

Public Interest in the Judicial Process: A Critique of Selected Decisions on Corruption in Kenya

BY

BEN KIPKOSGEI MUREI

A Thesis submitted in partial fulfillment of the Degree of Master of Laws of
the Faculty of Law of the University of Nairobi

NAIROBI

November

2009

University of NAIROBI Library



0413742 8

DECLARATION

I **BEN KIPKOSGEI MUREI**, declare that this thesis is my original work and that it has not been submitted for examination for the award of a degree at any other University.


DATED at Nairobi this 26th day of November, 2009



BEN KIPKOSGEI MUREI
REG NO: G62/71787/2008

This thesis has been submitted for examination with my approval as University Supervisor.

DATED at Nairobi this 26th day of November, 2009



JOY K. ASIEMA
FACULTY OF LAW, UNIVERSITY OF
NAIROBI

DEDICATION

To my daughters, Faith and Sonia.

ACKNOWLEDGEMENT

This paper would not have been possible without the able supervision of Mrs. Joy Asiema. Her knowledge and interest in the subject helped shape this thesis to what it is.

Secondly, I wish to thank my wife, Karen, for her sacrifice during the course of my studies and for assisting in proof reading.

Thirdly, I am grateful to my colleagues at the Kenya Anti-Corruption Commission, notably David Ruto and Jairus Ngaah, who interested me in the subject and for their useful suggestions.

Last, but not least, I am grateful to Mr. John Odhoji, the Librarian at the Kenya Anti-Corruption Commission for his assistance in gathering relevant literature.

Be that as it may, I take sole responsibility for any shortcomings in this thesis.

TABLE OF CONTENTS

Contents	Page number
i. Declaration	i
ii. Dedication	ii
iii. Acknowledgement	iii
iv. Table of Contents	iv
v. Abstract	viii
vi. Abbreviations	ix
vii. Table of Cases	x
viii. Table of Statutes	xii
1 CHAPTER 1: INTRODUCTION	
1.1 Introduction	1
1.2. Problem Statement	2
1.3. Justification	3
1.4. Main Research Objective	4
1.4 Specific Objectives	4
1.6. Hypotheses	4
1.7. Main Research Questions	5
1.8. Specific Research Questions	5
1.9. Theoretical and Conceptual Framework	5
1.9.1 What is Law?	5
1.9.2 Interpreting the Law	8
1.9.3 Interpreting the Constitution	10
1.9.4 Choice of Interpretation in the Context of the Study	12
1.9.5 The Concept of Corruption	13
1.9.6 Public Interest	15
1.9.7 Judicial Process	16
1.10 Literature Review	16

1.11	Delimitations	23
1.12	Methodology	23
1.13	Chapter Breakdown	23
1.14	Conclusion	24
2	CHAPTER 2: FROM GACHIENGO TO NEDEMAR: AN ANALYSIS OF SELECTED DECISIONS ON CORRUPTION IN KENYA	25
2.1	Stephen Mwai Gachiengo & Another V Republic	26
2.2	Meme Vs Republic & Another	28
2.3	Republic v Judicial Commission of Inquiry into the Goldenberg Affairs & 2 others <i>Ex parte</i> George Saitoti	30
2.3.1	Legality of <i>Ex Gratia</i> Export Compensation	32
2.3.2	Public Interest	33
2.3.3	Implication of the <i>Saitoti</i> case on the Rule of Law	34
2.3.4	Constitutional Orders in Judicial Review	35
2.3.5	Extending the Protection under section 77 of the Constitution	37
2.3.6	Pre-Trial Publicity	39
2.3.7	Fidelity to the Language of the Constitution	40
2.4	Eric Cheruiyot Kotut vs S.E.O. Bosire & 2 others	41
2.4.1	Re-examination of evidence	41
2.4.2	Non-Joinder of the Attorney General	43
2.4.3	Proceedings not in the Name of the Republic	43
2.4.4	Extending the Protection under Section 77 of the Constitution	44
2.4.5	Reluctance to Follow the Precedents in <i>Saitoti</i> and <i>Kotut</i> Decisions	44
2.4.6	Selective application of the Law	45
2.5	Republic vs The Kenya Anti-Corruption Commission Ex Parte First Mercantile Securities Corporation	46

2.5.1	Mutual Legal Assistance and Swiss Law	48
2.5.2	Use of Foreign Authorities	49
2.5.3	Endorsement by the Attorney General	49
2.5.4	Burden of Proof	50
2.5.5	Exclusion of the Criminal Process	50
2.5.6	Fair Trial in Civil Cases	51
2.6	Midland Finance & Securities Globetel Inc. vs The Attorney General and Another	52
2.6.1	Exclusion of the Criminal Process	53
2.7	Nedemar Technology BV Ltd vs The Kenya Anti-Corruption Commission and another	55
2.7.1	Secrecy	55
2.7.2	National Sovereignty	56
2.7.3	The Attorney General's Opinion	57
2.7.4	Contract Cannot be Questioned	57
2.7.5	Recovery of Public Funds under an Illegal Contract	58
2.7.6	KACC Cannot Investigate the Executive	58
2.7.7	Inconsistency with Previous Holdings	59
2.7.8	Implications of the Decision	60
2.7.9	Payments Must be Made	62
2.7.10	National Security	63
2.7.11	Public Policy	64
2.7.12	Reluctance to Follow the Precedents in <i>Mercantile</i> , <i>Midland</i> and <i>Nedemar</i> Decisions	65
3	CHAPTER 3: FINDINGS AND RECOMMENDATIONS	67
3.1	The Findings were Constitutionally and Legally Unjustified	67
3.1.1	The Decision in <i>Gachiengo</i>	68
3.1.2	The Decisions in the Goldenberg cases	68
3.1.3	The Decisions in the Anglo-Leasing cases	70

3.2	The Decisions Impede the Fight Against Corruption	72
3.3	The Judiciary Insensitive to Public Interest and Lacks Independence	73
3.3.1	Insensitivity to Public Interest	73
3.3.2	Lack of Independence	75
3.3.2.1	Appointment of Judges and Constitution of the Bench	75
3.3.2.2	The Executive Branch as a Major Player in Corruption	76
3.3.2.3	Evidence of Lack of Independence	77
3.3.2.4	Need to Safeguard the Judiciary from Executive Influence	78
3.4	Recommendations	78
3.4.1	Enhancing the Independence of the Judiciary	78
3.4.2	Mainstreaming Anti-Corruption Laws and Principles in the Constitution	80
3.4.2.1	Constitutional Review: Opportunities for Reform	80
3.4.2.2	Amending the Constitution in the Short Term	82
3.5.3	Strengthening KACC	82
3.5.4	Strengthening other Institutions	83
3.6	Conclusion	84
	BIBLIOGRAPHY	85

ABSTRACT

The study begins by acknowledging that corruption is a matter of grave concern in Kenya today. As such, the investigation, prosecution and punishment of those engaging in the vice is a matter of grave public interest. Unfortunately, the study laments, Kenya does not have a good record in the successful investigation, prosecution and conviction of perpetrators of major corruption scandals.

It notes that the judiciary has prohibited the investigation and prosecution of a number of corruption cases. Some of the cases prohibited involved the twin scandals of Anglo-Leasing and Goldenberg. Through an analysis of seven significant cases on corruption, the study examines the legal justifications of the decisions. Its main focus is to establish the extent to which the judiciary gives effect to public interest when dealing with corruption cases. The study argues that the public has a right to subsist in an environment that is conducive to development to enable them to meet their basic needs and the state to provide basic services. Public interest therefore demands thorough investigation, prosecution and punishment of perpetrators and restitution of property acquired through corruption. The study also seeks to establish the effects of the decisions on the quest for accountability for those responsible for major scandals.

Upon conducting analysis of the selected cases, the study established that the decisions were riddled with glaring errors and inconsistencies with previous holdings. It faults the judiciary for selective application of the law. It argues that the effect of the jurisprudence created by the selected cases is to paralyze investigation and prosecution of perpetrators of major scandals and to unconstitutionally amend the Constitution. It further argues that the judiciary is insensitive to public interest. It further finds that as a result of external influence, particularly through the exercise of politics and power, the judiciary lacks independence. The study concludes by suggesting necessary reforms which include; enhancing the independence of the judiciary, mainstreaming of anti-corruption laws and principles in the Constitution, and strengthening institutions important for fighting corruption.

ABBREVIATIONS

1. ACECA Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003
2. ACPU Anti-Corruption Police Unit
3. AUCPCC The African Union Convention on Preventing and Combating Corruption
4. CID Criminal Investigation Department
5. E.A. East Africa Law Report
6. eKLR electronic Kenya Law Report
7. FIU Financial Intelligence Unit
8. FRC Financial Reporting Centre
9. GOK Government of Kenya
10. JSC Judicial Service Commission
11. KACA Kenya Anti-Corruption Authority
12. KACC Kenya Anti-Corruption Commission
13. KANU Kenya African National Union
14. KLR Kenya Law Report
15. NARC National Rainbow Coalition
16. PWC Price Waterhouse Coopers
17. SFO Serious Fraud Office
18. UK United Kingdom
19. UN United Nations
20. UNCAC United Nations Convention Against Corruption
21. USAID United States Agency for International Development
22. USSR Union of Soviet Socialist Republic

TABLE OF CASES

1. *A.T Archer Treuchand AG & Another vs Attorney General* (1995) 1 Commonwealth (LRC) 625
2. *Chamanlal Kamani vs Kenya Anti-Corruption Commission* (2007) eKLR
3. *Dr. Christopher Ndarathi Murungaru vs Kenya Anti-Corruption Commission & another* (2006) eKLR
4. *Christopher Darathi Murungaru v Kenya Anti-Corruption & another* (2006) eKLR (civil suit no 54 of 2006)
5. HC. Misc. Appl. No. 591 of 2006; *David Lumumba Onyonka vs Attorney General* (unreported)
6. HC. Petition No. 199 of 2007; *Deepak Chamanlal Kamani v Principal Immigration Officer & 2 others* (unreported)
7. *Eric Cheruiyot Kotut v S.E.O. Bosire & 2 others* (2008) eKLR
8. *Francis Mburu Mungai v Director of Criminal Investigations & another* (2006) eKLR
9. *James Nyasora Nyarangi & 3 others v Attorney General* (2008) eKLR
10. *Kenya African National Union v Mwai Kibaki & 6 others* (2005) eKLR
11. *Meme vs Republic & another* (2004) 1 KLR 637
12. HC Misc. Appl. No. 359 of 2007, *Midland Finance & Securities Globetel Inc. vs The Attorney General and Another* (unreported)
13. HC Petition No. 390 of 2006, *Nedemar Technology BV Ltd vs The Kenya Anti-Corruption Commission and another* (unreported)
14. *Njoya & others vs Attorney General & others* (2004) 1 K.L.R 194
15. *Pattni vs Republic* (2001) KLR 264
16. *Republic v Attorney General & another Ex parte Vaya & another* (2004)KLR 281
17. *Republic v El Mann* 1969 E.A 357
18. *Republic v Judicial Commission of Inquiry into the Goldenberg Affairs & 2 others Ex parte George Saitoti* (2006) eKLR

19. *Republic vs Kenya Anti-Corruption Commission & another ex parte Josphat Konzolo* (2006) eKLR
20. HC Misc. Appl. No. 695 of 2007, *Republic vs The Kenya Anti-Corruption Commission Ex Parte First Mercantile Securities Corporation* (unreported)
21. *Stephen Mwai Gachiengo & another v Republic* (2000) eKLR
22. *Wilfred Karuga Koinange v Commission of Inquiry into Goldenberg Commission* 2006 eKLR
23. *Uwe Meixner & another vs Attorney General* (2005) eKLR

TABLE OF STATUTES

1. The Constitution
2. The Anti-Corruption and Economic Crimes Act, No. 3 of 2003
3. The Local Manufacturers (Export Compensation) Act, Cap. 482, Laws of Kenya
4. The Penal Code, Ca. 63, Laws of Kenya
5. The Prevention of Corruption Act, Cap. 65, Laws of Kenya (repealed)
6. Statute Law (Miscellaneous Amendments) Act, 2007

CHAPTER ONE

INTRODUCTION

'I am looking for someone who has empathy and understanding. Someone who understands that justice isn't about some abstract legal theory or footnote in a case book. It is also about how our laws affect the daily realities of people's lives.'¹

1.1 Introduction

Corruption is a matter of grave concern in Kenya. Hardly a week passes before reading in the press of the occurrence of corruption in Government or public institutions.² The investigation, prosecution and punishment of corruption is therefore of paramount importance. Unfortunately, Kenya has a poor record in the investigation and successful prosecution of corruption cases particularly the mega type. The investigation and/or prosecution of many cases of corruption have not been concluded. This dismal performance has served to entrench a sense of impunity in those engaging in corruption.

Regrettably, the Judiciary has in the recent past restrained the investigation and/or the prosecution of a number of high profile cases of corruption. It is in the utmost interest of the public that corruption is eradicated or substantially reduced in view of the fact it has adverse effects on the quality of life of the citizens of a country such as Kenya which is struggling to provide basic services to its people. A number of those decisions touch on

¹ See article 'Senators to Obama: Look beyond the Federal bench', http://www.newsmax.com/politics/us_scotus_senate/2009/05/04/210285.html?utm_medium=RSS (accessed on 22/6/2009). President Obama is quoted in the USA commenting on the qualities of the person he wants to replace Justice David Souter at the Supreme Court who was retiring. .

² See for instance the following stories: 'Billions of taxpayers' money at stake', *The Nation*, 9/5/2009; 'Budget: Shs. 9.6 b "not accounted for"', *The People Daily*, 6/5/2009; 'Youth Fund on the spot over Sh. 300m', *The Sunday Nation*, 26/4/2009; 'Charge Pyrethrum bosses over deal, says anti-graft body', *The East African*, 3/5/2009; 'Postapay Suspends 6 managers over audit', *The Star*, 5/5/2009; 'Koech accused of swindling Sh. 19m' *The Daily Nation*, 15/7/2009; 'Ex-NSSF boss denies Sh 100m fraud', *The Daily Nation*, 22/4/2009; and 'Conflicting accounts on fertilizer scandal', *The Standard*, 17/4/2009.

some of the most scandalous cases related to corruption in this country. They include Goldenberg and Anglo-Leasing scandals which involve loss of colossal amounts of public funds. The decisions have rendered the investigation and prosecution of suspects in some of the scandals nearly impossible. The courts in the cases under consideration have decided that the investigation and/or prosecution of the suspects would infringe on their constitutional rights.

The proposed study seeks to determine whether the Constitution unduly protects the interests of the suspects at the expense of those of the public. It seeks to interrogate whether the Constitution elevates the individual rights and freedoms above the state's right to investigate and prosecute crimes with such devastating consequences to society as corruption.

1.2 Problem Statement

Kenya has been plagued by corruption since independence. In recent times, two scandals stand out in terms of their magnitude and the publicity that they received. The scandals have had, and continue to have, wide implications on Kenya's economy in view of the huge amounts of money involved. These are the Goldenberg and Anglo-Leasing Scandals. The Goldenberg Scandal was a major scam in which the Government, according to the Judicial Commission of Inquiry into the Goldenberg Affair, lost Kenya shillings 27 billion.³ The total costs of the contracts excluding interest in respect of the Anglo-Leasing Scandal according to the Controller and Auditor General totalled Kshs. 56,333,355,450⁴. The effects of such scandals can be devastating especially to a nascent state such as ours. Scandals of such magnitude have the capacity to threaten the national security of the state as it may undermine its capacity to offer essential services to its people leading to political instability.

Public interest in such cases demand that the scandals be thoroughly investigated, the perpetrators brought to account and looted property recovered. Yet the Judiciary has

³ See Report of the Judicial Commission of Inquiry into the Goldenberg Affair. Report also available at <http://www.tkenya.org/documents/Goldenberg%20Report.pdf> (accessed on 1/7/2009)

⁴ See 'Special Audit Report of the Controller and Auditor General on Financing, Procurement and Implementation of Security Related Projects,' April, 2006.

prohibited the investigation and prosecution in a number of cases with respect to the two scandals.⁵ In addition, the judiciary in one case has declared the body charged with fighting corruption to be unconstitutional.⁶ The impact of those decisions in the fight against corruption has not been examined. The constitutional and legal justifications for the decisions have not been exhaustively examined. It has not been established, for instance, whether the reasons for the decisions have been the contents of our Constitution and the ordinary law or the enforcement by our courts.

1.3 Justification

Corruption is a big threat to the country's socio-economic well-being today. Graft scandals are escalating by the day. As at the time of writing this thesis, the country is grappling with oil⁷ and maize⁸ scandals.

Yet the trend of the judgments delivered by our courts in such major scandals as Goldenberg and Anglo-Leasing has been to prohibit investigative agencies and the Attorney General from investigating and/or prosecuting the suspects invariably on account of breach or threatened breach of one or more of the suspect's constitutional rights. The need to fight graft and end impunity is absolutely important. It is therefore necessary to examine the reasons that account for this trend of judicial reasoning and propose the way forward to remedy the situation.

⁵ The cases involved are: *Republic v Judicial Commission of Inquiry into the Goldenberg Affairs & 2 others Ex parte George Saitoti* (2006) eKLR; *Eric Cheruiyot Kotut v S.E.O. Bosire & 2 others* (2008) eKLR ; HC. Misc. Appl. No. 695 of 2007, *Republic vs The Kenya Anti-Corruption Commission Ex Parte First Mercantile Securities Corporation* (unreported); HC Misc. Appl. No. 359 of 2007, *Midland Finance & Securities Globetel Inc. vs The Attorney General and Another* (unreported); and HC Petition No. 390 of 2006, *Nedemar Technology BV Ltd vs The Kenya Anti-Corruption Commission and another* (unreported).

⁶ This was in *Stephen Mwai Gachiengo & another v Republic* (2000) eKLR

⁷ Oil which was held by Kenya Pipeline Corporation in trust for creditors of Triton Petroleum Company Ltd and worth an estimated Kshs. 7.6 billion was reportedly released to the company without the authority of the creditors. Several people have been charged in Nbi. ACC No. 18 of 2009; *Republic vs Yagnesh Devani and 7 others*.

⁸ The Kenya Anti-Corruption Commission is currently investigating allegations that maize which constituted part of Kenya's strategic reserves have been sold to well connected individuals who have in turn exported them to Southern Sudan.

Apart from literature descriptive of the phenomenon and those that analyze the existing legislative framework, the validity of the decisions delivered by the courts prohibiting the investigation and prosecution of corruption suspects has not been examined in detail. The proposed study, it is hoped, will therefore provide useful insights into the subject.

1.4 Main Research Objective

To critically analyze selected decisions by the Judicial Review and Constitutional Court prohibiting the investigation and prosecution of corruption cases.

1.5 Specific Objectives

1. To examine the effect of selected decisions made by the courts in Kenya on the investigation and prosecution of cases of grave public interest.
2. To examine the constitutional and legal justifications for the courts' decisions.
3. To determine to what extent the judiciary is sensitive to public interest to investigate and punish corruption and to recover looted property in the selected cases.
4. To examine gaps/loopholes/weaknesses in the legal and institutional framework.
5. To propose necessary legal and institutional reforms.

1.6 Hypotheses

1. The effect of the court's decisions has been to substantially weaken the capacity of the State to investigate and prosecute corruption cases of grave public interest.
2. Majority of the selected decisions were constitutionally and legally unjustified.
3. The Judiciary is insensitive to public interest in handling corruption cases of grave public interest and lacks independence.
4. There are gaps/loopholes/weaknesses in the legal and institutional framework for fighting corruption.
5. There is need for legal and constitutional reforms to enhance the capacity of the state to effectively investigate and prosecute corruption cases of grave public interest.

1.7 Main Research Questions

What is the emerging jurisprudence on investigation and prosecution of corruption cases of grave public interest?

1.8 Specific Research Questions

1. What are the underlying principles informing the decisions in the cases selected for analysis in this study?
2. Can the decisions in the cases analysed be justified by the Constitution and/or ordinary law?
3. What do these decisions portend for the State's quest to punish corruption in high profile cases? In this respect, is the Judiciary independent and responsive to public interest?
4. Are there any necessary constitutional or legal reforms to strengthen the capacity of the state to effectively deal with corruption cases of great public interest?

1.9 Theoretical and Conceptual Framework

At the root of this study is the question of what law is and whether judges find laws or make laws. Arising from the foregoing are two questions. Firstly, is the question of the proper method of judging: Should the Judge apply the law legalistically and mechanically or should he have regard to such factors as the prevailing socio-economic circumstances, societal values and felt needs? Secondly, are judges immune to forces such as power and politics in arriving at decisions? This section analyses various schools of thought on what the law is and how judges should interpret the law. It then discusses the relevance of this analysis to corruption in the context of the interpretation of the law by judges when adjudicating cases on corruption.

1.9.1 What is Law?

Positivists, such as H.L.A Hart and Hans Kelsen theorize that law consists of binding formal rules. The rules are binding irrespective of moral, ethical or other normative

standard. The test of validity is pedigree rather than content.⁹ They attempted to conceptualize law distinct from other discipline associated with it such as politics, morality and ethics. The view of law as distinct and independent constitutes the fundamental difference with natural lawyers who state that the law must comply with dictates of justice, morality, ethics and God. They (the natural lawyers) advocate for the disobedience of an immoral law.¹⁰

It is within the traditional positivists' theory that the view that law is value neutral and that judges merely discover law finds expression. This perspective also known as legal formalism sees law as complete and coherent and that decisions can be made purely on the basis of legal reasoning¹¹.

Over the years, the neutrality of law and the objectivity of the judge have come under intense scrutiny. The Marxists view the law as full of bourgeois ideology. They posit that by using the language of the law, the capitalist masks and legitimate the exploitation of the working class.¹² According to the Marxists, an understanding of the economic relations is vital to the appreciation of law. The state together with its institutions including the legal institutions is seen as apparatus for class oppression by the ruling class.¹³ In the 19th and 20th century, there arose the American Realist and the Critical Legal Studies theories. All the forgoing theories question the view that the law is determinate and neutral.

The American Realists question the view that law is determinate and can be ascertained *a priori*. Oliver Wendell Homes believed that the law is not certain until the judge says so. He famously commented:

⁹ Dworkin R.M, 1977, *The Philosophy of law*, Oxford University Press, p. 40

¹⁰ For a full discussion on the various schools of law, see Lloyd D, 1991, *The Idea of Law*, London: Penguin Books

¹¹ Adelman S. and Forster K., 'Critical Theory: The Power of Law' http://www.nclg.org.uk/book1/1_7.htm, p.1 (accessed on 12/6/09)

¹² See Freeman M.D.A., 2001, *Lloyd's Introduction to Jurisprudence*, 7th Edition, London: Sweet & Maxwell, pp 953-991

¹³ *Ibid*, p 970

‘The prophecies of what the courts are likely to do in fact, and nothing more pretentious, are what I mean by the law.’¹⁴

Critical lawyers reject the common characterization of the law as neutral, value-free arbiter, independent of and unaffected by social and economic relations, political forces and cultural phenomena.¹⁵ They argue that by virtue of its relationship with other disciplines, law reflects and perpetuates the interests of the dominant social group. In particular, they recognize the critical role that power has in the creation and application of the law. They argue that by viewing the law as neutral, the reality of the power is obscured while the existing political order is rationalised in the rhetoric of equality, rights and the rule of law.¹⁶ Thus substantive inequality is masked by uniform application of the law. They equally dispute the view that judges decide cases purely on the basis of law and facts. Rather, they contend that judges are not robots and that they too ‘form values and prioritise conflicting considerations based on their experience, socialization, political perspectives, self-perceptions, hopes, fears and a variety of other factors.’¹⁷ In addition, they lament that dominant groups in society have gained control and use of the legal system to preserve their interests.¹⁸

Another view is the sociological school of thought. This school argues that the law should serve an important purpose of social engineering to achieve desired standards of behaviour or goals. Roscoe Pound sees law as a social institution for satisfying wants and minimizing conflicts. He observed that:

“... I am content to see in legal history the record of continually wider recognizing and satisfying human wants or claims or desires through social control; a more embracing and more effective elimination of wastes and precluding of friction in human enjoyment of goods of existence- in short, a continually more efficacious social engineering.”¹⁹

¹⁴ Holmes O.W, 1897, ‘The Path of Law’ 10, *Harvard Law Review*, 457

¹⁵ Kairys D., ‘The Politics of Law: A Progressive Critique’, http://www.nclg.org.uk/book1/1_3.htm, p.4 (accessed on 12/6/09)

¹⁶ supra note 11

¹⁷ Supra, note 15

¹⁸ See Thompson A., ‘Forward: critical approaches to law, who needs legal theory?’ http://www.nclg.org.uk/book1/1_2.htm (accessed on 12/6/2009)

¹⁹ Pound R., 1954, *An Introduction to the Philosophy of Law*, 4th Indian Reprint, Delhi: Universal Law Publishing Co. PVT Ltd, p. 50

He envisages a situation where the judge will exercise a law making function in certain circumstances. The guide to law making in those circumstances is the social purpose for which law is intended to serve.

Besides the arguments on indeterminacy of the law, there are others who argue that the facts are not always determinate and that the judge may manipulate the same to fit a preferred rule. By placing emphasis on certain facts and downplaying the others, the judge may arrive at a decision which he prefers rather than one the objective view of the facts and the law would have found.²⁰ The Scandinavian Realists are typically facts skeptics and espouse the fact finding role of the judge or the jury.

There is thus a general agreement that the Judge, in certain cases at least, has a choice. Even positivists like H.L.A Hart agree that in certain cases there is 'a penumbra of uncertainty' in which event the Judge is at liberty to choose between two or more competing rules²¹.

1.9.2 Interpreting the Law

Besides the discretion in the choice of the law and the facts, the judge also exercises freedom in the choice of method of interpretation. According to Fiss;

'Adjudication is interpretation: Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and values embodied in the text.'²²

Most scholars agree that in interpretation the judge must have regard to the country's legal history. The point of divergence is to what extent a judge should feel bound by that history and how to proceed therefrom. Other contentious questions with respect to interpretation include: whether or not a judge exercises a measure of subjectivity, and whether or not he should take into account the economic and social consequences of his judgment.

²⁰ Ibid p. 66

²¹ Hart L. A, 1994, *The Concept of Law*, 2nd Edition, Oxford: Oxford University Press, p. 12

²² Fiss O.M, 1982, 'Objectivity and Interpretation', (1982) 34 *Stanford LR* 739, 739

Some judges insist that only the plain meaning of a statute at the time of enactment is relevant to interpretation. This is the literal school of thought. In the defence of their view, they invoke the emotive concept of the rule of law whose claim is that a citizen must be able to read the statute books and know his rights and duties. Others contend that the original intent of the legislature at the time of the enactment is important. Both the foregoing views share a common characteristic; they adhere to history and give no regard to present conditions. The historical view of interpretation has come under severe criticism for insensitivity and rigidity.

Without discarding history, Ronald Dworkin posits that interpretation should aim at substantive social goals and principles of justice.²³ Other theorists see interpretation as involving the creative, subjective role of the reader in coming to understand and express the meaning of the text.²⁴ Benjamin Cardozo is of the view that the judge as the interpreter of the community's sense of law and order, must supply omissions, correct uncertainties and harmonize results with justice.²⁵ He must balance conflicting claims and give effect to the most fundamental principle; one that represents the larger and deeper social interest.²⁶ He has little regard for precedent noting that few rules are so well established that they may not be called upon any day to justify their existence. He observes that 'there are times when precedents seem to lead to bizarre conclusions, at war with social needs.'²⁷ While emphasizing that judgments must take into account the felt needs of the time, Cardozo nevertheless sticks to objectivity noting that the needs must be those of the society and not the judge's idiosyncratic feelings. Lord Denning appears to agree with Cardozo. He observes that the aim of interpretation must be to advance the course of justice and that a judge ought not to be unduly constrained by history. He advocates for modification or for the discarding of precedent when found to be unsuited

²³ Dworkin R.M, 1982, 'Law as interpretation', *Texas Law Review*, Vol. 60: 527-550 at p. 544

²⁴ Roederer C., 2004, 'Interpretive Approaches to Legal Theory', in Christopher Roederer and Darrel Moellendorf, *Jurisprudence*, Lansdowne: Juta and Company Ltd: 214-245 at p. 223

²⁵ Cardozo B., 1961, *The Nature of the Judicial Process*, 7th Indian Reprint, Delhi: Universal Law Publishing Co. PVT, p. 16

²⁶ *Ibid*, p. 43

²⁷ Cardozo B., 1923, *The Philosophy of Law*, Indian Economy Reprint, 2006, Delhi: Universal Law Publishing Co. PVT p. 65

to the times or when found to work injustice²⁸. William Eskridge sees interpretation as a dynamic process; a process that is responsive to both historical and current realities. His emphasis is for a pragmatic approach to interpretation noting that statutes begin to evolve from the time people start applying them to concrete problems.²⁹

It has also been urged that judges should have a good grasp of economics.³⁰ Some have noted that the courts have erred in failing to have regard to the economic and social consequences of their judgments; that they have sacrificed satisfaction of social needs at the altar of regularity.

1.9.3 Interpreting the Constitution

There is a lot in common between constitutional and statutory interpretation. The difference arises in the fact that the Constitution is the basic law of the land. Thus some jurists would like to give as much deference as possible to the views of makers of the constitution as expressed in the text while others would like to interpret it so as to give effect to present conditions.

Justice Antonin Scalia of the US Supreme Court is an unapologetic originalist. He argues that what he 'looks for in the Constitution is precisely what he looks in a statute: the original meaning of the text, not what the original draftsman intended.'³¹ He rejects the contention that the Constitution is envisaged to change arguing that the whole purpose is to prevent change; to ensure that certain rights are not so easily taken away by the future generation.³² This view was authoritatively endorsed in the case of *Republic v El Mann*³³. The court, while addressing itself to the argument that the court should adopt a liberal approach to interpretation and after noting that an argument based on the spirit of the constitution is powerful and emotive, observed;

²⁸ Denning, Lord, 1979, *The Discipline of Law*, London: Butterworths, p.192

²⁹ Eskridge W., 1991, *Dynamic Statutory Interpretation*, 1st Indian Reprint, 2000, Delhi: Universal Law Publishing Co. PVT, p. 65

³⁰ Supra note 14

³¹ Scalia A., *A matter of Interpretation: Federal Courts and the Law*, New Jersey: Princeton University Press, p. 38

³² Ibid, p. 40

³³ 1969 E.A 357

‘We do not deny that in certain context a liberal interpretation may be called for, but in one cardinal respect we are satisfied that a constitution is construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous they are to be construed in their ordinary and natural sense. It is only where there is some imprecision or ambiguity in the language that any questions arises whether a liberal or restricted interpretation should be put upon the words.’³⁴

Justice Benjamin Cardozo on the other hand favours the ‘living spirit’ approach. He argues that the great generalities of the Constitution have content and significance that vary from age to age.³⁵ Thus, according to him, constitutional interpretation is more than the ascertainment of the meaning and intent of the original lawmakers noting that it contains principles for an expanding generation rather than the rules for the moment.³⁶ Dworkin supports Cardozo’s position. He argues that principles cannot be seen as stopping at a certain period in time noting that the approach of interpreting a Constitution as a living document takes rights seriously while interpretation according to original meaning does not.³⁷

Locally, Justice Ringera succinctly restated the principle of purposive interpretation in *Njoya & others vs Attorney General & others*³⁸ thus:

‘I shall accordingly approach constitutional interpretation in this case on the premise 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 purposively or teleological to give effect to those values and principles; and that whenever the consistency of any provision(s) of an Act of Parliament with the constitution are called into question, the court must seek to find whether those provisions meet the values and principles embodied in the constitution.’³⁹

³⁴ 1969 E.A 360

³⁵ Supra, note 25, p. 17

³⁶ Ibid, p. 83

³⁷ Dworkin R. M., 1986, *Law's Empire*, Indian Economy Reprint, 2nd Edition, Delhi: Universal Law Publishing Co. PVT p. 369

³⁸ (2004) 1 K.L.R 194

³⁹ Ibid, page 206

1.9.4 Choice of Interpretation in the Context of the Study

With respect to the definition of law, this paper rejects the view that law is value neutral and independent of social forces. To this extent, it associates itself with Critical Lawyers. It accepts that laws do not always reflect the interests of the society. It agrees that due to inequalities in society- particularly with respect to wealth, power and politics- the law reflects and perpetuates the interests of the dominant social group. The direction for reform therefore, should be with a view to liberating the law from the dominant forces and remodelling it in such a way as to address the real concerns of the society at large.

Regarding interpretation, the paper accepts that to a large extent, the law is fairly certain and the role of the judge is to find that law and apply it impartially. In other words, the judge must demonstrate fidelity to the law. The law is expressed in the language of the Constitution or the statute. When the language of the Constitution or statute is clear and unambiguous, it is the sacred duty of the judge to apply that law. However, the paper rejects the view that the law is always clear and that judge's duty is merely to discover it. The study also rejects the view that the facts are out there to be determined objectively by the judge and recognises the powerful role the judge plays in establishing the pertinent facts. It advocates that the judge, in those cases where the law is not certain and where there are various sets of facts competing for attention and recognition, must be cognizant of the social and economic consequences of his decision. This call could never be more appropriate in the 21st century when the world is facing a myriad of challenges ranging from terrorism to corruption and from poverty to environmental degradation.

The paper argues that in arriving at decisions, the judge should have regard to overriding considerations, desired values, public interest and felt needs of the society in which it operates. President Obama, while commenting about the qualities of the person he is looking for to replace Justice David Souter as judge of the Supreme Court, stated that he was looking for somebody with empathy and understanding. He further stated that he is looking for a person who;

‘...understands that justice isn’t’ about some abstract legal theory or footnote in a case book. It is also about how our laws affect the daily realities of people’s lives.’⁴⁰

The paper endorses the sentiments expressed by the American President.

While dealing with corruption cases, the court should weigh in the perverse effects such conduct has had to society in his judgment. While fully giving effect to express law, the judge in making policy choices, should give prominence to the public interest to thoroughly investigate graft, to expeditiously prosecute and punish those found culpable, and to recover stolen property. More importantly, it is important for a legal system to develop a coherent philosophy in its interpretative approach; like cases should be decided in like manner. The study advocates for a consistent, predictable and stable style of interpretation that is applicable within the legal system.⁴¹

1.9.5 The Concept of Corruption

Generally speaking, to corrupt is to deprave or to make impure. It has to do with conduct which deviates from ethically acceptable standards; the aim of the actor being self-enrichment at the expense of the wider society. The conduct may or may not be illegal. In a wider sense therefore, corruption goes beyond the law.

In the constitution of society, it is theorized that people agreed to live together and to be bound by rules, norms and standards. These rules, norms and standards were *inter alia* intended to achieve a rational way of sharing public goods. One way of sharing is through common ownership of resources. If a person ‘steals a match’ on society by taking more than he is entitled to or by privatizing common property, therefore, he commits an act of corruption. Ringera thinks that corruption is the brazen subversion of the social contract theory.⁴² It usually manifests itself as abuse of office for private gain.

⁴⁰ Supra note 1

⁴¹ See Bix B., 2006, *Jurisprudence: Theory and Context*, 4th Edition, Sweet & Maxwell, p.155

⁴² Ringera A. G, 2007, ‘Corruption in the Judiciary’, a paper presented to the World Bank at Washington D.C on 25th April, 2007, (unpublished) p. 3

Corruption has also been described as an act or omission perpetrated by an individual or a group which goes against legitimate expectations and interests of the society.⁴³ By legitimate expectations the writers are referring to a certain state of affairs or a certain standard of conduct in public service that the citizens take it for granted that it will be observed. For instance, the citizenry is entitled to take it as a given that money intended for a public purpose will not be diverted to private accounts. However it is to be noted that legitimate expectations like public interest is dynamic. What is legitimately expected today may not be necessary tomorrow and conversely what is optional today may be obligatory tomorrow.

The effects of corruption can be devastating especially to a nascent state. It undermines the foundation of a modern democratic state.⁴⁴ It destroys the basis for social, political and economic development. It robs society of its resources. It undermines merit and values of hard work and honesty. It dismantles a received value system and replaces it with venal self-interest. According to Ringera, corruption is the very anti-thesis of civilized behaviour.⁴⁵ According to Adrian Leftwich, corruption erodes the state's capacity to pursue coherent and consistent policies of economic growth, undermines development, and institutionalizes unfairness.⁴⁶

Kofi Anan, former Secretary General to the UN, in his forward to United Nations Convention Against Corruption (UNCAC), noted that corruption undermines democracy and the rule of law and erodes the quality of life. In particular, he observed that corruption hurts the poor disproportionately by diverting funds intended for development and provision of basic services.⁴⁷ The United States Agency for International Development (USAID) noted that, over the long-term, corruption can erode the

⁴³ Kibwana *et al*, (eds) 1996, *The Anatomy of Corruption: Legal, Political and Social-Economic Perspectives*, Nairobi: Claripress Ltd, p. 34

⁴⁴ *Ibid* p. 6

⁴⁵ *ibid*

⁴⁶ Leftwich A, 2005, 'Theorizing the State,' in Peter Burnell and Vicky Randball (eds) *Politics in the Developing World*, New York: Oxford University Press: 140-154 at p.151

⁴⁷ See page (iii) of the UNCAC document available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed on 30/8/2009)

legitimacy of government and undermine democratic values including trust, tolerance, accountability, and participation.⁴⁸

There is thus considerable consensus on the harmful effects of corruption and therefore on the need to combat it.

1.9.6 Public Interest

The term public interest is portent. It has an emotive appeal to action. Yet it is poorly understood. It is incapable of precise definition. What can constitute public interest is infinite. It is also capable of abuse. Interest groups may interpret it to suit their purpose even though their concerns may be essentially personal. It is against this background that the study deems it fit to give a conceptual framework of public interest.

Walter Lippman defines public interest as ‘what men would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently.’⁴⁹ He thus sees public interest as what would be obviously for the common good. Robert Denhardt, on the other hand, states that public interest means different things to different people.⁵⁰ Nevertheless, he advocates for its centrality in democratic governance as it has the capacity to frame the thinking of citizens in public policy debates and motivate action. It is not wholly separate from private interest. Indeed it can be viewed as the aggregate of private interests. It encompasses shared interests within a society.

Within the context of this study, it is pointed out that corruption is a negation of the common good. It is the anti-thesis of public interest. With respect to corruption involving loss of public funds, it may be assumed that the interests of all tax paying citizens have been affected save for the beneficiaries of the scandal. The study further assumes that an aggrieved public would be interested in obtaining justice with respect to the act of corruption and restitution of the stolen funds. It is against this public background that the

⁴⁸ USAID, 1998, *Democracy and Governance: a Conceptual Framework*, Washington: Center for Democracy and Governance, p. 20

⁴⁹ Lippman W., (1955; 2003 reprint), *The Public Philosophy*, New Jersey: Transaction Publishers, p. 42

⁵⁰ Denhardt R., 2007, *The New Public Service: Serving, not Steering*, New York: M.E Sharpe, p. 67

study argues that it is in the public interest that major scandals are thoroughly investigated, the perpetrators are prosecuted and punished and assets recovered.

1.9.7 Judicial Process

Judicial process, in a wide sense, refers to all the activities and procedures taking place within a legal system. In a strict sense, however, it refers to adjudication. It is this strict sense that Justice Cardozo described in his book, *The Nature of the Judicial Process*.⁵¹ In the book, Justice Cardozo is basically describing the business of a Judge and offering tips on how to adjudicate on matters.

Thus when the study discusses public interest in the judicial process, it is essentially investigating how public interest concerns feature in judicial discourse. It is interested in finding out to what extent public interest features in judicial consciousness. It seeks to establish to what extent public interest is prioritized and given effect in adjudication.

1.10 Literature Review

On the subject of corruption, Kibwana *et al* conducted research and came up with a book exposing the extent of the vice in Kenya. The report is titled *The Anatomy of Corruption: Legal, Political and Social–Economic Perspectives*.⁵² They describe corruption as an act or omission perpetrated by an individual or a group which goes against the legitimate expectations and hence the interest of society.⁵³ By referring to expectations, the writers are alluding to the fact that corruption involves an element of breach of public trust and subversion of public interest. They observe that corruption is pervasive and that if not checked it will tear the fabric of society. They warn that corruption has highly adverse effects on the economy and calls for urgent action to curb it. The report is a pioneering text on corruption in Kenya in which a serious attempt is made to study the phenomenon and its socio-economic effects. It provides a good background and highlights the need to effectively combat the vice.

⁵¹ Supra note 25

⁵² Supra note 43

⁵³ Ibid, p.34

Still on the subject, Ondieki in her LL.M thesis⁵⁴ has given a critical analysis of the legal and institutional framework in the fight against corruption in Kenya. She argues that a serious impediment to the success of the anti-corruption strategy is a corrupt, inept and incompetent judiciary.⁵⁵

Scholars are generally agreed on the importance of a Constitution and constitutionalism. In liberal democracy, a Constitution is supposed to act as a check on the elected government so that its actions do not infringe on the rights and freedoms of others. B.O Nwabueze, in his book, *'Constitutionalism in the Emergent States'*,⁵⁶ wrote that there can be no doubt that the core and the substantive element of constitutionalism is the limitation of government by a constitutional guarantee of individual civil liberties enforceable by an independent tribunal. The challenge is to find the correct balance between enforcing fundamental rights and protecting public interest.

The Prof. Okoth-Ogendo was a strong proponent of constitutionalism. He acknowledged that a Constitution is important to check the exercise of executive power in liberal democratic theory. However, he thought a good Constitution is of no use unless the leaders accept it as a legitimate document that is meant to check how power is exercised. He wrote a celebrated chapter titled *'Constitutions without Constitutionalism: Reflections on an African Political Paradox'*.⁵⁷ He noted that independence in Africa increased rather than decreased the role of the state in public life. In the process, he observed that the Constitution was subverted and failed in its role of being an arbiter of power.⁵⁸ The result was an all powerful executive and the weakening of the autonomy and power of the other arms of government namely the legislature and the judiciary.

⁵⁴ Ondieki, A. O., 2006, 'A critical analysis of the legal and institutional framework in the fight against corruption in Kenya', unpublished LL.M thesis, University of Nairobi, Kenya

⁵⁵ Ibid, p. 178

⁵⁶ Nwabueze, B. O., 1973, *Constitutionalism in the Emergent States*, Cranbury: Associated University Presses

⁵⁷ Okoth-Ogendo H.W.O, 1993, 'Constitutions without Constitutionalism: Reflections on an African Political Paradox,' in Greenberg D., et al (eds), *Constitutionalism and Democracy: Transitions in Contemporary World*, New York: Oxford University Press, pp 65-82

⁵⁸ Ibid p. 73

Kenya was not spared the spectre of an all-powerful executive and a subservient judiciary. The courts took a stringent view of individual rights protected by the Constitution and were reluctant to enforce them. Various scholars have written about the repressive KANU era when rights were not being enforced. In the process, they have discussed the relationship between the Judiciary and the Executive and examined whether there is equality and independence between the two organs. In addition, they have in the process discussed the proper approach to constitutional interpretation.

The late Justice William Mbaya wrote in the repressive period and made a strong case for a more robust enforcement of fundamental rights.⁵⁹ He noted that the High Court, owing to its own failings, has not been effective in protecting the fundamental rights of the individual. He notes for instance that the High Court, by adopting a rather legalistic and narrow approach to constitutional interpretation, has rendered the provisions for the protection of individual rights inoperative. He argued that the Constitution is not toothless and its provisions must be enforced in order for it to have meaning. He laments that the judiciary in Kenya is captive to executive influence particularly due to the mode of appointment and dismissal of judges. He prescribes that for the Judiciary to be effective in enforcing constitutional rights, it must be independent of any external influence. This includes independence from both state and private powers. In addition, he recommends that the government must be committed to the principles of constitutionalism in order to foster enforcement of constitutional rights.

Christopher Mulei penned a chapter titled '*The Judiciary and Constitutionalism: Creating New Ethos and Values*'.⁶⁰ He sees the Judiciary as an important institution for democracy and constitutionalism. He argues that for it to carry out its functions, it must be independent from any other authority and subject only to the laws. He laments that the Kenyan Judiciary is not independent noting that the appointment to the bench is usually a reward to those lawyers and magistrates who have been perceived to be pro-executive.

⁵⁹ Mbaya W., 1993, 'Fundamental rights in Kenya', unpublished LL.M thesis, University of Nairobi, Kenya

⁶⁰ Mulei C, 2002, 'The Judiciary and Constitutionalism: Creating New Ethos and Values', in Lawrence Mute and Smokin Wanjala (eds), *When the Constitution begins to Flower: Paradigm for Constitutional Change in Kenya*, Vol, Nairobi: Claripress. 3: 58-88

He notes that the President virtually has a free hand in the appointment of senior judicial officers. His overall assessment of the judiciary is that it is associated with 'corruption, ineptitude and timidity before the shadow of the executive'.⁶¹

Githu Muigai, writing on '*Constitutional amendments and the constitution amendment process in Kenya (1964-1977)*'⁶² traced the constitutional amendments made since independence and the role of the court in the amendment process. He observed that the judiciary had failed to interpret the Constitution according to its letter and spirit. As a result, he notes, the judiciary effectively amended the Constitution. He points out that one of the ways in which the judiciary subverted the Constitution was by ignoring 'binding principle and precedent in order to reach a conclusion that appeared politically correct and expedient.'⁶³ He concluded *inter alia* that the Judiciary's lacked a coherent philosophy of constitutional interpretation. He posits that the court's jurisprudence was 'muddled and confusing, changing from case to case and offering little precedent value'.⁶⁴ He lamented that the judicial process has failed to safeguard the integrity of the Constitution and has in fact been used to undermine it.⁶⁵ He recognizes the importance of a proper application of the Constitution besides its content. He states that Constitutions can only yield good results if applied in good faith.

Prof. Makau Mutua penned an article titled '*Justice under Siege: The Rule of Law and Judicial Subsistence in Kenya*'.⁶⁶ In it, the author espouses the values of constitutionalism and the role of an independent judiciary in a constitutional government. He argues that the Constitution is what separates a democratic state from a tyrannical state.⁶⁷ He observes that the Kenyan judiciary lacks independence and is subservient to the executive. He states that the judiciary has been unable to uphold the rule of law as against executive actors, individual senior government officials and their business

⁶¹ Ibid p. 66

⁶² Muigai, G., 2001, 'Constitutional amendments and the constitution amendment process in Kenya (1964-1977)' unpublished PH.D thesis, University of Nairobi, Kenya

⁶³ Ibid, p. 189

⁶⁴ Ibid, p. 233

⁶⁵ Ibid, p. 241

⁶⁶ Mutua M., 2001, 'Justice under siege: The rule of law and judicial subsistence in Kenya', *Human Rights Quarterly*, Vol. 23: 96-118

⁶⁷ Ibid, p. 97

associates.⁶⁸ He laments that state officials have sought the protection of the courts for their illegal acts as corruption becomes the norm. He notes that the executive plays a predatory role on both the judiciary and the legislature although in theory they are supposed to be equal. His assessment of the Kenyan Judiciary leads to a dim conclusion. He says that nothing short of radical transformation of ‘the norms, institutions, and personnel that comprise the legal and political structures of the Kenyan state can restore the judiciary’s role as the guarantor of legality and the guardian of human rights.’⁶⁹

In the post –KANU era the democratic space opened up considerably. Courts seem to have abandoned the conservative cloak and are more eager to enforce fundamental rights. The concern is whether the courts have failed to strike a proper balance between enforcing the criminal law and protecting fundamental rights. It is also necessary to investigate whether this apparent eagerness to enforce fundamental rights is evidence of new found independence or it is perpetuation of partisan interests.

Mohamed Nyaoga investigated the subject of finding a proper balance and whether the judiciary has lived up to its constitutional mandate. He wrote on ‘*Abuse of the judicial criminal process in Kenya.*’⁷⁰ His focus was on how the prosecution has used the criminal process to institute unmeritorious criminal charges and notes that the malpractice persists. On the flipside, he notes that there are instances when accused persons make frivolous applications challenging their trial with the sole intention to delay the trial and waste the court’s time. He recognizes the conflict between the interest of the state to investigate and punish criminals and the obligation of the state to protect liberty and constitutional rights and calls for the striking of a proper balance. He identified the judiciary as contributing to the problem noting that it suffers from not only from corruption but incompetence, indolence and general laziness.⁷¹

There are however some writers who are worried that the judiciary may, in the process of asserting their new-found independence, have exceeded their power and traversed into

⁶⁸ Ibid p. 99

⁶⁹ Ibid

⁷⁰ Nyaoga, M., 2004, unpublished LL.M thesis, University of Nairobi, Kenya

⁷¹ Ibid, p. 52

areas traditionally belonging to the executive or the legislature. Prof. Joel Ngugi is one such writer. In his article '*Stalling Juristocracy While Deepening Judicial Independence in Kenya: Towards a Political Question Doctrine*',⁷² he questions whether the pendulum has swung too far. He cautions that not all political questions are constitutional questions; and not all constitutional questions are judicial (or legal) questions. He urged the judiciary to develop 'a political question doctrine' in which they will set criteria for determining those cases that properly fall within their domain and those that do not. He apprehends that unless the judiciary avoids assuming jurisdiction in certain issues, it is likely to lose its prestige and respect and fall into disrepute.

Despite the apparent eagerness to enforce constitutional rights, some commentators maintain that judiciary is still captive to executive interests and the judicial process is used to protect state officials from criminal liability. Gladwell Atieno, the then Executive Directive of Transparency International (Kenya), in an opinion titled '*Corruption Perception Index- Kenya to perform poorly*' observed:

'Because the corrupt tend to be persons formerly in control or often still in the employ of the state: they can use the massive resources accumulated through graft to frustrate reform. They are richer since they have the loot; they can get custody of evidence; they can obstruct the judicial process; they are accustomed to manipulating and subverting the system.'⁷³

Few authors have ventured to discuss the emerging jurisprudence in Kenya with respect to corruption. One such writer is Dr. Paul Musili Wambua. In his article '*The Emerging Jurisprudence in the Control of Irregularities*',⁷⁴ he traces a number of recent cases and gives his assessment of the resultant jurisprudence.⁷⁵ He observes that many judgments in

⁷² Ngugi J., 2007, 'Stalling Juristocracy While Deepening Judicial Independence in Kenya: Towards a Political Question Doctrine', in Kithure Kindiki (ed.), *Reinforcing Judicial and Legal Institutions: Kenyan and Regional Perspectives*, Judiciary Watch Series, Vol. 5, Nairobi: Kenyan Section of the International Commission of Jurists: 1-20

⁷³ Atieno G., 2003, 'Corruption Perception Index- Kenya to perform poorly', <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=8373> (accessed 24/6/2009)

⁷⁴ Musili W., 2008, 'The Emerging Jurisprudence in the Control of Irregularities', in Ludeki Chweya (ed), *The Conduct Of the Public Service in Kenya*, Nairobi: Claripress

⁷⁵ He discussed; *Gachiengo v Republic* (2001) 1 EA 67, *Kenya Anti-Corruption Commission v Pattni* (2003) KLR 643, *Meme v Republic & another* (2004) 1 KLR 637, *Christopher Ndarathi Murungaru v*

cases that involve dishonesty appear to inhibit rather than facilitate justice for the aggrieved public. He notes that many suspects have escaped conviction and the misappropriated properties have not been recovered. He states:

‘...many judgments in cases that involve dishonesty appear to inhibit rather than facilitate justice to the aggrieved public. Most importantly, many cases that involve dishonesty have appeared before subordinate courts, the High Court of Kenya, and the Court of Appeal, but the suspects have escaped conviction and the misappropriated funds or lost property have not been recovered. In fact, the courts have in some of the matters exonerated the primary suspects on ostensibly sound legal basis.’⁷⁶

He sees the emerging scenario as contradictory and blames the jurisprudence rather than the existing state of law for this state of affairs. He notes financial impropriety, particularly Goldenberg and Anglo-Leasing scandals, have occurred in the context of weak jurisprudence. He warns that the resultant jurisprudence could further inhibit efforts to control financial improprieties. In his view, the courts have performed poorly for a number of reasons. Firstly, they have relied on narrow technical interpretation of law. Secondly, they have applied the law selectively as a result of which major suspects have been exculpated while the accomplices are held to account. Thirdly, they have treated similar cases differently leading to conflicting decisions. Fourthly, they have failed to control the executive and have in some instances appeared ‘more executive-minded than the executive.’⁷⁷

This study will continue the investigation of whether the judiciary has found its proper position in the constitutional order in the post KANU era or whether it is still captive to the same forces. In particular, it will investigate whether the judiciary has discharged its role in interpreting the law appropriately when dealing with corruption cases. Some of the cases dealt with in the study have not been analysed before and are of grave concern to the public.

Kenya Anti-Corruption Commission & another Misc. Civ. Appl. 54 of 2006, Republic vs The Judicial Commission of Inquiry into the Goldenberg Affair & others ex parte George Saitoti HC Misc. C. App. No. 102 of 2006 and Wilfred Karuga Koinange v Commission of Inquiry into the Goldenberg Affair (H.C Misc. Appl. No. 372 of 2006). In contrast, this study will be extensive both in terms of perspective and the number of cases analyzed.

⁷⁶ Ibid

⁷⁷ Ibid

1.11 Delimitations

The subject of finding the right judicial balance between protecting the right of the state to investigate and punish crime *vis-à-vis* enforcing fundamental rights of persons charged with corruption offences is a wide area. Time and resources are limiting. In the premises, the study will be based on seven selected decisions including the Goldenberg and Anglo-leasing scandals. It will focus on the Constitutional and Judicial Review Division of the High Court.

1.12 Methodology

The study will rely on qualitative research techniques. Primarily, due to shortage of time and financial resources, the study will be desk top research. It will endeavour to critic the decisions made by the judges based on the facts, the theories about law and the applicable principles of interpretation. In this respect, the writer will mainly visit the libraries of the High Court, the University of Nairobi and the Kenya Anti-Corruption Commission. Further, the writer will conduct internet research.

1.13 Chapter Breakdown

Chapter one will be introductory. It will restate the problem and outline the scope of the study. Chapter two will form the crux of the study. It will contain a critique of selected cases dealing with investigation or prosecution of corruption cases. It is contended that the cases selected are of great importance to the public either because they deal with scandals whose monetary values are astronomical or because they give rise to jurisprudence of grave implications to governance within the polity. Chapter three will contain general observations of the study. It will present the findings of the analysis with respect to the seven cases examined. The underlying principles informing the decisions will be set out and tested for validity. The errors in the decisions, if any, will be exposed. It will then draw conclusions on the findings and examine their implications on the quest for accountability in cases of grave public importance. Lastly, it will contain recommendations on how to ensure that perpetrators of major scandals face the law. The study will also make proposals on how to strengthen the legal and institutional framework for fighting graft.

1.14 Conclusion

This chapter has introduced the study. It has *inter alia* laid out the problem and provided the theoretical framework of the study. It has in addition analysed the relevant literature. The next chapter will embark on the study proper. It will analyse selected cases and expose the underlying jurisprudence.

CHAPTER 2

FROM GACHIENGO TO NEDEMAR: AN ANALYSIS OF SELECTED DECISIONS ON CORRUPTION

'The main constraint to social progress in Kenya and in other developing countries is poverty and lack of access to food, water, dwellings, education, health and essential services. In the light of those shortages, it should be considered that the welfare needs of Kenya's people dictates good husbandry over national resources, and efficiency in detecting misuse of these resources and in bringing before the courts of justice persons suspected of crimes involving public resources.'¹

Chapter one introduced the study and provided the theoretical and conceptual framework. Chapter two comprises the core of the study. It will review seven cases. These are:

- i) *Stephen Mwai Gachiengo & another vs Republic*²;
- ii) *Meme vs Republic & another*³;
- iii) *Republic vs Judicial Commission of Inquiry into the Goldenberg Affairs & 2 others Ex parte George Saitoti*⁴;
- iv) *Eric Cheruiyot Kotut v S.E.O. Bosire & 2 others*⁵;
- v) *Republic vs The Kenya Anti-Corruption Commission Ex Parte First Mercantile Securities Corporation*⁶;
- vi) *Midland Finance & Securities Globetel Inc. vs The Attorney General and Another*⁷ and;
- vii) *Nedemar Technology BV Ltd vs The Kenya Anti-Corruption Commission and another*⁸.

¹ Justice Ojwang, in *Republic v Attorney General & another Ex parte Vaya & another* (2004)KLR 281 at p. 298

² (2000) eKLR

³ (2004) 1 KLR 637

⁴ (2006) eKLR

⁵ (2008) eKLR

⁶ HC. Misc. Appl. No. 695 of 2007 (unreported)

⁷ HC Misc. Appl. No. 359 of 2007 (unreported)

Other cases of relevance are cited within the context of the analysis of issues raised in the selected cases.

These cases are significant because the decisions in them raise fundamental questions for analysis on what the law is and how it should be interpreted in the light of public interest concerns relative to investigation, prosecution and punishment of corruption and recovery of stolen property. *Stephen Mwai Gachiengo & another vs Republic* and *Meme vs Republic & another* are significant because of the precedent they set with respect to institutional arrangements to tackle corruption. The rest of the cases deal with the twin scandals of Goldenberg and Anglo-Leasing and the decisions in them have far reaching implications for the fight against mega corruption.

2.1 STEPHEN MWAI GACHIENGO & ANOTHER V REPUBLIC

From early 1990s, Western governments and international institutions began to be concerned about the state of governance in most third world countries. The main reason for this development is the collapse of the Union of Soviet Socialist Republic (USSR). The collapse brought about two significant developments. Firstly, liberal democracy emerged as the only viable form of government. Secondly, Western Countries who were hitherto offering unquestioned support to their backers began to be more critical of developing nations.⁹ They were concerned that most of the money advanced to poor countries in form of loans or aid ended up in private pockets rather than being used in the intended projects. Good governance gained eminence as a developmental concept. Aid was pegged on the adoption of measures to advance good governance including fighting corruption.

Following the said developments, Kenya established the Kenya Anti-Corruption Authority (KACA) in 1997 vide an amendment to the Prevention of Corruption Act¹⁰.

⁸ HC Petition No. 390 of 2006, (unreported)

⁹ See Okoth-Ogendo H.W.O, 2000, 'The Quest for Constitutional Government in Africa', in Hyden G., *et al* (eds), *African Perspectives of Governance*, Trenton: Africa World Press, 1-22, p.11

¹⁰ Cap. 65 of the laws of Kenya (now repealed)

Under section 11B of the said Act, KACA was mandated *inter alia* to investigate and, subject to the Attorney General's consent, to prosecute corruption cases. KACA took a number of high profile people to court. It demonstrated a measure of independence and boldness unlike the Attorney General's Office. There was thus considerable disquiet among the political class over the new institution. Its legality was challenged in the case of *Stephen Mwai Gachiengo & another vs Republic*¹¹ (hereinafter '*Gachiengo*').

The applicants had been charged with nine counts of abuse of office contrary to section 101 (1) of the Penal Code.¹² It is noteworthy that before being arraigned in court the Attorney General sanctioned the prosecution of both applicants under section 101(3) of the penal code. Before the trial began, several constitutional issues were raised necessitating reference to the High Court. Among the issues for determination by the High Court was whether the provisions establishing KACA are in conflict with the Constitution especially section 26 thereof. The Applicants contended that it is contrary to the administration of justice for KACA to investigate and prosecute. KACA replied that it can only prosecute under the directions of the Attorney General and that its prosecutors are appointed by the Attorney General.

After a brief analysis of the powers of the Attorney General under the Constitution vis-à-vis the functions of KACA, the court composed of Justices Mbogholi-Msagha, Johnston Mitey and Kasanga Mulwa concluded;

'From the foregoing, it is crystal clear that S. 10 and S. 11B of Cap 65 are in direct conflict with S. 26 of the Constitution. Whether or not KACA purports to act under the direction of the Attorney General in relation to prosecution, the exercise of powers under S. 11B of Cap. 65 offends the Constitution. By alienating powers conferred upon him by the Constitution the Attorney General was being escapist and is a mark of abdication of responsibilities bestowed on him by the constitution.'¹³

It is submitted that this finding was cavalier and was not borne out by a reading of section 26 of the Constitution nor section 11B of the Prevention of Corruption Act. It is trite that

¹¹ (2000) eKLR

¹² Cap. 63 of the Laws of Kenya

¹³ *Stephen Mwai Gachiengo & another v Republic* (2000) eKLR, p.6

KACA 'was not purporting to act under the directions of the Attorney General'. The act specifically provided so at section 11B (3) in the following terms:

- (3) The functions of the Authority shall be-
 - (a)
 - (b) To investigate, and subject to the directions of the Attorney General, to prosecute for the offences under this Act and other offences involving corrupt transactions;

The court further found that the KACA's powers of investigations infringed on the powers of the Commissioner of Police contrary to the Constitution. The court concluded that the existence of KACA undermines the powers and authority of both the Attorney General and the Commissioner of Police as conferred by the Constitution. By this pronouncement the court effectively killed the nascent institution.

Fortunately for this study, a full critique of this decision will be provided by the succeeding decision.

2.2 MEME VS REPUBLIC & ANOTHER

The *Gachiengo* decision was rendered on 22nd December, 2000. Thereafter the duties exercised by KACA were taken over by the Attorney General and the Commissioner of Police through a special unit known as the Anti-Corruption Police Unit (ACPU). This state of affairs continued until the end of KANU rule when the new National Rainbow Coalition (NARC) Government was inaugurated in January 2003. The NARC Government was elected partly on its promise to bring an end to corruption. Pursuant to their objective, they quickly passed the Anti-Corruption and Economic Crimes Act¹⁴ (ACECA) in May of the same year. ACECA established the Kenya Anti-Corruption Commission (KACC) under section 6. KACC was *inter alia* mandated to investigate corruption but, unlike KACA, it was not given powers of prosecution; it can only make recommendations to the Attorney General who has the final authority on whether or not to prosecute.

¹⁴ Act no. 3 of 2003

KACC embarked on its mandate and started conducting investigations. Like KACA, its legality was immediately challenged in the case of *Meme vs Republic & another*¹⁵ (hereinafter '*Meme*').

Meme was charged before the Anti-Corruption Court with the offence of abuse of office. He applied for stay of the criminal proceedings and filed a reference in the High Court. In the High Court, he contended that the trial process was contrary to the Constitution. Like in the *Gachiengo* case, the applicants argued that KACC could not validly investigate corruption as that would violate the constitutional powers of the Commissioner of Police and the Attorney General. He maintained that such investigative powers were exclusively vested in the Commissioner of Police and the Attorney General under the Constitution. He further argued that the decision in *Gachiengo* bound the court.

The case was handled by a bench comprised of freshly appointed judges namely, Justices Rawal, Njagi and Ojwang. The court while rendering its decisions did an excellent job, in the view of this study, of critiquing the *Gachiengo* decision. The Court agreed with the submission of counsel appearing for KACC that although the constitution gives the Attorney General power to supervise criminal proceedings, he had no monopoly in that regard and that *Gachiengo* was wrongly decided. The learned judges observed:

‘The plain meaning of section 26(3)(b) and (c) is, in our view, that some person or authority other than the Attorney-General could very well, and quite lawfully, undertake prosecutions; save that such action will always remain subject to the control of the Attorney – General.

It becomes plain, as submitted by counsel and as we ourselves see it, that the *Gachiengo* case rested on a misconception, both in terms of construction and of principle; and with utmost respect, we would depart from the position taken by the learned judges in that case.’¹⁶

The court further found that the constitution does not purport to give exclusive investigative powers to the Commissioner of Police. It found that the power of

¹⁵ (2004) 1 KLR 637

¹⁶ P. 684

Commissioner of Police to investigate crime is to be found in the Police Act and not the Constitution as submitted.

This study finds that this case was correctly decided by judges who adopted a very balanced and purposive approach to constitutional interpretation. With respect to ACECA, the court noted the public interest in its enactment. For instance it observed that:

‘It is the mandate of the judiciary to apply all such laws as may be duly made by Parliament; and accordingly, as we see it, there is no basis for disputing the constitutionality of the Anti-Corruption and Economic Crimes Act (Act No 3 of 2003) in this Court. We consider that this Court should be slow to unsettle those public policy choices which have been incorporated in legislation, enacted by Parliament by virtue of its constitutional competences. However, it remains the sacred duty of this Court to uphold the sanctity of the Constitution, the Court will not hesitate to assert the supremacy of the Constitution by striking out such provisions.’¹⁷

2.3 REPUBLIC V JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIRS & 2 OTHERS EX PARTE GEORGE SAITOTI

This case, hereinafter referred to as the *Saitoti* case,¹⁸ together with the succeeding case¹⁹ relates to the Goldenberg Scandal. The Goldenberg Scandal, as it is infamously known, was a major scam in which the Government, according to the Judicial Commission of Inquiry into the Goldenberg Affair (hereinafter, ‘the Goldenberg Commission’), lost Kenya shillings 27 billion.²⁰ The *modus operandi* mainly involved purported export of gold and diamond and payment of export compensation at the rate of 35%. Besides the fact that the exports were fictitious, the Local Manufacturers (Export Compensation) Act²¹ under which payment was purportedly made only allowed compensation at the rate of 20%. In later stages of the graft, it involved direct theft where money was siphoned from the Paymaster General’s Account at Central Bank of Kenya into private accounts.

¹⁷ P. 690

¹⁸ The full citation is; *Republic V Judicial Commission Of Inquiry Into The Goldenberg Affairs & 2 Others Ex Parte George Saitoti* (2006) eKLR

¹⁹ *Eric Cheruiyot Kotut vs Judicial Commission of Inquiry into the Goldenberg Affairs & 2 others* (2008) eKLR.

²⁰ See Report of the Judicial Commission of Inquiry into the Goldenberg Affair. Report also available at <http://www.tkenya.org/documents/Goldenberg%20Report.pdf> (accessed on 1/7/2009)

²¹ Cap. 482

Concerned about the magnitude of the scandal and the disastrous consequences it has had on the economy, the NARC Government, upon taking office, instituted a commission of inquiry headed by Justice Samuel Bosire to *inter alia* establish how much was lost, how the scam was perpetrated and who was responsible. The Commission painstakingly heard and evaluated the evidence and came up with recommendations of who were to be further investigated and who were to be charged with various offences in respect of the loss of public funds. Among the people recommended for prosecution were Prof. George Saitoti who was the Minister for Finance at the time Goldenberg International Ltd. came into existence up to January, 1993 and Mr. Eric Kotut who was the Governor of Central Bank between January 1990 and July 1993. Being aggrieved by the findings and recommendations of the Commission the two filed judicial review applications.

Saitoti sought orders to *inter alia* prohibit the Attorney General from filing and prosecuting criminal charges against him in respect of the Goldenberg Affair pursuant to the Judicial Commission of inquiry into the Goldenberg Affair 'or otherwise'. There are two curious observations with respect to this prayer. Firstly, the addition of phrase 'or otherwise' to the prayer immediately raises eyebrows because the concern for a judicial review court should be the decision sought to be impugned and not other extraneous considerations. Secondly, the Respondents in this matter were the Commissioners and not the Attorney General. Hence the issue of prohibiting the Attorney General ought not to have arisen.

Saitoti complained *inter alia* that the Commission had not struck a fair balance between the general and public interest of the community and the protection of his fundamental rights. He further complained that the findings were unreasonable and actuated by bad faith.

The Attorney General replied on behalf of the Respondents that judicial review is not concerned with the merits of the decision but the decision making process and that the court is being asked to substitute the findings of the Commission with those of the court.

2.3.1 Legality of *Ex Gratia* Export Compensation

The court, comprised of Justices Nyamu, Wendoh and Anyara Emukule, found that the payment of the 15% *ex gratia* compensation was made pursuant to Government policy and the Commission's findings that it was illegal constituted an error of fact and law and that in any case Parliament had approved the same. One wonders why it is necessary to have a law which prescribes the rate of export compensation at 20% while the 35% compensation can be paid through government policy. Secondly, the finding is ridiculous as it means that Government policy can operate above the law. The court is creating another hierarchy of governmental action called 'Government Policy' which operates outside and above the law. In the view of this study, the decision is judicial endorsement of impunity and a blow to the rule of law.

The basis for finding that Parliament had approved the payments was an *ex post facto* observation by the Parliamentary Accounts Committee that the 'policy decision to grant export compensation to gold and diamond jewellery was done procedurally'. The court thus concluded that the applicant approved in principle the payment of the additional incentives as a matter of Government policy and on the recommendations of public officials. The officials referred to were bureaucrats in his office (Ministry of Finance) and those of ministry of Natural Resources and Mines. To question the decision of Parliament, the court concluded, would be to disturb the historical respect between the three arms of Government. In what amounts clearly to a misstatement of the facts, the court stated;

'a decision of Parliament cannot be the basis of a civil or criminal proceedings against the applicant who is a member of Parliament or be the basis of a cause of action.'²²

This paper argues that, firstly, Parliament merely expressed an opinion about what had been undertaken. Whereas parliament could amend the law to increase export compensation, it was not its business to approve executive policies prior to

²² *Republic v Judicial Commission of Inquiry into the Goldenberg Affairs & 2 others Ex parte George Saitoti* (2006) eKLR p. 36

implementation neither did it purport to do so. Secondly, a single Minister purportedly acting pursuant to the recommendations of Senior Civil Servants could not authorize payment of money from the exchequer without a valid law or approval by Parliament. Thirdly, by commenting on executive decisions and expressing an opinion on the same, Parliament does not make an illegal act legal nor deprive the court jurisdiction. Lastly, the court seems to suggest that the applicant as a member of parliament enjoys certain immunities with respect to criminal liability for acts done outside Parliament.

2.3.2 Public Interest

Further, in faulting the decision of the Commission, the court justified their decision on the grounds of public interest. Elsewhere, the court stated that public interest is expressed in protection and enforcement of fundamental rights. In what appears to be a stretched reasoning, the court observed that causing the applicant to defend himself in a court of law over the same issue in which he defended himself in Parliament would be against public interest.²³ The court, without citing any authority for the novel proposition ruled that;

‘The applicant is a Member of Parliament who in making his contribution in Parliament defended himself on the floor of the House. Historically Parliaments were in certain jurisdictions called High Court of Parliament in that as regards matters within their jurisdiction they are regarded as final and could not be reopened elsewhere. There is a semblance of double jeopardy.’²⁴

According to the court therefore, a Member of Parliament who has committed an act which could amount to a criminal offence has the choice of defending himself in Parliament or in court. The court further noted that the applicant was subjected to questions and points of order. This, according to the court, demonstrates that the applicant had been subjected to some form of trial which gives rise to a plea of ‘double jeopardy, if he is to undergo a similar process.

²³ Ibid p. 41

²⁴ Ibid p. 49

2.3.3 Implication of the *Saitoti* case on the Rule of Law

Guillermo O'Donnell observed that the rule of law is among the essential pillars upon which a democracy rests.²⁵ The rule of law ensures *inter alia* mechanisms of accountability and constrain potential abuses of state power. For the rule of law to have meaning, it must be fairly applied. By "fairly applied" it is meant that;

‘the administrative application or judicial adjudication of legal rules is consistent across equivalent case; is made without taking into consideration the class, status, or relative amounts of power held by the parties in such cases; and applies procedures that are established, knowable, and allow a fair chance for the views and interests at stake in each case to be properly voiced.’²⁶

In addition, the rights and obligations specified must attach to each individual considered as a legal person, irrespective of social position or membership to another arm of Government or other attributes of the respective actors. More fundamentally, no one, including the most highly placed official, is above the law.²⁷

The logical conclusion in the *Saitoti* case is that Members of Parliament are not subject to the rule of law like ordinary Kenyans. If a Member of Parliament is facing accusations of impropriety, he can choose between the dock and the floor of the House. A Member of Parliament who opts to defend himself on the floor of the house can whip party and tribal support to his aid. According to this view therefore, the Grand Regency and the Maize scandals in which the responsible ministers have defended themselves in Parliament are no longer justiciable.²⁸

The decision therefore strikes a blow against the rule of law. It privileges Members of Parliament over the rest of the citizens. It exempts Members of Parliament from the application of ordinary laws and procedures.

²⁵ O'Donnell G., 2004, 'The Quality of democracy: Why the rule of law matters', *Journal of Democracy*, Vol. 15 No. 4: 32-46 at p. 32

²⁶ *Ibid* p. 33

²⁷ *ibid*

²⁸ Hon. Amos Kimunya has been censured by Parliament on the manner of sale of 'the Grand Regency Hotel' upon surrender by Uhuru Highway Development Co. Ltd, while a motion to censure Hon. William Ruto on the sale of Maize in the strategic reserve to private individuals failed.

2.3.4 Constitutional Orders in Judicial Review

In granting Prof. Saitoti the orders sought, the court disregarded the fact that this was a judicial review matter and proceeded to make findings of a constitutional nature and issue consequential orders. For instance instead of the court simply prohibiting the Attorney General from relying on the Goldenberg report, the court went ahead to find that in view of the publicity surrounding the Goldenberg Commission, the Accused would not get a fair trial. The court observed;

‘The court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicant’s fundamental rights. The court is empowered under s 84 of the constitution to give such orders as are just to secure such rights.’²⁹

The Court thus proceeded to prohibit the Attorney General absolutely from prosecuting Prof. Saitoti in respect of the Goldenberg affair even on the basis of fresh evidence. The finding and the order was constitutional in nature as it touched on section 77 (1) and (2)(a) of the Constitution.

In making the findings, the judges disregarded their precedent set in *Chamanlal Kamani vs Kenya Anti-Corruption Commission*³⁰ and *Kenya African National Union v Mwai Kibaki & 6 others*³¹ among others.

In *Chamanlal Kamani vs Kenya Anti-Corruption Commission*, Justice Nyamu had this to say;

‘I have given this matter serious consideration and find on a prima facie basis the applicant cannot, with respect, effectively articulate the constitutional matters mentioned above without bringing a constitutional application alleging violation/or contravention by the passage of the Anti-Corruption and Economic Crimes Act or the section upon which the powers have been exercised by KACC.’³²

The court went on to say;

²⁹ *Republic v Judicial Commission of Inquiry into the Goldenberg Affairs & 2 others Ex parte George Saitoti* (2006) eKLR, p. 50

³⁰ (2007) eKLR

³¹ (2005) eKLR

³² *Chamanlal Kamani vs Kenya Anti-Corruption Commission* (2007) eKLR, p. 3

‘In addition section 70 of the constitution which clearly limits nearly all rights on the ground of public interest casts a long shadow on the need to have filed a constitutional application. The application brought on the other hand is substantially a judicial review application. A constitutional application is much wider and it could where appropriate seek judicial review relief...’³³

The court was here saying that you cannot articulate constitutional matters in a judicial review yet it was willing to make an exception in *Saitoti* case.

In *Kenya African National Union v Mwai Kibaki & 6 others*,³⁴ a bench consisting of Justices Nyamu, Mohammed Ibrahim and Anyara Emukule, held that one cannot seek both Judicial Review and Constitutional remedies in the same cause. The court in that matter stated;

‘The Applicant’s claim is not merely that the Respondents have not acted according to law, the Applicant’s claim is that the Respondents have infringed upon the Applicant’s fundamental right to the protection of property without compensation contrary to the provisions of section 75 of the Constitution. This too is very obvious from the Notice of Motion itself dated 20-02-2003 and filed on 26-02-2003. The motion combines public law reliefs with private law claims and reliefs, which the judicial review court has no jurisdiction to determine under the provisions of section 8 and 9 of the Law Reform Act, and order LIII Rules 1(1) and (2) and (3) thereof of the Civil Procedure Rules.’³⁵

The court further observed that in view of the clear provisions relating to the exercise of judicial review jurisdiction, the question of invoking its inherent powers under section 3A of the Civil Procedure Act does not apply. It thus ruled out mixing public law and private law remedies. In its own words;

‘The jurisdiction is thus clear cut. The court will therefore not combine or mix public law remedies (that is Certiorari, prohibition or mandamus) with private law remedies such as the right to private property. The Court does not as yet, unlike in England since 1977 as outlined in the previous pages of this Ruling, have or enjoy that jurisdiction.’³⁶

Yet in the *Saitoti* case, the court had no hesitation in crisscrossing both judicial review and constitutional jurisdictions and giving the Applicant the best of both domains. It is

³³ Ibid p. 4

³⁴ (2005) eKLR

³⁵ Ibid p. 22

³⁶ Ibid p. 23

submitted that the finding is inconsistent with previous decisions and is a case of selective application of the law.³⁷

2.3.5 Extending the Protection under Section 77 of the Constitution

Section 77 of the Constitution contains provisions intended to secure a fair hearing for a person charged with an offence. A few of those provisions are worth highlighting. They provide as follows:

- 77(1) 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 and impartial court established by law.
- (2) Every person who is charged with a criminal offence-
 - (a) shall be presumed innocent until he is proved or has pleaded guilty
(The sub-section then proceeds to enumerate other rights protected which include the right to be informed of the nature of the offence with which he is charged and the right to examine witnesses.)
- (7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

The scope of the protection intended to secure a fair hearing under section 77 of the Constitution had long been established in the case of *Republic vs El Mann*.³⁸ In that case, the accused sought to object to the production of answers to questions put to him prior to being charged pursuant to an Act of Parliament as evidence at his trial. The accused argued that allowing the evidence to be produced would infringe the constitutional protection that no person who is tried for a criminal offence shall be compelled to give evidence at his trial. Upon the objection being raised, the magistrate referred the question to the High Court. The court consisting of three judges held that the constitutional provision should be construed literally. Mwenda C.J observed that;

‘We do not deny that in certain context a liberal interpretation may be called for, but in one cardinal respect we are satisfied that a constitution is construed in the same way as any other legislative enactment, and that is, where the words used are precise and unambiguous they are to be construed in their ordinary and natural sense. It is only where there is some imprecision or ambiguity in the language that

³⁷ See also HC. Misc. Appl. No. 534 of 2003; *Republic vs The Commissioner of Police ex parte Nicholas Karira* (unreported), where a bench consisting of Justices Nyamu, Ibrahim and Makhandia ruled that one cannot invoke both Judicial review and Constitutional jurisdictions of the High Court in the same cause.

³⁸ (1969) E.A. 357

any questions arises whether a liberal or restricted interpretation should be put upon the words.’³⁹

The court therefore found that there was no ambiguity and held that the right only applies during his trial.

This study agrees with the principle enunciated in the *El Mann* decision. If the constitutional provision is plain and unambiguous, it is the sacred duty of the Judge to apply it. It thus contends that the rights intended to secure a fair trial under section 77 of the Constitution begin upon the person being charged.

However, in declaring that Prof. Saitoti would not have a fair hearing, the court disregarded the clear language of the Constitution and extended the protection offered by the section to the period before the accused is formally charged. In so doing, they disregarded the precedent by Justice Nyamu (who was one of the Judges in the panel) set in *Francis Mburu Mungai v Director of Criminal Investigations & another*.⁴⁰ It is noteworthy that the ruling in the *Mungai* case was delivered on 5th day of April, 2006 while the judgment in the *Saitoti* case was delivered on 31st July, 2006, a difference of about 3 months. In the said case (*Mungai* case), Justice Nyamu categorically stated;

‘It is clear that the presumption of innocence commences upon the suspect being charged-see s 77(2a) of the Constitution.’⁴¹

Barely four months after the judgment in the *Saitoti* case, on 1st December, 2006, a court comprising some of the judges in this case held that the protection under section 77(1) and (2)(a) of the Constitution can only come into operation once the person has been charged. In *Dr. Christopher Ndarathi Murungaru vs Kenya Anti-Corruption Commission & another*,⁴² a bench consisting of Justices Lesiit, Anyara Emukule and Wendoh, categorically stated that the right to fair trial begins when one has been charged and not

³⁹ (1969) E.A. 360

⁴⁰ (2006) eKLR

⁴¹ Ibid p. 3

⁴² (2006) eKLR

before.⁴³ It adopted a measured approach to the question of constitutional interpretation observing that;

‘Our Constitution must in our view be interpreted within the context and social, economic development keeping in mind the basic philosophy behind not only the particular provisions of the constitution but also the provisions of the law which is sought to be impugned.’⁴⁴

It went to identify corruption, terrorism, drug trafficking and money laundering as the quadruple evils facing the world in the 21st Century. The court followed the precedent set in *Republic VS El Mann*⁴⁵ and held that the right to a fair hearing under the Constitution begins when one has been charged with an offence. The court saw the Constitution as expressing the will of the people which will is not discoverable in ‘some wild fantasy and exploration of the liberal, generous, and purpose of the spirit’.⁴⁶ According to the court, the will and the aspiration of the people and the spirit of the constitution will only be found in the language of the Constitution. It expressed readiness to interpret the Constitution broadly if there is reason for so doing, the reason usually being that there is some ambiguity in the language used and that to give it a literal meaning would lead to an absurdity. However, with respect to section 77(1) and (2) of the Constitution, the court saw no such ambiguity stating;

‘That is not the case here either in terms of section 77(1) or 77(2)(b) or indeed 77(7). The Plaintiff has not been charged in any court of law. His right to the presumption of innocence, or to testify against himself has not been called into question. This is an investigation.’⁴⁷

2.3.6 Pre-Trial Publicity

With regard to pre-trial publicity the court in the same case (*Murungaru* case) pointed out that it is a moot point to state that the accused would not get a fair hearing since he had not been charged. The same argument was adopted by the court, composed of Justices Nyamu, Wendoh and Emukule, in HC. Petition No. 199 of 2007; *Deepak Chamanlal*

⁴³ It is noteworthy that Justices Anyara Emukule and Wendoh had sat in the *Saitoti* case.

⁴⁴ Ibid p. 31

⁴⁵ (1969) E.A. 357

⁴⁶ *Dr. Christopher Ndarathi Murungaru vs Kenya Anti-Corruption Commission & another* (2006) eKLR p. 67

⁴⁷ Ibid p. 68

Kamani v Principal Immigration Officer & 2 others (unreported). In rejecting the claim based on pre-trial publicity, the court stated that;

‘a constitution must be interpreted in the light of present-day conditions with a rider that **clear constitutional provisions cannot and must not be ignored by the court**’.⁴⁸ (Emphasis added)

Similarly in *Pattni vs Republic*,⁴⁹ the court was emphatic that the right to be presumed innocent begins when a person has been charged with an offence, stating that it would be speculative to hold otherwise. In the words of the Judges in that case;

‘The presumption of innocence only protects people who have been charged in court. It does not assume that every Kenyan will at some stage in future become a potential suspect and thereby offer indetermins (sic) to protection. If the law was to do so, it would undermine criminal justice system.’⁵⁰

The court in the *Pattni* case did not think pre-trial publicity can affect the fairness of the trial noting that;

‘...the applicants here will be tried by a professional magistrate who is bound by the judicial oath and who has to adjudicate on any matter on the basis of evidence, procedure and counsel’s submissions.’⁵¹

2.3.7 Fidelity to the Language of the Constitution

In a later decision, Justice Nyamu emphasized fidelity to the language of the constitution even when the court adopts a liberal interpretation. In *James Nyasora Nyarangi & 3 others v Attorney General*,⁵² he quoted with approval the observations of Justice McIntyre *In Reference Republic Employee Relations Act, Labour Relations Act and Collective Bargaining Act* (1987) 38 DLR 4th 161 where he held that:

‘While a liberal and not a very legislative approach should be taken to constitutional interpretation, the Charter should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the Charter, as of all constitutional documents is constrained by the language, structure and the history of the constitutional text, by constitutional traditions and by history, traditions and underlying philosophies of our society.’⁵³

⁴⁸P. 108

⁴⁹ (2001) KLR 264

⁵⁰ (2001) KLR 284

⁵¹(2001) KLR 285

⁵² (2008) eKLR

⁵³ *James Nyasora Nyarangi & 3 others v Attorney General*(2008) eKLR, p. 19

It thus appears that the *Saitoti* decision was clearly erroneous. A balanced and rational approach to constitutional interpretation would not have yielded the results reached by the Judges.

The jurisprudence created in this case paved way for similar applications. Eric Kotut did not hesitate in taking advantage.

2.4 ERIC CHERUIYOT KOTUT V S.E.O. BOSIRE & 2 OTHERS

This case,⁵⁴ hereinafter '*Kotut case*', is closely related to the *Saitoti* case. The case was heard by Justices Nyamu, Dulu and Wendoh. The Applicant was the governor of Central Bank of Kenya when payments were made to Goldenberg International in respect of purported compensation for export of gold and diamond. Besides purported export compensation, payments were directly made to Goldenberg with no accompanying explanations. The direct payments totalled Kshs. 5.8 billion and were made pursuant to instructions from the Permanent Secretary in the Ministry of Finance, one Dr. Wilfred Koinange. The Goldenberg Commission found that Mr. Kotut was in Koinange's office when the first letter authorising the payment of Kshs. 1.8 billion was drafted and approved the transfer of the said amount from the Paymaster General's account to an account at Kenya Commercial Bank. According to the Commission, this finding was supported by the evidence of Dr. Koinange and 3 employees of Central Bank of Kenya namely Mr. Werunga, Mr. Riungu and Mrs. Bretta N. Mutungi.⁵⁵

2.4.1 Re-examination of evidence

With respect to this evidence, the court stated:

'Concerning the meeting of 19th April 1993 in the Permanent Secretary's office where the applicant is said to have approved the transfer of Kshs. 1.8 billion from the PMG account to the Kenya Commercial Bank account the man who made the

⁵⁴The full citation is *Eric Cheruiyot Kotut v S.E.O. Bosire & 2 others* (2008) eKLR

⁵⁵ See paragraph 652 of the Report

payments Mr. Werunga, (since converted into a prosecution witness) had testified that Mr. Ruingu who gave him the letter and instructed him to pay told him that the letter had only been seen by him (Riungu) and Dr. Koinange alone and that Mr. Werunga was now the 3rd person-see Exhibit No. 132 page verbatim (*sic*) of 11th February 2004 page 8478.

This evidence notwithstanding, the Commission relied on shaky evidence of the two accomplices Dr. Koinange and Mr. Riungu and the shaky memory of Dr. Koinange's secretary. The Report sets out the Commission's own observation of the evidence of the three witnesses. They did so without any explanation and contrary to the clear and uncontroverted evidence of the witness, Mr. Werunga who made the actual payments and who never mentioned the applicant at all as having been present.⁵⁶

It is submitted that the court went beyond the permitted purview of a judicial review court. It extensively analyzed the facts and substituted the findings of the Commission with their own. Describing a witness's evidence or memory as 'shaky' without having presided over the hearing is speculative and amounts to an unwarranted interference with findings of the Commission. It is to be noted that judicial review is concerned with the decision making process rather than the merit of the decision itself. The Court of Appeal restated this principle in the case of *Uwe Meixner & another vs Attorney General*⁵⁷ in the following terms:

'As the learned Judge correctly stated, judicial review is concerned with decision making process and not with the merits of the decision itself. Judicial review deals with the legality of the decisions of bodies or persons whose decisions are susceptible to judicial review.'⁵⁸

The Attorney General rightly contended, in the view of this study, that the court was being asked to examine the evidence afresh which was akin to being asked to seat on appeal and substituting the Commission's findings with those of the court, which cannot be a function of judicial review.

⁵⁶ See page 36 of the Judgment

⁵⁷ (2005) eKLR

⁵⁸ *Uwe Meixner & another vs Attorney General* (2005) Eklr p. 5

2.4.2 Non-Joinder of the Attorney General

Notwithstanding that the Attorney General was not a party to the proceedings the applicant prayed for *inter alia* an order prohibiting him from prosecuting the applicant on the basis of the Goldenberg Report 'or otherwise, including the further prosecution of the Applicant in Criminal case number 518 and 519 of 2006 already pending before the Chief Magistrate's Court, Nairobi'.

The court observed that it was not necessary to join the Attorney General since he was already a party. Yet the Attorney General was only present as the Lawyer for the Commission and not as a party. Going by the court's reasoning, a judge is at liberty to pass judgment against the litigant and/or his Lawyer though he is not a party to the proceedings. In *Republic vs Kenya Anti-Corruption Commission & another ex parte Josphat Konzolo (2006) eKLR*, Justice Aluoch struck out a judicial review application seeking to bar the Attorney General from prosecuting him on the grounds that he had not been made a party to the proceedings.

It is submitted that whereas a party who is merely affected by the judicial review proceedings need only be served with the notice of the application, it still remains a cardinal rule of adversarial practice that you must sue the person against whom you are seeking orders. Appearance by the Attorney General as a legal counsel for a Commission, whose term had expired, is not tantamount to appearance by the Attorney General as a party to the proceedings. It would be paradoxical to uphold the right to be heard on the part of the Applicant but deny the same protection to the Attorney General.

2.4.3 Proceedings not in the Name of the Republic

The rule that proceedings for judicial review are brought in the name of the Republic has a long and rich history. It arose out of English subjects asking the King to intercede on their behalf in respect of administrative decisions which affected them. That is why judicial review reliefs are known as 'prerogative orders'. Thus proceedings for judicial review must be brought in the name of the Republic. The amended notice of motion

showed Kotut as the formal applicant rather than the *ex parte* applicant. The court did not however hesitate to brush aside the objection and proceeded to grant the orders.

2.4.4 Extending the Protection under Section 77 of the Constitution

Like the *Saitoti* case, the court held that the Applicant would not get a fair hearing and proceeded to prohibit the Attorney General from prosecuting the applicant in respect of the Goldenberg affair both with regard to the cases then existing or at all. This was on the grounds of pre-trial publicity and the infringement of the presumption of innocence, which, as submitted in this study with respect to the *Saitoti* case, does not arise until a person has been charged with an offence.

Paradoxically, instead of the Report of the Goldenberg Commission advancing the cause of justice and accountability for the public, it served as a basis for the court to shield suspected perpetrators of the scandal from prosecution.

2.4.5 Reluctance to Follow the Precedents in *Saitoti* and *Kotut* Decisions

Among the precedent setting principles that came out of the *Saitoti* and *Kotut* cases is that 11 years after the offence is committed is a long time to charge a person. It was further established that the Goldenberg Commission was discriminatory, irrational, *Wednesbury* unreasonable, biased and that the pre-trial publicity surrounding its Report means that the applicants would not get a fair hearing. It is therefore fair to assume that these findings are of a general nature and would apply irrespective of the applicant. For instance, pre-trial publicity will affect all the people against whom a recommendation to charge have been made.

However, in the case of *Wilfred Karuga Koinange v Commission of Inquiry into Goldenberg Commission*,⁵⁹ Justice Anyara Emukule, who was a member of the bench in the *Saitoti* case, appears to have moved away from the precedent and declined to grant

⁵⁹ 2006 eKLR

leave to Dr. Koinange to apply for orders of judicial review.⁶⁰ The Judge observed that public interest is against granting the applicant the orders sought. He observed that:

‘The state represents a community of individuals, who all contribute to the welfare of the state. In the wider context therefore, it is in the interest of the state, the community of Kenyans and all persons living within the territorial boundaries of Kenya, and perhaps beyond, that lawsuits including criminal prosecutions which particularly impinge upon the welfare of the state and therefore the community within the state be prosecuted in a sequence and within a reasonable time and not by way of a multiplicity of suits, motions over other motions and sometimes cross-motions.

The multiplicity of such motions is but gerry-mandering through the court corridors contributing nothing but delays in the dispensation of justice to the individual accused or the applicant and also the community of Kenyans because the issues raised, like in this case, and the previous applications, whether or not the disbursement of Kshs. 5.8 billions was legal or illegal should be determined in a proper trial, and should not be stayed by the court merely because they relate to issues raised 4, 8, 12 or more years ago.’⁶¹

2.4.6 Selective application of the Law

It is submitted that the principles enunciated in the statement quoted above could have been used against Saitoti or Kotut *mutatis mutandis* without any contradiction. To the extent that it was not depicts selective application of the law. It is submitted that if 12 years is a long time for Prof. Saitoti or Mr. Kotut, it is similarly a long time for Dr. Koinange.

Regarding the claim that Dr. Koinange would not receive a fair hearing, the court dismissed such a suggestion stating;

‘There are no allegations that he would not receive a fair hearing albeit protracted as we observed in the Saitoti case, that the matters concerning payments to Goldenberg International Limited are subject of extensive, intensive and comprehensive investigations which are of necessity protracted and long. The Applicant may well be exculpated from any alleged theft or any wrong doing.’⁶²

⁶⁰ It is to be observed that even from a statistical point of view, leave is rarely denied, let alone in a Goldenberg matter where a lot of issues are involved.

⁶¹ P. 14

⁶² Ibid p. 15

The Judge was telling the applicant to go through the criminal process despite the risk that he may not get a fair hearing. It is submitted that this case depicts the thin line between protection by the High Court and subjection to the criminal process.

2.3.1 REPUBLIC VS THE KENYA ANTI-CORRUPTION COMMISSION EX PARTE FIRST MERCANTILE SECURITIES CORPORATION

This case⁶³, hereinafter referred to as the *Mercantile* case, concerned the supply and installation of broad band communication equipment for the Postal Corporation of Kenya. It was a judicial review application. The case (together with the subsequent cases) relates to the Anglo-Leasing scandal.

The Anglo-Leasing Scandal involves a total of 18 high value contracts entered into by the Government of Kenya with various parties, some of doubtful identity. The contracts were identified by the Controller and Auditor-General in his special report dated 10th April, 2006.⁶⁴ The Controller and Auditor General noted that seven of the contracting parties do not exist in the countries in which they were purportedly registered. The total costs of the contracts excluding interest according to the Controller and Auditor General totalled **Kshs. 56,333,355,450**. The Controversy and the secrecy surrounding these contracts is popularly referred to as the Anglo-Leasing Scandal.

Characteristics of the contracts

The contracts related to security and communication projects. All the contracts, including financing, were awarded secretly without any bidding purportedly on the grounds of state security notwithstanding the fact that some of those contracts had nothing to do with state security. Secondly, the contracts involved three parties; the Government as the purchaser or employer, the supplier and a financier, who would finance the supplier as per an agreed schedule without further instructions from the Government. In effect, once the

⁶³ The full citation of the case is *HC Misc. Appl. No. 695 Of 2007, Republic Vs The Kenya Anti-Corruption Commission Ex Parte First Mercantile Securities Corporation (Unreported)*⁶³

⁶⁴ See 'Special Audit Report of the Controller and Auditor General on Financing, Procurement and Implementation of Security Related Projects', April, 2006.

contract was entered into, the Government could not stop payment, say, on the grounds of non-performance on the part of the supplier. The Controller and Auditor General noted that there was no linkage between payments made to the contractors/suppliers by the Treasury and the level of actual project implementation by the contractors/suppliers on the ground. He further noted the Government was in effect funding the financiers/suppliers to finance the procurement of the goods and services due under the contracts while also paying interest and other financing costs to the same financiers/suppliers. The financier was either the supplier or had a close relationship to the supplier.

Fourthly, the contracts were fairly onerous to the Government. For instance, the Government waived its rights to sovereign immunity and its properties were subject to execution like any other party. Further, the Controller and Auditor General noted that the prices of goods/equipment were grossly inflated compared to the market prices at the time. In addition, the Government was obligated to pay the financier notwithstanding that the contract had not been performed by the supplier. In effect, the Government could pay the entire contract price without receiving any benefit in return.

Fifthly, it invariably contained an opinion from the Attorney General that all the conditions antecedent to entering into the contracts had been complied with. In most cases, most of such conditions including budgetary approvals had not been complied with. In effect, the Controller and Auditor General noted, the Attorney General's opinion was used as a substitute for actual compliance. The Attorney General's opinion also confirmed that the contracts were valid according to Kenyan laws. Sixthly, the figures involved were high. Further, the Controller and Auditor General noted that the commitment of the Kshs. 56.33 billion was made outside the Government budgetary process and without the approval of Parliament.

Investigative activities

When the existence of the contracts came to light, there was public uproar. The Government reneged on payment and there was a flurry of investigative activities by

government agencies and contracted firms such as Price-Water House Coopers (PWC). In the light of the foregoing, some parties went to court to stop investigation and to ensure that the Government continued to make payments. Following is an analysis of the judicial decisions given in respect of these contracts.

The applicant which is a company purported to be registered in Switzerland is listed by the Controller and Auditor General as one of those companies which do not exist in the addresses provided. The basis for the application was a letter of mutual assistance written by the KACC to the Swiss Authorities requesting them to help investigate whether *inter alia* the Applicant exists at all. In the letter, KACC indicated that the request had the blessings of the Attorney General and enclosed a copy of the Attorney General's endorsement. The court set out some of the main requests made by the Commission to the Swiss authorities. This included;

- i) Investigations relating to bank accounts
- ii) Order production of relevant documents
- iii) Order the freezing of assets in the accounts identified
- iv) Order seizure of documents and imaging of computer records

2.5.1 Mutual Legal Assistance and Swiss Law

The court considered the Commission's powers under the Anti-Corruption and Economic Crimes Act and concluded that the Commission could not carry out the acts. At page 22, it observed;

'KACC was seeking seizure of documentary evidence and of equipment and freezing of accounts, through means that are unlawful in Kenya, and definitely the Act did not permit the seizure of property, the freezing of back (*sic*) accounts and the obtaining of documentary evidence in the manner sought by the KACC in the letter of request for Mutual Legal Assistance.'

It is submitted that this finding was simplistic and overly technical given that KACC can perform those functions after obtaining appropriate court orders. It is instructive that

KACC was not requesting and could not request the Swiss authorities to disregard their own laws and procedures in executing the request.

After noting that KACC had no power to issue a letter asking for mutual legal assistance, the court held that the letter of request was highly prejudicial to the applicant, that it was likely to deny it a fair trial and in the circumstances smacked of harassment which the court cannot countenance.

2.5.2 Use of Foreign Authorities

In granting the orders, Justice Lesiit quoted extensively and authoritatively from the decision of Gibraltar, a British territory, in *A.T Archer Treuchand AG & another vs Attorney General*⁶⁵ as if our laws and circumstances were similar.

Prof. Carlos Rosenkrantz argues that authoritative use of foreign law hampers the development of a constitutional culture stating that such a practice would leave constitutional interpretation at the mercy of the arbitrary choices by courts.⁶⁶ He makes the case that it will always be better that courts look inward, rather than outward, in the search of constitutional arguments.⁶⁷ This study concurs with Rosenkrantz.

2.5.3 Endorsement by the Attorney General

While it is a moot point whether the Commission alone can request for legal assistance from a foreign authority, the Judge failed to take into account the weight of the Attorney General's endorsement. With a tinge of disdain the court observed;

‘Was there reciprocity? This is the bottom line. Conventions are signed by the nations and governments. An institution cannot wake up one morning and write to a foreign country requesting or requiring it to do certain things from the blue. The request should come from Government or must have Government sanction.’⁶⁸

⁶⁵ (1995) 1 Commonwealth (LRC) 625

⁶⁶ Rosenkrantz C. F., 2003, ‘Against borrowings and other nonauthoritative uses of foreign law’, *International Journal of Constitutional Law*, Vol. 1, No. 2: 269 295 at p. 294.

⁶⁷ Ibid.

⁶⁸ P. 24

It is instructive that in the *Treuchand* case (supra), the court had observed that only the Governor could give an assurance binding on the Crown; a condition which had been complied with in the instant case through the Attorney General's endorsement.

In any event, it is further submitted that the issue of reciprocity is not one that the suspect under investigations can validly raise. It is an issue for the respective Governments. It is a diplomatic issue.

2.5.4 Burden of Proof

The court further appeared to shift the burden of proof and treated the Commission as if it was the applicant seeking leave to issue a letter of mutual request. It observed;

'Conversely, it was necessary to know what the law in Switzerland says concerning Mutual Legal Assistance. None has been placed before this court. What is before the court is a clear demonstration that KACC was imposing what it had agreed upon on a foreign country, which it definitely has no power to do. As also demonstrated, KACC was breaching the municipal law. Without any evidence to show what the Swiss Confederation Law required, the letter of request of Mutual Legal Assistance is a mere piece of paper which cannot be acted upon. Any evidence obtained or property seized pursuant to the letter of request is unlawfully obtained.'⁶⁹

It is submitted that it was for the Applicant to demonstrate that, under Swiss law, what was requested was unlawful rather than for KACC to demonstrate that it is permissible.

2.5.5 Exclusion of the Criminal Process

The court went out of its way to offer gratuitous advice to the commission on the best cause of action to take. It was not necessary for the court to make the point but the observation explains the wider reasoning that informed the decision. The court stated;

'I have already set out the functions and powers of KACC. Under s7, it is quite clear that KACC was of the view that the public property was lost, it had the statutory duty to institute civil proceedings for purposes of recovery (*sic*). Since such a civil suit has already been filed, a counterclaim for recovery of the funds is a good option.'⁷⁰

It further stated;

⁶⁹ P. 25

⁷⁰ P. 32

‘The core function of the KACC is to recover public property, even property outside Kenya. Why is it that KACC has opted to pursue the criminal process through which no recovery can be effected; which is of paramount importance to the company (sic); the recovery of lost public funds and property or the criminal prosecution of criminal elements suspected to have siphoned Kshs. 2.6 billion of public funds? Therein lies the key to determining this issue. Whether there is a collateral purpose in the request of Mutual Legal Assistance.’⁷¹

The two statements raise disturbing conclusions:

Firstly, that where there is loss of public funds, the state should abandon the criminal process and pursue a cause for recovery. This grants immunity from criminal prosecution to those actors who succeed in looting public funds. Those to be punished are only those who fail to execute their criminal plan.

Secondly, that there is a necessary inconsistency between investigating for criminal prosecution and for recovery of property. It is instructive to note that one of the specific requests to the Swiss authorities was to help trace and freeze assets within the country, which is essentially a civil remedy.

Thirdly, that under the Anti-Corruption and Economic Crimes Act, one can file suit for recovery (or counterclaim) without investigations. This is incorrect. Investigations are a condition precedent to filing suit.

Fourthly, that KACC can file a counter-claim in the arbitral proceedings pending in The Hague. KACC is not even a party in the Hague proceedings.

2.5.6 Fair Trial in Civil Cases

The court appears to have extended the fair trial provisions under the Constitution to civil cases.

The court observed;

⁷¹ P. 33

‘I find and hold that the request was highly prejudicial to the ex-parte Applicant, that it was likely to deny him a fair trial in the civil suit and in the circumstances smacked of harassment which this court cannot countenance.’⁷²

It is submitted that the decision was erroneous in many respects. The effect is to consign the Government of Kenya to The Hague to defend itself in the civil case without the benefit of investigations.

2.6 MIDLAND FINANCE & SECURITIES GLOBETEL INC. VS THE ATTORNEY GENERAL AND ANOTHER

In this case,⁷³ hereinafter referred to as ‘*Midland case*’, the Government had, through the Ministry of Finance, procured Price Waterhouse Coopers (PWC) to carry out a forensic audit of the contract entered between the applicant and the Government of Kenya. The contract was for the supply of telecommunication equipment. The applicant is one of those companies whose identities the Controller and Auditor General doubted. The applicant alleged that the findings of PWC may be wrongfully used to commence criminal proceedings against them and that the PWC contract was illegal as it is only KACC which is statutorily empowered to undertake investigations. It further alleged that the equipment contracted had been supplied and is pending in the port at Mombasa and that to allow PWC to investigate may lead to deprivation of their rights without compensation. At this point, it is instructive to note that the Controller and Auditor General had observed that the status and values of the projects could not be established and recommended forensic audit. Thus the contract to PWC was very important for the Government. In opposing the application, the Respondents contended *inter alia* that the right to fair trial under the Constitution accrues only upon being charged. Secondly, they contended that PWC had not been joined in the proceedings.

⁷² P. 43

⁷³ The full citation of the case is; *HC. Misc. Appl. No. 359 of 2007, Midland Finance & Securities Globetel Inc. Vs the Attorney General and another* (Unreported)

The court found that the equipment had been delivered to Mombasa as the same had not been denied. Yet this is a matter within the Applicant's knowledge and constituted one of the reasons why PWC was contracted- to ascertain whether equipment procured had been supplied and value thereof. The Court held that the contract would infringe on the constitutional rights of the *ex parte* Applicant and its Directors and quashed the same pointing out that the Ministry of Finance had no capacity to appoint PWC to perform the task envisaged. It further held that the actions of PWC may lead to deprivation of property without compensation.

It is difficult to see how an investigation will lead to deprivation of property without compensation. Secondly, nothing in the Anti-Corruption and Economic Crimes Act prevents the Government from contracting any party to carry out a forensic audit on its projects and none was given by the court save to state that:

‘Counsel for the Second Respondent (the Commission) submitted that there is nothing wrong with the Ministry entering into a contract with PWC but the view of the court is that the Commission cannot delegate its core business to the Ministry of Finance who in turn contract it out to a private entity. It is a violation of the Commissions independence and mandate.’⁷⁴

Even if it was a violation, at whose instance should the court intervene? It is submitted that the same can only be at the instance of KACC and not a party under investigations.

2.6.1 Exclusion of the Criminal Process

Like in the *Mercantile* case (*supra*), the court looked with disfavour at any investigations which may lead to criminal prosecution of the applicant. For instance on whether the procurement process was followed, the court observed that this is a matter squarely on the shoulders of an arbitral tribunal when appointed in terms of the contract.

The court observed the principle of estoppel would apply against the Attorney General were he to proceed against the Applicant. Whereas estoppel may be raised in a civil suit filed by the Attorney General, it cannot operate to bar the State from investigating and

⁷⁴ P. 34

prosecuting offenders. As no one is above the law, investigations may extend to the role played by the person holding the office of the Attorney General.

It is further submitted that the court acted rather naively and made sweeping assumptions in favour of the Applicant. The Court observed;

‘Take the case of the Petitioners who have entered into an international agreement with an arbitral clause and who before entering into the Agreement knew nothing of the domestic requirements before they could they could enter into an international agreement. The first thing they ever thought about was the Attorney General’s opinion to assure them on the essential, before committing themselves. Having relied on the opinion it would be contrary to good morals and also public policy for the Attorney General and the GOK to be allowed to disregard the opinion.’⁷⁵

Having regard to the secretive manner in which the contract was made, it was rather extravagant for the court to come to the conclusion without thorough investigations having been conducted. The concept of public morality and public policy was used to deny the very same public the right to establish whether or not mega corruption was committed and to recover looted property.

Like Justice Lesiit before him, Justice Nyamu took the liberty of gratuitously advising the Attorney General and KACC on the way forward in dealing with allegations of corruption with respect to the case, although he was only required to decide on the validity of the PWC contract. He suggested that the way forward is to mount a strong defence in any arbitral tribunal or a claim in an English court and that even if there was corruption or illegality, ‘the greater public interest is in defending the GOK in the arbitral tribunal’.⁷⁶ Further, the court observed;

‘By purporting to criminalize the contract as opposed to what was contemplated by the parties namely an International Commercial contract, the Attorney General would in my judgment be acting against the public interest or the wider interest of the GOK in securing its best interest in the circumstances. Recovering the amount due or receiving good value for the services represents a greater public interest than the apparent public sideshows of invoking criminal law strategies.’⁷⁷

⁷⁵ P. 39

⁷⁶ P. 46

⁷⁷ P. 47

The court went on to state;

‘Thus, the big public show by Respondents of appearing to chase the criminality aspect of an otherwise complicated international commercial agreements might not necessarily secure or serve the general public interest which in many cases will be recovery of the unpaid billions or being given full value of the promised services by other Contracting Parties. Perhaps even mediation could be a viable option’.⁷⁸

Therefore according to the Learned Judge, investigating mega corruption such as in the instant case is a ‘show’. Despite the verbose insistence on pursuing recovery action, no suggestion was however made on how the Government was going to gather its evidence.

2.7 NEDEMAR TECHNOLOGY BV LTD VS THE KENYA ANTI-CORRUPTION COMMISSION AND ANOTHER

This was a petition brought pursuant to section 84 of the Constitution.⁷⁹ The petition concerned a contract between the Government of Kenya and the petitioners to design, execute and complete an integrated Command Control Centre for the Armed Forces code-named ‘Project Nexus’. It was heard by Justice Nyamu. The basis of the petition was *inter alia* that the KACC had ‘sought to intervene and/or interrogate the Petitioner’s consultants, subcontractors and employees regarding Project Nexus’.

2.7.1 Secrecy

The contract provided in part that:

‘the contractor and the Employer shall treat the details of the contract and any documents specifications or plans ancillary thereto as private and confidential save insofar as may be necessary for the purpose of the contract thereof and shall not publish or disclose the same to any third party or any particulars thereof in any trade or technical paper elsewhere without the prior written consent of the other party’.⁸⁰

⁷⁸ P. 57

⁷⁹ The full citation for the case is; *HC. Petition No. 390 Of 2006, Nedemar Technology Bv Ltd Vs the Kenya Anti-Corruption Commission and another* (Unreported)

⁸⁰ P. 6

It further provided that:

‘The parties hereto further agree that the contractor may not discuss or disclose any details of the contract with any governmental departmental ministry or individuals other than the end user notified to them pursuant to the provisions of clause 2.1 hereof.’⁸¹

No reasons were given for the need of this secrecy given that the contract involved public funds which would necessitate accountability and transparency.

2.7.2 National Sovereignty

Whereas the contractor was shielded from any accountability in public law, the Employer was stripping itself of any protection traditionally accorded to states. The contract provided:

‘The Employer agrees that this contract and the transaction contemplated herein constitute a commercial activity and that this contract and the transactions contemplated herein are subject to domestic private and commercial law, and not international or public law and the Employer hereby irrevocably waives any right of immunity which it or any of its property has or may acquire in respect of its obligations hereunder and irrevocably waives any immunity from jurisdiction suit, judgment, set off, execution, attachment or other legal processto which it or any property may otherwise be entitled in any suit or proceeding arising out of or relating to the contract save as limited by the Government Proceedings Act Chapter 40, Laws of Kenya.’⁸²

The provisions of the Government Proceedings Act would have afforded the Government of Kenya procedural safeguards if a suit was brought against it in Kenya but since the applicable law of the contract was English and the contemplated forum court was the International Court of Arbitration at The Hague, the provisions of the Act were irrelevant.

As testament to the manifest unfairness of the contract as against the Government of Kenya, clause 6.7 stated that:

‘the Employer is subject to civil and commercial law with respect to its obligations under the contract and that the execution, delivery and performance of any or all the terms of this contract by the Employer constitute private and commercial acts rather than governmental or public acts and that the Employer and its property do not enjoy any right of immunity from the suit, set off or attachment or execution or judgment in respect of any or all of its obligations

⁸¹ P. 7

⁸² P. 8

under the contract and that the waiver contained in the contract by the Employer of any such right is irrevocably binding on the Employer.’

In a way, the contract provisions had the effect of stripping off Kenya’s sovereignty and the protection that comes with it. It is submitted that the persons who signed on behalf of the Government of Kenya had no capacity to contract as such without the authority of Parliament or at the very least, of the Cabinet. In a democracy, decisions touching on sovereignty should be handled by elected representatives representing the collective will of the people, not unelected state bureaucrats.

2.7.3 The Attorney General’s Opinion

Like the *Midlands* and the *Mercantile* cases, the contract further provided that:

Clause 2.1

“As at the date of this contract the Employer shall be deemed to have received a Legal Opinion issued by the Attorney General of the Republic of Kenya to the effect that;

- 2.2 The Employer has the power to enter into the agreement and has taken all necessary actions that are required for the execution delivery and performance of this Agreement.
- 2.3 This Agreement constitutes a legal valid and binding obligation of the Employer enforceable in accordance with its terms under the laws of the Republic of Kenya.
- 2.4 The Employer shall have obtained all the necessary licenses, authorizations, requisitions, approvals, consents and exemptions required by and in respect of governmental authority or agency of or within the Republic of Kenya, and has duly effected any other declarations, filing or registrations with any governmental authority or agency which is required or appropriate in connection with the execution, delivery and performance of this Agreement and the use of any equipment or services either within or outside of the Republic of Kenya.’

2.7.4 Contract Cannot be Questioned

After briefly acknowledging that it would be contrary to public policy to prevent fair and genuine investigations against individuals involved, Justice Nyamu criticized the investigations by the KACC on the grounds that it ‘intends to carry out general investigations touching on performance and value of the contract and not on any alleged criminal elements against any individuals or companies attached to the Contracting

parties'.⁸³ It is noteworthy that this finding is made at the very beginning of the analysis without setting out the evidence that supports the finding. Even if, for purpose of arguments, the investigations by KACC were general rather than specific, it is submitted that the same would still be supportable on the grounds of public policy. In any event, it is onerous to require KACC to be specific when the investigation is still at its nascent stage. It is further submitted that such a finding at the beginning of the analysis had the potential of affecting the Judge's objectivity.

Without giving any reasons therefor, the Court found that the legality of the contract, the very basis of the contract, cannot be reopened in view of the Attorney General's finding. The Judge stated:

'Neither the Honourable Attorney General nor KACC can run away from the opinion, the representations made by the Attorney General in the areas now the subject matter of the intended investigations. They are birds of a feather!'⁸⁴

2.7.5 Recovery of Public Funds under an Illegal Contract

He further observed:

'KACC intends to unravel the representations made by the Attorney General concerning the legality of the transaction on behalf of the GOK (Government of Kenya). KACC has urged that it has a statutory recovery role under the Act but to what extent can it use the Court's processes either in this country or elsewhere to recover under the illegal contract?'⁸⁵

The court was implying that if the contract was found to have been tainted by illegality and public funds were paid under such a contract no recoveries can be made under such a contract. With respect, it is submitted that such a finding is naïve and depicts insensitivity to public interest. It is submitted that if the investigations were to establish that the contract was tainted by illegality, for instance because the parties who purported to contract on behalf of the Government lacked authority, there is no reason why the Government cannot recover on the principle of restitution.

2.7.6 KACC Cannot Investigate the Executive

The Court proceeded to observe, rather agitatedly:

⁸³ P. 17

⁸⁴ P. 18

⁸⁵ Ibid

‘Moreover are the proposed investigations not clearly intended to undermine an ongoing arbitral process in The Hague by one party? KACC does not blink an eye in stating that it is not part of Government. However constitutionally we do not have a fourth arm of Government. With respect this is institutional arrogance of the highest order..... It is not clear who instructed KACC to carry out investigations in the first place. It is still subject to the Constitution and the public policy of the country.’⁸⁶

The court went on to observe that the Commission is bound by the representations made by the Attorney General and the Government of Kenya. It viewed its investigative role as limited by any actions of the Attorney General. It observed KACC ‘has no independent existence outside the role of the Attorney General.’ The court was keenly interested in seeing the commission restrained. It stated that:

‘It cannot be allowed to claim to be the fourth arm of the Government which operates from the clouds and which superintends all other agencies.’⁸⁷

2.7.7 Inconsistency with Previous Holdings

The findings and the tone adopted by the Judge contrasts with some of his previous pronouncements where he was protective of the State’s right to investigate and prosecute crime. The decisions include *Christopher Ndarathi Murungaru vs Kenya Anti-Corruption & another*,⁸⁸ and *Francis Mburu Mungai vs Director of Criminal Investigations & another*⁸⁹

In *Christopher Ndarathi Murungaru v Kenya Anti-Corruption & another*, the judge stated;

‘In a situation such as the court now finds before it the role of the court is to consider the weight of the individual applicant’s rights as pleaded as against the public interest. The basis for this is that all **the Chapter 5 rights are subject to the provisions of s 70 of the Constitution which clearly states that the fundamental rights are subject to the rights of other persons and the public interest.**

Indeed as I held last week in a case involving the right to access banker’s books the responsibility of the court is to strike a balance between the individual rights i.e. the due process and the societal rights of crime detection and control. A balance has to be struck between these two ideals. The additional factor is that **in**

⁸⁶ P. 19

⁸⁷ P. 49

⁸⁸ (2006) eKLR (Misc. C. Appl. No. 54 of 2006)

⁸⁹ (2006) eKLR

the criminal justice system such as ours the need of the law enforcement agencies to have reasonable workability in attaining the values of crime detection, prevention and control cannot be disregarded by the courts.

I know of no democratic state which has ignored this and survived.

I have held in some of my judgments that fundamental rights do occupy a special place in the scheme of our Constitution but in the real world and even under the provisions of the Constitution the rights are not absolute and they are subject to the public interest.

The upshot is that **s 70 demands that the court in enforcing and securing those rights must also consider the public interest.**

In the circumstances of the case when I put **the ideals as set out above my inclination is to uphold the public interest in crime detection, prevention and control since any feared shortcomings in the due process can easily be taken up by the applicants as and when and if they happen.**⁹⁰
(Emphasis added).

The same sentiments were expressed by the Judge in *Francis Mburu Mungai v Director of Criminal Investigations & another*. He stated;

‘As I held in my recent impromptu ruling in *Murungaru vs Attorney General* civil suit no. 54 of 2006 (unreported) **crime detection, prevention and control are also core values recognized by our Constitution and the court has a duty to weigh these values against any alleged violation of the due process** and ascertaining whether the principle of legality is in place, so as to justify any derogation. In this case it is alleged that the criminal process is being used in a manner that is civil but it is clear to the court that investigations have not been finalized and any alleged abuse at this stage appears to the court to be speculative. Under our Constitution pre-hearing investigations cannot be unconstitutional unless they purport to obtain evidence in an unlawful manner or they infringe on the rule against self incrimination or violate the right of silence or because of the manner they have been conducted they seriously erode the presumption of innocence **if and when the suspect is charged. It is clear that the presumption of innocence commences upon the suspect being charged**-see s 77(2)(a) of the Constitution.’⁹¹(Emphasis added)

2.7.8 Implications of the Decision

It is submitted that the findings by the Honourable Judge has very wide implications for the jurisprudence of the court and the laws of this country. It first makes the mandate of

⁹⁰ P. 3

⁹¹ P. 3

KACC subject to any prior opinion or representations made by the Attorney General which constitutes an amendment to the Anti-Corruption and Economic Crimes Act. The Anti-Corruption and Economic Crimes Act declares KACC independent and only accountable to Parliament.⁹² The Court found that since the acts were carried out by the executive and since the Commission is part of the executive, it is bound by those acts and cannot question the same. This finding undermines the mandate of KACC considering that it was set up as a ‘watch dog’ institution to *inter alia* investigate corruption and recommend prosecution. If the court’s argument is stretched to its logical limits, it means that the Commission cannot investigate any act done by the executive. This would be a huge blow to the fight against corruption since most graft complaints are against the executive branch.

Secondly, it equates the Attorney General’s opinion or representation as tantamount to immunity against investigation and/or prosecution. Yet the Attorney General has no power to grant immunity under the Constitution. In the event that the Attorney General was wrong in his opinion, it means that illegal acts will not be punished. It also means that money lost through such acts cannot be recovered. It is submitted that KACC had the mandate to investigate the legality of the contract including the role that the Attorney General played in the transaction. The Attorney General (or any person for that matter) is not above the law and his actions can be questioned by other public institutions such as KACC and the Courts.

This paper finds the courts abhorrence of investigations into the contracts unusual. Whereas estoppel may arguably be raised against the Attorney General or the Government of Kenya in the event that he was to contend otherwise than his earlier representations in a civil case, there can be no valid objection to an investigation which can even be for a civil purpose. The court equated investigations to ‘criminalization of a commercial transaction’. Yet it agrees that civil action can be pursued. It held that;

⁹² Section 10

‘both Respondents are not entitled in law to criminalize a commercial transaction while it is clear to all that the greater public interest, which is recovery of any loss, can be secured in the Arbitration.’⁹³

2.7.9 Payments Must be Made

The court is in favour of payments to the *ex parte* Applicant without any inquiry. It observed;

‘Attempts to stop payments payable and due to a contracting party induces breach of contract. KACC’s directives on this constitute a statutory breach and clear encouragement by KACC for the GOK to breach an international commercial agreement and such an action is clearly outside the purpose of both vindicating criminal justice and upholding Kenya’s public policy. **No agent whether within or without GOK should be allowed to unravel contractual transactions entered into by the Government**’.⁹⁴(Emphasis added)

Thus according to the Judge, public policy and public interest requires that all contracts entered into on behalf of the Government of Kenya should be honoured without questions and without laying bare the details to determine whether the Government is getting value for money. It is submitted that the judgment is a blow to transparency and accountability. The importance of transparency and accountability in public affairs cannot be over-emphasized. Article 5 of UNCAC urges member states to develop and implement or maintain effective anti-corruption policies that reflect the principles of the rule of law, transparency and accountability in management of public affairs.

While noting that the contract has been said to be suspect, the court nevertheless held that Kenya’s reputation would suffer internationally if it is not honoured. He observed that the contract should be honoured even in the face of allegations that the Applicant is non-existent noting that the ‘so called “ghosts” did hand over a completed project.’⁹⁵ Does performance confer personality to a non-person? The view of this paper is that the identity of the Petitioner was one fact which the Commission was entitled to investigate since it had been called into question.

⁹³ P. 25

⁹⁴ P. 29

⁹⁵ P. 36

2.7.10 National Security

In its judgment, the Court invoked national security as a ground for prohibiting investigation. Traditionally, the executive is the final authority on the question of national security since it is a political question. In this case however, the court dismissed the statement by the Permanent Secretary, Internal Security, to the effect that no issue of national security is involved and found that he had no idea what he was saying. It found:

‘although the affidavit sworn by Zachary Mwaura, Permanent Secretary Department of Defence has expressed the Permanent Secretary’s view of the matter on security concerns,it is the court’s view that it is entitled to have the final word because the acts, inquiries, investigations or court proceedings would include publications of the plans, specifications and drawings which would have considerable national security dimensions.’⁹⁶

The court went on to find that national security overrides concerns about corruption. It stated;

‘It is the firm view of this court, that national security concerns override any other public interest concerns including investigations no matter how well intentioned. The prosecution of a criminal act or omission or anti corruption crusades, including investigations, all fade away in the face of national security. The need to preserve national security ranks higher in the public interest concerns for this country...’⁹⁷

It thus concluded;

‘Finally, with great respect, the Permanent Secretary in his affidavit has not given thought or mention to these concerns at all and the court is entitled to intervene because in the view of the court no Permanent Secretary given the same set of facts would reach Mwaura’s conclusion in the circumstances.’⁹⁸

It is submitted that the court was being more executive-minded than the executive. It shows a lack of respect for the executive by the judiciary and constitutes a breach of the principle of separation of powers. It is further submitted that corruption occurring at a large scale can be a threat to national security. Indeed the preamble to UNCAC expresses concern about the threats posed by corruption to ‘the stability and security of societies’ and about ‘cases of corruption that involve vast quantities of assets, which may constitute

⁹⁶ P. 57

⁹⁷ P. 59

⁹⁸ Ibid

a substantial proportion of the resources of States and that threaten the political stability and sustainable developments of those state'.⁹⁹It was therefore wrong for the court to sacrifice anti-corruption measures at the shrine of national security. In any event, if the court was genuinely of the view that the matter was non-justiciable, it should not even have handled the petition in the first place.

2.7.11 Public Policy

The court partly justified the intervention on public policy. In the court's view;

'the court's intervention is absolutely necessary so as to uphold the public interest.'¹⁰⁰

It therefore held that the Respondents are in breach of the public policy of Kenya and restrained them as prayed for in the petition.

This finding on public policy contrasts with that of Justice Ojwang in *Republic v Attorney General & another Ex parte Vaya & another*.¹⁰¹ According to Ojwang, our major social problems are poverty and lack of access to food, water, dwellings, education, health and essential services. He held that public policy is in favour of bringing before the courts of justice persons suspected of crimes involving public resources noting that prohibitory orders have had the effect that 'allegations of corruption or misapplication of funds were not tried and fully ventilated in court.'¹⁰²He held:

'One critical custodian of this public policy is the Attorney General in his prosecutorial role; and in a matter such as the one in hand, this Court ought not hold that no prosecutions may be brought against persons suspected of committing offences touching on national resource use. Accordingly I hold that there is no public policy to limit the competence of the Attorney General to prosecute persons in the position of the applicants.'¹⁰³

It is submitted that Justice Ojwang correctly evaluated public policy choices. As a result, he correctly determined the overarching public policy when it comes to misuse of public

⁹⁹ See the UNCAC document available at http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed on 30/8/2009) p. 5. The preamble to the African Union Convention on Preventing and Combating Corruption, (AUCPCC) similarly recognizes the destructive capacity of corruption on the stability of states.

¹⁰⁰ P. 62

¹⁰¹ Supra note 1

¹⁰² Ibid at p. 296

¹⁰³ Ibid p. 298

resources. There is no necessary connection between investigating corruption and national security. UK's Serious Fraud Office (SFO) has been investigating BEA systems, the world's second largest arms manufacturer with respect to allegations of corruption, for the last six years without any interventions by the courts on grounds of national security.¹⁰⁴

2.7.12 Reluctance to Follow the Precedents in *Mercantile, Midland and Nedemar* Decisions

In a later case of HC. Misc. Appl. No. 591 of 2006; *David Lumumba Onyonka vs Attorney General*,¹⁰⁵ Justice Wendoh backed away from holding that the Attorney General's opinion barred the state from instituting a criminal case for wrong-doing. The Applicant had contended that the Attorney General, having confirmed that all the legal aspects had been addressed, cannot charge the Applicant on the same facts that he had addressed. Unlike the preceding cases, the Judge was willing to 'unravel the contract' and determine the role which the applicant played in the transaction. She was ready to accept that the Attorney General's opinion does not absolve an applicant from wrong doing. She stated;

'The question is whether the Applicant performed the due diligence or verified the existence of the Anglo Leasing Finance Co., what projects it has successfully completed and its credit-worthy as he alleges in his recommendations at paragraph 2.8 of his opinion. The Applicant has not shown how the Respondent's legal opinion relates to the issue of the existence of Anglo Leasing Co. and how sound an entity it was. These are not the issues that this court can determine in a Judicial Review application.'¹⁰⁶

This decision contrasts with the preceding decisions which *inter alia* declared that: KACC, as part of the executive, cannot be allowed to unravel a contract in which the Attorney General has rendered an opinion; that the Attorney General cannot run away from his decision; that KACC is bound by the Attorney General's opinion; that where public money has been lost criminal action will not be appropriate; that public morality demands that we do not back away from international contracts; that you cannot

¹⁰⁴ Story available at <http://news.bbc.co.uk/2/hi/business/8284549.stm> (accessed on 1/8/09)

¹⁰⁵ Unreported

¹⁰⁶ P. 12

'criminalize' an international contract containing an arbitration clause; and that issues of criminality can be dealt with by the arbitral tribunal. The case depicts that even the courts themselves are not comfortable with the jurisprudence developed in these cases. They will try as much as possible to create fine distinctions in order to depart from them in certain cases.

Conclusion

This chapter dealt with an in-depth analysis of seven selected cases. These are *Gachiengo*, *Meme*, *Saitoti*, *Kotut*, *Midland*, *Mercantile* and *Nedemar* cases. This study has succeeded in exposing the emerging jurisprudence in the cases analyzed. The next chapter will highlight the underlying principles to these decisions. It will seek to find a connecting thread in the decisions. It will then draw general conclusions of the study and demonstrate whether the hypotheses of the study have been proved or disapproved. Lastly, it will make recommendations for reform.

CHAPTER 3

FINDINGS AND RECOMMENDATIONS

‘For more than forty years, Africa’s political leadership has failed to attain an acceptable level of internal and external legitimacy in the management of public affairs. As a result, decision-making in the public domain remains an affair largely of power, rather than of law, of expediency rather than of essential justice, and of discreetly determined impulses rather than of social necessity.’¹

The previous chapter analysed a total of seven significant cases on corruption in Kenya. At the risk of repetition, these are; *Gachiengo*, *Meme*, *Saitoti*, *Kotut*, *Midlands*, *Mercantile* and *Nedemar* cases. The cases are significant because they produced jurisprudence with far reaching implications on the business of fighting major corruption scandals. They are also significant because they relate to high value cases. *Saitoti*, *Kotut*, *Midland*, *Mercantile* and *Nedemar* cases relate to the twin scandals of Goldenberg and Anglo-leasing. The next task will be to draw conclusions from the study. Has it succeeded in the task set out in Chapter One.? Has it proved or disapproved the hypothesis? These and other questions are what this chapter will deal with. In addition, the chapter will contain recommendations to remedy or alleviate the problem whereby major corruption scandals are not thoroughly investigated, the perpetrators are not brought to book and public property is not recovered and thereby advance accountability in public service. We begin by testing the findings against our hypotheses.

3.1 The Findings Were Constitutionally and Legally Unjustified

It is the conclusion of this study that, with the exception of *Meme*, the findings in the cases under review were constitutionally and legally unjustified. The errors have been

¹ Okoth-Ogendo H.W.O, 2000, ‘The Quest for Constitutional Government in Africa’, in Hyden G., *et al* (eds), *African Perspectives of Governance*, Trenton: Africa World Press: 1-22 at p.17

demonstrated in chapter two. The erroneous principles established include; that only the Commissioner of Police can conduct investigations under the Constitution; that there can be government policy which is contrary to the law; that once a Member of Parliament has been questioned by Parliament he cannot be charged on the basis of the same facts; that the right to be presumed innocent takes effect well before the person has been charged; and that public policy demands that where money has been lost, recovery rather than prosecution should be pursued. The following are some of the outstanding errors highlighted against specific cases or group of cases.

3.1.1 The Decision in *Gachiengo*

As explained in the preceding chapter, a comprehensive critique of this case has been provided by the *Meme* decision. Its outstanding error is that only the Attorney General can conduct prosecutions under the Constitution. The other main error is that only the Commissioner of Police can conduct investigations under the Constitution. The law may empower other agencies of Government to investigate crime and prosecute without offending the Constitution.

3.1.2 The Decisions in the Goldenberg cases

The decisions referred to herein are the *Saitoti* and *Kotut* cases. The decisions expose a number of errors.

The first error is that **there can be public policy which is contrary to the law**. In exonerating *Saitoti*, the court held that he acted pursuant to government policy to approve export compensation at the rate of 35% even though the law fixed it at 20%.² It is submitted that public policy cannot operate outside the law. That would be a criminal conspiracy rather than public policy.

Secondly, **the courts went beyond the permitted limits of judicial review and substituted the factual findings of the Goldenberg Commission with those of their**

² The Local Manufacturers (Export Compensation) Act, Cap. 482

own. This is contrary with the cardinal principle that judicial review is concerned with the decision making process rather than the merits of the decision itself.

Thirdly, **it was not legally permissible to combine public law and private law remedies.** It was therefore not in order to find that the Goldenberg Commission exceeded its mandate and at the same time hold that the Applicant's right to fair hearing had been breached. In so far as that finding went against previous holdings, the courts applied the law selectively and inconsistently.³

Fourthly, their holding that the applicants' constitutional rights to fair hearing and to be presumed innocent had been breached, **openly went against the plain reading of the Constitution and previous holdings that such protection only accrues upon the accused being charged with an offence.**⁴ It does not cover pre-trial publicity. The implication of the holding is that all suspects of major financial scandals will not face the law because of the publicity that will precede it.

Fifthly, the holding in *Saitoti* case **that a 'trial' can occur in Parliament which can give rise to a plea of double jeopardy if the Member of Parliament in question is subsequently charged, or threatened to be charged in a court of law on the same facts is spurious.** Such a finding would be contrary to the theory of separation of powers underlying Government functions and undermine the rule of law.

Lastly, there is no necessary connection between the quashing of the Goldenberg Report and the charging of the applicants based on available evidence independent of the Report. Even before the Goldenberg Commission was established, the evidence existed. The existence of the Commission did not alter the culpability or otherwise of those who perpetrated the scandal. **The failure of the Goldenberg Commission to deliver a credible report (and it is contended that the report was credible) should not be a bar**

³ The decision went against their holding in *Kenya African National Union v Mwai Kibaki & 6 others* (2005) eKLR,

⁴ See particularly; *Republic VS El Man* (1969) E.A. 357; *Francis Mburu Mungai v Director of Criminal Investigations & another* (2006) eKLR; and *Dr. Christopher Ndarathi Murungaru vs Kenya Anti-Corruption Commission & another* (2006) eKLR

to the quest for accountability and justice to the aggrieved public. It is a historical past which we must confront and come to terms with through a combination of truth, amnesty and justice.

3.1.3 The Decisions in the Anglo-Leasing Cases

The decisions referred to herein are *Midlands*, *Mercantile* and *Nedemar* cases. Similarly, the cases contained a number of errors.

The first error is that **there should be no criminal investigation in contracts bearing an arbitration clause**; that the role of the court in such instances is merely to uphold party autonomy to choose the forum to deal with the matter. This came out clearly in the *Midlands* and *Nedemar* cases. As a basic fact, it is trite practice that the court must weigh the implication of its judgment. What the court ignored was the fact that not all the parties were private entities. One of the parties in each of the three cases was the Government of Kenya. The contract price was to be paid with public funds. Therefore all the laws relating to authorization, procurement and payment were to be followed from inception to completion of the contracts. The implication of the Courts ruling is that, all that the public officers committing Kenya to unconscionable contracts have to do is to insert an arbitration clause in the agreement. Through this single act, the parties concerned will have granted themselves immunity from the criminal process for the role of the court is merely to support party autonomy. Such a conclusion goes against the fundamental principle that no one is above the law nor can preclude the criminal jurisdiction of the court. Both civil and criminal consequences should flow from breach of law.

The second error is that **contracts which relate to national security are non-justiciable and cannot be investigated by state agencies.** This was the holding in *Nedemar*. Further according to the decision, the final authority on whether state security is in danger of being breached is not the representative of the Executive but the Court.

The political question doctrine is used by the Courts to shield themselves from deciding questions which are political in nature. The principle is important in order to preserve

functional separation between the three arms of government. It cannot be used to bar investigations relating to legality of transactions entered on behalf of the Government. Further, it is for the executive to state that national security is at stake. It is not for the presiding Judge to overrule the executive and hold that national security is at stake. As submitted in chapter two, corruption can be a threat to state security. The fight against corruption should not be sacrificed rather too casually at the altar of national security at the instance of the judiciary.

The third error is that **as long as there is money lost, public interest demands that recovery be pursued and criminal investigations and proceedings should not be instituted**. This was the holding in all the three cases. Several objections can be raised. Firstly, other than mere assertion, no such public policy was shown to exist. Secondly, it is the duty of the court to apply the law and not to prescribe what public policy is. That task should be left to elected officials and state bureaucrats. Thirdly, such a policy would privilege those who succeed to steal public funds over those who merely attempt. Fourthly, such a policy can only act as a guide in terms of prioritization and cannot be used to bar investigations of whatever nature and institution of criminal proceedings. Finally, in order to mount recovery proceedings investigations are necessary.

The fourth error is that **the applicants are protected by the provisions of section 77(1) and (2)(a) of the Constitution before they are charged**. As submitted in chapter two, the right to a fair trial and to be presumed innocent begins once a person has been charged. As Dr. Githu Muigai observed, to the extent that the courts have erroneously interpreted the Constitution, they have unconstitutionally amended it.⁵

The fifth error is that **KACC cannot investigate a contract entered into by the executive in which the Attorney General has rendered an opinion**. This is a prescription for impunity. All that the executive needs to do to ensure that its action will not be questioned is to obtain an opinion from the Attorney General. The Attorney

⁵ Muigai, G., 2001, 'Constitutional amendments and the constitution amendment process in Kenya (1964-1977)' unpublished PH.D thesis, University of Nairobi, Kenya, p. 232

General's opinion cannot render an illegal act legal. The Attorney General's opinion can only found a plea of estoppel in a civil case or mitigation in a criminal case.

The sixth error is that **the exercise of the mandate of KACC is subject to any prior opinion or representations made by the Attorney General.** This was one of the observations in *Nedemar*. This finding constitutes an amendment to the Anti-Corruption and Economic Crimes Act which declares that the Commission is independent and that it is only accountable to Parliament.⁶

The seventh error is that **if the contract between the Government of Kenya and a third party is found to have been tainted by illegality and public funds were paid under such a contract, no recoveries can be made.** If the investigations were to establish that the contract was tainted by illegality, for instance because the parties who purported to contract on behalf of the Government lacked authority, there is no reason why the Government cannot recover on the principle of restitution.

The eighth error is that **as long as the contract has been performed, there is no need to conduct investigations to establish whether the company which carried out the work actually exists.** This was one of the observations in the *Nedemar* case where the court castigated KACC for questioning the existence of the applicant when the "ghost" company had delivered on the contract. Legal status is conferred by registration not by performance of a contract.

3.2 The Decisions Impede the Fight against Corruption

Besides messing up our jurisprudence and unconstitutionally amending our Constitution, the decisions have crippled investigation and prosecution of the twin scandals of Anglo-Leasing and Goldenberg and entrenched impunity in our national consciousness. The pronouncements in *Saitoti* and *Kotut* cases, for instance that 11 years is a long time to institute criminal charges, means that each and every actor in the scandal ought not be prosecuted. The judiciary effectively buried all hopes of holding all those who

⁶ Section 10 of ACECA

perpetrated the same to account. With respect to Anglo-leasing cases, in so far as the Attorney General gave his positive opinion and in so far as the contracts have an arbitration clause, the court has decreed that you cannot ‘criminalize’ such contracts. It follows that according to the Courts, the Government should pay as per the contracts however unconscionable. Indeed in *Nedemar*, the court chastised KACC for advising the Government to withhold payment until the contracts are investigated.

3.3 The Judiciary is Insensitive to Public Interest and Lacks Independence

This study concludes that the judiciary is insensitive to public interest in handling corruption related cases and lacks independence. Based on the analysis and the glaring inconsistencies in the enforcement of the law, it is the view of this study that the conclusion is justified. The study will address the issues of public interest and independence separately.

3.3.1 Insensitivity to Public Interest

The upshot of the foregoing analysis is that the judiciary is insensitive to public interest in corruption related cases. After analyzing the emerging jurisprudence in Anglo-Leasing and Goldenberg cases, Dr. Wambua Musili regrets that the decisions inhibit rather than facilitate justice to the aggrieved public.⁷ He concluded that;

‘...the process of bringing to justice many suspects of corruption and economic crimes and the recovery of lost public funds have been disrupted. The courts appear to have dispensed justice selectively; they have at once exculpated leading suspects in the face of overwhelming evidence and placed their accomplices on their defence.’⁸

He therefore exhorted the Judiciary to eschew erroneous jurisprudence and to deliver justice.

In the view of this study, the Judiciary has frustrated the fight against corruption through a number of schemes or strategies:

⁷ Musili W., 2008, ‘The Emerging Jurisprudence in the Control of Irregularities’, in Ludeki Chweya (ed), *The Conduct Of the Public Service in Kenya*, Nairobi: Claripress

⁸ *ibid*

The first strategy is to **construe the case for the State strictly and that of the applicant liberally**. Rules of procedure are relaxed. Substantive law is interpreted broadly and both private law and public law remedies are granted to the applicant in the same cause.

The second strategy has been to **prohibit the investigative agencies from conducting investigations on the grounds they have no necessary mandate**. This happened in a number of cases. In the *Gachiengo* case the court determined that KACA has no legal authority to investigate corruption. In the *Mercantile* case the court decided that KACC has no legal authority to request for mutual legal assistance even when the Attorney General had approved the application. In the *Midland* case the court decided that the Ministry of Finance could not legally commission PWC to conduct an audit of the work undertaken by the applicants pursuant to the contract entered into with the Government. Lastly in the *Nedemar* case the court held that KACC cannot investigate a contract entered into by the executive and in which the Attorney General has given an opinion.

The third strategy is to **declare that the contract touches on state security** and thus cannot be investigated or questioned. This happened in the *Nedemar* case.

The fourth strategy is to **stretch the permissible limits of the protection under section 77 of the Constitution** intended to secure a fair hearing to the period before a person is charged. This happened in virtually all the cases reviewed. Because of the high profile status of the cases, the most effective strategy is to declare that the applicants will not have a fair hearing due to pre-trial publicity.

The fifth strategy is to **invoke public interest in aid of the applicant's case**. The grant of the orders in most of the cases reviewed, were justified on grounds of broad public interest or public morality. It is therefore submitted that public interest values have been alienated by the court and applied in aid of those suspected of subverting the public good. The emotive power of public interest has been invoked in aid of the applicant's case against the state.

The sixth strategy is to **declare key provisions of the Anti-Corruption legislations unconstitutional**. This happened in the *Gachiengo* case with respect to the Prevention of Corruption Act⁹. Section 31 of ACECA which allowed KACC to seize and detain passports upon application to the court was also declared unconstitutional.¹⁰ Unsuccessful attempts to declare unconstitutional sections 26, 27, 28, and 30 of ACECA, which granted KACC extensive powers of investigations, were made in *Dr. Christopher Ndarathi Murungaru vs Kenya Anti-Corruption Commission & another*.¹¹

3.3.2 Lack of Independence

3.3.2.1 Appointment of Judges and Constitution of the Bench

It is to be noted that all the judges are appointed by the President ostensibly on the advice of the Judicial Service Commission (JSC). The JSC is composed of the Chief Justice, the Attorney General, two Judges appointed by the President, and the Chairman of the Public Service Commission, all of whom are Presidential appointees.¹² The President thus single-handedly, literally, constitutes the JSC. In addition, the President appoints the Chief Justice. He also promotes judges to the Court of Appeal. The Chief Justice, as the Chief Executive of the judiciary wields immense power. He can determine who sits in which Division and who sits in which panel. He can also determine who gets transferred where. He can advise the President to set up a commission to determine the competence of a judge to hold office.

With specific reference to the Judicial Review and Constitutional Division, the Chief Justice appoints judges to sit in the division. When it comes to an important case, he is responsible for assembling the bench to hear the matter. By having regard to the philosophy and individual attributes of a judge, the Chief Justice can influence the outcome of a case.

⁹ Cap. 65 (now repealed)

¹⁰ This happened in the case of HC. Petition No. 199 of 2007; *Deepak Chamanlal Kamani vs Principal Immigration Officer and 2 others*

¹¹ Parliament later controversially amended the said provision with the result that KACC's powers of investigations were whittled down.

¹² See section 68 of the Constitution.

It is therefore apparent that the Executive has a lot of influence on the Judiciary. In practice, the influence of the executive over the judiciary is more acute. This dominance is what late Prof. Okoth Ogendo refers to as the ‘the primacy of the office of the President over all organs of government’.¹³ In such an arrangement, he notes that ‘the semblance of separation of powers that remains is, at best, of administrative significance only and varies with the specific matter at issue’.¹⁴ In this scenario of institutional inequality, ‘decision-making in the public domain remains an affair of power, rather than law, of expediency rather than essential justice and of discreetly determined impulses rather than social necessity.’¹⁵ This is not healthy for a constitutional democracy.

3.3.2.2 The Executive Branch as a Major Player in Corruption

All the major scandals have involved the executive branch of Government. The secrecy surrounding some of the transactions such as security contracts provide fertile ground for executive actors to enrich themselves. With respect to Anglo-Leasing cases, and as pointed out in Chapter two, all the contracts bore very close similarities. They all provided that; the criminal law of Kenya will not apply, the property of the Government of Kenya is liable to execution, the Government of Kenya will not plead sovereign immunity and that payment of the contract price will not be linked to performance. Indeed the payments were ostensibly made by a financier with close nexus to the contractor through a separate finance agreement. The Attorney General gave his opinion in all the cases that the contracts complied with the laws of Kenya (even where they did not) and were enforceable. All the contracts were shrouded in secrecy. There was therefore a system which connected all the Anglo-leasing contracts suggesting common origin. It is submitted that no ordinary person can exact such a bargain from the Government. The contractors must be executive actors or have strong connection with the executive.

¹³ Okoth-Ogendo H.W.O, 1993, ‘Constitutions without Constitutionalism: Reflections on an African Political Paradox,’ in Greenberg D., *et al* (eds), *Constitutionalism and Democracy: Transitions in Contemporary World*, New York: Oxford University Press, pp 65-82 at p. 74

¹⁴ *ibid*

¹⁵ *Supra* note 1 at p.17

3.3.2.3 Evidence of Lack of Independence

Our courts exhibit lack of independence. The evidence is clear when the same judge changes his position with respect to interpretation of the same law from case to case even where the facts are very similar. This embarrassing spectre is best demonstrated by the conflicting interpretations of the scope of protection under section 77 of the Constitution intended to secure a fair hearing. The other example is when the court grants both public law and private law remedies in a judicial review matter as it happened in the *Saitoti* and *Kotut* cases. Both procedural and substantive law is breached for the benefit of selected applicants.

It is not, as might seem, that our Judges are more assertive than their counter-parts in the KANU era. They are still captive to the same interests- executive actors. In this instance however, their interest is not to silence critics, but to shield themselves from the criminal process. Prof. Makau Mutua notes that the judiciary lacks independence and is subservient to the executive.¹⁶ In the view of this study, he is correct when he observes that;

‘.....the judiciary has been subservient to the executive. The judiciary has shown no ability or inclination to uphold the rule of law against the express or perceived whims and interests of the executive and individual senior government officials, their business associates, and cronies.’¹⁷

His observation with regard to the behaviour of Judges in the KANU era is still true today. He argues that;

‘State officials and business associates of leading public servants have sought the protection of the legal system and the judiciary for their illegal actions as official corruption has become the norm. An aggrieved party cannot expect the rule of law to be upheld by a Kenyan court if the offender is a public official or is connected to the KANU elite.’¹⁸

One can substitute ‘aggrieved party’ and ‘KANU elite’ with ‘aggrieved public’ and ‘government’ respectively and the entire statement will accurately describe the present state. With respect to the Goldenberg Scandal, Prof. Mutua points out that the courts have

¹⁶ Mutua M., 2001, ‘Justice under siege: The rule of law and judicial subservience in Kenya’, *Human Rights Quarterly*, Vol. 23: 96-118 at p. 98

¹⁷ Ibid p. 99

¹⁸ Ibid

demonstrated complete inability to effectively and fairly adjudicate or try any matter in which senior officials of government are in jeopardy.

Influence need not be direct or overt. The late Justice William Mbaya, himself a victim of executive interference, notes that ‘the emasculation of the judiciary may be and is often achieved through subtle ways, by letting the judge to take cue of what needs to be done.’¹⁹ He cites that fear of transfer to unpopular stations or other administrative action will ordinarily influence the judge.

3.3.2.4 Need to Safeguard the Judiciary from Executive Influence

Because corruption is prevalent in the executive branch of government, it is important, if the Judiciary is to act as a check on the said branch, that the executive should have no role in the constitution of the former. The Judiciary should be completely free of executive influence whether directly or indirectly. As Prof. Mutua observes, ‘only an overhaul of the legal and substantive relationship between the judiciary and the executive can start to restore sanity to the system.’²⁰ It is better that we take our chances with the legislature than the executive in the circumstances.

3.4 RECOMMENDATIONS

3.4.1 Enhancing the Independence of the Judiciary

The key challenge to constitutional democracy, particularly in Africa, is how to build institutions that can withstand pressure from outside, particularly from executive actors. The executive exercises undue influence on many of the governance institutions. The executive is still predatory on the other institutions of Government which are in theory supposed to be equal; namely the Judiciary and the Legislature.

¹⁹ Mbaya W., 1993, ‘Fundamental rights in Kenya’, unpublished LL.M thesis, University of Nairobi, Kenya p.127

²⁰ Mutua M., 2001, ‘Justice under siege: The rule of law and judicial subservience in Kenya’, *Human Rights Quarterly*, Vol. 23: 96-118 at p. 107

This study shows that the problem is hardly the law. It is the institution that is tasked with interpreting it that has subverted the Constitution and the law through the process of interpretation. This has hampered the development of a coherent and principled interpretation of the Constitution and the ordinary law. Little or no precedent value is created as the principles applied change from case to case. It has also undermined the authority of the Constitution as the supreme law of the land. In addition, it has exposed the judiciary to ridicule and damaged its esteem as an independent institution.

The main cause of inconsistent behaviour appears to be pressure from the executive. As corruption mainly touches on the executive branch, it is proposed that it should have no role in the constitution of the judiciary. All Judges of the High Court and the Court of Appeal should be appointed by a body whose members are not executive appointees and approved by Parliament. The Chief Justice should also be appointed through the same procedure. Similarly, the recommendation that a tribunal be constituted to determine the fitness of a judge should be to the same body.

We should borrow from the example of the Advisory Board of KACC. The Advisory Board is composed of nominees of professional and religious organizations.²¹ A similar arrangement should be put in place with respect to the appointment of Judges. Granted, this recommendation does not represent a perfect solution. Indeed the nominees will be subject to the political processes within their respective organizations and may represent partisan interests. However, it is submitted that such an arrangement will certainly enhance the independence of the Judiciary.

A warning is however appropriate that it will take time for the judiciary, even after independence is granted, to shed off the culture of subservience to the executive that is entrenched in the institution. Much of its success will depend on the goodwill on the part of the executive which must be committed to constitutional principles and the rule of law. In a sense, the executive must be willing to free its captive.

²¹ See section 16 of ACECA. The Advisory Board recently resisted pressure from the executive to endorse the unilateral re-appointment of the Director and two Assistant Directors of KACC by the President.

3.4.2 Mainstreaming Anti-Corruption Law and Principles in the Constitution

Corruption is a matter of national concern. It threatens our very being as a nation. It violates the social contract under which it is theorized that we all agreed to be governed by the law and to compete fairly for a share of the public goods and to own certain resources jointly. It is time that we mainstreamed anti-corruption laws and principles in the highest law in the land.

Principles such as integrity, accountability, transparency, rule of law, public trust, public interest and responsibility should be recognized and anchored in the Constitution. Laws meant to deal with corruption should not be exposed to the risk of being rendered sterile through judicial interpretation. As long as the anti-corruption legislation is subordinate to the Constitution, it will be undermined and subverted through interpretation by the Judiciary or amendment by Parliament. By entrenching the law into the Constitution, the Judges will be denied an opportunity to undermine the law by declaring it to be contrary to the Constitution or prohibit investigative agencies from executing their mandate on the grounds that their activities infringe on fundamental rights. Anti-Corruption principles and legislations will rank at par with other constitutionally protected interests such as fundamental rights. The Judiciary will not be at liberty to relegate anti-corruption measures on account of constitutional rights. KACC in particular, together with its powers and functions should be constitutionally protected.

It is noted that Kenya is currently reviewing its constitution. This presents an excellent opportunity to effect the proposed changes. It is therefore appropriate at this point to review past attempts to entrench anti-corruption laws and principles in constitutional drafts.

3.4.2.1 Constitutional Review: Opportunities for Reform

Encouraging steps to entrench anti-corruption laws and principles into the supreme law in this country were made in the failed constitutional drafts. These were ‘The Draft Constitution of Kenya, 2004’ also known as ‘the *Bomas* draft’ and ‘the Draft Constitution of Kenya, 2005’ variously known as ‘the *Wako* draft’, ‘the *Kilifi* draft’ or the

‘Referendum draft’. The Wako draft is essentially a modification of the Bomas draft. Large portions of the Bomas draft were lifted and incorporated into the Wako draft.

Both drafts emphasise the values of public trust and public service. Section 150 of the Bomas draft provide that the powers of the Executive are to be exercised for the well-being and benefit of the people of Kenya and that an office bearer who is assigned executive authority shall serve the people and shall not act in a manner incompatible with the principle of service to the people. Section 141 of the Wako draft is to the same effect. With respect to judicial power, the drafts emphasise that it is derived from the people and that it shall be exercised for the common good.²²

The drafts espouse the principles of good governance, transparency and accountability and the rule of law.²³ The drafts require state officials interpreting the Constitution to have regard to the national values, principles and goals which include eradication of corruption and efficient management of national resources.²⁴ The drafts do not subordinate these principles to such interests as national security. They provide that national security shall be pursued in compliance with the law and with utmost respect to *inter alia*, the rule of law.²⁵

Responsible leadership and proper conduct in public affairs is similarly given prominence by both drafts. At section 94, both drafts emphasise public trust, integrity, meritocracy, public interest and accountability in public office. Section 96 of both drafts directly addresses corruption and forbids state officers from *inter alia*; using ones office for private gain, accepting bribes, misappropriating public funds and misusing public property. At section 99 of both drafts, an ‘Ethics and Integrity Commission’ is created with the mandate of *inter alia* receiving wealth declaration forms from public officers and putting in place measures for the prevention of corruption.

²² Section 181 of the Bomas draft and section 178 of the Wako draft.

²³ Section 4 of both drafts

²⁴ Section 12 of the Bomas draft and 13 of the Wako draft

²⁵ Section 272 of the *Bomas* draft and 255 of *Wako* draft

One major shortcoming of both drafts is that they failed to create a strong body with the mandate to investigate and prosecute corruption. The proposed body has a weak mandate and is more akin to an Ombudsman than an Anti-Corruption Agency. Nevertheless, the drafts to a large extent mainstream anti-corruption laws, principles, values and goals. They serve as important benchmarks for future constitutional reviews.

3.4.2.2 Amending the Constitution in the Short Term

Pending comprehensive review, a number of constitutional amendments are immediately necessary if the fight against major corruption is to be sustained. Firstly, the Constitution needs to be amended to make it clear that the fundamental rights under part V of the Constitution are subject to the public interest of detecting, investigating and punishing crime. Secondly, as argued by Ringera, prohibition of investigations of corruption cases should be constitutionally outlawed since the power has been exercised irresponsibly to the detriment of anti-corruption measures.²⁶ Thirdly, the Constitution should provide that once a trial has begun, the court will not issue orders to stay proceedings on the grounds of violation of fundamental rights until the determination of the trial. This will inhibit frivolous applications intended to stall prosecution. Fourthly, the Constitution should provide that ‘nothing in the Anti-Corruption and Economic Crimes Act should be read as being contrary to this Constitution.’ This will serve to anchor the Act in the constitution and thereby protect the powers and functions of KACC.

3.4.3 Strengthening KACC

KACC is charged with the primary task of investigating corruption. Its powers of investigations were however considerably whittled vide Statute Law (Miscellaneous Amendment) Act, 2007.²⁷ As a result, it cannot compel a suspect to provide information and any evidence obtained from the suspect is inadmissible. The amendments need to be reversed and more powers need to be given to KACC. Secondly, there is need to expressly grant it power to request for mutual legal assistance to reverse the effect of the

²⁶ See ‘Resignation statement by Justice (Rtd.) Aaron G. Ringera, Director of Kenya Anti-Corruption Commission (KACC) on 30.09. 09’ (unpublished)

²⁷ The amendments affected sections 26, 27, 28 and 30 of ACECA.

Mercantile decision. Thirdly, its jurisdiction to recover public property needs to be made more robust by providing for summary procedures for determining cases using affidavit evidence in appropriate cases. Fourthly, there is need to grant it prosecutorial power in line with international standards set under UNCAC.²⁸ Fifthly, there is need to make it clear that reappointment of the Director and Assistant Directors is upon recommendation by the Advisory Board and approval by Parliament. This is to guard against Executive interference of the institution.²⁹

3.5.4 Strengthening other Institutions

There is need to strengthen the capacity of other institutions dealing with corruption cases. These include the Prosecutions Department of the Attorney General's Office, the Criminal Investigations Department (CID) of the Police and the Judiciary. The respective offices should be sufficiently manned by personnel with appropriate training. With respect to the CID, they should be equipped with skills in forensic investigations. The State Counsels at the Prosecutions Department of the Attorney General's Office on the other hand need to be trained on modern ways of investigating corruption and presenting evidence, particularly of the electronic type. The members of the judiciary too need to be sensitised on corruption and on the emerging trends in dealing with graft cases in a globalized world in which advancement in technology pose a serious challenge in the control of the vice.

In addition, there is need to create other institutions to augment anti-corruption efforts. One such institution is a Financial Intelligence Unit (FIU) whose mandate would be to detect money laundering.³⁰

²⁸ Article 36 requires states to establish specialized agencies to combat corruption through law enforcement. The states are further required to grant such bodies sufficient independence to effectively carry out their duties.

²⁹ On 6th August, 2009, the President unilaterally reappointed the Director and two Assistant Directors. Following public uproar over the reappointments, the three subsequently tendered their resignations.

³⁰ There is pending in Parliament 'The Proceeds of Crime and Anti-Money Laundering Bill, 2008,' which proposes to establish a Financial Reporting Centre (FRC).

3.6 Conclusion

This study has examined judicial attitude to corruption cases through the prism of seven cases. The seven cases were selected because the jurisprudence in them has serious implications for the legal and institutional framework for fighting corruption. The principles they espouse have the potential to paralyse the investigation and prosecution of corruption cases of grave public importance. The judiciary has prohibited investigation and prosecution of cases touching on major scandals on the grounds *inter alia* that the constitutional rights of the suspects have been, or are likely to be, infringed. In one case, the court decided that the mandate of the body charged with fighting corruption was unconstitutional. The precedents pose a risk to the anti-corruption crusade. The study has also shown that in six out of the seven cases selected for analysis, public interests is not given prominence and effect in the decision making process. It may well be that the analysis of the seven cases exemplify the general attitude of the courts to corruption cases. However, that is the task for a more extensive research going beyond the scope of this study. However, in view of the significance of the cases examined, it is trite to show concern for the emerging jurisprudence.

The study has shown that the state of our laws is hardly the cause for the trend. The main problem has been the interpretation given by the judiciary. The interpretations change from case to case depending on the personalities before the court. There is therefore need to enhance the independence of the judiciary to shield it from outside interference, particularly from the executive. In addition, there is need to shield the investigation and prosecution of corruption cases from the capricious behaviour on the part of judiciary. Judicial power to stop investigation and prosecution of corruption cases should be curtailed.

It is hoped that the study has made a case for more concern for public interest in the judicial process. With every power comes responsibility. This truism applies to judicial power no less. Judicial power, like any power vested in a public office, is held and exercised in public trust. As such, it must be used to advance public good. If it is exercised irresponsibly or capriciously, public interest suffers. That is an important lesson of this study.

BIBLIOGRAPHY

Books

1. Austin J., 1954, *The Province of Jurisprudence Determined*, Indian Economy Reprint, 2005, Delhi: Universal Law Publishing Co. PVT
2. Bentham J., 1781, *Introduction to the Principles of Morals and Legislation*, Indian Economy Reprint, 2004, Delhi: Universal Law Publishing Co. PVT
3. Bix B., 2006, *Jurisprudence: Theory and Context*, 4th Edition, Sweet & Maxwell
4. Cardozo B, 1923, *The Philosophy of Law*, Indian Economy Reprint, 2006, Delhi: Universal Law Publishing Co. PVT
5. _____, 1923, *The Growth of Law*, Indian Economy Reprint, 2006, Delhi: Universal Law Publishing Co. PVT
6. _____, 1961, *The Nature of the Judicial Process*, 7th Indian Reprint, Delhi: Universal Law Publishing Co. PVT
7. Diamond L., 1999, *Developing Democracy: Toward Consolidation*, Baltimore: John Hopkins University Press
8. Denhardt R., 2007, *The New Public Service: Serving, not Steering*, New York: M.E Sharpe
9. Denning, Lord, 1979, *The Discipline of Law*, London: Butterworths
10. _____, 1982, *What Next in the Law*, London: Butterworths
11. _____, 1983, *The Closing Chapter*, London: Butterworths
12. _____, 1984, *Landmarks in the Law*, London: Butterworths
13. Dworkin G., (ed), 1967, *Ogders' Construction of Deeds and Statutes*, London: Sweet & Maxwell
14. Dworkin R.M, 1977, *The Philosophy of law*, Oxford University Press
15. _____ 1986, *Law's Empire*, Indian Economy Reprint, 2nd Edition, Delhi: Universal Law Publishing Co. PVT
16. Eskridge W., 1991, *Dynamic Statutory Interpretation*, 1st Indian Reprint, 2000, Delhi: Universal Law Publishing Co. PVT

17. Fitzgerald P.J (ed), 1970, *Salmond on Jurisprudence*, London: Sweet & Maxwell
18. Freeman M.D.A., 2001, *Lloyd's Introduction to Jurisprudence*, 7th Edition, London: Sweet & Maxwell, pp 953-991
19. Fuller L.L, 1969, *The Morality of Law*, 4th Indian Reprint, 2006, Delhi: Universal Law Publishing Co. PVT
20. Goodman A., 2005, *How Judges Decide Cases: Reading, Writing and Analysing Judgements*, ST. Albans: Xpl Law
21. Hart L. A, 1994, *The Concept of Law*, 2nd Edition, Oxford: Oxford University Press
22. Kibwana, K., Wanjala, S. and Oketch-Owiti.,(eds) 1996, *The Anatomy of Corruption: Legal, Political and Social–Economic Perspectives*, Nairobi: Claripress Ltd.
23. Lippman W., (1955; 2003 reprint), *The Public Philosophy*, New Jersey: Transaction Publishers
24. Lloyd D, 1991, *The Idea of Law*, London: Penguin Books
25. Nichols C., Daniel T., and Polaine M., 2006, *Corruption and Misuse of Public Office*, Oxford: Oxford University Press
26. Nwabueze, B. O., 1973, *Constitutionalism in the Emergent States*, Cranbury: Associated University Presses
27. Pound R., 1954, *An Introduction to the Philosophy of Law*, 4th Indian Reprint, Delhi: Universal Law Publishing Co. PVT Ltd
28. Scalia A., *A matter of Interpretation: Federal Courts and the Law*, New Jersey: Princeton University Press
29. Sihanya B.(ed), 2005, *Control of Corruption in Kenya: Legal-Political Dimensions 2001-2004*, Nairobi: Claripress
30. Snowwiss S., 1990, *Judicial Review and the Law of the Constitution*, 4th Indian Reprint, 2008, Delhi: Universal Law Publishing Co. PVT
31. USAID, 1998, *Democracy and Governance: a Conceptual Framework*, Washington: Centre for Democracy and Governance
32. Wagner A., Werner W., and Cao D., (eds), 2007, *Interpretation, Law and the Construction of Meaning*, Dordrecht: Springer

33. Wellington H., 1990, *Interpreting the Constitution: The Supreme Court and the Process of Adjudication*, 1st Indian Reprint, 2005, Delhi: Universal Law Publishing Co. PVT
34. Williams R., Williams J., and Flanary R., (eds), 2000, *Corruption in the Developed World*, Cheltenham: Edward Elgar Publishing Ltd.

Chapters in Books

1. Beevi F.M, 1998, 'The Judiciary In Democratic Governance: Some Insights from the Indian Experience', in Inter-Parliamentary Union (ed), '*Democracy: Its Principles and Achievement*', Geneva: Inter-Parliamentary Union: 31-36
2. Boye A. K., 1998, 'Some Important Problems and Aspects of Democracy in the Context of Black African States', in Inter-Parliamentary Union (ed), '*Democracy: Its Principles and Achievement*', Geneva: Inter-Parliamentary Union: 37-46
3. Leftwich A, 2005, 'Theorizing the State,' in Peter Burnell and Vicky Randball (eds) *Politics in the Developing World*, New York: Oxford University Press: 140-154
4. Mulei C, 2002, 'The Judiciary and Constitutionalism: Creating New Ethos and Values', in Lawrence Mute and Smokin Wanjala (eds), *When the Constitution begins to Flower: Paradigm for Constitutional Change in Kenya*, Vol 3, Nairobi: Claripress: 58-88
5. Musili W., 2008, 'The Emerging Jurisprudence in the Control of Irregularities', in Ludeki Chweya (ed), *The Conduct Of the Public Service in Kenya*, Nairobi: Claripress
6. Ngugi J., 2007, 'Stalling Juristocracy While Deepening Judicial Independence in Kenya: Towards a Political Question Doctrine', in Kithure Kindiki (ed.), *Reinforcing Judicial and Legal Institutions: Kenyan and Regional Perspectives*, Judiciary Watch Series, Vol. 5, Nairobi: Kenyan Section of the International Commission of Jurists: 1-20
7. Okoth-Ogendo H.W.O, 1993, 'Constitutions without Constitutionalism: Reflections on an African Political Paradox,' in D. Greenberg, S. Katz, S.

- Wheatley and M. Oliviero (eds), *Constitutionalism and Democracy: Transitions in Contemporary World*, New York: Oxford University Press: 65-82
8. _____ 2000, 'The Quest for Constitutional Government in Africa', in G. Hyden, D. Olowu and H. Okoth-Ogendo (eds), *African Perspectives of Governance*, Trenton: Africa World Press: 1-22
 9. Roederer C., 2004, 'Interpretive Approaches to Legal Theory', in Christopher Roederer and Darrel Moellendorf, *Jurisprudence*, Lansdowne: Juta and Company Ltd: 214-245

Articles

1. Adelman S. and Forster K., 'Critical Theory: The Power of Law' http://www.nclg.org.uk/book1/1_7.htm, p.1 (accessed on 12/6/09)
2. Atieno G., 2003, 'Corruption Perception Index- Kenya to perform poorly', <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=8373> (accessed on 24/6/2009)
3. Dworkin R.M, 1982, 'Law as interpretation', *Texas Law Review*, Vol. 60: 527-550
4. Fiss O.M, 1982, 'Objectivity and Interpretation', (1982) 34 *Stanford LR* 739, 739
5. Holmes O.W, 1897, 'The Path of Law', 10, *Harvard Law Review*
6. Issacharoff S., 2008, 'Democracy and collective decision making', *International Journal of Constitutional Law*, Vol 6 No 2: 231-266
7. Kairys D., 'The Politics of Law: A Progressive Critique', http://www.nclg.org.uk/book1/1_3.htm, p.4 (accessed on 12/6/09)
8. Mutua M., 2001, 'Justice under siege: The rule of law and judicial subservience in Kenya', *Human Rights Quarterly*, Vol 23: 96-118
9. O'Donnell G., 2004, 'The Quality of democracy: Why the rule of law matters', *Journal of Democracy*, Vol. 15 No. 4: 32-46

10. Okoth-Ogendo H.W.O, 2007, 'Power in quest for constitutional order: Reflections on an African political gridlock,' an address delivered at the 7th Hekima Theological Week, February 28th -2nd March 2007 (unpublished)
11. Ringera A. G, 2007, 'Corruption in the Judiciary', a paper presented to the World Bank at Washington D.C on 25th April, 2007, (unpublished)
12. _____, 2009, 'Resignation statement by Justice (Rtd.) Aaron G. Ringera, Director of Kenya Anti-Corruption Commission (KACC) on 30.09. 09', (unpublished)
13. Rosenkrantz C. F., 2003, 'Against borrowings and other nonauthoritative uses of foreign law', *International Journal of Constitutional Law*, Vol. 1, No. 2: 269-295
14. Thompson A., Forward: critical approaches to law, who needs legal theory? http://www.nclg.org.uk/book1/1_2.htm (accessed on 12/6/2009)

Theses

1. Mbaya W., 1993, 'Fundamental rights in Kenya', unpublished LL.M thesis, University of Nairobi, Kenya
2. Muigai, G., 2001, 'Constitutional amendments and the constitution amendment process in Kenya (1964-1977)' unpublished PH.D thesis, University of Nairobi, Kenya
3. Nyaoga, M., 2004, 'Abuse of the judicial criminal process in Kenya', unpublished LL.M thesis, University of Nairobi, Kenya
4. Ondieki, A. O., 2006, 'A critical analysis of the legal and institutional framework in the fight against corruption in Kenya', unpublished LL.M thesis, University of Nairobi, Kenya

Reports

1. The Hansard
2. Report of Judicial Commission of Inquiry into the Goldenberg Affair
3. Special Audit Report of the Controller and Auditor General on Financing, Procurement and Implementation of Security Related Projects, April, 2006

International Instruments

1. The African Union Convention on Preventing and Combating Corruption (AUCPCC)
2. The United Nations Convention Against Corruption (UNCAC)

Constitutional Review Documents

1. The Draft Constitution of Kenya, 2004 (*Bomas* Draft)
2. The Draft Constitution of Kenya, 2005 (*Wako* Draft)

Newspapers

1. The Daily Nation
2. The East African Standard
3. The New York Times, available at <http://www.nytimes.com/>
4. The People's Daily
5. The Star
6. Timesonline, available on <http://www.timesonline.co.uk/tol/news/>