

**TOWARDS A LEGAL FRAMEWORK FOR PERSONAL LIABILITY FOR MISUSE OF OFFICE BY PUBLIC
OFFICERS IN KENYA**

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*GPR699: A PROJECT PAPER PRESENTED TO
THE SCHOOL OF LAW, UNIVERSITY OF NAIROBI,
IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF
THE DEGREE OF MASTER OF LAWS (LL.M)*

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DECLARATION

I, Mark Gakuru Manyeki, hereby declare that this project paper is my original work. This work has never been submitted to any University, College or other institution of learning for any academic or other award. Other works cited or referred to are accordingly acknowledged.

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SUPERVISOR'S APPROVAL

This dissertation has been submitted for examination with my approval as University supervisor.

Signed:.....

Ms Joy Asiema,
University of Nairobi,

Date:.....

DEDICATION

This thesis is dedicated to my wife Miriam who has encouraged me during my studies for a Master of Laws degree. It is also dedicated to my parents for the support both financial and moral, as it is them who laid the foundation of my education and who taught me that even the biggest task can be accomplished if it is done one step at a time.

ACKNOWLEDGEMENT

I thank God the Almighty who has guided me through this period successfully despite my ever challenging schedules. I wish to acknowledge the contribution of my supervisor Ms Joy Asiema, whose input contributed immensely to the completion of this study.

My heartfelt thanks to all my lecturers who were always willing and ready to be consulted despite their busy schedules.

I greatly appreciate the unconditional support my family, brothers, sisters and cousins offered me during the course of my study.

My sincere thanks to all colleagues of the LLM class of 2009/2010 whose presence and interactions served as wonderful stress breakers in and outside class.

Finally, I would like to appreciate all friends within and outside the University of Nairobi, School of Law, whose moral, spiritual, technical and financial support kept my morale and confidence high.

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CHAPTER ONE: INTRODUCTION

1.1 CONCEPTUAL AND THEORETICAL FRAMEWORK

Rousseau stated in *Du Social Contract*¹ that the essence of the society is to advance the ends of the societal, and hence mandate the government to carry out protection of life and property. This is also echoed by Hobbes² and Locke³, both talking about the need for a society that is responsive to the societal concerns of security and self-preservation. The governing body, the government, hence has the sole duty to provide service of governance to the standards of the societal, in such a way as to, according to Amartya Sen,⁴ guarantee the people the right to choose the kind of life they want to live. Indeed, this is the essence of governance. Governance is '*the exercise of political authority and the use of institutional resources to manage society's problems and affairs*,⁵ In an environment of good governance, there is development, and there is enrichment of humans lives through access to 'life sustaining' necessities.⁶

Governance, however, is pillared on certain core principles, at the core of which is accountability.⁷ Accountability ensures actions and decisions taken by public officials are subject to oversight so as to guarantee that government initiatives meet their stated objectives and respond to the needs of the community they are meant to be benefiting, thereby contributing to better governance and poverty reduction.⁸ Indeed, accountability is a key determinant of the state of governance. Thus, strict observation of accountability in the management of public affairs promotes good governance while the lack of it is the

¹ Rousseau, Jean-Jacques (1762), *The Social Contract, or Principles of Political Right*, translated 1782 by G. D. H. Cole, public domain, available at: <http://www.constitution.org/jjr/socon.htm>, (last accessed 20th August, 2012).

² Hobbes, Thomas (1651), *Leviathan*, available at: <http://www.constitution.org/th/leviatha.htm>, (last accessed 20th August, 2012).

³ Locke, John (1689), *The Second Treatise of Civil Government*, available at: <http://www.constitution.org/jl/2ndtreat.htm>, (last accessed 20th August, 2012).

⁴ Amartya Sen (1999), *Development as Freedom*, (Oxford: Oxford University Press), p. 5.

⁵ World Bank (2012), *What is Governance? Arriving at a Common Understanding of "Governance,"* available at: <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/EXTMNAREGTOPGOVERNANCE/0,,contentMDK:20513159~pagePK:34004173~piPK:34003707~theSitePK:497024,00.html>, (last accessed 22nd August, 2012).

⁶ Seers D & Joy L (eds). (1971), *Development in a Divided World*, (Oxford: Oxford University Press), p. 11.

⁷ Odhiambo Mbai (2003), *Public Service Accountability and Governance in Kenya since Independence*, African Journal of Political Science Vol 8 No. 1, available at: <http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/political%20science/volume8n1/ajps008001006.pdf>, (last accessed 21st August, 2010).

⁸ *ibid*, p. 4.

major course of bad governance.⁹ Public accountability is further described as the requirement that those who hold public trust should account for the use of the trust to citizens or their representatives.¹⁰ Given its central nature, accountability should hence be enforced through strategic sanctions and rewards.¹¹ In essence, a widespread lack of public accountability in governance certainly undermines provision of public services and economic development.¹²

In the enforcement of accountability, the law takes a central role. It can serve to entrench and enforce personal legal liability as a central role in instances of abuse of public trust through breach of or lack of accountability.¹³ Legal liability is the legal bound obligation to pay debts.¹⁴ Personal legal liability is a financial obligation for which an individual is responsible and which may be satisfied out of his or her assets.¹⁵ In law a person is said to be legally liable when they are financially and legally responsible for something. Legal liability concerns both civil law and criminal law. The laws apportioning liability are covered in tort, contract, administrative and criminal law. There are different forms of liability, depending on the law apportioning liability, and the person who has committed the act attracting the liability.

The notion of liability for public officers is complex. In addition to personal liability under contract, tort, criminal law and administrative law, there are underlying notions of “public trust” and fiduciary obligations with the public officers being the beneficiaries or the fiduciaries and public sector directors being the trustees.¹⁶ The law hence creates special regulations through new or newly considered special torts and special common

⁹ Polidano, C. & Hulme D (1997), *No Magic Wands: Accountability and Governance in Developing Countries*, Regional Development Dialogue, Vol.18, No.2, p. 11, available at: <http://www.manchester.ac.uk/escholar/uk-ac-man-scw:1b7517>, (last accessed 22nd August, 2012).

¹⁰ *supra*, note 7, p. 5.

¹¹ *ibid*, p. 9, ‘...Sanctions which are spelt out for punishing public servants who abuse their public offices can only be effective if they are uniformly and objectively applied. At the same time, extending incentive rewards to good workers is also another effective way of promoting public accountability in the public service.’ para 4.

¹² *supra*, note 9, p. 15.

¹³ *ibid*, p. 13.

¹⁴ Sullivan, Arthur; Steven M. She (2003), *Economics: Principles in Action*, (Upper Saddle River, New Jersey: Pearson Prentice Hall), p. 187.

¹⁵ *ibid*.

¹⁶ Robinson Mark (1996), *Personal Senior Public Sector Liability*, Paper Delivered at a BLEC Seminar "Government Liability" in Canberra, 1 November 1996, p. 2, available at: <http://www.robinson.com.au/monoartpapers/papers/Personal%20Senior%20Public%20Sector%20Liability%20in%20Australia.pdf>, (last accessed 20th August, 2012).

law crimes which apply only to public sector senior officers, for example, the tort of misfeasance in public office, and the common law offence of misbehaviour in public office. On the other hand, there is immunity being given to certain public officers due to their work, with its origins in common law, from personal liability for acts performed in the course of their official duties. It is based upon a long standing public policy that public officers and employees should not be deterred in the performance of official duties by fear they will be personally liable for consequences that may result from the performance of those duties.¹⁷ This hence calls for a special balancing of the treatment accorded to the public officers.

“To throw a spanner into the works,” there are public officers who by their reckless actions cause injury to third parties, occasioning the government financial liabilities and grave losses through vicarious liability. Despite the loss, their liability in most cases is limited to criminal sanctions and in most cases, loss of office. However, there has been no clear law for the imposition of personal liability on the officers.

The study is based on three theories: Locke’s theory on function of government, economic analysis of law and utilitarianism. John Locke (1664) observed that the purpose of law is to enhance social relations.¹⁸ He explains the function of a legitimate government as being, “to preserve, so far as possible, the rights to life, liberty, health and property of its citizens, and to prosecute and punish those of its citizens who violate the rights of others and to pursue the public good even where this may conflict with the rights of individuals.”¹⁹ He paints a legitimate government as an impartial judge to determine the severity of an offence, and to set a punishment proportionate to the offence.²⁰ Applying the theory to the study, civil servants committing civil wrongs, that occasion damage to third parties, should be ‘punished’ through incurring personal liability and paying for the wrongs. The government as the impartial judge should therefore develop laws and guidelines to

¹⁷ Mashaw Jerry L (1978), *Civil Liability of Government Officers: Property Rights and Official Accountability*, Faculty Scholarship Series. Paper 1156, p. 5, available at: http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2145&context=fss_papers, (last accessed 21st August, 2012).

¹⁸ John Locke (1664), *Questions Concerning the Law of Nature*, edited version (Ithaca: Cornell University Press, 1990), p. 14.

¹⁹ *ibid*, p.5.

²⁰ *ibid*, p. 18.

implement such a system. The theory therefore calls for the law in the various countries to provide for personal liability.

The study further relies on Economic Analysis of Law. Richard Posner argues that legal rules are efficient, thus inducing efficient behavior.²¹ Individuals respond to legal rules economically, leading to a “pareto efficient” society, an economic state where resources are allocated in the most efficient manner.²² This theory would suppose that implication of personal liability on public officers would make them efficient, not engage in recklessness and negligence which would have previously occasioned the government losses.

The study finally relies on utilitarianism. John Stuart Mill states that, “in the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility. To do as one would be done by, and to love one's neighbor as oneself, constitute the ideal perfection of utilitarian morality.”²³ Bentham posits that, “it is the greatest happiness of the greatest number that is the measure of right and wrong.”²⁴ He therefore states that, “Actions are approved when they are such as to promote happiness, or pleasure, and disapproved of when they have a tendency to cause unhappiness, or pain.”²⁵ This theory applied to the study would disapprove actions occasioning loss to the government and public in general, as being immoral. It would implore upon public servants to be careful with government property as they would be careful with their own, minimizing loss of funds by the government.

1.2 CONTEXTUAL FRAMEWORK: MISUSE OF OFFICE BY PUBLIC OFFICERS IN KENYA

Bad governance is a major contributor to poor service delivery in Africa.²⁶ In Kenya, the level of accountability in the management of public affairs has consistently declined since independence.²⁷ This is in spite of various legal instruments and watchdog institutions established to regulate and monitor the ethical conduct of public officials.²⁸ Since

²¹ Stanford Encyclopedia of Philosophy (2001), *Economic Analysis of Law*, available at: <http://plato.stanford.edu/entries/legal-econanalysis/>, (last accessed 9th September, 2013).

²² *ibid.*

²³ John Stuart Mill (1863), *Utilitarianism*, (London : Parker, Son, and Bourn), p. 15.

²⁴ Jeremy Bentham (1776): *A Fragment on Government*, (London: T. Payne; P. Elmsly; and E. Brooke), p. 5.

²⁵ *ibid*, p. 7.

²⁶ *supra*, note 7, p. 2.

²⁷ *ibid*, p.1.

²⁸ *ibid*, p. 5.

independence, Kenya has formulated various legal instruments and established a number of watchdog institutions for regulating and monitoring the ethical behaviour of its public officials. However, despite the existence of a number of legal instruments and watchdog institutions for regulating and monitoring the ethical standards of public officials, and the adoption of multipartism, the management of public affairs and institutions by those who are entrusted with positions of authority in the country has not improved. It seems that the ethical codes, which conventionally should promote integrity, have failed to deliver.²⁹

Every year, the Government of Kenya loses huge sums of money resulting from misuse of office in blatant breach of the law by public officers, occasioning injury to third parties. The Government is sued by the aggrieved parties and ends up losing tax payers money from the resultant judgments. Incidentally, the Government incurs liability even where it is clear that the public officer involved was clearly abusing his office in complete disregard of the law and his employment contract.

There are many instances of abuse of office in Kenya. An example is *Dominic Arony Amolo vs Attorney General*.³⁰ The Commissioner of Prisons continued to hold the applicant in jail even after he had been acquitted by the appellate court. The High Court made a declaration that the continued imprisonment of the Applicant after the court had ordered his release was in violation of his fundamental human rights. Further, the court found that the refusal by the Kenya Air Force, who were the employers of the Applicant, to reinstate the Applicant to its service and refusal to pay him for services rendered during his employment amounted to cruel and inhuman treatment. The Court awarded him Kshs.2,500,000/= in damages against the Government.

Another example is the recent constitutional petition of *Kariku Kimani vs Commissioner of Lands and Another*³¹. The case involved breach of express law on compulsory land

²⁹ Wanyande P. and C. Odhiambo-Mbai (2001), "Public Service Ethics in Kenya," in UNDESA (eds) *Public Service Ethics in Africa* Vol.2, p. 39, available at: <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan001699.pdf>, (last accessed 23rd August, 2012).

³⁰ High Court (Nairobi) Misc. Application No.494 of 2003 (unreported)

³¹ *Kariku Kimani (Suing Thro' James Thuo Kariuki) Power of Attorney Number 45330/1 v The Commissioner of Lands & another*, High Court (Nairobi), Constitutional Petition; Petition No.758 of 2008 eKLR, available at: http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=47240674279210767_030389, (last accessed 24th August, 2012).

acquisition. The Land Acquisition Act, Section 9 and 23 required that the Commissioner appoints a date not earlier than 30 days and not later than 12 months after the publication of the notice to acquire for holding inquiry for the hearing of claims to compensation by persons with interest in the land. The Commissioner had the discretion to postpone the date of the inquiry or adjourn the hearing for sufficient cause provided the same shall not extend the inquiry beyond 24 months. If the inquiry was not held within the time prescribed, it was to be deemed that the Minister had revoked his direction to acquire the land. In this case, the Commissioner fixed the inquiry on a date later designated to be a public holiday. With no inquiry held, entries were made on the land registry vesting the land to the government. The original owner's attempt to fence off his land was met by resistance by the government leading to destruction of his fencing materials. The Court awarded the applicant Ksh. 500,000/= for uprooting of the fence and carrying away materials, Ksh, 2,500,000 for loss of use of land and Ksh. 7,500,000 as punitive damages against the government.

These are just some of the instances where the Government shouldered the damages without the offending public officer being made to pay.

In light of the above and similar actions by public servants causing loss to third parties, there is no clear legal framework at the moment in which the Government indemnifies itself from acts of Public Servants who willfully or otherwise act contrary to the law and their own employment service charter. This is because the Government is rightly held to be vicariously liable for the acts of its servants.

This study is of the opinion that civil liability should expressly be imposed on the public civil servant for injury caused to third parties. The judges or magistrates would be tasked with making a finding on whether the public officer should be made personally liable. In a case where the public servant is made personally liable, the aggrieved party would execute against the individual. This would not only provide positive incentive for Government officials to exercise higher standards of care but also act as deterrence against such officers from misusing their office for personal gain to the detriment of the public. I would also propose that an insurance indemnity cover be introduced for public servants. Every cadre of public service would have a specific cover to cover particular risks

associated with the service. This will make it easier for public servants to meet their obligations in cases where they are not able to pay as a result of a judgment. It will therefore as a consequence lead to less waste of public resources

Given the foregoing, and appreciating the centrality of proper management of public resources, it is imperative that the law takes a central role in obligating the officers who misuse public resources and or offices and cause financial losses to third parties, to be made personally liable for losses incurred.

There is hence need for a comparative review of the current legislative, policy and institutional framework in Kenya, with the aim of understanding the gaps and lacuna in protecting public resources from misuse due to abuse of office by public officers, and to propose a new legal regime that will go beyond merely prohibiting public officers from abusing office, and penalizing them, but also making them personally liable to third parties for loss occasioned by such abuse. The new legal regime should be clear, and devoid of the current practice of merely holding the government vicariously liable.

This paper analyzes the current legal regime with regard to personal liability of public officers to third parties for misuse of office. The author hypothesizes that a promulgation of a legal regime towards making public officers personally liable to third parties would lead to more responsible civil service, and tentatively, a more responsible government. The author opines that the current laws, policies and institutions regulating personal liability of officers for offences related to misuse of public office are inadequate and do not serve the interests of the public and of justice. There is hence a gap in holding of public officers liable for their acts which occasion loss to third parties. The government must now be obliged to establish a progressive legal regime for holding public officers who misuse their offices personally liable for losses so incurred by third parties. The paper concludes that the government has an obligation to provide legal, institutional and policy infrastructure to ensure that the public officers are not allowed to, by their reckless actions, incur vicarious liability to the government and then go scot free.

1.3 STATEMENT OF THE PROBLEM

Despite the centrality of prudent management of public resources in the overall development of any nation, the liability occasioned to the government towards third parties by public officers through their misuse of public office are enormous. With citizens more aware of their rights, the Kenyan government has found itself faced by numerous claims of damages from persons, who were at the receiving end of civil servants' misuse of office.³² Liability arising from such claims costs the government huge sums of money, running into billions.³³

The Kenya legal regime protects public officers from incurring any personal liability whatsoever for such acts. This has created a public service inclined to act in ways which are blatantly illegal, unprocedural and malicious towards the public they serve, knowing they incur no personal liability for such actions. The Police under the Office of the President and the Commissioner of Lands are the leading departments in which such claims have cost the government colossal amounts.³⁴ The lack of a clear legal regime to enforce personal liability for such acts has only increased, rather than limited, such actions.

It hence seems that the current legal regime, however novel, is not sufficient to promote prudent management of public resources and penal regime for misuse of the same. It is the opinion of the author that there is need for a new regime of legal principles that will go beyond interdictions, surcharges and penal sanctions against the public officers who misuse public offices and resources, wherefore the study proposes holding such officers personally liable for their actions by proposing exceptions to the doctrine of vicarious liability.

1.4 PURPOSE OF THE STUDY

The main purpose of this research paper is to analyze the effectiveness of Kenya's legal regime in curbing misuse of powers by public officers, occasioning vicarious liability to

³² Daily Nation (September 2, 2012), *Defending Kanu Regime Human Rights Violations Githu's Biggest Headache*, <http://www.nation.co.ke/News/-/1056/1493596/-/y9474rz/-/index.html>, (last accessed 3rd September, 2012).

³³ Estimate given by Stella Muthoni Munyi, Head of Civil Litigation Department at State Law Office, in an interview on 4th September, 2012.

³⁴ Interview with Stella Muthoni Munyi, *ibid*.

the government towards third parties and to propose a legal regime for personal liability of public officers.

1.5 RESEARCH QUESTIONS

The primary research question this study seeks to address is whether it is possible to effectively curtail misuse of office, occasioning injury to third parties, by imposing personal liability against errant officers.

This research question flows from two sub-questions namely:

1. To what extent does the current legal regime in Kenya impose personal liability to third parties for misuse of public office?
2. What changes should be made to the current legal regime in Kenya to enforce personal liability to third parties against officers who misuse public office?

1.6 SIGNIFICANCE OF THE STUDY

Misuse of office causes losses in resources and development. The priority and seriousness of effective public resource management cannot be gainsaid. Further, the role of the legal regime in establishing the principles of public resource management and ensuring they are complied with, is as paramount. No in-depth research, incorporating a comparative analysis, on the extent to which Kenya's legal regime provides for personal liability for misuse of office has been done so far. Such an analysis is necessary and important in order to determine the kind of legal reform that should be undertaken to address the gaps in the law.

This study is also significant because Kenya, like many African countries, is still facing the problem of misuse of office by public officers. This can be partly attributed to the inability of the legal regime to curtail the vice through imposing personal liability towards third parties injured by the conduct. It is, therefore, imperative to interrogate the current legal regime with regard to imposition of personal liability in cases of abuse of office. Out of this analysis, the paper identifies gaps and lacuna that need be filled through legislative amendments and new enactments to advance proper public management.

Further, the study seeks to relate this study to the larger, ongoing dialogue in the literature about misuse of public resources by public officers and consequent role of law; seeking to fill in the gaps and proposing new perspectives for the holding of the officers personally liable. The results of this study have provided useful academic knowledge and resource to students, academicians, policy makers and other stakeholders who wish to understand in depth the area of study. Consequently, it has offered a basis for further criticisms and development of the knowledge on the need for information for development and the role of law in the same.

Further, the paper has introduced a paradigmatic shift to the current debate on prevention of misuse of public resources by moving from penal sanctions and surcharges to imposition of personal civil liability.

1.7 RESEARCH METHODOLOGY

1.7.1 Data Type

The study has relied on secondary sources of data, including the Kenyan Constitution, various statutes addressing the issue of liability for actions by public servants, cases decided in the Kenyan courts on liability for misuse of public office and government policy documents. Treatises, journals, working papers and newspaper articles have been reviewed.

The researcher did not carry out primary data collection, partly due to the availability of the required data, and partly due to the limitation of time and money to carry out primary data collection and data analysis.

1.7.2 Data Sources

The data was obtained through desk research, library research, internet research, legislative analyses and comparative analyses of various jurisdictions on personal liability of public officers.

1.7.3 Data Analysis

The data was analyzed through a comparative study of the research materials so as to seek to show the importance of imposing personal civil liability on public officers who misuse office and cause grievous losses to the government.

1.7.4 Data Presentation

The research final work has been presented in the form of a project paper.

1.7.5 Scope and Limitations of the Study

The study has confined itself to the role of law in enhancing prudent public resource management through imposing civil liability on the public officers who are errant. The theoretical scope of the study was to involve the analysis of the theories of penal sanctions and civil liability.

The study has revisited and examined the issue of legal liability of individuals serving in Government and its agencies. The study has reviewed the need to introduce personal liability of public officers for acts that amount to misuse of public office. Further, it has interrogated the governance principles that should apply in determining whether or not public servants should be held personally liable and the guidelines for imposing such liability to protect aggrieved litigants. The study has considered the necessity for a comprehensive legislation to clarify the duties and responsibilities of civil servants and instances where personal liability for misuse of office would apply.

A limitation in the study is the fact that the author has only used secondary data. This is mainly because the author seeks to do a critical analysis of theories already espoused by various writers and hence the work is not a novel theoretical masterpiece but an attempt to seek the best relationship between various theories for the purposes of effective and maximum output.

1.8 HYPOTHESES

These are two namely;

1. The current legal regime does not impose personal liability to third parties for misuse of public office.

2. The current legal regime should be amended to impose personal liability on public officers for damages occasioned to third parties arising from their misuse of public office.

1.9 LITERATURE REVIEW

1.9.1 Summary

This literature review aims to review the critical points of current knowledge and or methodological approaches on the issue of legal liability of individuals serving in Government and its agencies. The literature reviews are secondary sources, and as such, do not report any new or original experimental work. The goal of this literature review is to bring the reader up to date with current literature on the legal liability of government officers and the role of the law in enforcing the same. Further, the review establishes the gap, which necessitates this research study.

1.9.2 Introduction

Literature in personal liability for government officers is fairly recent. This literature review seeks to share with the reader the results of other studies and writings on the role of law of personal liability of public officers.

1.9.3 Introducing Governance and Accountability

The World Bank defines governance as '*the exercise of political authority and the use of institutional resources to manage society's problems and affairs, on behalf of and for the benefit of the societal*'³⁵. The UNDP defines it thus;

"the exercise of political, economic and administrative authority in the management of a country's public affairs at all levels It incorporates the complex mechanisms, processes and institutions through which citizens and groups articulate their interests, mediate their differences and exercise their legal rights and obligations."³⁶

³⁵. *supra*, note 5.

³⁶ UNDP (2010), *Governance Policy Paper*, p. 2, available at: <http://mirror.undp.org/magnet/policy/summary.htm>, (last accessed 20th August, 2012).

Goran Hyden finds the above definitions inadequate.³⁷ This is because, from the definitions, it is (a) "difficult to reign in what the concept really refers to, and (b) impossible to create a set of manageable measures. Given these "limitations", Hyden defines governance to mean "*the conscious stewardship of regime structures (rules) with a view of regulating the public realm, i.e. the arena in which state and society actors operate and interact to make authoritative decisions... It refers to the way a political system is constituted, the way fundamental values and norms are understood and acted upon at different levels in society*".³⁸

The author disagrees with Goran since the essence of governance is the prudent management of resources and programs for the benefit of the populace, and this is aptly covered by the UNDP definition in the phrase, '*management of a country's public affairs at all levels*'. Further, despite his criticism, it is quite apparent that there are no major differences between Hyden's definition of governance and that of the UNDP.

According to Anyang Nyong'o, good governance "*simply means good and competent management of public affairs, with or without encompassing all the major tenets of democracy*".³⁹ This view is defensible since there are various cases, like South East Asian Countries, namely Singapore, Hong Kong, Taiwan and South Korea, which do not have very clear democratic accountable systems, but are very progressive in development and provision of social services.

Odhiambo argues that governance can either be good or bad, and that good governance, however, is pillared on certain core principles, at the core of which is accountability.⁴⁰ This, he argues, ensures that actions and decisions taken by public officials are subject to oversight so as to guarantee that government initiatives meet their stated objectives and

³⁷ Hyden, G (1999), *An African Governance Barometer? Measurement and Monitoring Issues*, A Paper Prepared for the Workshop on the theme "Indicators for Ministry Progress Towards Good Governance in Africa" 20-22 September 1999, Addis Ababa, Ethiopia, p. 2, available at: <http://dspace.cigilibrary.org/jspui/bitstream/123456789/32796/1/Measuring%20and%20Monitoring%20Progress.pdf>, (last accessed 22 August, 2012).

³⁸ *supra*, note 26, p. 3.

³⁹ Anyang Nyong'o P. (1989), "*State and Society in Kenya: The Disintegration of National Coalition and the Rise of Presidential Authoritarianism*," Oxford Journal of African Affairs Vol. 88 No. 351, p. 112, available at: <http://afraf.oxfordjournals.org/content/88/351/229.citation>, (last accessed 22 August, 2012).

⁴⁰ *supra*, note 7, p. 5.

respond to the needs of the community they are meant to be benefiting, thereby contributing to better governance and poverty reduction.⁴¹

Rasheed & Olowu define accountability as; "*public accountability is the requirement that those who hold public trust should account for the use of the trust to citizen or their representatives*".⁴² Similarly, another definition of accountability is proposed by Mouftau Laleye thus; "*public accountability refers to sanctions and procedures by which public officials may be held to account for their actions*".⁴³ According to Polidano and Hulme, accountability is a key determinant of the state of governance. Thus, strict observation of accountability in the management of public affairs promotes good governance while the lack of it is the major cause of bad governance.⁴⁴

From the foregoing, it is clear that there is a tacit relationship between good governance, and accountability. Further, this accountability is not political, but rather administrative accountability.

1.9.4 Defining Personal Legal Liability

Personal legal liability is a financial obligation for which an individual is responsible and which may be satisfied out of his or her assets.⁴⁵ Personal liability covers any amount someone becomes legally liable to pay as compensation for any claim or series of claims arising from any one event or source of original cause in respect of accidental (including legal costs and expenses) bodily injury, death, illness or disease to any person who is not in ones employment or who is not a close relative or member of the household.⁴⁶

Rasheed writes that whether written or unwritten, ethical codes of conduct generally promote the values of impartiality, objectivity, integrity, efficiency, effectiveness and discipline of public servants when acting in the public interest in general and when

⁴¹ *ibid.*

⁴² Rasheed S & Olowu D (eds) (1993), *Ethics and Accountability in African Public Services*, United Nations. Economic Commission for Africa & African Association for Public Administration and Management (Addis Ababa: Ethiopia), p. 11.

⁴³ Laleye, M (1993), "*Mechanisms for Enhancing Ethics and Public Accountability in Francophone Africa*," in Rasheed S. and Dele Olowu, eds. *Ethics and Accountability in African Public Services*, *ibid*, p. 25.

⁴⁴ *supra*, note 9, p. 15.

⁴⁵ *Black's Law Dictionary* (Pocket), 3rd Edition.

⁴⁶ *ibid.*

exercising discretionary powers in particular.⁴⁷ He hence seems to argue that the ethical codes can ultimately promote accountability. However, he does not talk about the need for personal legal liability of public officers.

Barlow considers statutes or Acts of the legislature or provision of a country's constitutions.⁴⁸ However, he fails to delve into the efficacy that the laws may have if they were to apportion personal legal liability on the public officers in tort or contract law for the losses incurred by lack of propriety.

Writing on the need for clear legal instrumentation of duties and obligations of public officers who abuse office, Barkan J.D. also falls short of directing his mind to the need for holding such officers personally legally accountable and liable.⁴⁹

From the foregoing, the various intellectuals that have reviewed the issue of public accountability and enforcement of the same have not so far addressed their minds to the issue of pursuing legal personal liability of the various persons alleged to be at fault.

1.9.5 Personal Legal Liability for Public Officers

The immunity of public officers and employees from personal liability for acts performed in the course of their official duties has its origin in the common law. It is based upon a long standing public policy that public officers and employees should not be deterred in the performance of official duties by fear they will be personally liable for consequences that may result from the performance of those duties.⁵⁰

However, imposition of personal liability to public officers towards third parties for misuse of office occasioning of damages is also based on common law. Clearly, public officers in exercise of their discretion in managing their programs and agencies should be aware of the potential legal ramifications of their actions. Chief Justice Holt in *Asby v*

⁴⁷ *supra*, note 31, p. 287.

⁴⁸ Barlow, C.H.M. (1993), "*Ethical Codes of African Administration: Nature, Content, Limitation and Required Improvements*," in Rasheed S. and Olowu D. eds. *Ethics and Accountability in African Public Services*, *supra*, note 31, p. 212.

⁴⁹ Barkan J.D. (1992), "*The Rise and Fall of a Governance Realm in Kenya*," in Goran Hyden and Michael Bratton, eds., *Governance and Politics in Africa*, (Boulder and London: Lynne Reinner Publications), pp. 103-115.

⁵⁰ University of Texas (2012), *Personal Liability of Public Officers and Employees*, available at: www.utwatch.org/corporations/freeportfiles/liability.html, (last accessed 5th September, 2013).

White held that; “if publick (*sic*) officers will infringe men's rights, they ought to pay greater damages than other men, to deter and hinder other officers from the like offences.”⁵¹ The grant of exemplary damages against individual public officers was recently buttressed by the House of Lords in *Watkins v Home Office* where Lord Bingham held: “If a public officer knowingly and deliberately acts in breach of his lawful duty he should be amenable to civil action at the suit of anyone who suffers at his hands.”⁵² The court further held that, “the policy of the law is not in general to encourage the award of exemplary damages, but they may nonetheless be awarded to mark the court’s disapproval of proven misfeasance in public office, and deter repetition.”⁵³ In essence, the United Kingdom courts have qualified immunity on public servants when assessing losses caused by them.

In recent years, however, United States courts have qualified the immunity of officials (meaning that it is not absolute). The change in direction has been attributed to the case of *Bivens v. Six Unknown Federal Narcotics Agents*⁵⁴ in which narcotics agents burst into Bivens’ home without a search warrant and without probable cause, used excessive force, threatened to arrest his family, and interrogated and jailed him. The court held the officers personally liable and ordered them to pay the plaintiff damages. The judges emphasized the notion of accountability, insisting that officials must be held accountable for their actions while in office.

However immunity for public officers, from personal liability for acts performed in the course of their official duties, remains to be good law. There is thus need for special balancing of the treatment accorded to the public officers. As defined previously, a person is said to be legally liable when they are financially and legally responsible for something. This means that liability covers both criminal and civil wrongs and follows an act.

In essence hence, every act which invites liability must be visited on the errant officer.

⁵¹ *Ashby v White* (1703) 92 ER 126, 135; 2 Ld Raym 938, 952 (Holt CJ).

⁵² *Watkins v Home Office* [2006] UKHL 17, [2006] 2 AC 395, p. 25.

⁵³ *ibid*, p. 30.

⁵⁴ *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), available at http://www.hrcr.org/safrica/enforcement/bivens_narcotics.html, (last accessed 19 August, 2012)

1.9.6 Conclusion: The Gap

Accountability is a key requirement of good governance. Not only governmental institutions but also the private sector and civil society organizations must be accountable to the public and to their institutional stakeholders. Who is accountable to whom varies depending on whether decisions or actions taken are internal or external to an organization or institution. In general an organization or an institution is accountable to those who will be affected by its decisions or actions. Accountability cannot be enforced without transparency and the rule of law.

From the foregoing, there has not been any writing on the need for personal liability and regulation of the same through legal enactment in Kenya. However, there is the recalcitrant misuse of office and causing the loss to the government. The study is necessitated by current concerns about standards of conduct of all holders of public office, including arrangements required to ensure the highest standards of propriety in public life. The study, thus, proposes to explore issues touching on personal civil liability of public officers for misuse of public office in contravention of the constitution, operative laws and regulations and specific service charters in Government/Government agencies in Kenya.

In this regard, the study revisited and examined the issue of legal liability of individuals serving in Government and its agencies. The study reviewed the need to introduce personal liability of public officers for acts that amount to misuse of public office in Kenya. Further, it interrogated the governance principles that should apply in determining whether or not public servants should be held personally liable and the guidelines for imposing such liability to protect aggrieved litigants. The study considered the necessity for a comprehensive legislation to clarify the duties and responsibilities of civil servants and instances where personal liability for misuse of office would apply.

1.10 CHAPTER BREAKDOWN

This study is undertaken in four chapters. Each chapter aims at answering one or more of the research questions.

Chapter one serves as the introduction, and provides the general background and framework for the study.

Chapter two is an incisive analysis of the current legal framework on personal liability for public officers in Kenya. It examines the Kenyan constitution, the relevant statutes and government policy documents on the issue. It also explores decided cases on the issue.

Chapter three engages in a comparative analysis of the legal framework in Kenya with other jurisdictions that have advanced on the same. It also engages in an in-depth examination of the principles that should govern imposition of personal liability on government officers.

Chapter four critiques Kenya's legal framework on personal legal liability by employees of government, based on both the principles of good governance and comparative studies. It then makes recommendations on the changes necessary in the legal framework so as to improve accountability among public officers in Kenya.

CHAPTER TWO: LEGAL FRAMEWORK FOR PERSONAL LIABILITY OF PUBLIC OFFICERS IN KENYA

2.1 VICARIOUS LIABILITY AND PERSONAL LIABILITY

2.1.1 Vicarious Liability

Vicarious liability is a concept that makes one person, not the tortfeasor, liable for a tort committed by someone else. It is therefore an extreme form of strict liability.⁵⁵ It is also defined as the liability one suffers for the act or acts of another.⁵⁶ The doctrine is applied to a number of relationships, but key among them employer employee relationship. The employer is usually held liable for torts committed by employees in the course of their employment.

Vicarious liability is justified in several ways.⁵⁷ First, an employer is much more likely to have the assets to pay damages and to be insured against liability than an individual employee. Secondly, it may sometimes be unclear which of a number of employees has actually committed the tort, but the employer will be vicariously liable for all of them. Third, the employer has established a business and derives the economic benefits of commercial success: the employer ought therefore to be liable for damage caused by the business. Finally, the concept is thought to make the employer more likely to take staff training and supervision seriously.

To succeed in a claim based on vicariously liability, the claimant has to establish that: the alleged tortfeasor was an employee, the employee committed a tort and the employee committed the tort in the course of employment.⁵⁸

2.1.2 Personal Liability

Personal liability on the other hand holds employees personally liable for their torts without dragging the employer into their misdeeds. Employees who breach their duty of care are made to pay for their breach rather than transferring the burden to the employer.

⁵⁵ Winfield Percy Henry & Jolowicz John Anthony (1998), *Winfield and Jolowicz on Tort*, (London: Sweet & Maxwell), 14th ed. p. 702.

⁵⁶ J. G. Fleming (1992), *The Law of Torts*, (London: Law Book Company), 8th ed. p. 366.

⁵⁷ Justifications explained in detail at J.W. Neyers (2004) *A Theory Of Vicarious Liability*, available at: [www.ucc.ie/law/odg/attachments/NEYERS_\(Theory_of_VL\).pdf](http://www.ucc.ie/law/odg/attachments/NEYERS_(Theory_of_VL).pdf), (last accessed 23rd September, 2012).

⁵⁸ *supra*, note 54, p. 703.

Albert Venn Dicey in developing the concept of rule of law insisted on personal liability in tort for public officers, noting that 'no person is above the law and it is law that rules all.'⁵⁹ He said:

Every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. [Appointed government officials and politicians, alike]...and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorise as is any private and unofficial person.⁶⁰

Applied to public servants, the courts have held that despite existence of vicarious liability, a public officer could and still can be sued in his personal capacity. Vicarious liability is therefore not a bar to personal liability for public servants.

2.1.3 Why execute only against the government?

In Kenya, the courts have held that even though the employer is vicariously liable, the employee also remains liable. In most cases of negligence, the courts hold both the state and the public servant jointly and severally liable. Under joint and several liability or all sums, a claimant may pursue an obligation against any one party as if they were jointly liable and it becomes the responsibility of the defendants to sort out their respective proportions of liability and payment.⁶¹ This means that if the claimant pursues one defendant and receives payment, that defendant must then pursue the other obligors for a contribution to their share of the liability.⁶²

In all cases, the claimants execute the judgments against the government and not the public servant. This appears to be informed by the fact that the government has endless resources and it is easier to get full payment of any amounts from the state rather than an individual who can be found impecunious.

⁵⁹ Albert Venn Dicey (1885), *An Introduction to the Study of the Law of the Constitution*, 5th ed. (Macmillan: London), p. 79.

⁶⁰ *ibid.*

⁶¹ William L. Prosser (1937), *Joint Torts and Several Liability*, 25 *California Law Review*, p. 413, available at: <http://scholarship.law.berkeley.edu/californialawreview/vol25/iss4/2> (last accessed 5th October, 2013).

⁶² *ibid.*

2.1.4 Indemnity?

Indeed the employer is entitled to recover from the employee the amount of any damages paid to the claimant.⁶³ In cases where the employer is insured, the effect of the rule therefore is that an insurance company is able to recover the amounts it has paid under the insurance policy.⁶⁴ Most insurance companies have entered into an informal agreement not to exercise such rights, therefore diminishing the importance of this rule.⁶⁵

2.1.5 History Of Vicarious Liability On The Government

In 1254, during the reign of King Henry III in Great Britain, a declaration was made, in the King's Court, that the Crown cannot be summoned or receive command from anyone.⁶⁶ This paved way for absolute immunity for the Crown from claims under contracts or torts. The immunity was based on 'prerogativity' and 'exceptionality' of the King.⁶⁷ It was further based on the twin principles that, 'writs do not run against the King,' and 'the King has no fault.'⁶⁸ The immunity was further based on the reasoning that the King could not be sued in the central courts of law because they were his, and no lord can be sue in his own courts.⁶⁹ This immunity only covered the King personally, but he would occasionally extend it to shield those who did unlawful acts in his name.⁷⁰

Harshness resulting from this immunity was relieved by the development and use of petitions to the King. The injured party could not order the King through writs, but could petition the King as the 'fountain of justice and equity,' asking the King to redress wrongs occasioned on the subjects.⁷¹

⁶³ Principle developed in *Lister v Romford Ice and Cold Storage Co Ltd* [1956] AC 555. The House of Lords held that contracts of employment contain an implied term that an employee owes a duty to take reasonable care of the employer's property and in the performance of his tasks. The employee is therefore bound to indemnify the employer should they breach this implied term.

⁶⁴ *ibid.*

⁶⁵ *supra*, note 55, p. 369.

⁶⁶ Ferdinand Stone (1968), *Governmental Immunity in Tort: A Waning Privilege*, 17 *Tulane Law Review* 159, p. 407, available at: biblio.juridicas.unam.mx/revista/pdf/derechocomparado/1/art/art21.pdf, (last accessed 5th October, 2013).

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ *ibid.*

⁷⁰ *ibid.*, p. 408.

⁷¹ *ibid.*

Similarly, by the middle ages in England, there was no formal procedure for suing the Crown.⁷² The only recourse for a person seeking redress of a wrong committed by the central government was to petition the King.⁷³ The petition asserting a legal right against the Crown was called a 'petition of right.' If the King gave his consent, and endorsed the petition, 'fiat justitiae,' loosely translated in English to mean let right be done. Such an endorsement would allow the matter to be tried in the ordinary courts. However, if the King refused his consent, the Crown could not be sued.⁷⁴ After the development of responsible government in the mid-nineteenth century, the King's discretion to grant the 'royal fiat' became the discretion of the government of the day.⁷⁵

This system had three major deficiencies.⁷⁶ First, the petition of right was a matter of grace of the Crown. Secondly, it did not permit the Crown to be sued in tort even where substantive legal rights could be asserted against the Crown by the petitioner. Finally, the full range of remedies and procedures was not available to the petitioner, with injunction, specific performance, mandamus, and discovery not available in any proceeding against the Crown.

As a result of the system, before enactment of the Crown Proceedings Act in England, the Crown could not be sued in tort.⁷⁷ The aggrieved party would sue the individual public servant responsible for the injury.⁷⁸ This is evident in the following English case:

2.1.5.1. *Entick v Carrington*⁷⁹

On 11 November 1762, the King's Chief Messenger, Nathan Carrington, and three other King's messengers, James Watson, Thomas Ardran, and Robert Blackmore, broke into the home of the Grub-street writer, John Entick (1703?-1773) in the parish of St Dunstan, Stepney 'with force and arms.' Over the course of four hours, they broke open locks and doors and searched all of the rooms before taking away 100 charts and 100 pamphlets,

⁷² Peter W Hogg (1989), *Liability of the Crown*, 4th ed, (Carswell Publishers: London), p. 3.

⁷³ *ibid.*

⁷⁴ *ibid.*, p. 4.

⁷⁵ *ibid.*

⁷⁶ *ibid.*, p. 4.

⁷⁷ Harry Street (1953), *Governmental Liability: A Comparative Study*, (Cambridge University Press: New York), p. 5.

⁷⁸ *ibid.*

⁷⁹ [1765] EWHC KB J98

causing £2000 of damage. The King's messengers were acting on the orders of Lord Halifax, newly appointed Secretary of State for the Northern Department, 'to make strict and diligent search for the author, or one concerned in the writing of several weekly very seditious papers intitled, The Monitor, or British Freeholder.' Entick sued the messengers for trespassing on his land. Carrington and his colleagues claimed that they acted on Halifax's warrant, which gave them legal authority to search Entick's home; they therefore could not be liable for the tort. However, Lord Camden, the Chief Justice of the Common Pleas, held that Halifax had no right under statute or under precedent to issue such a warrant and therefore found in Entick's favour.

However, despite liability on individual public servants, the Crown usually indemnified the servant against any damages. The courts persistently expressed concern about the crown avoiding any form of liability, evident in the following case:

*2.1.5.2 Macgregor v Lord Advocate*⁸⁰

A claim for damages by a member of the public who had been knocked down by a motor car driven by a driver in the Royal Army Service Corps in the course of his duty was dismissed as incompetent on the ground that an action of damages did not lie against the Crown in respect of a wrongful act committed by one of its servants. Lord Salvesen expressed his unease about this result thus; "The present state of the law, as it has been settled in England, does not appear to me to be satisfactory, because it leaves it in the option of a department to accept liability where it pleases, and to repudiate liability where pressure is not brought upon it, possibly from political sources, to accept liability. I do not think it is desirable, from the point of view of public policy, that a department should be in that position, and it may well be that the present state of matters ought to be the subject of legislative amendment."

2.1.6 The Crown Proceedings Act (UK)

As a result of persistent concerns by both the Court of Appeal and House of Lords, Parliament found it necessary to act on the concerns and review the law on crown immunity. In 1921, a Crown Proceedings Committee, presided over by Lord Hewart, initially as Attorney General and later as Lord Chief Justice, was formed to revisit the

⁸⁰ 1921 SC 847

issue.⁸¹ By 1927, the committee had drafted a Crown Proceedings Bill that proposed that the law relating to the privileges of the Crown in litigation and its immunity from liability in tort should be reformed.⁸² However, the draft Bill was opposed by some government departments, including in particular the Post Office and the departments which were responsible for the armed services. As a result, little was done to progress it through parliament.⁸³

It was not until 1946 that the Court of Appeal in *Adams v Naylor*,⁸⁴ in refusing to entertain a claim against a nominated army officer arising from injuries which children had sustained in a derelict minefield, gave rise to further debate on this issue. This led to introduction and passage of the Act in 1947. The Act received the Royal assent on 31 July 1947 but did not fully come into force until 1 January 1948.

The Crown Proceedings Act, 1947 abolished the petition of right, replacing it for the most part with the procedure that would be available between the Crown and the subject.⁸⁵ The requirement of the Crown's fiat was also abolished, enabling the Crown to be sued without its consent. Furthermore, the Crown's immunity in tort was abolished, although some vestiges of immunity remained, and the Crown became liable to give discovery. However, the Crown's immunity from injunction and specific performance was expressly retained.⁸⁶

As a general rule at common law, a master or employer is vicariously liable for a tort committed by her servant or employee in the course of employment.⁸⁷ However, prior to enactment of the Crown Proceedings Act, 1947, the Crown was immune from vicarious liability in tort. The Act imposed vicarious liability on the Crown 'in respect of a tort committed by any of its servants or agents.'⁸⁸ The Crown Proceedings Act was transposed into Kenya as Government Proceedings Act, Chapter 40, Laws of Kenya.

⁸¹ Joseph M Jacob (1987), *The Debates behind an Act: Crown Proceedings Reform 1920-1947*, Journal of Public Law, p. 452, available at: www.jstor.org/stable/1119039 (last accessed 2nd October, 2013).

⁸² *ibid.*

⁸³ *ibid.*, p. 453.

⁸⁴ [1946] AC 543.

⁸⁵ *supra*, note p. 454.

⁸⁶ *ibid.*

⁸⁷ William V. H. Rogers, Percy Henry Winfield & John Anthony Jolowicz (2010), *Winfield and Jolowicz on Torts*, (Sweet & Maxwell: London), p. 987.

⁸⁸ Rodney Brazier (1997), *Ministers of the Crown*, (Oxford University Press: New York), p. 238.

2.2 PUBLIC SERVANTS: DIFFERENTIATION OF STATE OFFICERS FROM PUBLIC OFFICERS

The current Constitution creates a new term, State Officer, distinct and separate from Public Officer. State officers are defined as persons holding any of the following offices; President, Deputy President, Cabinet Secretary, Member of Parliament, Judges and Magistrates, member of a constitutional commission, holder of an independent constitutional office, member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government, Attorney-General, Director of Public Prosecutions, Secretary to the Cabinet, Principal Secretary, Chief of the Kenya Defence Forces, commander of a service of the Kenya Defence Forces, Director-General of the National Intelligence Service, Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or an office established and designated as a State office by national legislation.⁸⁹

Public officers on the other hand are defined as any State officers or any persons, other than State Officers, who holds an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament.⁹⁰ Public service is defined to mean the collectivity of all individuals, other than State officers, performing a function within a State organ.⁹¹

For avoidance of doubt, this paper shall address the liability of public officers, which is defined to include state officers. The Public Officers Ethics Act⁹² defines the term public officer in a more detailed way thus;

Any officer, employee or member, including an unpaid, part-time or temporary officer, employee or member, of any of the Government or any department, service or undertaking of the Government; the National Assembly or the Parliamentary Service; a local authority; any corporation, council, board, committee or other body

⁸⁹ *Constitution of Kenya*, Article 260, available at: <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/ConstitutionofKenya2010.pdf>, (last accessed 22 August, 2012).

⁹⁰ *ibid.*

⁹¹ *ibid.*

⁹² *The Public Officer Ethics Act*, Chapter 183 of the Laws of Kenya, available at: <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/PublicOfficerEthicsAct.pdf>, (last accessed 22 August, 2012).

which has power to act under and for the purposes of any written law relating to local government, public health or undertakings of public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; a co-operative society established under the Co-operative Societies Act; a public university; and any other body prescribed by regulation for the purposes of this paragraph.⁹³

From the above definitions, a deduction can be made that only natural persons are considered public officers, and that the bringing of cause of action to a corporate body as a juridical public officer cannot be sustained. However, this is a moot point, desirous of litigation to prove the veracity of the jurisprudential issues attendant.

The novelty in the act, however, derives from the fact that even ‘volunteers’ can be held liable, hence the equitable doctrine that, ‘the law does not aid a volunteer’ comes to fore in full force.

2.3 LEGAL FRAMEWORK FOR LIABILITY FOR MISUSE OF OFFICE BY PUBLIC OFFICERS

There are several pieces of legislation that attempt to address the issue of liability for misuse of office for public servants.

2.3.1 The Framework before enactment of Constitution of Kenya 2010

The general approach was to transfer the liability to the government and absolve the individual public officers of any blame. This was evident in the old constitution itself and the various acts of parliament enacted under it.

2.3.1.1 The Repealed Constitution⁹⁴

The Constitution was silent on issues regarding accountability in the public service. It did not provide for values to be observed in the public service and was silent on values of leadership and integrity. This may be attributed to the timing of its enactment,

⁹³ *ibid*, Section 2.

⁹⁴ *The Constitution of Kenya (Repealed)*, available at: http://www.kenyalaw.org/klr/fileadmin/pdf/downloads/Constitution/Constitution_of_Kenya%28Repealed%29.pdf, (last accessed 27th August, 2012).

immediately after independence. By then, public service faced serious understaffing problems and thus the values of integrity and accountability were not a priority.⁹⁵

2.3.1.2 Government Proceedings Act⁹⁶

This is the law relating to civil liability of the government and civil proceedings against the state. The Act places the state as a litigant in the same position as an ordinary citizen.⁹⁷ It provides that the state shall be sued in respect of torts committed by its servants or agents if circumstances exist that give rise to a cause of action in tort against that servant or agent or his estate.⁹⁸ The Government is made liable in torts of omission for failure by public officers to execute statutory duties.⁹⁹ The Act designates torts committed by public officers in the course of discharge of common law or statutory duties as torts committed in the course of employment.¹⁰⁰

The effect of the Act is that if a public officer commits a tort, and can be held personally liable, then the state shall incur vicarious liability as the employer. This applies to all officers appointed by the government and paid from the Consolidated Fund or monies allocated for that purpose by parliament.¹⁰¹

Though it does not absolve public officers from personal liability for any torts they commit, the practice has been to sue the state, due to the justifications for vicarious liability espoused above. In all cases, as sampled below, the state and not the individual public officer is the person who is sued.

2.3.1.3 Government Contracts Act¹⁰²

Since the government is not a natural person, many of its contracts are negotiated and signed on its behalf by public officers. The above law governs the process of negotiation and signing of contracts on behalf of the government.

⁹⁵ *supra*, note 7, p. 5.

⁹⁶ *Government Proceedings Act*, Chapter 40 of the Laws of Kenya, available at: http://www.kenyalaw.org/kenyalaw/klr_app/frames.php, (last accessed 29th August, 2012).

⁹⁷ *ibid*, Section 4(1).

⁹⁸ *ibid*, Section 4(1)(a) and (b).

⁹⁹ *ibid*, Section (4)(2).

¹⁰⁰ *ibid*, Section 4(3).

¹⁰¹ *ibid*, Section 4(6).

¹⁰² *Government Contracts Act*, Chapter 25 of the Laws of Kenya, available at: <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/GovernmentContractsAct.pdf>, (last accessed 23rd August, 2012).

It provides that no public officer shall be liable to be sued personally upon any contract which he makes in that capacity, on behalf of the government.¹⁰³ This opens a window for public officers to sign contracts that are not appropriate, placing heavy and unnecessary financial burden on the state, and others which are even illegal, without recourse on the specific public servants.

The public officers are only to be held personally liable on two occasions, that is, if they expressly pledge their personal credit or if they contracts otherwise than as the agent of the Government.¹⁰⁴ These safeguards are inadequate since rarely do public officers pledge their personal credit in any government purchases. Equally, they mostly hide under their official capacity even when signing contracts that are on the borderline, thus evading personal liability.

The general objective of the Act is to establish accountability in signing of government contracts by providing that government contracts should only be signed by public officers duly authorized in writing. This objective is defeated by the provision that no public officer acting on behalf of the Government shall be liable to be sued for breach of an implied warranty of his authority to enter into any contract.¹⁰⁵ This opens a window of opportunity for public officers to sign contracts which they well know they are not authorized to sign, but still escape personal liability.

2.3.1.4 State Corporations Act¹⁰⁶

A lot of misuse of office occasioning the government financial liability to pay damages and losses happens in state corporations. This Act provides for the establishment, control and regulation of state corporations. It thus regulates liability of officers of state corporations to some extent.

In entrenching accountability, the Act provides that the Board of any state corporation is responsible for the proper management of the affairs of a state corporation, including

¹⁰³ *ibid*, Section 6(1).

¹⁰⁴ *ibid*.

¹⁰⁵ *supra*, note 10, Section 6(2).

¹⁰⁶ *The State Corporations Act*, Chapter 446 of the Laws of Kenya, available at: http://www.scac.go.ke/index.php?option=com_docman&task=doc_download&gid=2&Itemid=57, (last accessed 25th August, 2012).

accountability for moneys, financial business and management of state corporations. It thus makes the board answerable.¹⁰⁷ Further, it provides that the chief executive of a state corporation may be summoned by the Public Investments Committee to answer any questions on behalf of the Board on financial statements.¹⁰⁸ This makes the boards and the chief executives, appointees of the executive arm of the government, answerable to parliament.

Moreover, it gives the Inspector General of state corporations power to surcharge persons responsible for incurring or authorizing expenditures, any sums which were expended contrary to the law or to any direction lawfully given or which have not been duly accounted for.¹⁰⁹ He is also empowered to surcharge amount of any loss or deficiency upon any person, by whose negligence or misconduct, the loss or deficiency has been incurred.¹¹⁰ Such persons are prohibited from hiding behind board resolutions to escape surcharges, as long as such resolutions are unlawful.¹¹¹ This ensures caution on spending of resources by public officers working in these corporations, knowing that they shall be held personally liable for unauthorized expenditures.

However, the Act and its Schedules are unclear on personal liability for public officers for misuse of office. In the Orders establishing various boards, annexed as schedules to the Act, they provide that matters or things done by the chairperson or any other member of the Board or any officer, employee or agent of the Agency shall, if done in good faith for the purposes of executing any powers given by the law, not render such persons or any person acting under their direction personally liable to any action, claim or demand.¹¹² Most of the conduct that occasions heavy civil liability on government is done pursuant to exercise of functions, and in good faith, but done negligently and un-procedurally. Persons engaging in such actions, though negligent, would thus escape personal liability under this provision.

¹⁰⁷ *ibid*, Section 15(1).

¹⁰⁸ *ibid*, Section 15(2).

¹⁰⁹ *supra*, note 14, Section 19(1).

¹¹⁰ *ibid*.

¹¹¹ *ibid*, Section 19(4).

¹¹² Section 9 of the Kenya Tourist Board Order, 1997, Section 9 of the National AIDS Control Council Order, 1999, Section 17 of the Kenya Medical Supplies Agency Order, 2000, Section 11 of the Kenya Maritime Authority Order, 2004, Section 16(1) of the Kenya Accreditation Service Order, 2009, Section 25 of the Kenya Institute of Education Order, 2010, and section 15 of the Kenya Trade Network Agency Order, 2010.

To compound the matter, the Act provides that exemption from personal liability does not relieve the board or agency of the liability to pay compensation or damages to any person for any injury to that person or his interests caused by the exercise of any power conferred by law or by failure, whether wholly or partially, of any works.¹¹³ This places the burden on corporations to pay for damages themselves and not the individual negligent public officers.

The Act thus demands accountability but falls short of holding public officers personally liable for their misdeeds.

2.3.1.5 Anti-Corruption and Economic Crimes Act¹¹⁴

This Act deals with situations where a public officer unjustly enriches himself using public office. It defines public offices broadly to include officer, employee or member of a public body, including one that is unpaid, part-time or temporary.¹¹⁵ It then provides a framework prohibiting public officers from engaging in corruption and economic crimes.

It apportions personal liability on the public officer for any damages arising from conduct which is corrupt. This is by providing that persons who do anything that constitutes corruption or economic crime are liable to anyone who suffers a loss as a result for an amount that would be full compensation for the loss suffered.¹¹⁶ This may allow third parties to institute direct legal proceedings against public officers to recover damages. Further even though the government pays, the Ethics and Anti-Corruption Commission (EACC) is empowered to recover the benefits from the public officers engaged in corruption.¹¹⁷

¹¹³ Section 10 of the Kenya Tourist Board Order, 1997, Section 10 of the National AIDS Control Council Order, 1999, Section 18 of the Kenya Medical Supplies Agency Order, 2000, Section 12 of the Kenya Maritime Authority Order, 2004, Section 16(2) of the Kenya Accreditation Service Order, 2009, Section 26 of the Kenya Institute of Education Order, 2010, and section 16 of the Kenya Trade Network Agency Order, 2010.

¹¹⁴ *The Anti-Corruption and Economic Crimes Act*, Chapter 65 of the Laws of Kenya, available at: <http://www.kenyalawreport.co.ke/Downloads/Acts/The%20Anticorruption%20And%20Economic%20Crimes%20Act,%202003%28final%29.pdf>, (last accessed 28th August, 2012).

¹¹⁵ *ibid*, Section 2.

¹¹⁶ *ibid*, Section 51.

¹¹⁷ *ibid*, Section 53.

However, corruption and economic crimes are independent from negligent and unlawful acts of public officers. Though some of the latter actions may be influenced by former considerations, they are separate.

The Act thus does not address the issue of personal liability for misuse of office that does not constitute corruption or economic crime. In fact, it protects the officers of EACC, who are public officers, from personal responsibility for misuse of their powers. The Act provides that no action or proceeding for compensation or damages shall be brought against a member of the Advisory Board, the Director, an Assistant Director, an investigator or any staff of the Commission in respect of anything done or omitted in good faith under this Act.¹¹⁸ With EACC enjoying wide powers to investigate and recommend for prosecution corruption and other economic crimes, there is a possibility for misuse of the same. The Act absolves EACC officers from personal liability as long as their actions are in good faith. Actions which are beyond powers can easily be brought under the cover of good faith, by appealing to the vague concept of public interest and urgency.

To compound the issue, the Act makes it clear that even if EACC or Advisory Board officers are absolved of personal liability, the Commission or Advisory Board itself is not relieved of any liability to third parties.¹¹⁹ It also acknowledges that a judgment or an order may be given against the Commission for payment of money by way of damages.¹²⁰ The foregoing provisions have the net effect of holding EACC liable to pay damages to persons who have been injured by the actions of its officers, leaving the individual officers to go scot free.

2.3.1.6 Public Officer Ethics Act¹²¹

Much of the liability for misuse office arises from lack of professionalism and ethics by public officers. This Act seeks to advance the ethics of public officers by providing for a Code of Conduct and Ethics for public officers among other things.

¹¹⁸ *supra*, note 22, First Schedule, Section 9(1) and Second Schedule, Section 7(1).

¹¹⁹ *ibid*, First Schedule, Section 9(2) and Second Schedule, Section 7(2).

¹²⁰ *ibid*, Section 61A.

¹²¹ *The Public Officer Ethics Act*, Chapter 183 of the Laws of Kenya, available at: <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/PublicOfficerEthicsAct.pdf>, (last accessed 23rd August, 2012).

The Act provides that a public officer shall, to the best of his ability, carry out his duties and ensure that the services that he provides are provided efficiently and honestly.¹²² The public officer should also seek to improve the standards of performance and level of professionalism in his organization.¹²³ He should discharge his duties in a professional manner¹²⁴ and should carry out his duties in accordance with the law.¹²⁵ Further, the public officer should not violate the constitutional rights and freedoms of any person in carrying out his duties.¹²⁶ A public officer should not use his office to improperly enrich himself or others.¹²⁷ The public officer should also avoid being in a position in which his personal interests conflict with his official duties.¹²⁸

Moreover, a public officer is required to take all reasonable steps to ensure that property that is entrusted to his care is adequately protected and not misused or misappropriated. In case of damage or loss, the officer is held personally liable for losses resulting from the contravention.¹²⁹

The foregoing requirements provide a framework of ethics which, if fully implemented, shall end up reducing the numerous cases of abuse of office by public officers. In case public officers contravene the above requirements, the act allows appropriate disciplinary action to be specified by the minister for Justice and Constitutional Affairs.¹³⁰ However, the regulations published pursuant to the Act are silent on specific disciplinary actions, leaving that to the discretion of the responsible commissions.¹³¹

The Act provides a window for holding officers personally liable. It provides that if it is the opinion of the responsible Commission that civil or criminal proceedings ought to be considered, the Commission shall refer the matter to the Attorney-General or other

¹²² *ibid*, Section 8.

¹²³ *ibid*, Section 9(c).

¹²⁴ *ibid*, Section 9(g).

¹²⁵ *ibid*, Section 10(1).

¹²⁶ *ibid*, Section 10(2).

¹²⁷ *ibid*, Section 11(1).

¹²⁸ *ibid*, Section 12(1).

¹²⁹ *ibid*, Section 15.

¹³⁰ *supra*, note 29, Sections 36 (1) and (5), 42.

¹³¹ *The Public Officer Ethics Regulations, 2003*, schedule to the Act, published vide Legal Notice L.N. 120/2003.

appropriate authority.¹³² However, this is not mandatory and is subjected to the opinion of the responsible commission, making it a prerogative.

Despite the Act giving a good framework to prevent misuse office by public officers, it provides a weak enforcement framework. It also is silent on what would happen if the abuse of office occasions the government liability to pay damages to third parties.

2.3.1.7 Public Service Code of Regulations

This code also addresses the issue of negligence by civil servants, though in a shallow way. It provides that an officer who makes improper use of a Government vehicle is personally liable to surcharge in addition to any other disciplinary action which may include dismissal.¹³³ It also provides that public officers making use of government quarters are held personally liable to make good all damages and dilapidation due to their own negligence.

The code is however silent on the core issue of this research. It does not define who is liable to third parties and to what extent if public officers engage in negligent acts. It only points to surcharge as a potential personal liability to public officers. That then means that the government is principally fully liable, and can only recover damages paid to third parties from individual officers as surcharge. This study goes further to propose a framework for holding individual public officers personally liable to some extent.

2.3.2 Framework after enactment of Constitution of Kenya 2010

2.3.2.1 Constitution of Kenya 2010¹³⁴

The current Constitution sets up a framework that would enable apportioning of personal liability to public officers for misuse of office. Among the principles of leadership and integrity, it provides that state officers should be accountable to the public for their decisions and actions.¹³⁵ Parliament is then empowered to pass legislation prescribing additional penalties that may be imposed for a contravention of the Chapter on leadership

¹³² *ibid*, Section 38.

¹³³ *ibid*, Regulation K19(1).

¹³⁴ *Constitution of Kenya, 2010*, available at: <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/ConstitutionofKenya2010.pdf>, (last accessed 24th August, 2012).

¹³⁵ *ibid*, Article 73(2)(d).

and integrity. Parliament should seize this window to insist on personal liability to public officers for such breaches that occasion pecuniary liability to the State.

The Constitution also provides for values and principles of public service. Among them are; high standards of professional ethics and accountability for administrative acts.¹³⁶ This allows imposition of personal liability to public officers so as to hold them accountable for their actions.

It has a Bill of Rights which binds all State organs and all persons.¹³⁷ The Constitution requires the State and every State organ, all public officers by extension, to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.¹³⁸ It grants any person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.¹³⁹ In such proceedings, the court may grant appropriate relief, including order for compensation.¹⁴⁰

It is noteworthy that the Constitution is not clear on who can be sued for breach of the rights contained in the bill of rights. However, since such rights bind all persons, it is thus possible to sue public officers in their own capacities for such breaches. The Constitution thus creates a progressive framework which if applied to the latter is not a bar to imposition of personal liability on public officers for losses and compensation arising out of their misuse of office.

2.3.2.2 Legislation establishing Constitutional and other Commissions

The New Constitution establishes a number of Commissions and Independent Offices. Parliament is empowered to enact laws to provide for the detailed functioning of the same. Most of the laws drafted so far contain a blanket protection to members and officers working for these commissions against personal liability for their actions. They protect the public officers from being personally liable to any action, claim or demand whatsoever, provided their actions are done in good faith and are done towards executing the

¹³⁶ *ibid*, Article 232(1)(a) and (e).

¹³⁷ *ibid*, Article 20(1).

¹³⁸ *supra*, note 42, Article 21(1).

¹³⁹ *ibid*, Article 22(1).

¹⁴⁰ *ibid*, Article 23(3)(e).

functions, powers or duties of the Commissions.¹⁴¹ This study argues that proving the twin conditions of, good faith and acting towards executing powers, is easily possible for all actions even if some are illegal. That will then make such officers never incur personal liability.

The Acts thus make it almost impossible for public officers working in these commissions to incur personal liability for their misuse of office.

2.3.2.3 Leadership and Integrity Act¹⁴²

This Act attempts to implement Chapter Six of the Constitution on Leadership and Integrity. It lays out requirements that state officers and public officers must meet in order for them to pass the integrity test. Though the Act is primarily targeted at State officers, it extends application of the Leadership and integrity code to Public officers in general.¹⁴³

A Public officer is expected to respect, abide and carry out his functions in accordance with the Constitution and the law.¹⁴⁴ In performing his functions, he should not violate the legal rights and fundamental freedoms of any person.¹⁴⁵ He should exercise his authority and responsibility in the best interest of the people of Kenya.¹⁴⁶ The public officer should carry out the duties in a transparent and accountable manner,¹⁴⁷ not use the office to unlawfully or wrongfully enrich himself or other persons financially¹⁴⁸ and not to engage in activities that amount to abuse of office.¹⁴⁹ He should take care of public property in his custody, possession or control, failure to which he incurs personal liability for any loss or damage to it.¹⁵⁰

¹⁴¹ See Section 18, The Commission on Revenue Allocation Act, No. 16 of 2011; Section 20, The Ethics And Anti Corruption Commission Act, No. 22 of 2011; Section 25, The Kenya National Commission on Human Rights Act, 2011, Section 25, The National Land Commission Act, 2012; and Section 23, The National Police Service Commission Act, No. 30 of 2011.

¹⁴² *Leadership and Integrity Act*, available at: <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/bills/2012/LeadershipandIntegrityBill2012.pdf>, (last accessed 25th August, 2012).

¹⁴³ *ibid*, Section 53(1) and (2).

¹⁴⁴ *ibid*, section 7(1) and (2).

¹⁴⁵ *ibid*, Sections 7(3).

¹⁴⁶ *ibid*, Section 8.

¹⁴⁷ *ibid*, Section 10(b).

¹⁴⁸ *ibid*, Section 12(1).

¹⁴⁹ *ibid*, Section 13(1)(b).

¹⁵⁰ *ibid*, Section 21.

The revolutionary requirement in this Act is that a public officer should take personal responsibility for the reasonably foreseeable consequences of any actions or omissions arising from the discharge of the duties of the office.¹⁵¹ This opens the window for holding public officers personally liable for acts or omissions which cause loss to the government. Further, consequences for breach of the leadership and integrity code are defined to include surcharge.¹⁵² For illegal acquisition of property, EACC is authorized, in addition to forfeiture, to order the officer to pay compensation to the State. The amount to be paid should have regard to the loss suffered by the Government or public entity and such order is deemed to be a decree under section 25 of the Civil Procedure Act, enforceable as such.¹⁵³

Despite these attempts to hold public officers personally liable for any loss occasioned to third parties as a result of their misuse of office, the Act goes ahead to give blanket exception from personal liability for EACC officers. It provides that no civil or criminal liability should attach to an officer of EACC or any public entity acting on the instructions of the chief executive officer of a public entity, for anything done in good faith by that officer in the performance of the duties under this Act.¹⁵⁴ It is reiterated that even prima facie illegal actions can be demonstrated to be done in good faith, making this a blanket exception.

The Act thus has a weak framework on personal liability. Despite calling for public officers to be personally responsible for foreseeable results of their actions, it emphasizes on surcharge and repaying the state when it is only the state suffering loss or damage. It does not address personal liability for instances where the state as an employer is sued vicariously for misuse of office and is liable to third parties.

2.4 SELECTED COURT CASES

Kenya lacks jurisprudence on public servants personal liability, given that there has not been a suit of that cause of action. All suits reviewed here were brought under the doctrine of vicarious liability, seeking damages against the government for actions of

¹⁵¹ *supra*, note 50, Section 9.

¹⁵² *ibid*, Section 42(8)(d).

¹⁵³ *ibid*, Section 50(2).

¹⁵⁴ *ibid*, Section 51.

public servants, and employees. The courts awarded damages against the government purely for constitutional torts. For negligence cases, the courts found the public officer and the government jointly and severally liable, therefore awarding damages, that were only enforced against the government.

The cases have been categorized into two; cases for Constitutional torts and cases on pure negligence.

2.4.1 Constitutional Torts

2.4.1.1 *Wachira Weheire v Attorney- General*¹⁵⁵

The plaintiff who was a Commercial Officer with Associated Battery Manufacturers (EA) Ltd Nairobi, was arrested on 2nd December 1986 without a warrant in breach of section 72(3) & (5) of the Constitution. On the same day his house was unlawfully searched; and that he was locked up at Jogoo Road Police Station in contravention of section 72(1) of the Constitution. The plaintiff was subsequently blindfolded and locked up for 16 days at Nyayo House basement which was not officially gazetted as a police station, in contravention of section 72(3) and (5) of the Constitution. He sought declaration that the Plaintiff's fundamental rights and freedoms under were contravened; entitlement to the payment of damages and compensation for violations and contraventions of his fundamental rights; general damages, exemplary damages on an aggravated scale; antecedent orders, and costs of the suit.

The court agreed that through the misdeeds of the police, who are public officers, plaintiff lost his job and that his social standing and reputation was adversely affected by the violation of his fundamental rights and freedom, and that he also suffered physical, mental and psychological torture. The Court thus awarded him, as against the government, global award of Kshs.2.5 million as sufficient compensation to the plaintiff for the violations suffered by him and the consequent loss.

¹⁵⁵ *Wachira Weheire v Attorney- General*, Miscellaneous Civil Case 1184 of 2003, in The High Court of Kenya at Nairobi (Nairobi Law Courts), available at: http://kenyalaw.org/Downloads_FreeCases/72867.pdf, (last accessed 25th August, 2012).

Whereas the application was successful, it is important to note that the individual police officers who had arrested him and misused their powers to commit unlawful acts went scot free, suffering no liability, as the government was left to pay damages.

*2.4.1.2 Kariku Kimani v the Commissioner of Land and the Attorney General*¹⁵⁶

The Commissioner of Lands by a Gazette Notice dated 13th October, 1972 gave notice of intention to compulsorily acquire a portion of parcel of land LR.No.11618 measuring 75 acres. On the same date the Commissioner gave notice of the date and place where an inquiry on the same would be held, that is, Wednesday 8th November, 1972 at the Lands Office, Harambee Avenue room No.308. However, this date was later designated as *idd ud fitr*, a public holiday. Consequently, no inquiry was held on that date or any other date thereafter.

Later in May 2005, the petitioner attempted to fence his land, but government agents destroyed his fence, damaged the materials and also carried away some fencing posts. It is then that he discovered that an entry had been irregularly entered against his title as entry No.4 of 3rd March, 1972 absolutely vesting the land in the government. That amounted to unlawful acquisition of private land by government contrary to the Constitution. It was unlawful because; no inquiry was held to prove that the government was acquiring it for purposes of promoting public interest and that the acquisition was a necessity; no compensation was paid at all and the registered owner had remained in possession of the said land till the fencing demolitions.

The courts agreed that the Commissioner of lands had acted unlawfully in acquiring private land without following due process. The government agents had also acted unlawfully by destroying the fence and carrying away some fencing poles. The court awarded. The Court awarded the Ksh. 500,000/= for uprooting of the fence and carrying away materials, Ksh, 2,500,000 for loss of use of land and Ksh. 7,500,000 as punitive damages against the government. The government was also to pay the costs of the suit.

¹⁵⁶ *Kariku Kimani (Suing Thro' James Thuo Kariuki) Power of Attorney Number 45330/1 v The Commissioner of Lands & another*, High Court (Nairobi), Constitutional Petition; Petition No.758 of 2008 eKLR, available at: http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=47240674279210767_030389, (last accessed 24th August, 2012).

Again in the above case, the government incurred liabilities of over Ksh. 10 million, yet the individual officers who had acted unlawfully and in total disregard to the law went away scot free, without any liability.

*2.4.1.3 Harun Thungu Wakaba v The Attorney General*¹⁵⁷

This is a representative citation of 21 consolidated cases. All the cases were seeking declarations of infringement of constitutional rights and damages from the state. They mainly dealt with unconstitutional conduct by police officers and other public officers in arrest and detentions. Each plaintiff was arrested individually on a particular date, taken to a police station and thereafter to the Nyayo House Basement, where each was held incommunicado in a completely dark cell. Each of the plaintiff was also subjected to interrogation, and various acts of torture, inhuman and degrading treatments, at the Nyayo House. After being held for a number of days, most of the plaintiffs were charged in court, several with treason offences, others with some minor offences. Some pleaded guilty under duress and were convicted and sentenced to terms of imprisonment. Others, pleaded not guilty, and were remanded in custody, where the inhuman and degrading treatment continued. Several of the plaintiffs were released after more than 2 years in custody, when the Attorney General entered *Nolle Prosequi* in their cases. The plaintiffs complained of having suffered physical and psychological torture, and also having suffered loss and damage as a result of the incarceration.

The court castigates the unlawful acts of the Police officers and awards damages of between 1.5 and 3 million for each of the plaintiffs against the government. This shows another instance of government incurring heavy liability to third parties due to incompetent and unlawful conduct by its agents. The individual police officers, despite their intentional and at times malicious unlawful actions, incur absolutely no liability at the expense of government. This is the problem that this study intends to address.

¹⁵⁷ *Harun Thungu Wakaba & 20 others v The Attorney General (consolidated)*, High Court at Nairobi (Nairobi Law Courts), Miscellaneous Application 1411 of 2004, eKLR, available at: http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=94469217776390819881480, (last accessed 2nd September, 2012).

2.4.1.4 *Mahamud Muhumed Sirat v Ali Hassan Abdirahman & Others*¹⁵⁸

Another case in Kenya where the plaintiff, or indeed, any citizen, civil society organisation, and or the government, would have sued for recovery of costs from public servants is a case that involve a multitude of public servants, including a government minister, a constitutional commission, law enforcement and other public officials. This was an application to determine citizenship within an election petition.

It all started with an election petition by Mahamud Muhumed Sirat against the MP for Wajir South, Abdulrahman Ali Hassan. Mr. Sirat had sought to nullify the election of Mr. Hassan over allegations of electoral malpractices. Rather than deal squarely with the petition on its merits, Mr. Hassan made an application seeking to have the election petition dismissed with costs on the basis that Mr. Sirat was not a Kenyan citizen. He argued that Mr. Sirat had voluntarily acquired the citizenship of Australia and therefore owed allegiance to the government of Australia. Mr. Hassan further argued that the petitioner, being Australian, was not eligible or ought not to have been registered as a voter in Kenya and could not have qualified to be elected an MP in Kenya. Finally, Mr. Hassan argued that Sirat lacked legal and constitutional capacity to institute or to proceed with the petition. Along the way, Mr. Hassan recruited gullible immigration officials and an ODM minister to boot who managed to howl Sirat from the sanctity of his home into the State dungeons on mere allegations of a political opponent. Forget about the presumption of innocence. Mr. Hassan vigorously argued that Sirat had no locus standi to file and present an election petition; that even the Court had no jurisdiction to hear the petition. Sirat was supposed to be detained and deported without being heard.

In his judgment, Kimaru J. stated that Sirat, “by virtue of his birth in Kenya, and the fact that both his parents are citizens of Kenya, is entitled [to] citizenship of Kenya.” The judge stated that section 97(1), (3) and (7) of the Constitution of Kenya does not deprive a Kenyan citizen by birth of his citizenship upon acquiring nationality of another country. He opined that sections 88, 90, 92, 93, 94, 95 and 97 of the Constitution only “prohibited persons of a particular category who are citizens of other countries at the time Kenya

¹⁵⁸ *Mahamud Muhumed Sirat v Ali Hassan Abdirahman, Brahim Hish Adan (Returning Officer) And The Electoral Commission Of Kenya*, High Court at Nairobi (Milimani Commercial Courts), Election Petition 15 of 2008, eKLR, available at: http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=87656738470792874935521, (last accessed 2nd September, 2012).

attained independence". Those sections do "not apply to citizens of Kenya who acquired citizenship by virtue of their birth from acquiring citizenship of another country after attaining twenty-one years of age."

This case portrayed the best mix of public servants performance of their duties with malice, negligent disregard for due process, reckless actions, and hence potentially causing financial loses to the government. Further, it involves the full scope of public servants, from the minister in charge of immigration, to the senior government officials, employees at the immigration department, to the law enforcement officials, to the electoral commission. It provided, and indeed, still provides, the locus classicus case for setting precedent on personal liability of public servants, since it covers constitutional bodies, elected officials, employees, law enforcement officials, and also senior government officials.

Indeed, on thorough analysis of the case, these causes of action subsist for personal liability suit, yet no such suit has been filed.

2.4.1.5 Mwangi Stephen Mureithi v Hon. Daniel Toroitich Arap Moi E.G.H¹⁵⁹

This is a unique case capturing constitutional as well as commercial elements. The respondent, using his powers as the President of the Republic of Kenya, without any lawful cause and excuse, ordered and caused the detention without trial of the plaintiff. During the period of the detention, the respondent caused to be sold and ravaged the plaintiff's interests in companies and properties they had invested in together, without accounting for the same to him. The respondent since the release of the plaintiff had refused to give the petitioner an account of his dealings in the companies and properties. He also prevented the plaintiff from accessing any information whenever he sought an account for the purpose of illegally and unconstitutionally depriving the petitioner of his rights in the joint ventures.

The judge concurred that the reasons for the plaintiff's detention were personal to the respondent and meant to achieve ulterior commercial advantages for the respondent and

¹⁵⁹*Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi*, Petition No. 625 of 2009, High Court of Kenya at Nairobi, available at: http://www.kenyalaw.org/CaseSearch/view_preview1.php?link=53668167281360180330308, (last accessed 3rd September, 2012).

that in detaining him without trial, the respondent acted in abuse of office as President of the Republic of Kenya. The respondent was thus ordered to pay KShs 80,161,720 as unaccounted proceeds from the sale of joint ventures, at 12% interest with effect from 1/7/1982. He was further ordered to pay KShs 50,000,000/- as punitive damages at 12% p.a. from the judgment date.

The above case shows a rare occasion when the courts have found a public officer personally liable for misuse of his powers. The government was not even a party in the above case, and that was ruled not to be defective. It heralds a new dawn in liability for misuse of office in Kenya, where public officers can be held personally liable. This study shall make further proposals towards introducing a framework for such liability on public officers for negligent acts.

2.4.2 Negligence

2.4.2.1 Pramod Patel v Esther Wanjiku & the Attorney-General¹⁶⁰

On the 3rd of December, 1998, Mr. Pramod Patel, an advocate of the High court of Kenya was driving his motor vehicle registration number KAD 997B along Harambee Avenue in Nairobi City. As he approached the dual carriage which was adjacent to the Parliament building he was suddenly knocked by a motor vehicle registration GK Y427, belonging to the Immigration department, driven by Esther Wanjiku. His vehicle extensively damaged on the front that it was later described as being beyond mechanical repair.

Esther stated that she has had 11 years experience as a driver. On the material day she was assigned to drive to the Central Bank. There was another vehicle that was following her. She was caught up in a traffic jam on her correct side of the road. She then crossed to the wrong side of a dual carriage lane. It was her expectation that the on-coming vehicles would see her. She flashed her lights and hooted. The one oncoming vehicle came and collided with her. She expected the vehicle to swerve to the other lane on the same dual carriage way but it did not.

¹⁶⁰ High Court of Kenya at Nairobi, Civil Case No.2151 Of 1999, available at: http://www.kenyalaw.org/CaseSearch/case_search_one.php?pageNum_result=5709&totalRows_result=69481&casCourt=High+Court (last accessed 28th September, 2013).

The plaintiff stated he had not seen the defendants' vehicle nor did the vehicle flash and hoot. He just felt the impact of the collision and was in shock.

The court held from the evidence that the accident was solely caused by the 1st defendant's negligence, by leaving her dual carriage way and drove on the opposite dual carriage way despite a concrete island, positively dividing the two roads. The plaintiff was held not to have contributed to the accident. The first defendant was found 100% liable for the accident. The second defendant, the Attorney General, was held vicariously liable for the acts of its agent and or servants. Liability was therefore entered against the two defendants both jointly and severally at 100%. The court awarded general damages for pain suffering and loss of amenities at Ksh.200,000/-.

2.4.2.2 Stephen Njuguna v Jonathan Ogo Nyangara & The Attorney General¹⁶¹

Jonathan Ogo Nyagala an authorized driver of army vehicle registration Number 08AF 38 Peugeot Saloon drove a motor vehicle on a public road without due care and attention Contrary to Section 49(1) of the Traffic Act Cap 403. On 6.2.96 at about 10.00 a.m. along Ngong Road, Jonathan was overtaking at a junction while he was meant to drive straight and collided with the lorry registration Number KUX 593. He was found negligent in failing to exercise care, overtaking at a junction and driving on the outer lane while he was not turning on the offside The court awarded damages against both defendants: Kshs.223,917.75 for repair of the lorry, Kshs. 5,000.00 as assessment charges and Kshs. 100.00 as charges for police abstract.

2.4.2.3 Mugo v Attorney General & 2 others¹⁶²

The plaintiff, a 14 year old boy sued through his mother for compensation for injuries sustained as a result of a road traffic accident. He was being carried in lorry No GK 121U together with other children returning from participating in a singing competition at Embu, when he was seriously injured as a result of a collision between that vehicle and an Isuzu lorry KRY 702 on the Embu Siakago road.

¹⁶¹ High Court of Kenya at Nairobi, Civil Case No. 118 of 1997, available at: [related:www.kenyalaw.org/CaseSearch/case_download.php?go=9503959324818726078541&link= Stephen Njuguna v Jonathan Ogo Nyangara & The Attorney General](http://www.kenyalaw.org/CaseSearch/case_download.php?go=9503959324818726078541&link=Stephen+Njuguna+v+Jonathan+Ogo+Nyangara+%26+The+Attorney+General) (last accessed 28th September, 2013).

¹⁶² High Court, at Nairobi, Civil Case No 1698 of 1980, available at: http://www.google.co.ke/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CDUQFjAC&url=http%3A%2F%2Fwww.kenyalaw.org%2FCaseSearch%2Fcase_download.php%3Fgo%3D72752247612235322062590%26link%3D&ei=ikBSUoOmO4Kl0wWyl4DYDQ&usg=AFQjCNEmbJdawS-TWYTu7JmWTy6uxe1OQA&bvm=bv.53537100,d.d2k&cad=rja (last accessed 28th September, 2013).

Evidence was led to show that the plaintiff, was seriously traumatized by the accident and had his right arm amputated. It was also led in evidence that he could no longer play as he did before the accident and that learning to use his left hand was proving difficult.

The court awarded the plaintiff, against the government, Kshs.180,000 in general damages and Kshs.800 in special damages.

2.4.2.4 Berita Wangari Muchene v Stephen N. Wairagu, the Attorney General and Sher Agencies Ltd¹⁶³

On the 19th day of April 2001 along the Nairobi – Limuru road. There was a multiple car accident involving a government ambulance, G.K J569 and motor vehicle registration KAC 891D, vehicle registration KAK 388Z and another public service vehicle.

Sher Agencies Ltd’s motor lorry vehicle was being driven along the Nairobi Limuru road on the lane nearest the wall that divided the highway from on-coming vehicles from the opposite side. It moved to the right dual carriage lane was to attempt to overtake a public service vehicle that was on the left lane. Before overtaking this vehicle the PSV vehicle slowed down and pulled off into a bus stop stage. At the said stage to the left of the road there was indeed already a stationary public service vehicle (matatu), KAK 388Z, which was parked and was completely off the left lane road. There were passengers in this vehicle. An ambulance belonging to the Ministry of Health motor vehicle registration GK J569 overtook the lorry vehicle using the left lane. As it sped almost past the lorry it collided with the PSV vehicle on the side of its right tale light. The ambulance on hitting the 4th vehicle swerved and hit the lorry. The lorry in turn swerved to give the ambulance an opportunity to get between the two vehicles. In the process the lorry knocked the dividing wall of the highway. The impact caused the trailer or body of the lorry to overturn partially. This portion of the lorry landed on the stationary matatu public service vehicle belonging to the 1st defendant motor vehicle registration No. KAK 388Z. It hit the said vehicle to its side. The passenger inside the said vehicle sustained injuries, one of whom is the plaintiff in this case.

¹⁶³ High Court of Kenya at Nairobi, Civil Case No.548 Of 2002, available at: http://www.google.co.ke/url?sa=t&rc=tj&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CC0QFjAA&url=http%3A%2F%2Fwww.kenyalaw.org%2FCaseSearch%2Fcase_download.php%3Fgo%3D92275911911594847986524%26link%3D&ei=3kBSUq2eDOnA0QWm74GwCQ&usg=AFQjCNGpOSwkiF-FmDid2fNOVmaGGLdQqA&bvm=bv.53537100,d.d2k (last accessed 28th September, 2013).

The court held that from the evidence, it is clear that the driver of motor vehicle registration GK J569 was wholly to blame for this accident. Since he was not using his siren, it was his negligence that caused the accident. The government vehicle collided with a public service vehicle, lost control collided with the lorry belonging to the 3rd defendant and then stopped in the middle of the road. If the 3rd defendant had not swerved, the ambulance would have been extensively damaged. Instead and most unfortunate the occupiers of the stationary public service vehicle were injured and the vehicle damaged.

The Attorney General was therefore held vicariously liable for this accident at 100% and ordered to pay damages and costs be assessed later.

2.5 CONCLUSION

The Kenyan legal framework places liability for negligence by public officers squarely on the government. It vehemently protects the individual officers from any form of personal liability. Though the new constitution demands that public officers be accountable for the foreseeable consequences of their actions, the implementing framework does not fully implement this. However, the High Court in 2011 issued a landmark ruling, holding a public officer personally liable for abuse of office. This is a sign that there may be light at the end of the tunnel, in fashioning an accountable public service.

There is however need to digest lessons from other jurisdictions which have achieved some level of personal liability for negligent and reckless public officers, which is analyzed in the next chapter.

CHAPTER THREE: VIABILITY OF IMPOSING PERSONAL LIABILITY ON PUBLIC SERVANTS

3.1 BASIS FOR IMPOSING PERSONAL LIABILITY ON PUBLIC SERVANTS

The imposition of personal liability for public servants as proposed by this study is based on principles of good governance. These are enumerated herein below;

3.1.1 Accountability

The concepts of accountability, is among the founding principles of public administration.¹⁶⁴ Accountability refers to the obligation on the part of public officials to report on the usage of public resources and answerability for failing to meet stated performance objectives.¹⁶⁵ It is a standard of public life, where “holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their offices.”¹⁶⁶

Among the principles of public service in the new constitution is accountability for administrative acts.¹⁶⁷ Lack of this accountability is what has led public servants into malicious and reckless actions before that have cost the government billions of shillings in paying damages to aggrieved persons. Imposition of personal liability would give a chance to public officers to account to the public their reasons and logic behind their actions. This shall happen in their defenses against claims for damages. Without such incentive, many public servants are unwilling to account for the use or misuse of the powers granted to them, hiding under the veils of official secrecy and discretion.

¹⁶⁴ The UN Charter states, “The paramount consideration in the employment of the (UN) staff ... shall be the necessity of securing the highest standards of efficiency, competence and integrity.” (Article 101) In addition, many Member States identify integrity, transparency and accountability among core values or founding principles for their public administrations in their constitutions and relevant laws.

¹⁶⁵ Elia Armstrong (2005), *Integrity, Transparency and Accountability in Public Administration: Recent Trends, Regional and International Developments and Emerging Issues*, p. 1, available at: <http://unpan1.un.org/intradoc/groups/public/documents/un/unpan020955.pdf>, (last accessed 18th September, 2012).

¹⁶⁶ Pope, Jeremy, IT source book 2000, confronting corruption: the elements of national integrity system, available at: <http://info.worldbank.org/etools/docs/library/18416/00.pdf> (last accessed on 20th September 2013).

¹⁶⁷ The Constitution of Kenya 2010, Section 232(1)(e).

3.1.2 Integrity

In public administration, integrity refers to “honesty” or “trustworthiness” in the discharge of official duties, serving as an antithesis to “corruption” or “the abuse of office.”¹⁶⁸ To uphold integrity, “public servants must neither solicit nor accept anything from their fellow citizens to perform their duties, thus creating a climate of confidence in them and in the public service as a whole.”¹⁶⁹

The new constitution has devoted a whole chapter on leadership and integrity. It demands that state officers exercise their authority in a manner that promotes public confidence in the integrity of the office.¹⁷⁰ It provides for selection of public officers on the basis of personal integrity.¹⁷¹ Integrity is also mentioned among the national values and principles of governance.¹⁷² Much of the liability the Kenyan government faces for misdeeds by civil servants arises from instances where civil servants failed to fully exercise their mandate in attempt to solicit for bribes. Other instances, public servants receive financial incentives from interested parties to do unlawful things for the benefit of their financiers. Imposition of personal liability would expose such instances, and deter such actions in future.

3.1.3 Transparency

Transparency refers to unfettered access by the public to timely and reliable information on decisions and performance in the public sector. Transparency must be fostered by providing the public with timely, accessible and accurate information.¹⁷³ This, if implemented ensures that processes, institutions and information are directly accessible to those concerned with them, and enough information is provided to understand and monitor them.¹⁷⁴

¹⁶⁸ Supra note 138.

¹⁶⁹ Yemeni Civil Service Act No. 19 (1991) and By-Law No. 122 (1992), cited in forthcoming UN Report, Public Sector Transparency and Accountability in Selected Arab Countries: Policies and Practices

¹⁷⁰ Article 73(1)(a)(4)

¹⁷¹ Article 73(2)(a)

¹⁷² Article 10(2)(c)

¹⁷³ Constitution of the Republic of South Africa, 1996, Chapter 10, Article 195 (g)

¹⁷⁴ Graham, Amos, Plumptre (2003), *Principles for Good Governance in the 21st Century*, Policy Brief No.15, p. 6, available at: http://www.ops-oms.org.pa/drupal/SCMDSS/2%20WCSDH%20Discussion%20Paper%20resources/1%20Governance/IOG_Principles_for_good_governance_UNDP_PolicyBrief15_2003.pdf, (last accessed 18th September, 2012).

The new constitution places transparency among the national values and principles of governance.¹⁷⁵ Transparency is demanded in almost all spheres of governance including judiciary,¹⁷⁶ financial control,¹⁷⁷ government procurement,¹⁷⁸ electoral systems,¹⁷⁹ administration of land,¹⁸⁰ functioning of constitutional commissions¹⁸¹ and national police service.¹⁸² Among the values and principles of public service is transparency and provision to the public of timely, accurate information.¹⁸³ Finally the bill of rights grants every citizen the right of access to information held by the State.¹⁸⁴

Numerous claims have made the government to pay damages for actions and omissions of public servants, shrouded in secrecy. The secret Nyayo Torture Chambers have cost the government millions in damages to persons who were locked up there, since it was not a gazetted police station. By placing personal liability on public servants for their actions, it shall force them to avail all information pertaining to and informing their actions, enhancing transparency to the public.

3.1.4 Rule of Law

This is the principle that all people and institutions are subject to and accountable to law that is fairly applied and enforced.¹⁸⁵ It implies presence of constitutional limits on the extent of government power.¹⁸⁶ If this principle was to be observed in the public service, all public servants and state officers, despite their rank must be willingly bound by the law. Not only should the law be enforced, but it should also be enforced fairly and without discrimination.

¹⁷⁵ Article 10(2)(c)

¹⁷⁶ Articles 172(1) and 172(2)(a)

¹⁷⁷ Articles 225(2) and 226(1)(a)

¹⁷⁸ Article 227(1)

¹⁷⁹ Articles 81(e)(iv), 82(2)(b) and 86(a)

¹⁸⁰ Article 60(1)(d)

¹⁸¹ Article 230(5)(d)

¹⁸² Article 224(b)

¹⁸³ Article 232(1)(f)

¹⁸⁴ Article 35(1)(a)

¹⁸⁵ Council of Europe (2011), *Report on the Rule of Law*, p. 2, Adopted by the Venice Commission at its 86th plenary session in Venice, 25-26 March 2011, available at: <http://www.venice.coe.int/docs/2011/CDL-AD%282011%29003%20rev-e.pdf>, (last accessed 18th September, 2012).

¹⁸⁶ *ibid.*

The New constitution embodies this principle. Among the national values and principles of governance is the rule of law.¹⁸⁷ Political parties are required to promote the rule of law.¹⁸⁸ The president himself is tasked to observe the rule of law.¹⁸⁹ The Attorney-General should promote, protect and uphold the rule of law.¹⁹⁰ National security should also be pursued in compliance with the law and with the utmost respect for the rule of law.¹⁹¹ Finally, the constitution should be interpreted in a manner that advances the rule of law.¹⁹²

Part of the liability that government is forced to shoulder on behalf of public servants arises from lack of respect of rule of law. Public servants engage in actions that blatantly disregard the law itself and also have no respect for court orders, leading to award of damages against the government to aggrieved persons. Imposition of personal liability on any public servants, irrespective of rank, shall help remove the burden for such actions from the government and apportion it on individual public servants. It shall also ensure that no public officer is above the law in any way. For fear of incurring liability, public servants will thus have an incentive to uphold the rule of law, a key pillar of good governance.

3.1.5 Respect for Human Rights

Good governance promotes fundamental and universal human rights.¹⁹³ Human rights principles provide a set of values to guide the work of governments and other political and social actors. They also provide a set of performance standards against which these actors can be held accountable.¹⁹⁴ Strict observance of this principle would see all public servants be careful in their actions so as not to infringe on other persons' human rights.

¹⁸⁷ Article 10(2).

¹⁸⁸ Article 91(1)(g)

¹⁸⁹ Article 131(2)(e)

¹⁹⁰ Article 156(6)

¹⁹¹ Article 238(2)(b)

¹⁹² Article 259(1)(b)

¹⁹³ Dobriansky Paula (2012), *Principles of Good Governance*, Under Secretary of State for Global Affairs, available at: <http://usinfo.org/enus/government/forpolicy/dobriansky.html>, (last accessed 18th September, 2012).

¹⁹⁴ UN High Commissioner for Human Rights (2007), *Good Governance Practices for the Protection of Human Rights*, HR/PUB/07/4 , p. 5, available at: <http://www2.ohchr.org/english/issues/development/governance/index.htm>, (last accessed 19th September, 2012).

The new constitution also emphasizes this principle. Respect for human rights is among national values and principles of governance.¹⁹⁵ Further, the rights and fundamental freedoms guaranteed in the Bill of Rights belong to each individual and are not granted by the State.¹⁹⁶ The State is required to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.¹⁹⁷ The constitution further establishes the Kenya National Human Rights and Equality Commission, with the mandate of promoting, enhancing, protecting and monitoring observance of human rights.¹⁹⁸ The president is required to ensure the protection of human rights and fundamental freedoms.¹⁹⁹ National security should also be pursued in compliance with human rights and fundamental freedoms.²⁰⁰ The National Police Service is required comply with constitutional standards of human rights and fundamental freedoms.²⁰¹ Finally the constitution provides that it should be interpreted in a manner that advances human rights and fundamental freedoms in the Bill of Rights.²⁰²

Majority of the claims against government for misdeeds relate to the police department. They include arbitrary arrests, torture, inhuman treatment, illegal searches, extra-judicial killings and other breaches of human rights by police officers. The government is thus forced to pay billions to aggrieved parties. Imposition of personal liability for reckless breach of human rights would make the police desist from such actions in future, saving the government a lot of money. The errant officers would then be forced to pay damages for their reckless actions from their pockets acting as deterrence for burly and trigger happy officers.

3.1.6 Efficiency Principle

Efficiency in governance denotes existence of processes and institutions that produce results that meet needs while making the best use of resources available.²⁰³ Efficiency as a

¹⁹⁵ Article 10(2)(b).

¹⁹⁶ Article 19(3)(a).

¹⁹⁷ Article 21(4).

¹⁹⁸ Article 59.

¹⁹⁹ Article 131(2)(e)

²⁰⁰ Article 238(2)(b)

²⁰¹ Article 244(c).

²⁰² Article 259(1)(b).

²⁰³ International Fund for Agricultural Development (IFAD) (1999), *Good Governance: An Overview*, p. 6, available at: <http://www.ifad.org/gbdocs/eb/67/e/EB-99-67-INF-4.pdf>, (last accessed 19th September, 2012).

principle of good governance also covers the sustainable use of natural resources and the protection of the environment.²⁰⁴

The new constitution espouses this principle. It calls for efficient administrative actions in respect to justice,²⁰⁵ efficient management of land,²⁰⁶ efficient electoral systems,²⁰⁷ efficiency in parliament,²⁰⁸ efficiency in judiciary,²⁰⁹ efficiency in service delivery by county governments²¹⁰ and efficiency in management of public funds.²¹¹ Among the values and principles of public service is efficient, effective and economic use of resources.²¹² The Public Service Commission is tasked with the role of ensuring that the public service is efficient and effective.²¹³

By placing personal liability for misdeeds or lack of action on public servants, it ensures that they act in an efficient manner. The government has lost millions of money to pay off claims arising from negligent by public servants. When they know that liability for such actions will squarely fall on them, they shall be more careful in their actions, saving the government lots of money. This shall translate to efficient use of both money and even other natural resources.

3.2 FORMS OF PERSONAL LIABILITY WITHIN THE SCOPE OF THIS STUDY

There are many forms of actions which can lead to lawful and correct apportioning of personal liability to individual public servants. These are discussed hereunder so as to clarify the scope of this study.

3.2.1 Constitutional torts

This happens when persons can sue and recover damages when public officials violate the plaintiffs' constitutional rights. This is currently the leading cause of civil lawsuits against

²⁰⁴ See *Essay on Good Governance*, available at: <http://www.oxbridgewriters.com/essays/politics/principle-of-good-governance.php>, (last accessed 18th September, 2012).

²⁰⁵ Article 47(1)

²⁰⁶ Article 60(1)

²⁰⁷ Article 81(e)(v)

²⁰⁸ Article 127(6)(a)

²⁰⁹ Article 172(1)(e)

²¹⁰ Article 176(2), 203(1)(e)

²¹¹ Article 226(1)(a)

²¹² Article 232(1)(b)

²¹³ Article 234(2)(e)

the government. Most suits affect the ministry of internal security, especially the police. The complaints range from arbitrary arrests, torture, detention in illegal places and extra-judicial killings. This study proposes that public servants take personal liability for damages arising out of their blatant abuse of other persons' constitutional rights.

3.2.2 Ultra-vires actions

Invalid administrative decisions end up apportioning liability on the government to pay damages. Decisions of public officers, particularly those exercising independent decision-making power, are often declared invalid for being, or being found to be, *ultra vires*. This happens in two aspects. The first is involves irresponsible actions of public servants which are not based on any substantive or incidental power to do an act. These public officers do certain actions in situations where they clearly know or are ignorant of the fact they have no powers to do so. The second area is actions of public officials which bear procedural defects and deficiencies and abuse of power. Put together, the two areas of *ultra vires* provide for grounds of judicial review under the relevant Acts or the common law.

The Government Ministry that records the second highest number in claims is the Ministry of Lands, Housing and Urban Development²¹⁴. Most complaints involve land officers acting maliciously and recklessly in *ultra vires* manner. In the end the government incurs liability in damages to persons affected by such actions. This study proposes that public servants should incur personal liability for such damages.

3.2.3 Entering into unlawful and unconscionable contracts and also blatant breach of valid contracts

The government has capacity to enter into contracts just like any other individual. However, since its not a human person with its own body and will, it enters into such through public servants. This is abused in many ways. Some public officers enter into contracts containing unreasonable terms that commit the government to heavy financial responsibilities. Others breach contracts with impunity, placing the burden of paying damages for breach on the government.

²¹⁴ Supra note 33.

This study proposes that public servants incur primary personal liability for the unconscionable contracts and damages for breach.

3.2.4 Negligence

Negligence is the body of law that covers unintentional torts. This body imposes a duty of care on all people, to exercise reasonable care, in carrying out their functions. A cause of action will succeed if the defendant's action caused harm (personal injury, or property damage) to a third party, as a result of lack of care or reasonable contemplation.

Numerous cases of public officers acting negligently have been reported, occasioning the government liability to pay damages in tort. This study proposes that such public servants should incur the primary legal liability to pay those damages.

In conclusion therefore, this study notes a lacuna in the above areas. The position on personal liability for criminal offences is clear in Kenya. Public servants are responsible personally for all crimes they commit while in office. The study will thus only restrict itself to civil liability as highlighted above.

3.3 COMPARATIVE ANALYSIS

3.3.1 Canada

Canadian law and also the courts are inclined towards instilling personal liability on public servants for their misdeeds. First, the Quebec Civil Code provides that; "every person capable of discerning right from wrong is responsible for the damages caused by his fault to another, whether by positive act, imprudence, neglect or want of skill." The law thus clearly imposes personal civil liability to all persons including public servants for their misdeeds. Second, the Canadian courts have been more than willing to impose personal civil liability on public servants who fail in their duties. Plaintiffs unhappy with the economic impact of decisions or actions of public authorities can use the tort of misfeasance in public office as an avenue for obtaining compensation. The tort of misfeasance in public office is also referred to as abuse of power or abuse of authority. The individual public servants take personal liability for paying the damages, and not the state. Example is shown in the following case;

*Roncarelli v. Duplessis*²¹⁵

Roncarelli, a member of the Jehovah's Witnesses, was a proprietor of a restaurant and held a liquor licence for that restaurant. He posted bail for nearly 400 Jehovah Witnesses who had been arrested for distributing printed material related to their faith contrary to by-laws. Maurice Duplessis, premier of Quebec during this time, directed the Quebec Liquor Commission to revoke Roncarelli's liquor licence and to declare him banned forever from obtaining a licence. Duplessis testified that he believed it was his right and his duty to remove the "privilege" of the licence from Roncarelli because of Roncarelli's support for the Jehovah's Witness campaign. The Supreme Court of Canada found that Duplessis, as a matter of fact, caused the permit to be cancelled and therefore caused Roncarelli harm. The Court held that Duplessis was not acting in the exercise of his official power because his purpose was wholly irrelevant to the Quebec Alcoholic Liquor Act. Moreover, the right of cancellation of a permit was a power conferred on an independent commission and therefore was not a power that Duplessis could exercise. Finally, the Court also found that Duplessis intentionally inflicted damage upon Roncarelli.

This case is the classic depiction of what has become known as the "targeted malice" means of committing the tort of misfeasance in public office. Most government actors are not as blatant as Mr. Duplessis, who openly admitted his improper motive, which meant that very few plaintiffs brought successful claims relying on the tort. To succeed they had to have a "smoking gun" in the form of an admission by the defendant of his motive or a documentary record that demonstrated such a motive. Roncarelli was awarded \$33,123.53 in damages, a fraction of his claim, plus costs. These were awarded against Duplessis personally and not against Quebec

This was also the case in;

Odhavji Estate v. Woodhouse

In 1997, Toronto police shot and killed Odhavji, a fleeing robbery suspect who was unarmed at the time. The Special Investigations Unit (SIU), an investigator of police misconduct, made several demands on the officers. It requested same-day questioning of the officers involved in the shooting, and wanted the officers to be segregated prior to questioning. The SIU also requested the officers' shift notes, on-duty clothing, and blood

²¹⁵ [1959] S.C.R. 121

samples. The police officers blatantly failed to comply with these requests. The SIU irrespective of this completed its investigation, without recommending charges on the errant officers. The Odhavji family sued officers involved in the shooting, the Chief of Police, the Police Services Board and the Solicitor General. They claimed for damages for wrongful death in association with the shooting itself, and negligence and misfeasance in a public office in relation to the SIU investigation. The misfeasance was based on a failure by the officers to comply with section 113(9) of the Police Services Act, which required the officers to cooperate fully with the members of the [SIU] in the conduct of investigations. The supreme court held that the police officers knew that they were under a statutory duty to cooperate with the SIU investigation, but they deliberately failed to do so. It thus allowed the claim for damages to proceed.

That is the kind of personal liability that this study is calling for in Kenya. public servants should bear the primary burden for atoning for their misdeeds, with the government only bearing secondary liability.

3.3.2 England

The courts in England were initially hostile to the idea of holding public servants personally liable, especially for contracts signed on behalf of government. This came out in;

*Dunn v Macdonald*²¹⁶

The courts stated that a Crown servant acting on behalf of the Crown could not be held personally liable under an implied warranty of authority

However, this stance was softened in a later case as follows;

*Wood v Little*²¹⁷

An elected councillor had accepted a bribe to sign a contract on behalf of government. The courts held that public servants could be held personally liable under implied warranty of authority if; their lack of authority to sign the contract is clear as a matter of law and if the third party should have been aware of this lack of authority.

²¹⁶ [1897] 1 QB 555

²¹⁷ (1921) 29 CLR 564

The above case opened a window for holding public servants personally liable. By the year 2000, the English courts had also allowed the use of the tort of misfeasance in public office as an avenue for obtaining compensation from individual civil servants. This was evident in the case;

*Three Rivers District Council v the Governor and the Company of the Bank of England*²¹⁸

Three Rivers represents about 6,000 depositors with the Bank of Credit and Commerce International (BCCI) in the UK. They suffered economic losses due to fraud and the eventual liquidation of BCCI, after fraud was committed on a large scale by senior staff. The depositors sued for misfeasance against senior officials at the Bank of England, for acting in bad faith in licensing BCCI as a deposit-taking institution and in failing to take steps to close BCCI "when the fraud was evident. The House of Lords set out the elements of the tort of misfeasance as;

- (a) the defendant must be a public officer.
- (b) the defendant's conduct must involve the exercise of power as a public officer, or the exercise of public functions.
- (c) the defendant must be shown to have one of two states of mind:
 - (i) targeted malice - conduct specifically intended to injure someone. This includes "bad faith" in the sense of exercising public powers for an improper or ulterior motive; or
 - (ii) acting with subjective knowledge that he has no power to do the act complained of and subjective knowledge that the act will probably injure the plaintiff; or acting with subjective reckless indifference with respect to the illegality of the act and subjective reckless indifference to the outcome.
- (d) the public officer must owe a duty to the plaintiff, which may be established by showing that the plaintiff has the right not to be damaged or injured by a deliberate abuse of power.
- (e) causation - the plaintiff must show that the defendant's abuse of power caused him harm as a matter of fact.
- (f) the plaintiff must show that he has suffered damages that are not "too remote" from the defendant's tortious act. The plaintiff must show not only that the defendant knew his

²¹⁸ [2000] 3 All E.R. 1.1

act was beyond his powers, but also acted in the knowledge that his act would probably injure the plaintiff or a person of the class of which the plaintiff was a member.

By the above terms, the complainants were awarded damages for misfeasance.

The above position clearly shows that public officials misusing their powers in Britain risk the possibility of personal suits, which would force them to pay huge sums of monies to persons affected by their actions. The damages would be awarded directly against the public servants in their capacity and not the government. This study proposes similar measure in the Kenyan public service.

3.3.3 America

In America, the laws and the courts initially put personal liability on individual public officers for their civil wrongs. First, three statutes, enacted as part of the Civil Rights Acts of 1866 and 1871, allow money damages claims against public officials who violate a plaintiff's constitutional rights.²¹⁹ 42 U.S.C. § 1983, part of the Civil Rights Act of 1871 puts it thus;

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.²²⁰

The courts have interpreted it that Section 1983 affords a money damages remedy against defendants who, acting under color of state law, violate a plaintiff's federal constitutional or statutory rights.²²¹

Second, plaintiffs aggrieved by violations of their constitutional rights are allowed to seek and recover damages from public officials responsible for the breaches. This is achieved

²¹⁹ These are 42 U.S.C. §§ 1981, 1983, and 1985. Section 1981 supports damages suits for racially-based discrimination; section 1983 is a basis for money claims for constitutional violations under color of state law; section 1985, among other things, provides causes of actions for damages for conspiracies to violate civil rights and for interference with the duties of federal officers.

²²⁰ *Civil Rights Act of 1866*, 14 Stat. 27 (1866), available at: http://www2.law.columbia.edu/faculty_franke/Civil%20Rights/Statutory%20Excerpts.htm, (last accessed 19th September, 2012).

²²¹ Scaram J, in *Monroe v. Pape*, 365 U.S. 167 (1961), p. 1145.

through actions for damages brought directly under the Constitution. This is referred to as constitutional torts in US and was developed in;

*Bivens v Six Unknown Federal Narcotics Agents*²²²

Six Federal Bureau of Narcotics acting under claim of federal authority entered Bivens' apartment and arrested him for alleged narcotics violations. They did not have a search warrant but proceeded to manacle Bivens in front of his wife and children, threatened to arrest the entire family, and searched the apartment. They conducted the arrests with unreasonable force and without probable cause. Bivens sought \$15,000.00 in damages for great humiliation, embarrassment, and mental suffering. The Supreme Court held that though the Fourth Amendment did not provide for any monetary damages for injuries suffered as a result of a federal agent acting unconstitutionally, it would adjust its remedies to allow Bivens to claim.

A similar decided case is

*Butz v. Economou*²²³

Following a failed attempt by the Department of Agriculture to revoke or suspend his commodity futures commission company's registration, Arthur Economou sought damages against Earl Butz and several other federal administrative officials for wrongful initiation of administrative proceedings. In its judgment, the court noted that federal officers "are accountable when they stray beyond the plain limits of their statutory authority."²²⁴ It reiterated its rejection of the notion that federal officials might be "absolutely immune from any liability for damages even if in the course of enforcing the relevant statutes" if they knowingly and deliberately infringed constitutional rights in doing so.²²⁵

However, the notion of personal liability was eroded later in;

*Harlow v. Fitzgerald*²²⁶

²²² *Bivens v. Six Unknown Federal Narcotics Agents* 403 U.S. 388 (1971), available at http://www.hrcr.org/safrica/enforcement/bivens_narcotics.html accessed on July 19, 2011

²²³ See *Butz v. Economou*, 438 U.S. 478, 507 (1978)

²²⁴ *Id.* at 495.

²²⁵ See Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1748 (2001)

²²⁶ 457 U.S. 800, 818 (1982)

Harlow was employed at the Department of the Air Force. He testified before Congress on military cost overruns, as a whistleblower. A number of senior advisors to the President disclosed his name to President Nixon, leading to his discharge from employment. Harlow sued the advisors alleging that they had conspired unlawfully, and against his rights as a whistleblower, to deprive him of his job. The courts declined to award damages, allowing the advisors to hide under an exception of good faith. The judges also empowered the congress to limit application of the *Bivens* remedy.

In response to the powers granted by *Harlow v Fitzgerald*, the Congress enacted several laws that protect federal public servants against personal liability for common law torts. If such officers commit torts while within the scope of employment, an action against the United States, under the FTCA, is the exclusive remedy against a federal employee for money damages caused by a negligent act or omission committed.²²⁷ Further, military medical personnel, including physicians, dentists, nurses, pharmacists, and paramedics, from tort liability arising out of the performance of medical, dental, or related health care functions.²²⁸ Attorneys, paralegals, and other members of legal staffs within the Department of Defense also have immunity from malpractice.²²⁹

The net effect of the foregoing enactments was to grant individual government employees' absolute immunity from any form of liability for torts. This reduced effectiveness of such claims.²³⁰

Despite the above clear provisions, immunity from personal liability has been lifted for constitutional torts in;

*Carlson v. Green*²³¹

A federal prisoner sued prison officials for damages under the eighth amendment, claiming that her son died in the prison from a lack of adequate medical care. She asserted that the failure of the prison officials to provide her son proper medical treatment for a

²²⁷ Federal Employees Liability Reform and Tort Compensation Act, 28 U.S.C. § 2679(b)(1)

²²⁸ The Gonzales Bill, 10 U.S.C. § 1089.

²²⁹ 10 U.S.C. § 1054, part of the Defense Authorization Act of 1987

²³⁰ Infact between January 1, 2004, and August 7, 2006, there were no cases affirming a judgment against federal employees. That means that there were no cases in which a monetary judgment against the defendants was upheld

²³¹ 446 U.S. 14 (1980).

chronic asthmatic condition resulting in his death amounted to cruel and unusual punishment. The Supreme Court held that the plaintiff had stated a cause of action for damages for violation of the eighth amendment to the Constitution. Despite the plaintiffs having an alternative remedy in the Federal Tort Claims Act (FTCA) against the government, the Court, refused to find that the possible existence of a cause of action under the FTCA precluded the plaintiff's constitutional tort claim. They thus awarded the damages.

Despite restrictive laws, the US courts have by the above case shown willingness to continue to impose personal liability on public servants for their misdeeds in office. This study proposes that such an approach needs to be adopted in Kenya.

3.4 CONCLUSION

From the foregoing discussions, it is clear that the Kenyan law contains sufficient basis for apportioning of primary personal liability on individual public servants for their misdeeds. However, there is lack of an enabling legal framework. This concept has also not been extensively litigated in the Kenyan courts so as to test the attitude of the Kenyan Judiciary towards it.

Other countries surveyed have enabling frameworks that allow imposition of personal liability on public servants. The judiciary in these countries has gone ahead to impose such liability, requiring public servants to pay damages for the consequences of their actions. This study shall propose in the next chapter modalities for implementing such a system in Kenya. Personal liability on civil servants would go a long way in promoting accountability, integrity, transparency and efficiency in the public service. The net effect of the foregoing would be to entrench good governance in the country's public service.

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

4.1 INTRODUCTION

The purpose of this study was to analyze the effectiveness of Kenya's legal regime in curbing misuse of powers by public officers, occasioning the government pecuniary loss. Based on the analysis, the study was to propose a legal regime for personal liability of public officers. The objectives of the study were; to examine the extent to which the current legal regime in Kenya impose liability for misuse of public office; and to propose changes should be made to the current legal regime in Kenya so as to enforce personal liability against officers who misuse public office.

4.2 SUMMARY OF THE CONCLUSIONS

4.2.1 Conclusion on the losses suffered by government in legal liability for misdeeds by public servants in Kenya

The Kenyan law places liability on the government through vicarious liability for misdeeds by public servants. This has made the government lose collusive sums of money through payment of damages to persons affected by such misdeeds. Currently the amount runs into billions. It is the conclusion of this study that this does not reflect efficient use of public resources. The study also opines that imposition of personal liability on public servants for such misdeeds would drastically reduce such incidences.

4.2.2 Conclusion on the concept of personal legal liability for public servants in Kenya

The concepts of personal legal liability of public officers is pillared on the need for public officers to be held accountable for their actions, which cause both harm to the plaintiffs, and subsequently, financial losses to the government, under the doctrine of vicarious liability. The study concludes that this is a sound concept, which if applied in Kenya would entrench good governance within the public service. It is an idea whose time has come, so as to curb corruption and inefficiency in public service.

4.2.3 Conclusion on principles governing imposition of personal liability on public servants

Personal liability of public officers is governed by the general principles of law that establish appropriate stands of conduct, both in criminal and civil law, but also by additional principles of good governance. The bases for its imposition are the principles of; accountability, public interest, and efficiency. The study concludes that its imposition would signify the superiority of the public will over private interests and ensure that the former is supreme in every activity and conduct of a public official. This would be a bold step towards good governance in the public sector.

4.2.4 Finding on Kenya's Legal framework on imposition of personal liability on public servants

This study opines that the doctrine of personal legal liability of public servants is docile in Kenya, with all actions brought being under the doctrine of vicarious liability. Though the government and the individual public servant are sued as defendants, the Government Proceedings Act makes the government liable for deeds of the public servants. In essence this Act imposes on the government the liability to pay the judgment amount without the contribution of the Public servant. This exists despite the fertile causes of action present in the various cases brought before the court. Further, and maybe as a corollary to the foregoing, the Kenyan statutes are poorly worded in defining various terms related to personal legal liability of public officers. There is hence need to for the laws should be amended to ensure that the public officers and servants can be held legally personally liable for their actions. There is hence need to propose recommendations for Kenya, for the purpose of establishing a vibrant culture of accountability, and hence good governance, in the public service. In Kenya, however, the holding of public servants, and especially public officers accountable, has not been affected by use of personal legal liability suits, despite the presence of potential causes of action.

4.2.5 Finding on Comparative Jurisdictional analysis on personal liability for public servants

The other jurisdictions, on the other hand, have developed causes of actions for holding public officers accountable, ranging from constitutional torts, to common law offences, through misfeasance claims. Experience in countries, namely, Canada, Britain and

America shows that personal legal liability is an effective mechanism to enhance good conduct in public service. In such jurisdictions, a government officer is generally not liable in tort. This is because a personal statutory immunity on one hand or vicarious liability on the other with the crown or employer generally indemnifying the officer. However, public officers are personally liable for breach of constitutional rights and for other forms of misfeasance. They are also personally liable for criminal offences including common law and statutory offences; for breaches of the contract of employment such as serious and willful misconduct and duty of fidelity to the employer; for the exercise of an independent discretionary statutory or prerogative power in the government; and for legal costs incurred in defence or in representation before tribunals and commissions.

4.3 SUMMARY OF RECOMMENDATIONS

For public officials to be held responsible for their actions while in positions of authority there must be clear sanctions by which they can be punished in case they fail to adhere to those norms and values. Law as a tool for social engineering should play lead role in entrenching this responsibility. Enacted Acts of Parliament combined with provisions of the constitutions should espouse the principle of personal liability for public officers. The following amendments and additions need to be made on the laws and policy of the country, so as to enhance accountability while in office.

4.3.1 Constitutional framework

As noted earlier, lack of accountability in the public service is a major contributor to poor service delivery in Africa, and hence bad governance. The Constitution of Kenya 2010 provides for values and principles of public service in Kenya. Among them, it captures accountability, integrity, transparency and efficiency. These are repeated under the national values and principles of governance. It also has a chapter on leadership and integrity, emphasizing the role of integrity in public service. It ends by empowering parliament to make legislation for enforcement. The Constitution is thus facilitative of the introduction of the doctrine of personal legal liability for public servants. This doctrine, if implemented, shall be useful in entrenching good governance in the public service in Kenya.

The only weakness remains in the implementing legislation, which the study proposes should be amended to be in line with this doctrine. If done, it would allow both the government and the victims of legal injuries to claim against individual public servants.

4.3.2 Legislative Framework

Despite the constitution being facilitative of imposition of personal liability on public servants, the legislative framework fails to implement this. The only Act that attempts to do so is the Leadership and Integrity Act, by providing that a public officer should take personal responsibility for the reasonably foreseeable consequences of any actions or omissions arising from the discharge of the duties of the office. However, it does not define a clear mechanism for enforcement of such.

The study proposes adoption of an Act of Parliament, with liability of public servants as its major theme. This Act should impose personal liability on public servants for their acts and omissions along a framework which has two options. The first is pure personal liability on civil servants and the second is personal liability through liability insurance..

4.3.2.1 Pure Personal Liability

Under this option, persons aggrieved by any acts or omissions by public servants would sue the individual public servant as the major defendant, with the government being a second defendant. If the judicial process establishes sufficient grounds for the misdeed giving rise to legal liability, the same should be primarily imposed on the first defendant, in this case, the individual public servant. Judgment for damages and costs should thus be issued primarily against the individual public servant.

The government would then only incur secondary liability. This should only suffice if the individual public servant is impecunious. To prove this, the aggrieved party should provide evidence that he has attempted to enforce the judgment against the individual public servant but found him to be impecunious. It is only upon such proof that execution against the government as the second defendant should be allowed.

Even after execution against the government, the Act should empower the government to recover the monies it has paid on behalf of the individual civil servant. The proof of

payment by the government should be equated to a decree authorizing the government to execute the same against the individual public servant later so as to recover its loss.

Such a watertight system would place the civil servants in a responsible position, making them to be careful and diligent in their actions and omissions.

However, it is not lost to this study that imposition of pure personal liability may create a situation where persons are not willing to be public servants for the fear of liability. Worse still it may make public servants to be hesitant to act fearing that the consequences of their actions shall expose them to liability. The study thus proposes safeguards and measures that would protect honest and diligent public servants.

The new Act should place limits on what needs to be proven before imposing personal liability. The study proposes that for the aggrieved person to succeed, he/she should prove the following elements;

1. That the first defendant was a public officer
2. That he was acting in his official capacity, purporting to exercise powers or discharge duties of his/her public office
3. That the officer's action or omission was based on subjective bad faith. This should interrogate the state of mind of the public officer. His action or omission should have been based on either a deliberate conscious decision which has elements of malice targeted at the plaintiff or a reckless act in which the officer is indifferent as to whether he is acting unlawfully and what the consequences of his action are.
4. That there is a nexus or link allowing the plaintiff to bring the action. This would require the plaintiff to prove *locus standi*.
5. That the action or omission caused the plaintiff damages, which are not too remote.

The above safeguards would remove the current blanket immunity based on good faith and replace it with a qualified immunity, which interrogates the good faith. It would ensure that personal responsibility falls on public servants who act recklessly and maliciously, while protecting those who act in good faith.

4.3.2.2 Liability Insurance for Public Officers

The second option would be to enact a public servants liability insurance scheme. This would make it mandatory for all public servants to take personal liability insurance. If they then act in ways that raise liability for damages, the insurer would then pay the damages. For aggrieved persons, the insurer and the individual civil servant would be the main defendants in a suit for liability, and not the government. It is not lost to this study that such a solution has potential of creating a moral hazard.²³² The public officers may end up acting recklessly and maliciously, knowing that the insurer shall pay for any damages arising from their conduct.

To eliminate moral hazard, these indemnity policies should have an exemption clause exempting the insurer from liability if the insured person is found, in a judgment or final adjudication, to have been dishonest or have acted with a dishonest purpose or intent in respect of the relevant action. This would make sure that the insurer only pays for actions that are done in good faith.

Such a system would leave the individual civil servants to be liable for actions and omissions that are not in good faith. With the insurer seeking to escape liability, the individual public servants would be hard pressed to demonstrate good faith in their actions and omissions. Since it's a principle of law that whoever alleges must prove, they would be required to prove their good faith. This would alter the current blanket exception of good faith, making it qualified and subject to scrutiny.

Personal insurance will hence act as a mechanism for reducing government waste. It would provide remedy to persons affected by wrongful actions of civil servants, even if done in good faith, but at the same be a disincentive for engaging in reckless and malicious actions for fear of personal liability. The proposed Act of Parliament should provide for the operation and the terms of such insurance.

²³² A situation where a party will have a tendency to take risks because the costs that could incur will not be felt by the party

4.3.3 Other recommendations towards entrenching personal liability for public servants

In addition to enacting the above proposed laws, there would be need to amend several existing legislations. Such amendments include, but are not limited to the below listed laws:

4.3.3.1 Government Proceedings Act

This Act provides that the state shall be sued in tort if the tort is committed by its servant or any agents of the state. This amounts to blanket imposition of vicarious liability for torts committed by public servants on the government. This law should be amended.

It should place principal liability on the individual public servants or their liability insurers as per the above proposed framework.

4.3.3.2 Government Contracts Act

This Act provides that no public officer shall be liable to be sued personally upon any contract which he makes in that capacity, on behalf of the government. This should be amended to reflect personal liability on the individual public officers or their liability insurers, within the legislative framework proposed above, for unconscionable, illegal and contracts signed without authority.

4.3.3.3 State Corporations Act

This Act provides that matters or things done by the chairperson or any other member of the Board or any officer, employee or agent of the Agency shall, if done in good faith for the purposes of executing any powers given by the law, not render such persons or any person acting under their direction personally liable to any action, claim or demand. This should be amended to remove the blanket protection from liability. The liability should be placed on the liability insurer if such actions have been done in good faith. If done maliciously, the liability should then be placed on individual public servants.

The individual public servants should be subjected to strict proof of good faith and purpose of executing any powers given by law. That would enhance accountability.

4.3.3.4 Public Service Codes of Regulations

The original code of regulations for civil servants was prepared during the colonial period. The current version in use was revised in 1992 ten years ago. This code has become outdated with time. As a result, it is silent on the issue of personal liability for public servants. It should be amended to provide for liability insurance. In the alternative, it should set out instances under which individual public servants shall incur personal liability for their actions.

4.3.3.5 Asset Declarations

The Public Officer Ethics Act requires financial disclosure by government officials, including publication of asset declarations, in order to combat corruption, foster public confidence in government, and encourage foreign investment. This Act should be amended to include the warning that assets of public officers may be attached for purposes of satisfying their legal liability for their malicious misdeeds.

4.4 CONCLUSION

Public accountability is the requirement that those who hold public trust should account for the use of the trust to citizen or their representatives. Public accountability signifies the superiority of the public will over private interests and tries to ensure that the former is supreme in every activity and conduct of a public official.

However, public accountability is dependent on sanctions and procedures by which public officials may be held to account for their actions. Experience in the commonwealth countries, namely, Canada, Britain and America shows that personal legal liability is an effective mechanism to enhance good conduct in public service.

In Kenya, however, the holding of public servants accountable has not been affected. This is due to a weak legal framework and untested judicial attitude towards the same. Going with the discussion on personal liability for public servants in this study, and looking at the recommendation of how best to entrench this in Kenya, we can safely surmise that it is possible to open a new chapter of good governance in the Kenyan Public service through entrenchment of the concept in Kenya.

The proposed framework shall have achieved two objectives simultaneously. First, it shall ensure that public officials, no matter how high their office is are held accountable for all actions taken on behalf of the government. This affords citizens injured by their unlawful actions a remedy in the law, without unnecessary overburdening the government. Second, through the safeguards, it shall enhance government efficiency, by allowing public servants the freedom to make decisions and discharge their duties unhindered by the fear of damage suits in respect of acts done in the course of those duties. It shall only impose personal responsibility to those who act maliciously and recklessly, protecting officers who act in good faith.

The net effect of adoption of the framework would be to create a public service that is characterized by transparency, integrity, accountability and efficiency. It would save the government the billions of money it spends paying damages for actions and omissions by its public servants, channeling the funds for other noble uses.

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