a nullity.

- *Odhiambo Olel vs. Republic CA 54 1989*
- *Wanyiri Kihoro vs. A.G CA 151 1988 – It was held* The Court should note the condition of the suspect as to whether he/she has injuries, complaints or requests made by him. The Court record of the Trial Court should be legible and clear to reflect all matters raised at the initial stage as it considers the period of detention.

## Case Law

- *The land mark case on pre arraignment detention is*

- *Albanus Mwasia Mutua Vs Republic CA 120 of 2004* - There was delay of 8 months from the date of arrest to the date of arraignment in court. the prosecution offered no explanation given by prosecution. Section 72 (3)of the Constitution was upheld.
- *Gerald Macharia Githuku vs Republic CA 119 of 2004*, The delay of 17 days between date of arrest and the arraignment date in court was not explained. The appeal was upheld.
- *Republic vs James Njuguna Nyaga Cr Case 40 of 2007*, Counsel for the accused person raised a preliminary objection against the Attorney General. The suspect was arrested on 12/2/07 and kept in custody for 5 months. A *habeas corpus* Misc application 436 of 2007 was filed and the suspect was produced and charged with the offence of murder on 14/6/07. The suspect was held in custody illegally for 105 days after the mandatory 14 days. The preliminary objection was upheld by the High Court and the proceedings of the case were stopped. They were a nullity.
- Case Law
- *Anne Njogu & 5 others Vs Republic Misc Criminal Application 551 of 2007*, - On 1/8/07 the Misc. application was filed, heard on 2/8/07. The applicants were arrested on 31/7/07 at 12 noon and were not brought to court until 2/8/07 when advocates blocked taking of pleas in the magistrate's ct pending the outcome of the High Court application. The applicants were not arraigned in court within the statutory 24 hours. The Misc. application was upheld and proceedings held to be a nullity.
- *Adan Keynan Wehliye Vs Republic. CC 223 of 2003* The applicant questioned the production of a *nolle prosequi* and unlawful detention of 29 days. The High court ordered the matter was to proceed for hearing before the trial court and the unlawful detention issue canvassed in the Trial Court.
- *Ben Amos Njau vs Republic CA 633 of 2007* The application was dismissed on the basis of the fact that the issue of the applicants arrest and detention had not been raised in the trial court.
- Case Law
- ***David Karobia Kiiru vs Republic Misc App 863 of 2007*** similarly the High Court directed that an application on the arrest and detention of a suspect is a matter of fact to be raised in the trial court so as to allow for an explanation before it is addressed in the High court.
- ***Samuel Ndungu Kamau and another vs Republic CA 223 of 2006***. The Court of Appeal now stated that the court exercised appellate jurisdiction. Therefore the question of arrest and detention be raised first in the trial court.

## Case Law

- The Court of Appeal delivered on 22nd February 2008 the case of ***Paul Mwangi Murunga vs Republic*** **(UR) Criminal Appeal No. 35 of 2006 and stated;**
- "...Under S72(3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged by the prosecution if the person accused raised a complaint. But if in the case the

prosecution does not offer any explanation, then the court, as the ultimate enforcer of the provisions of the Constitution must raise the issue."

## Case-law

- In the case of *Dominic Mutie Mwalimu Vs Republic* CA 217 of 2005, Court of Appeal stated, the issue of unlawful detention of 2 days beyond the mandatory 14 days was not raised in the trial court an 1st appeal. The prosecution was not given an opportunity to explain the delay. The ground of appeal had no merit.

## Case-law

- In the case of *Republic Vs Samuel Mbogo Ndwiga & Another* HCT 55 of 2001, the accused persons charged with murder, raised preliminary objection of arrest from 2000 and charged in 2007. The explanation was, there were committal proceedings (Now Repealed) *nolle prosequi* entered on the murder charge, inquest conducted, ruling given and accused persons charged again. High Court Held , the mere fact of detention beyond the requisite period is not unconstitutional, there should be reasonable explanation for the court to determine if the accused persons were brought to court as soon as was reasonably practicable.
- In the case Of *David Waiganjo Wanaina Vs Republic* CA 113of 2005, the Court of Appeal allowed the appeal
- There was a delay of 9 months between arrest and arraignment. The court stated the long delay was not explained.the Accused person was set free.

## Case-law

- When should the issue of unlawful detention be raised?
- In *Paul Njehia Vs Republic* HCT 96 of 2005,the accused person charged with murder. At the close of Prosecution case and ruling on a case to answer, the defense raised the issue of unlawful detention. High Court held: there are 2 competing interests; section 71 and 72 (3). The defense heard 11 witnesses for 2 years ad did not raise the issue. The timing did not accord the prosecution the opportunity to explain the detention. The objection was dismissed and defence hearing proceeded.

- In *Republic vs Joseph Ndirangu Nungari* and Another

HCt 42 of 2006. The accused persons charged with murder, at the close of the prosecution case, defense raised preliminary objection on unlawful detention. The investigating officer filed an affidavit on the delay. The High Court stated preliminary objections maybe raised at any time but this is more in civil cases than criminal ones; as the express intention of the application is to stop criminal proceedings. Criminal trials are matters of public interest, and each case determined on its peculiar circumstances. The application / objection be raised at the earliest stage. The preliminary objection dismissed.

## Case-Law

- In *Republic Vs Talib Abubakar & others Criminal Revision* No 1 of 2008, the High Court dealt with the following issues;
- The Magistrates' courts should take pleas in spite of the unlawful detention issue, and afford, the prosecution an opportunity to explain the delay.
- Section 72(3) seems to outlaw unlawful detention but with an exception; an opportunity to explain is given.
- Whether, the detention is unlawful is a judicial question to be determined on legal principles after hearing parties
- Whereas the high court determines questions of interpretation of The Constitution, facts that affect the Constitutional decision are best determined in the Magistrates' court

## Conclusion

- Pre arraignment detention must be in accordance with the Constitution.
- The issue may be raised as a preliminary objection at the earliest opportunity in the trial court.
- The trial court may also question the delay based on the C/Sheet
- The prosecution/police/state counsel has an opportunity in law to give an explanation.
- The court will determine on the basis of circumstances of the specific case, the outcome.
- The application for unlawful arrest can be filed in the High Court under section 84 (6) of the Constitution.

# CHAPTER FOUR
# ARRESTS

As it is in the nature of persons who have committed or are suspected of having committed offences to seek to elude the criminal process by which they may be adjudged guilty and punished accordingly, a lawful mechanism has to exist by which such persons may be apprehended, restrained and brought before court to be dealt with in accordance with the law. That mechanism is arrest. An *arrest* is a restraint upon a person's liberty and may take the form of physical confinement.

## 4.1 General Provisions relating to Arrests

In making an arrest, the policeman or any person effecting the arrest may touch or confine the body of the person being arrested, unless the person being arrested voluntarily submits to custody by word or action. Where a person forcibly resists the endeavour to arrest him or attempts to evade the arrest, the person effecting the arrest may use all means necessary to effect the arrest. The force applied to effect the arrest or to counter any attempt to resist apprehension must, however, be reasonable.[148]

In essence, therefore, the person effecting an arrest:

i. May but need not touch the person to be arrested
ii. May use all means necessary to effect the arrest, including reasonable force

Pursuant to a warrant, the person effecting an arrest may enter any place where the person to be arrested is hiding or is reasonably suspected to have entered and concealed himself and demand that the occupiers of that house allow him free ingress and reasonable facilities for the search.[149]

Where ingress is not possible, a police officer is at liberty to immediately break open any outer or inner door or window of a house or a place to effect entry[150] so long as he has a warrant. Even without a warrant, he may still so break so as to pre-empt the escape of the person that would be afforded by delay in obtaining a warrant. Similarly, the person effecting an arrest is authorized to break out of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.[151] The breaking action is only valid where the person effecting an arrest:

148 s 21 of the CPC, See also the case of *Wawera v Republic* [1982] KLR 137.
149 *Supra* nt 110, s 22(1) of the CPC.
150 *Ibid*, s 22(2)(1).
151 *Ibid*, s 23.

i. Has made notification of his entry
ii. Has stated his purpose
iii. Has made demand of admittance
IV. Has been denied or is otherwise unable to gain admittance[152]

Where the place is an apartment in the actual occupancy of a woman who, according to custom, does not appear in public, the person effecting an arrest must, before entering those premises, give notice to the woman to withdraw and must afford her every reasonable facility for withdrawing; whereupon he may break open the apartment and enter it.[153]

The person arrested should not be subjected to more restraint than is necessary to prevent his escape.[154]

The person effecting an arrest is at liberty to search the person being arrested and place into safe custody all articles, other than the necessary wearing apparel they have on them. [155]

A police officer or any other person authorized in writing by the Commissioner of Police may stop, search and detain any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or is reasonably suspected to have been used or employed in the commission or to facilitate the commission of an offence. He may do the same to any person reasonably suspected of having in his possession or conveying anything stolen or unlawfully obtained.[156]

The State is fully immunized from liability for any loss or damage suffered by any person by reason of the detention of any aircraft, vessel or vehicle under the foregoing circumstances as such person is not entitled to damages or compensation.[157]

As the body search of a person on arrest involves an intimate intrusion with great potential for indecency, section 27 of the Code prescribes that when a police officer needs to search a woman, he has to ensure that the search is carried out by another woman, with strict regard to decency. It would seem the law presupposes that there is nothing objectionable about a police woman conducting a body

152 *Ibid*, s 22(2)(1).
153 *Ibid*, s 22(2).
154 *Ibid*, s 24.
155 *Ibid*, s 25.
156 *Ibid*, s 26(1) &(2).
157 *Ibid*, s 26 (2).



search on a man, which is highly a debatable point. The requirement for strict regard to decency ought to cut across the board for it is possible for a person to be indecent while conducting a search on one of his or her gender.

In case a search uncovers offensive weapons concealed about the person being arrested, the police officer shall deliver them to the court or the officer before which or whom the officer or person making the arrest is required by law to produce the person arrested.[158]

Arrests may be of two kinds:

a) Arrests without a warrant
b) Arrests with a warrant

## a) Arrests without a warrant

There are instances when an arrest may be lawfully effected without a Court order or direction. They include the apprehension of persons who:[159]

i. Commit or are suspected to have committed cognizable offences, namely offences for which no warrant is needed in order for an arrest to be effected.[160] In *Republic v Hussen*,[161] murder was held to be *cognizable offence*, hence a police officer could arrest without a warrant.
ii. Commit a breach of the peace in the presence of a police officer.
iii. Obstruct a police officer in the execution of his duty.
iv. Escaped or attempt to escape from lawful custody
v. Are in possession of anything suspected to have been stolen or are reasonably suspected of having committed an offence in respect of that thing.
vi. Are reasonably suspected of being deserters from the armed forces
vii. Are found in a highway, yard or other place during the night and who are reasonably suspected of having committed or being about to commit a felony
viii. Are found in a street or public place nocturnally and are reasonably suspected of being there for an illegal or disorderly purpose or who are unable to give a satisfactory account of themselves
ix. Are reasonably suspected of having committed extraditable offences outside Kenya
x. Are in procession of implements of house breaking for which they are unable to provide a lawful excuse.
xi. Are reasonably suspected to be the subjects of a warrant of arrest.

158 s 28 of the CPC.
159 *Ibid*, s 29.
160 *Ibid*, s 2.
161 [1990] KLR 497.

It is clear from the aforesaid provisions that a police officer is entitled to effect an arrest without a warrant, so long as he has reasonable grounds for entertaining the suspicion at that material time. Subsequent events may show that the officer was in error at the time but the arrest will not thereby be rendered unlawful. This has been the law for more than a century as may be seen from the sentiments of Lord Diplock in *Dillon v O' Brien and Davis,*[162] *"In the case of an arrest, reasonable grounds for belief in guilt at the time of arrest are sufficient justification, though subsequent information or events may show those grounds to be deceptive."*

An Officer in charge of a police station may also arrest or cause to be arrested without the requirement of a warrant any suspicious *self-concealers;* being persons ound within the limits of the station in circumstances suggestive that they are taking precautions to conceal their presence with a view to committing a cognizable offence.[163]

In case the officer requires a subordinate to effect that arrest otherwise than in his presence, he shall do so by order in writing specifying the person to be arrested and the offence or other cause for which he is to be arrested.[164]

A person who has committed or is suspected to have committed a non-cognizable offence may still be arrested without a warrant if he, when asked, refuses to give details of his name and place of residence; or gives a name or residence which the officer has reason to believe to be false. Such a person may be arrested until such information is ascertained whereupon he shall be released with or without condition to appear before a magistrate if so required. Where the person is a non-resident of Kenya, his release is upon bond being secured by a surety or sureties resident in Kenya. If such information is not ascertained he must be arraigned in Court within a reasonable time.[165]

The police officer who arrests without a warrant must, without any un-necessary delay, and subject to the provisions of bail in the Criminal Procedure Code, take or send the person arrested before a magistrate having jurisdiction in the case or before an officer in charge of a police station.[166]

A private person can arrest one who commits a cognizable offence or one he reasonably suspects to have committed a felony. This is a citizen's arrest. Another instance is where damage to property has been committed and the owner of the

162 [1887] 16 Cox CC 245.
163 s 30 of the CPC.
164 *Ibid,* s 31.
165 *Ibid,* s 32.
166 *Supra* nt 127, s 33 of the CPC.



property or his servants or any other person he authorizes may arrest the offender.[167] The private person needs then to expeditiously take over the person being arrested to a police officer or, in the absence of a police officer, he must take that person to a police station for the person to be re-arrested. The police officer may release the person arrested where he deems that no offence has been committed.[168]

Where a person has been taken into custody without a warrant for an offence, the officer in charge of the police station to which the person has been brought, may release the person upon execution of a bond of a reasonable amount, with or without sureties to appear before a magistrate at a future date.[169] However, this is subject to certain conditions:

1. That the offence is not of a capital nature
2. It is not practicable to bring the person arrested before an appropriate subordinate Court within twenty-four hours after he has been taken into custody
3. The offence itself is not of a serious nature.

The officer in charge of a police station may also release a person arrested on suspicion of having committed an offence, when, after due police inquiry, he forms the opinion that there is insufficient evidence disclosed on which to proceed with the charge.[170]

The officers in charge of police stations are under obligation to report to the nearest magistrate the cases of all persons arrested without warrant within the limits of their respective stations; whether those persons have been admitted to bail or not.[171] These apprehension reports are intended to curtail arbitrary arrest and detention of persons by police officers in that they afford courts the opportunity to know, and make further inquiries and issue directions respecting the circumstances under which citizens within their jurisdiction have been deprived of their personal liberty.

A magistrate has power to personally arrest or order the arrest of any person who commits an offence in his presence within the local limits of his jurisdiction whereupon he may commit the offender to custody unless he admits the offender to bail. He may similarly arrest or direct the arrest in his presence within the local limits of his jurisdiction of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant. In both of these instances the arrest is without a warrant.[172]

167 *Ibid,* s 34.
168 *Ibid,* s 35.
169 *Ibid,* s 36.
170 *Ibid.*
171 *Ibid,* s 37.
172 s 39 of the CPC.

If a person escapes or is rescued from lawful custody, the person who had apprehended him, whether or not he be a police officer and whether or not he has a warrant, is entitled to pursue and arrest him without a warrant and may, moreover, break into any house or place so as seize to recapture and re-take him.[173]

There is a positive duty on all persons to assist police officers or magistrates who require their aid in taking or preventing someone from escaping and in suppressing any breach of the peace or any attempt at committing any injury to a railway, canal or any other public property.[174]

### b) Arrests With a Warrant

Section 100 of the Criminal Procedure Code states that if summons have been issued directed at a person against whom an accusation has been laid, the Court may, before or after the time of hearing, issue a warrant of arrest against the person so summoned. If the accused does not appear at the time and place appointed in and by the summons, and his personal attendance has not been dispensed with, the Court may issue a warrant to apprehend him and cause him to be brought before it but no warrant is issued unless a complaint has been made upon oath.[175]

The court may also issue a warrant for the arrest of a person who fails to appear when required even for the mention of his case as happened in the case of *Abdi Hakim Alsafa v Republic.*[176]

An *arrest warrant* is a written order issued by a magistrate for the apprehension of a person who fails to appear in Court at an appointed time and in relation to an offence committed by him or for witnesses who fail to appear in Court to give evidence. Warrants of arrest are issued by Court for witnesses who are bonded but fail to turn up to give evidence and for those accused persons who have jumped bail or have absconded.[177] They are directed to a police officer or any other person who will effect the arrest.

In obtaining a warrant of arrest, the police lay written information before the magistrate and on oath that a person has or is suspected of having committed an offence.[178] Issuance of warrants involves the exercise of judicial discretion. As such, a warrant of arrest should not be issued unless the offence in question is indictable or is punishable with imprisonment. Further, the court ought to be satisfied that

173 *Ibid*, s 40 read together with s 41.
174 *Ibid*, s 42.
175 *Ibid*, s 101.
176 [2007] eKLR (Miscellaneous Criminal Application No. 301 of 2007).
177 *Global Enterprises (PVT) Ltd v Robinson Malambo and another* [2006] eKLR (Civil Case No. 53 of 2006).
178 s 100 of the CPC.



the person named in the warrant would not voluntarily appear in attendance, as required, hence the necessity of the warrant.

## 4.2 Validity of Warrants[179]

The formal validity of a warrant is satisfied when the warrant meets the following requirements: Every warrant:

i. Must bear the signature of the judge or magistrate issuing it
ii. Must bear the seal of the Court
iii. Must bear the name of the person or persons to whom it is directed
iv. Must bear a *précis* of the offence with which the person against whom it is issued is charged
v. Must bear the name or description of the person to be apprehended (the subject)
vi. Must order the person or persons to whom it is directed to apprehend the subject for the purpose of bringing him before the Court issuing the warrant; or before some other Court having jurisdiction in the case, to answer to the charge therein mentioned and to be dealt with further in accordance with the law.

The warrant remains in effect until it has been executed, lifted or cancelled by the officer of the law or the Court that issued it.[180]

If the court issuing the warrant so directs by endorsement on the warrant, the subject thereof may be released if he executes a bond with sufficient sureties for his attendance before it at a subsequent specified time and thereafter until otherwise directed by the court. This, however, does not apply to the offences of murder, treason or rape as per the statute, though it ought properly to exclude the exact list of the usual non- bailable offences.[181]

The endorsement must state:

a) The number of sureties
b) The amount in which they and the subject are to be bound
c) The time at which the subject is to attend before Court

The officer to whom the warrant is directed must forward the bond to the Court whenever security is thus taken.[182]

Warrants of arrest are normally directed to a particular police officer or to

179 *Ibid*, s 102.
180 *Ibid*, s 102(3).
181 *Ibid*, s 103.
182 s 103 of the CPC.

a particular group of officers. They may, however, be directed to any person or persons if immediate execution is necessary and no police officer is immediately available and such person or persons shall execute the same. The liability to execute a warrant is joint and several on the part of the persons to whom it is directed.[183]

Where an escaped convict or a person accused of a cognizable offence has eluded pursuit, a magistrate may direct a warrant to a land holder, manager of land or farm manager who shall, on receipt of it, acknowledge it in writing and execute it if the subject enters upon his land or farm. The subject is then to be taken over with the warrant to the nearest police officer, who shall cause him to be taken before a magistrate unless the subject gives security.[184]

A warrant directed at a police officer is transferrable for execution to another officer provided the officer, to whom it is directed or endorsed, endorses it to the next officer.[185] The officer or other person who finally executes a warrant is under a duty to notify the subject of the substance of the warrant and show him the warrant should the subject so require[186] and shall then arrest and expeditiously bring the subject before the Court to which he is required to produce him.[187]

A warrant of arrest may be executed at any place in Kenya.[188] Where it is to be executed outside the local limits of jurisdiction of the issuing court that court may forward it by post or otherwise to a magistrate in whose local limits of jurisdiction it is to be executed. The receiving magistrate will then endorse it and cause it to be executed as if he issued it himself.[189]

Where a police officer receives a warrant directing him to execute it outside the local limits of his jurisdiction, he must take it to the magistrate in whose jurisdiction it is to be executed. This latter magistrate endorses his name on the warrant, which then constitutes sufficient authority for the police officer to execute it within those local limits and for the local police to afford him all the assistance he may need in executing it. The officer may, however, execute it without such endorsement if he has reason to believe that any delay may lead to the frustration or defeat of the execution of the warrant.[190]

183 *Ibid*, s 104.
184 *Ibid*, s 105.
185 *Ibid*, s 106.
186 *Ibid*, s 107.
187 *Ibid*, s 108.
188 *Ibid*, s 109.
189 *Ibid*, s 110.
190 *Ibid*, s 111.



Once a person is arrested outside the local jurisdiction limits of the court that issued the warrant, he shall be taken before a magistrate in the locality where he was arrested unless the court that issued the warrant is within twenty miles of the place of arrest or is closer than the local court.[191] The magistrate having jurisdiction over the locality of arrest shall then satisfy himself that the person arrested is the subject of the warrant and shall direct his removal in custody to the court that issued the warrant unless the subject gives security in an appropriate case.[192]

## 4.3 Irregularities and Defects in a Warrant[193]

Under the Criminal Procedure Code, any irregularities or defects in a warrant, be they in form or substance, as well as any variance between it and a written complaint, or between the warrant, the complaint and the prosecution evidence at the trial, do not vitiate or otherwise affect the validity of any proceedings at or subsequent to the hearing of the case. This has been given judicial endorsement in, *inter alia*, the case of *James Maina Njuguna v Republic*,[194] where an appeal on the ground that the mode of arrest had no nexus to the crime or any sound link connecting the appellant to the crime was rejected with the Court going further to say that the evidence adduced was consistent with the warrant.[195]

If it appears to the court that the variance is such that the accused has been thereby deceived or misled, it may merely adjourn the hearing of the case to some future date but will not nullify or stop the proceedings.

## 4.4 Can a Warrant of Arrest be used more than once?

Whereas the Criminal Procedure Code is silent on this issue and there appears to be no local decision on the point, the English position from ancient times is as expressed in *Dickenson v Brown*[196] where the Court of King's Bench doubted the legality of a second arrest of the plaintiff upon a warrant which had already been used to effect an arrest on an earlier occasion. It would, indeed amount to an abuse of the instrumentality of an arrest warrant were it to be executed repeatedly

191 *Ibid*, s 112(1).
192 *Ibid*, s 112(2).
193 *Ibid*, s 113.
194 [2008] eKLR (Criminal Appeal No. 43 of 2007).
195 See also *James Muhia Muiruri v Republic* [2008] eKLR Criminal Appeal 214 of 2007 & 215 of 2007 (Consolidated).
196 [1974] 1 Esp. 218.

for such an employment of it would turn it into an instrument of oppression and could also invite the mischief of circumventing the judicial angle where-under the police must prove on oath that a warrant should issue at all.

## 4.5 Miscellaneous provisions regarding processes

These give magistrates additional powers to enforce attendance. Examples include:

### *i. Power to make bond for appearance*

Where a person for whose appearance or arrest the officer presiding in a Court is empowered to issue summons or warrant happens to be present in Court, the officer may, without having to issue a summons or a warrant, require him to execute a bond with or without sureties, for his appearance in that Court.[197]

### *ii. Arrest for breach of Bond*

Should a person who has been freed on bond abscond or fail to appear before that Court, the officer presiding may issue a warrant directing that such person be arrested and produced before him.[198]

### *iii. Power to issue production orders*

Where a person for whose appearance or arrest a Court is empowered to issue summons or warrant is confined in a prison within the local limits of jurisdiction, the Court may issue an order to the officer in charge of that prison requiring him to bring the prisoner in proper custody, at a time to be named in the order, before the Court. Such order is referred to as a *production order.* The officer so in charge must provide for the safe custody of the prisoner during his absence from the prison.[199]

## 4.6 Rights of Arrested Persons[200]

One of the most significant criminal justice developments brought about by the adoption of the new Constitution is the elaboration and elevation of the rights of an accused person to constitutional status in clear response to a history of gross

197 s 114 of the CPC.
198 *Ibid,* s 115.
199 *Ibid,* s 116.
200 Art 49 of the Constitution.



abuses. This clearly imposes upon law enforcement agencies a greater duty of circumspection and regard to legality when effecting the arrest of suspects as well as their treatment of them while in their custody.

An arrested person has the right to:[201]

(a) prompt information, in the American *Miranda*[202] or *Judge's Rules* sense, in a language he understands, of:
  (i) the reason for the arrest;
  (ii) the right to remain silent; and
  (iii) the consequences of not remaining silent (namely that if he waives that right, anything he says will be taken down in writing and may be used in evidence.);
(b) silence;
(c) communication with an advocate and other persons whose assistance is necessary;
(d) non- compulsion to self incrimination;
(e) be held separately from convicts;
(f) prompt production in court within twenty-four hours after being arrested; or before the expiry of the next court day if the twenty-four hour period ends outside ordinary court hours;
(g) be charged when first produced in court, or informed of the reason for continued detention, or to be released; and
(h) be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

The Constitution has also outlawed the pre-trial detention of all persons charged with certain petty offences specifically those punishable by a fine only or by imprisonment for not more than six months.[203] The effect of this is that all such persons must be set at liberty perhaps on free bond for, to impose any other bail and bond terms, which they may be unable to meet or raise, would expose them to remand custody in default yet this is the very situation proscribed by the Constitution. This raises serious questions as to what assurances the court has that such persons would turn up at the trial and has already attracted judicial disquiet.[204]

201 *Ibid,* art 1
202 *Miranda v Arizona* 384 US 436 (1966).
203 *Supra* nt 201, s-art 2
204 See, for instance, Justice Fred Ochieng's concerns in *Republic v Joseph Wambua Mutunga and 3 others* HC *Criminal Case No 23 of 2008* (Unreported), where he says: *"... there is a real probability that many persons who are charged with offences that attract only fines or that attract imprisonment for six (6) months or less, will not bother to turn up in court for their trials. The nett effect will be to increase the volumes of pending cases in leaps and bounds."*

## 4.7 Constitutional issues raised by Arrests

Considering the very personal (often dramatic) and invasive nature of an arrest, both in fact and in effect, it is not at all surprising that it raises various issues implicating the Constitution. What is more, the Kenyan experience is that one too many times law enforcement officers, in particular the police, have exhibited a certain proclivity towards indiscriminate arrest whenever offences have been committed without first going through the pain staking process of determining who is truly implicated. This is an issue the Court of Appeal itself was aware of in *Shimechero v Republic*,[205] and said:

> The practice of rounding up all and sundry who may be connected, however remotely, with a criminal investigation, and detaining them unlawfully in police custody for questioning, is strongly to be deprecated.

Further, in the case of *Mohamed v Republic*,[206] the High Court stated that the police have no authority to hold in their custody persons who are only witnesses to the commission of a crime where such persons have been summoned to the police station or have taken themselves there to record statements. Moreover, witnesses to the commission of a crime should be released unconditionally from the police stations after they have recorded their statements. They can only be bonded later to attend court to give evidence.

In *Gachara v Republic*,[207] the Court said that liberty is one of the fundamental rights and freedoms of the individuals protected by the Constitution of Kenya but that it was subject to its not prejudicing the rights and freedoms of others or the public interest.

In the case of *Republic v Talib Abubakar and 5 others*,[208] the High Court held that the question whether or not the prosecutorial process has complied with the terms of section 72(3) of the repealed Constitution is a judicial question to be determined on legal principles, after hearing the parties. Although the interpretation of the Constitution is a function of the High Court and not the subordinate Courts, facts as may affect the constitutional decision arrived at, may in many cases be best determined by the trial Court. The Court made a reference to the case of *Dickson Ndicho Kago v Republic*,[209] where it was stated that:

> It is clear from the depositions and from submissions that hardly any reference at all was made to the right of the accused not to be detained for longer than was provided for, and so the purely-factual question whether there was cause for longer detention, was not at all considered. The trial Court is the tribunal of the fact in this matter, which ought to have the first opportunity to deal with that question.

205 Criminal Appeal No. 119 of 1974 (unreported).
206 [2003] KLR 338.
207 [2004] 1 KLR 373.
208 Criminal Revision No. 1 of 2008.
209 High Court Miscellaneous Application No. 639 of 2007.



It seems also that the objection as to the contravention of this right would be overruled if brought up too late in the day. Thus in *Morris Ngacha Njuguna and 3 others v Republic*,[210] when one of the appellants first raised the issue at the Court of Appeal, the Court was unimpressed and said:

> [I]f the second appellant felt his rights under the Constitution have been violated the best course of action would have been to file an application under the provisions of the Constitution to enable the relevant Court to investigate the issue. As the matter stands now, the issue having not been raised in the two Courts below, we can only base our decision on the material before us. The material is inadequate and on that basis it cannot be said that the second appellant's rights under section 72(3) (b) of the Constitution were breached.

There is no unanimity of opinion in legal circles or even the Court of Appeal itself. In the case of *Joseph Amos Owino v Republic*,[211] the Court said that the issue of violation of constitutional rights should be raised at the earliest opportunity only if it was dealing with a complaint of such a nature coming from an accused person who had been represented by an advocate either at his trial or on the first appeal. In such as case, the Court stated that it would assume that the accused was legally advised on his legal rights, and if he did not raise such issues, then he would be considered to have waived them and would not be heard to reclaim the same on second appeal.

In this case, the appellant represented himself both at the trial and during his first appeal. This, the Court observed, was in acceptance that being illiterate in law, the appellant may not have been aware of his constitutional rights as an advocate may have been and therefore relied wholly on the Court to ensure compliance with such rights by the prosecution.

The question as to the fate of the accused person who has been detained for longer than the expected constitutional period has given rise to a debate on what remedy is to be given by the Court. The cure that the Constitution prescribes is, on a plain reading of the text, compensation from the person that unlawfully arrests or detains him.

210 Criminal Appeal No. 232 of 2006.
211 Criminal Appeal No. 450 of 2007 Court of Appeal.

Consistent with this reading of the Constitution, and which appears to be the more doctrinally sound, being more felicitate to the text, the immediate consequence of over-shooting the constitutional time limit is to require the prosecution to proffer an explanation for the delay. The explanation may be reasonable or not. Where the Court is not satisfied by such an explanation, the Court may make a note that the accused person's rights have been violated. This does not, however, affect the merits of the case against the accused person, which must run its full course.

It is only if the delay is so long and extended as to lead to an *ipso facto* negation of his rights to a fair trial under section 77 of the former Constitution (or Article 50 of the current) that a question of acquittal can arise. There actually was a remedy under section 72 of the Constitution for such violations; and that remedy lies in an appropriate declaration and an award of damages- certainly not acquittals. The available remedies under the new Constitution are provided under Article 23(3) and include, for relevance, a declaration of rights and an order for compensation.

Consistent with this argument is the case of *Eliud Njeru Nyaga v Republic*,[212] where the Court was unable to hold that the prosecution had been given a reasonable opportunity to explain the delay but had failed to take advantage of the opportunity and therefore there was no reasonable explanation for the delay. The Court said:

> Even section 72(3) of the Constitution, which deals with the period of bringing an accused person to Court, recognizes that there can be a valid explanation for failure to bring an accused person to Court as soon as reasonably practicable.

In *David Waiganjo Wainina v Republic*,[213] the Court said:

> . . .we think it would be wrong for anybody to contend that where there has been inordinate delay in bringing an accused to Court, then without any further investigations such a person ought to be set free regardless of what had led to his arrest and incarceration.

In the case of *Murunga v Republic*,[214] the Court said that it was the burden of the prosecution to raise the issue about the unlawful detention of the accused in the custody of the police. The prosecuting authorities, after all, know the time and date when the accused was arrested. They also know when the arrested person

212 Criminal Appeal No. 182 of 2006.
213 Criminal Appeal No. 113 of 2005.
214 [2008]1 KLR 1.



is taken to Court, and accordingly know or ought to know whether the arrested person has been in custody for longer than the expected period. The Court stated:

> Under section 72(3) of the Constitution, the burden to explain the delay is on the prosecution, and we reject any proposition that the burden can only be discharged if the person accused raises a complaint. But in case the prosecution does not offer any explanation, then the Court as the ultimate enforcer of the provisions of the Constitution must raise the issue. . . That would help the High Court or any other Court to see if the explanation offered by the prosecution was reasonable in all the circumstances of the case.

And in the case of *Albanus Mwasia Mutua v Republic*[215] the Court suggested some examples of what might amount to an acceptable explanation for the delay:

1. It may be that upon arrest and being taken to the police station the accused person fell ill, was taken to hospital and was admitted and kept there in excess of the period allowed; or
2. The accused person was arrested on a Friday evening and because Courts do not operate on weekends he was not brought to Court until the next working day; and neither was it possible to release the accused on bail at the material time, or;
3. It may have been that the Court house was far from the police station, or;
4. The station vehicle broke down or had no fuel

Against this position is a new fangled jurisprudence espoused by some judges who have ruled that any violation, no matter how slight, of an accused person's right to be arraigned in Court in the constitutionally provided for period should lead to an automatic acquittal. To this line of thinking, the merits or evidential strength of the case facing the accused, as well as the seriousness of the offence with which he is charged, are absolutely of no moment. Much as this school appears to be strike a blow for constitutional rights, it has, in fact, a deleterious effect on the same in that by lionizing accused persons' rights and causing them to trump the public interest absent textual backing, they stretch rights too thin. They also invite mischief in that criminals would collude with corrupt police officers to hold them for longer by a day or two and immediately buy them acquittals.

The first of these cases is *Ann Njogu and 5 others v Republic*,[216] a decision of the High Court in Nairobi. There, Justice Onesmus Mutungi, while dealing with

215 Criminal Appeal No. 120 of 2004.
216 HC Misc. Application No 551 of 2007.

the issue of delay in the absence of representation on the part of the State, took the view that, *". . .in the absence of the authorities that are detaining, despite being duly served, there is no explanation, good or otherwise, as to why the applicants were not brought before Court within 24 hours."*

The learned judge went on to say that at the tick of the 60th minute of the 24th hour, if the applicants had not been brought before the Court, every minute thereafter of their continued detention was an unmitigated illegality as it was a violation of their fundamental and constitutional rights. The Court went on to assert that there was as yet no known cure for the nullity that results from attempted prosecution of any person, in this country, once it is shown that his or her constitutional rights violated prior to the purported institution of the criminal proceedings complained against. Nor is there any room for the extension of the constitutionally provided for period of 24 hours. The Court went on to order the immediate release of the applicants.

A section of the Court of Appeal gave this reasoning a ringing endorsement in *Gerald Macharia Githuku v Republic.*[217] There, the appellant was arraigned in Court on a charge of robbery with violence. The date of his arrest was stated in the charge sheet to have been January 13, 1995 while the date of his first arraignment was stated as January 30, 1995, i.e. 17 days later. The appellant was tried, convicted and sentenced to death. After his first appeal to the High Court was dismissed, he brought a second appeal in which his counsel argued that the High Court had erred in affirming his conviction and sentence when his constitutional rights had been violated.

Appeal Judges E.O. O'Kubasu, J.W. Onyango Otieno and W.S. Deverell were unanimous in what they saw as a defence of constitutional rights. They stated that even though the delay of *three days* in bringing the appellant to Court did *not* cause him any prejudice and although the evidence showed that he was *guilty as charged*, nevertheless the failure by the prosecution to abide by the requirements of the Constitution could not be disregarded. The prosecution, on whom the burden of proof rested, had failed to satisfy the Court that the appellant, who was charged with a capital offence, had been brought before the Court as soon as was reasonably practicable.

And in the case of *Republic v James Njuguna Nyaga*[218] the High Court held that it would be failing in its duty by not declaring that case null and void due to contravention of the accused person's right to be arraigned in Court in reasonable time. The Court said:

217 [2008] eKLR (Criminal Appeal No. 119 of 2004).
218 Criminal Case No 40 of 2007.



> . . . it is premised [on], and has its genesis [in] an illegality. And the position remains so irrespective of the weight of the evidence that the prosecution may adduce in support of the case. For such evidence will be in support of a vacuum- a nullity.

Better yet in the case of *Republic v Amos Karuga Karatu,*[219] the Court said:

> A prosecution mounted in breach of the law is a violation of the rights of the accused and it is therefore a nullity. It matters not the nature of the violation. It matters not that the accused was brought to Court one day after the expiry of the statutory period required to arraign him to Court. Finally it matters not that the evidence available against him is weighty and overwhelming. As long as that delay is not explained to the satisfaction of the Court, the prosecution remains a nullity.

It is easy to see that an incremental application of this new doctrine to its logical conclusion leads to a perverse subversion of the judicial process and has a dangerous potential for undermining both law enforcement efforts at curbing crime and the public confidence in the administration of justice and the rule of law. Fortunately, the tide of judicial thought seems to be turning decidedly in favour of the position we have previously espoused so that the violation-of-time-equals-acquittal seems to be receding as a relic to an aberrant moment only. Thus, in *Julius Kamau Mbugua v Republic,*[220] one of the latest decisions of the Court of Appeal, delivered after the adoption of the new Constitution, Githinji, Waki and Visram JJA placed the law in this area on a proper footing. This should, respectfully, be considered the last word on this subject. The court first captured the issue at hand as;

> ...whether an unconstitutional extra judicial incarceration by the police before the suspect is charged in court either entitles the subject not to be tried for the offence for which he was arrested, or, if tried, whether he is entitled to a discharge or acquittal ... put in another way whether ...[it] entitles the suspect to go scot-free. ... This is a fundamental question of great public importance.

The court then proceeded to describe the decisions to the effect that the trial court would either have no jurisdiction or that further hearing would be an illegality or a nullity and that the accused should be acquitted without trial politely as, "Jurisprudence peculiar to this jurisdiction and has no parallel in international jurisprudence." It then proceeded to state that,

> There is no law including the 1963 Constitution before repeal which bars such prosecutions or ousts the jurisdiction of the criminal courts in such cases. The issue of jurisdiction does not with respect, arise. It is presumptuous, to say the least, for

219 [2008] eKLR (Criminal Case No. 12 of 2006).
220 Criminal Appeal No 50 of 2008 (Unreported)

> the courts to usurp the law making function of the Legislature in such an important subject ... the right is not designed to avoid trials on the merits. Similarly, the right protected ... is to be taken to court as soon as reasonably practicable. It is not a right not to be taken to court after unreasonable delay.

Even had the judges found that the extra judicial detention was unlawful, they would have "considered an acquittal or discharge was disproportionate, inappropriate and draconian as remedy since public security would be compromised" and agreed with Emukule J, from whose judgment they were sitting on appeal, that breach of the right entitled the aggrieved person to monetary compensation only, the same relief that had been granted by the Court of Appeal in *Kihoro v Attorney General of Kenya.*[221]

The Constitution has now also decreed that a person who is detained, held in custody or imprisoned under the law, retains all the rights and fundamental freedoms in the Bill of Rights, except to the extent that any particular right or a fundamental freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.[222] What is more, such a person is entitled to petition for an order of *habeas corpus*[223] which is now not only a substantive and express constitutional right, but also one which is in the special category of Article 25 non-derogable fundamental rights and freedoms not open to any kind of limitation.[224]

Parliament is also under an obligation to enact legislation that provides for the humane treatment of persons detained, held in custody or imprisoned; and takes into account the relevant international human rights instruments[225].

221 [1993] 23 LRC 390
222 Art 51 (1) of the Constitution
223 *Ibid*, art 51(2)
224 Together with freedom from torture and cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude and the right to a fair trial.
225 *Ibid*, art 51(3)

# CHAPTER FIVE
# PROSECUTION

## 5.1 Legal basis of Public Prosecutions

Under article 157(6) of the Constitution, prosecutorial authority is vested in the Director of Public Prosecutions. He has powers to:

(a) institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed;
(b) take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority; and
(c) discontinue at any stage before judgment is delivered any criminal proceedings instituted by the Director of Public Prosecutions or taken over by him.

If any such discontinuance takes place after the close of the prosecution's case, the defendant shall be acquitted.[226]

The foregoing provision underscores the fact that it is the State through the Director of Public Prosecutions is bestowed with the power of controlling criminal prosecutions. This means that the Director of Public Prosecutions has a special constitutional role in the conduct of prosecutions and he is under duty to take into account and safeguard the public interest.[227]

In the case of *Republic v Attorney General and another ex parte Ng'eny,*[228] the High Court stated that the Attorney General enjoys both constitutional and statutory discretion in the prosecution of criminal cases and this should apply mutatis mutandis to the Director of Public Prosecutions. In exercise of his powers he is not to be directed or controlled by any other person or authority. The Director of Public Prosecutions shall not require the consent of any person or authority for the commencement of criminal proceedings and in the exercise of his or her powers or functions, shall not be under the direction or control of any person or authority.[229] However, the Director of Public Prosecutions may not exercise that discretion arbitrarily and is expected to have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.[230]

226 Art 157(7) of the Constitution.
227 See *Gregory and another v Republic thro' Nottingham and 2 others* [2004] 1 KLR 547 & *Wehliye v Republic* [2005]1 KLR 837.
228 *Supra.*
229 s 157(10) of the Constitution.
230 s 157 (11) of the Constitution