"JUSTICE BE OUR SHIELD AND DEFENDER"
_ AN EXAMINATION OF JUSTICE AS ENVISAGED BY THE KENYAN COURTS

Dissertation submitted in partial fulfilment of the requirements for the LLB degree
University of Nairobi

by

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DEDICATION

This dissertation is dedicated

To my father Githinji and my mother Nyambura for their care and concern in bringing me up.

And to

Ed, (Edwin C. Hutten)

Whose unparalleled friendship has been of untold inspiration to me.

For your sound guidance coupled with ineffable assurance which give me inexorable inspiration in seeking the right direction. Ever helpful at facilitating studies which can be debilitating. I thank you without reservation as I cherish always this motivation.
ACKNOWLEDGEMENTS

The writing of this dissertation is not a one-man job. I therefore feel indebted to a lot of people who gave me support and encouragement in writing this paper. Due to lack of space I cannot mention them by name but I appreciate greatly their contributions.

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MOSES WACHIRA GITHINJI
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ABBREVIATIONS

1. AG - Attorney General
2. All E.R - All England Reports
3. Cap - Chapter
4. CID - Criminal Investigations Department
5. CJ - Chief Justice
6. CPC - Criminal Procedure Code
7. Crim. App - Criminal Application
8. E.A - East African Law Reports
11. ed - edition
12. Hg. Ct - High Court
13. I.C.J. - International Commission of Jurists
14. KANU - Kenya African National Union
15. KSh - Kenya Shillings
16. L.N - Legal Notice
17. L.S.K - Law Society of Kenya
19. M.P - Member of Parliament
20. Nbi - Nairobi
21. No. - Number
22. P - President
23. R - Republic
24. S - Section
25. SRM - Senior Resident Magistrate
26. Unreport - Unreported
27. W.L.R - Weekly Law Reports
28. US - United States Law Reports
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22. R v Sundstrom, Hg Ct of Kenya at Mombasa, Criminal case No. 45 of 1980 (unreport)

23. R v The Commissioner of Prisons ex parte Kamonji Wachira & Others, Hg Ct of Kenya at Nbi, Misc Civ. App No. 60 of 1984 (unreport)


27. Wiseman v Borneman (1969) 3 All E.R 275
INTRODUCTION

O God of all Creation
Bless this our Land and Nation
Justice be our Shield and Defender:

.............

First stanza, Kenya National Anthem

This dissertation gets its title from the Kenyan National Anthem. Thus, at the outset, the writer feels enjoined to comment on the importance of a national Anthem, knowing only too well that the importance of our National Anthem cannot be over emphasised.

Basically our National Anthem is a prayer to God to bless Kenya in all her ways. But to my mind the Anthem goes further than that. I would liken it with an oath that the people of Kenya, each one of them, make with respect to the aspirations to be achieved for the common good of the nation. So important is our National Anthem that we hear it virtually everyday. It is a solemn prayer and an oath we make daily and forms part of our daily lives. We hear the Anthem played on radios, televisions, cinema halls, etc. daily at the beginning and closing of these services. People must respect the Anthem and they stand at attention when it is being played. The Anthem is also played during games and competitions both within and without the country.

All Kenyans are expected to know the words of the Anthem. They are indeed sacrosanct and are not words which have just been concocted; they were specially selected to commensurate with the pragmatic goals and aspirations Kenya should aim at.

One would go on and on to enunciate the importance of our
National Anthem but the foregoing should suffice to stress and emphasise the importance of this prayer and oath which touches and concerns all citizens of Kenya and our visitors too.

The struggle for our independence entailed selfless sacrifices, excruciating experiences with loss of life and a lot of blood being poured to annoint our land. The freedom fighters fought so bitterly so that they could attain justice which we seek to be our shield and defender. Justice should therefore shield and defend us from the evils against which our people died for, in the wake of independence.

I am convinced that only if we have justice can the social process take place without much friction. Justice helps curb friction and it is like oil which reduces friction and makes the wheels of development rotate smoothly.

The courts are the fora to ensure justice. This explains why the writer seeks to address himself squarely on the difficult task bestowed upon our courts to dispense justice to the people. And this task can only be resolved if we find out or investigate how our courts address themselves to the life long conundrum pertaining to the elusive concept of what justice is. The pertinent question then arises: What do our courts perceive justice to be? The writer categorically denies anything which would tend to suggest that this dissertation provides the answer to the question above. His is only an examination of justice as it seems in the eyes of our courts and this examination is of course subject to criticism by others. It is my contention that no amount of research in any given topic can claim exhaustiveness. I appreciate that even at the time of writing this dissertation other events are unfolding and the courts are
making decisions which I would never have the advantage of laying my hands on at this particular point in time. In any piece of writing there will always be loop-holes, though this should not be taken to justify a glaring omission or making half-baked enquiries into any topic. The lacuna which is so inadvertently left is for the other scholars to fill. In this connection this dissertation should jog the minds of others to complete the gaps which may be left.

Do our courts live to the aspirations or our National Anthem, the "song" of all songs; the supreme "song" of the land? The writer hopes that he will have "replied" to this question (for as said earlier he cannot give the answer to that question), at the end of this dissertation.

The reasons for writing a dissertation on this topic are easy to tell. Already as can be seen in our National Anthem justice is a very important component in our lives. Men and women of good will would like to see justice being administered to them. Everybody would want his piece of justice given to him and not taken by others unjustly. One day I was very touched indeed to see a family which I felt had been denied justice and the odds were working so much against it. The mother with stinging tears flowing down her cheeks fell onto her knees while holding her dying baby. She raised her eyes into the skies and cried loudly: "God, where has justice gone?" And I thought that our courts could have the answer to that poor mother with such tribulations. But then I thought it would not be as simple as that. Could our courts see justice the same way as the poor mother? This dissertation will no doubt shed light into that question.
That little story influenced me a lot into the kind of investigation I have engaged myself with, in this dissertation.

Human beings are difficult to deal with and more so when they are a nation with the same aspirations so to speak. Though they are governed by the same laws they will differ in the ways they appreciate these laws. Some may feel that the laws are unjust as their selfish designs are curtailed by those laws. Others will feel that really those laws are not meant for them and they will do everything to circumvent the said laws. No doubt the consequences of this will be disputes amongst themselves. The courts will then be called upon to arbitrate on those disputes and in this way the question of justice will come into play. In such circumstances what will the courts see as justice? We shall try also to highlight on such circumstances. Would the courts be for justice for both parties or for one?

The writer would like to point out that though it is essential to examine how the courts see justice in solving disputes between two private citizens more emphasis will be laid on instances where the private citizen has to reckon with the state, that is to say, where the "dispute" is between him and the government. It is my contention that when we say that "Justice be our shield and Defender" the state must be in the foremost front in not only doing this but also ensuring that it is done to the letter. The state no doubt has the capabilities to do this and therefore it carries the biggest onus. If ever there was anybody to say that the end of justice are maintained, the government must take the biggest task in this.

In his 4th Presidential inaugural speech following his swearing in into office President Moi said *Inter alia*:
"My Government is committed to defending our constitution and to abide the tenets of democratic rule. We shall continue to safeguard the rule of law under which we all Kenyans will be treated equally, irrespective of their race, religion or ethnic origin. We shall continue to safeguard the rights and freedoms of all individuals, guided always by the fundamental principle under which no individual will have the right to infringe upon the freedoms of another."

A cursory glance at that part of speech makes it crystal clear that the government is subject to the law. Thus the courts should see justice to mean equal justice before the individual vis-a-vis the government. Justice should not favour or be made to favour. In our quest for what justice is seen to be by our courts, we shall see whether it conforms to that important part of speech by the Head of State.

**METHODODOLOGY**

Basically the method of gathering and obtaining information for this paper will be personal library research in all libraries I can get access to and which libraries will be of help in this regard.

I also intend to have some discussions with leading academicians, members of the bench and bar. This will prove certainly to be very useful as I would like to hear how justice is seen from the horse’s mouth.

Discussion with class-mates cannot be ignored as it is with such class-mates I have always had heated arguments in various topics.

The views of members of the public and the so called "lay-men" will also go a long way in assessing the general understanding and perception of people as to what justice is.
Sometimes these so called "lay-men" are so helpful that one feels they don’t deserve to be called by that name. Of course, any other relevant material within my reach will be used for all the intents and purposes of this dissertation.

CHAPTER BREAKDOWN

In the first chapter, I wish to look at justice with respect to its definition. This is because our courts which are monumental in dispersing justices are courts of Law. What then is Law? As we shall see there is no consensus on the definition of Law. And yet our courts must apply the law in dispensing justice. This means that the way a judge views law can influence his understanding of justice. It is because of this reason we feel we should discuss what law is first and then justice. They do so with reasons and sometimes their definitions coincide and overlap. It is through the many definitions of the term justice that one can have a general view.

It is hardly possible to discuss justice without discussing what law is. This is because our courts which are monumental in dispersing justices are courts of Law. What then is law? As we shall see there is no consensus on the definition of law. And yet our courts must apply the law in dispensing justice. This means that the way a judge views law can influence his understanding of justice. It is because of this reason we feel we should discuss what law is first and then justice. Be that as it may, we shall not lose sight of the main topic and we shall examine the types of "justices" we shall be able to come up with. More emphasis will be given to Natural Justice which is very important the whole world over.

Chapter two will be taken up by the discussion of the Role of the Courts and the importance of this role in dispensing justice. The historical background of the Kenyan legal system will therefore be necessary. We shall also touch on the judge as an impartial umpire in the so called adversarial system of dispute settlement. The doctrine of separation of powers, the
rule of law and the independence of the judiciary will be discussed too.

In chapter three the Kenyan constitution as a fountain of justice will be examined. It would have been better to discuss the constitution before discussing the role of the courts since the constitution is the most important legal document of the land as regards the rights of the individual. But since we are dealing with courts in this paper we feel that we should underline the roles of the courts first so that we can seek to see whether our courts see the constitution as the supreme law of the land. We shall also examine how our courts interpret the constitution. The concept of constitutionalism will be touched.

Chapter four will be devoted to the courts' decisions and the analyses of the case law. This in fact will show clearly how our courts understand justice to be for if the courts are meant to dispense justice it is by dint of their decisions that we can understand their idea of justice. The basis of picking out these cases is that we feel that the omnipresent power of the state was spreading its tentacles to influence the decisions arrived at in those cases. The cases range from the colonial era to the present day Kenya.

We shall then conclude and make suggestions and these will be based on our findings. This will form the last chapter, chapter five.

The writer would like to say that though the words "Kenyan Courts" appear in the title of this dissertation, this does not necessarily mean that anything outside our Kenyan Courts will be ignored if it can be of any value to this paper.
CHAPTER 1
WHAT IS JUSTICE?

1:1:0 LAW AND JUSTICE - INTRODUCTION

Although we are dealing with the question of justice in this paper, it is a sine qua non in our opinion to look at what law is, albeit briefly, as justice and law are so intimately connected and indeed intricate. Ironically some writers argue that law and justice are entirely two different things and that legal justice is not necessarily the kind of justice which is just and fair. Be that as it may, our courts which are supposed to dispense justice are established by law. Thus, it can be seen that the question of what law is becomes germane. We therefore seek to examine the various schools of law before we come to the crux of the matter, namely, what justice is.

1:2:0 WHAT IS LAW?

1:2:1 THE SCHOOLS OF LAW

The concept of law is really baffling. As we shall see scholars are at variance as to what law is. Perhaps we should remember in trying to understand what law is that there is something cold about the law. Practice is a human matter. Laws are only a part of human matter. Laws are only a part of human practice and not the most important. We are all familiar with those people who tell us that they know our own minds better than we do ourselves - it is alarming to find that they can sometimes send us to prison on the strength of that.

The classic example as to the law being baffling is found in Charles Dicken's *Oliver Twist* where Mr. Bumble declared on being
told that he was answerable for his wife's action: "If the law supposes that, the law is an ass—an idiot."¹

This statement has been echoed by many litigants and is the basis of the principle of equity which seeks to avoid wrongs resulting from strict adherence to the letter of the law. The process of law making and judgement attempts to make the unfair fair.

1:2:2 NATURAL LAW

Basically there are six major schools of law. The natural law school of law must be tied with nature and whatever does not resort to nature in defining law cannot be proper law. However this school resorts to nature in different manners in an attempt to explain what law is. The greatest proponents of this school are Thomas Aquinas (1224-1274) and John Locke (1632-1704).

The natural law school postulates that natural law is universal and immutable. It has general principles known to everybody. Natural law must comprise norms which arise out of human reason and divine will. It argues that all other "laws" must accord to the rule of reason in order to be valid laws. If these "laws" are at variance with natural law then they are no longer legal, they are a corruption of the law.

According to natural law, the authorities with the right to promulgate law must be the repository of right reasoning and people endowed with divine reason. In this vein, states should only use the power vested in them by the people in order to justify natural law.

This school has been criticised as being idealistic and cannot commensurate with the contemporary empirical world. It
has been further argued that law is unique and a function of every society.

1:2:3 HISTORICAL SCHOOL OF LAW

The second school of law is called the historical school. This is a conservative school and rejects with tenacity and vehemence the natural law school.

According to this school, law is unique and therefore different in every unique people. The greatest propents of this school are Hugo, Savigny and Puchta.

This school contends that law must emanate from a people's custom and there cannot be a greater law than that. The development of law must involve legal norms which must be inherent in a national spirit called the "Volksgeist".

Since this school sees law in a people's custom, it justified unjust laws by virtue of the fact that they were in the custom. A case in point is slavery which was supported by Hugo, a proponent of this school.

Historical school of law supports the "Status Quo" and has no room for innovations since they are not in the custom. It objects to any reforms in law.

1:2:4 LEGAL POSITIVISM OR JURIDICAL POSITIVISM

The third school of law is called legal positivism or juridical positivism. This is the most popular school of law especially in capitalistic countries where there is free enterprise. Its proponents are John Austin, Bentham, Hart and
Kelsen though they differ in the manner in which they explain it.

This school sees law as what the state passes - any kind of state! The school supports the status quo and concentrates on law as it "is" and not what it "ought" to be. What the legislature passes to be law should be respected and observed. Failure there of the state must use its machinery to enforce that law. Law must be seen as a command of a sovereign backed by a coercive force, this being the state machinery.

According to Austin once law has been promulgated by the political superiors, it acquires the quality of law, it is indeed law. The quality of law is irrespective of the morality of that law.

1:2:5 SOCIOLOGICAL SCHOOL OF LAW

The sociological school of law, our fourth school, in this discussion, resorts to society to explain the law. Its greatest proponent are Ihering (1818-1892) and Roscoe Pound (1870-1964).

The argument advanced by this school is that one has to look into the social mores of the people in order to come up with law. This will be living law and will be ahead of legislative law.

Ihering argues that law should achieve social control. It must be the result of harmonisation of the conflicting social interests in society to get an acceptable balance.

Though this school is important in the sense that law is a societal phenomenon and one must dig into the society and understand it in a bid to understand what law is, it has been criticised in that law does not necessarily harmonise differing interests in society for there exists class-interests in a
society which may be irreconcilable.

1:2:6  **LEGAL REALISM OR CRITICAL LEGAL REALISM**

The fifth school is called legal realism or critical legal realism. It sees law as nothing but a prediction of what the courts will decide. Some of its proponents include Gray and Oliver Wendel Holmes.

1:2:7  **MARXIST-LENINIST THEORY OF STATE AND LAW OR HISTORICAL MATERIALIST SCHOOL OF LAW**

Last but not least, the sixth school is called the Marxist-Leninist Theory of State and Law or the Historical Materialist School. This school argues that law cannot be explained in isolation from the socio-economic structure of the society. Law does not have an independent history. It has not existed since time immemorial.

Law came up with the emergence of the state and the two are historical categories. The state arose as a result of having different interests. Marx puts it thus:

"It is ....... clear that here as always it is the interest of the ruling section of society to sanction the existing order as law and to legally establish its limits given through usage and tradition. Apart from all else, this by the way, comes about of itself soon as the constant reproduction of the basis of the existing order and its fundamental relation assume a regulated and orderly form in course of time. And such regulations and order are themselves indispensable elements of any mode of production. It is to assume social stability and independence from the mere choice and arbitrariness. These are precisely the forms of its social stability and therefore its relative freedom from arbitrariness and mere chance. Under backward conditions of production process as well as the corresponding social relations, it achieves this from by mere repetition of their very production. If it has
Marx thus relates the structure of the society and its development with the role of law. He argues that the mode of production in any society is fundamental to the character of the superstructural feature of law and the legal system is controlled by and used for the ruling class.

The legal system is the major instrument for the protection of the mode of production and the application of the law is enhanced by the coercive force of the state apparatus for the purpose of safeguarding, securing and making social relationship and arrangements which are advantageous and agreeable to the dominant class. The Marxist definition of law can thus be summarised as:

"A system of juridical standards expressing the will of the ruling class and protected by the coercive power of the state."
matters that exist in modern society, such as sale and purchase, inheritance, enjoyment, marriage, theft and manslaughter."

A legal code of a different type is the one that as the Bible recounts - Moses brought down from Mount Sinai in about 1200 BC as a law for the Israelites. The Ten Commandments are essentially a body of principles. They enshrine ideas of morality that have subsequently helped to shape law in almost every part of the world.

The ancient Greek tried to humanize law. They developed the idea that rules should be changed when they cease to meet the needs of the community. This idea seems commonplace today but in early society laws were seen as God-given, fixed and immutable. The greatest thinkers of ancient Greece including Socrates, Plato and Aristotle also concerned themselves with the quality of law and its moral standards.

Some Greek ideas were adopted by the Romans - but the Roman genius was essentially practical. The law makers sought primarily for order and efficiency in the administration of their territories. Henry Maine (1822 - 88) writing of Roman law said:

"The most celebrated system of jurisprudence known to the world begins, as it ends, with a code."

The question as to what law is can therefore be seen as far from being settled. It would seem it would depend on the school of law one subscribes to. This is problematic because all the citizens of a country are governed by the same laws. The problem becomes more acute as the judges who are supposed to dispense justice are human beings who also have their idea of what law is. This is fundamental in view of the role the judges take in
interpreting the law. The judges would more likely than not interpret the laws to commensurate with their ideas of what law is. This could defeat the intention of the legislature.

The idea of what law is, is elusive. Mutatis Mutandis is the notion of justice.

JUSTICE - TOWARDS ITS DEFINITION

Everybody talks of justice. Yet there is a life-long conundrum about justice. Everyone who attempts to define justice finds himself in a quagmire. Not even the most learned scholars agree as to what justice is. Denning L.J (as he then was) puts it more aptly in support of the foregoing:

"...... what is justice? That question has been asked by men far wiser than you and me and no-one has yet found a satisfactory answer. All I would suggest is that justice is not something you can see. It is not temporal but eternal."

Since justice is not tangible it becomes a concept which is difficult to explain. And yet our courts must grapple with the question of justice in their day to day functions.

So much baffling is the concept of justice that some lawyers address themselves to law not caring whether justice is meted out or not. When William Temple, sometimes Archbishop of Canterbury went to the Inns to talk to the lawyers, he opened his discourse by saying:

"I cannot say that I know much about the law having been far more interested in justice."

That was a piece of delicate irony gently rebuking the lawyers for losing sight of justice. The rebuke was well merited. His hearers were lawyers who had been brought up in the
philosophy of John Austin. Those who believe in that philosophy regard, as we saw earlier, the law as something separate and apart from justice.

In the same breath Denning, L.J. (as he then was) has this to say:

"Some lawyers care too much for law and too little for justice. They have become technicians spelling out the meaning of words instead of, as they should be, men of spirit and of vision leading the people in the way they should go, making the law fit for the times in which we live."

Now that such lawyers as in the foregoing paragraph would not care for justice in the law they care too much for justice would seem to find root in other areas other than the law. It would consequently mean that legal justice, that is, justice according to the law would fizzle out. Listen to a lawyer addressing a class of students. He told his students:

"I can tell you what the law is, but if you are interested in justice, you had better go to a school of divinity."

Apparently this lawyer believes that justice cannot be taught in a school of law. It would also be safe to argue that he believes that justice and law are two different things and that if one knows about the law, he does not necessarily know about justice.

It is interesting to note that this lawyer talks of a school of divinity as a repository of the teaching of what justice is. In this lawyer's mind religion must provide an answer as to what justice is rather than the law. Ironically if you take the great precepts of law and of religion you will see how close they are. These are the precepts of the law accepted by the great lawyers
of the past, "To live honestly, not to injure your neighbour and
to render each man his dues." Now take the precepts of
religion as found in the Bible, "What doth the Lord require of
thee?" asked the prophet Micah," but to do justly and to love
mercy, and to walk humbly with thy God."12

1:5:0 THE GREEK CONCERN WITH JUSTICE

When we still grapple with the question of justice it would
be worthwhile to shed some light on the Greeks’ idea of justice.

The Greeks believed that the city state of the Athenian type
arose from a quest for justice that their previous anarchic or
tribal arrangements could not satisfy. Plato (C427-347 BC) in
his Republic contrasts the view that justice is the rule of the
strong over the weak (which being "natural" must therefore be
right) with the rival Greek view that justice is the majority of
the weak collectively imposing their rule upon the strong. He
saw justice as a universally concept that consists of the right
relationship of the individual parts to the harmony of the whole.
Those he considered to fit to rule were an intellectual elite,
able to penetrate the nature of the truth and reality. Such a
view was far from the Athenian practice of democratic election as
the rule of ignorance, likely to lead to strife.

William Blake (1752-1827) epitomised one difficult problem
in the search for justice: "One law for the lion and is
oppression."13

The law that is fair to the lion may be unfair to the ox,
and vice versa. But law makers cannot produce individual laws
for each member of the community. They have to legislate for the
whole society. Many legal systems have felt the need for
mechanisms to remedy such injustices as result. In medieval Europe the church courts applied a system of equity to protect individuals from legal unfairness. And in imperial China judges were allowed to apply the law in a flexible way that took account of individual circumstances.

The foregoing comes closer to justice, namely, the desire to balance fairly the needs of the individual against the needs of the society plus the desire to find a fair balance between the interests of one individual and those of another.

To the layman and more so to ordinary rural folk, very little of law is known to him if any, but justice is known to him in a different way. In simple terms, the country folks know what is fair and what is unfair, what is just and what is unjust, what is good and what is bad. In these rather unsophisticated terms, he knows what justice is and what it is not. In this connection the rural folk needs no legal education to know justice as justice is not a question of intellect. Denning LJ propounds on this. Says he:

"How does a man know what is justice? It is not the product of his intellect but of his spirit. The nearest we can get to defining justice is to say that it is what the right-minded members of the community-those who have the right spirit within them-believe to be fair."1

1:6:0 SENSE OF INJUSTICE

Though we are getting closer to what justice is, the attempted definitions have rather clearly demonstrated that justice is unwilling to be captured in a formula. Nevertheless, it somehow remains a word of magic evocations.

We might be left entirely without empirical guidance if we look at the term "justice" as this lofty abstract concept lurks
somewhere beyong our discernment. In light of this, perhaps it would be better to look at the opposite side of justice namely "injustice" in a bid to explain justice in a simple sense which is clearly and frequently manifested; it is a familiar and observable phenomenon. This is the sense of injustice and its incidences show how justice arises and what biologic purpose it serves. Where justice is thought of in the customary manner as an ideal mode or condition, the human response will be merely contemplative. But the response to a real or imagined instance of injustice is something quite different; it is alive with movement and warmth in the human organism. Justice then in terms of defining it with regard to injustice would mean the active process of remedying or preventing what would arouse the sense of injustice.

We shall then proceed to give instances to elucidate what we mean by a sense of injustice. These are quite simple instances to grasp.

1:6:1 FIRST INSTANCE

Five men who had met to dine together are brought before a magistrate, on the complaint of the same police officer that each of them parked his car in a way that would obstruct other vehicles. All plead "not guilty" but offer no evidence or explanation. The testimony of the policeman is uniform regarding each alleged offence. The magistrate acquits three, imposes a thousand shillings fine on one, and sends the fifth defendant to jail for two months without the option of fine. This evokes the sense of injustice.

Obviously, in a given ethos all five might have been
acquitted; alternately, all might have been convicted and punished in some appropriate manner. Regardless of the individual dispositions, the inequalities arbitrarily created arouse the sense of injustice, because equal treatment of those similarly situated with respect to the issue before the court is a deep implicit expectation of the legal order.

In the above instance however, injustice would not necessarily have been occasioned if the magistrate had fined each defendant a different amount because justice does not necessarily connote equal treatment under equal circumstances. The point here is that inequalities resulting from the law must make sense. If decisions differ, some discernible distinction must be found bearing an intelligible relation of the difference in result. The sense of injustice revolts against whatever is unequal by caprice.

SECOND INSTANCE

Two shoe-factory employees, carrying a large amount of money, are waylaid, robbed, and fatally injured. The incident occurs during a period of intense public feeling against radicals of every kind. Subsequently, a shoemaker and a fish peddler are charged with the crime and, though entirely innocent, are convicted on flimsy circumstantial evidence. The fact that the fish peddler is an avowed anarchist influences the decisions of the trial judge, the appellate court. After languishing in jail for seven years, the accused are executed. This is felt to be unjust.

Here the sense of injustice attaches itself to the notion of
desert. The law is regarded as an implement for giving men what they deserve, balancing awards and punishments in the scale of merit. As general merit is so difficult of admeasurement, legal action is usually expected to relate to particular merit; that is, to the right, duty, or guilt acquired in a specific circumstance. Sometimes, because of its own clumsiness, the law cannot fulfil this function. Then it may convict a murderer for a murder he has not committed. In such case, the legal subterfuge does not evoke a keen sense of injustice, for desert has been somehow accorded.

1:6:3 THIRD INSTANCE

The defendant is convicted of seditious utterances by which he successfully sought to impair the morale and obedience of the citizens to the government. The sentence the court gives is that he be compelled to submit to a surgical operation on his vocal chords, so that thereafter he may only bark like a dog. This affronts the sense of injustice.

Here the main concern is with human dignity. From early times, cruel and unusual punishments have been relegated to the discretion of deity or destiny; law has pulled away from vengeance and humiliation. Vicious and debasing punishments are felt to dishonour the court and the human authority it wields.

The above instances show clearly that injustice is occasioned and it does not require one to overstrain his intelligence to see that.

The instances given may appear far fetched but our courts are inundated with similar cases. If we understand justice to mean that process of remedying or preventing what would arouse
the sense of injustice, then from the instances we have given it becomes clear that justice has suffered and continues to suffer a fatal flow. Madan J.A. (as he then was) upon his retirement had this to say about justice:

"Justice is the most abused divine bestowal. It has been raped through the centuries, ignored, corrupted, manipulated, falsely proclaimed, polluted, made an excessive ethnic entitlement and racially administered and bent with double standards, subrept and continually submerged. No punishment has been promulgated for debasing the divine content of justice."\textsuperscript{15}

1:7:0 THE CONFLICT OF LAW AND JUSTICE

We have just seen that the concept of justice is far from being tangible. We also saw that there is no consensus on what law is. There are many arguments about the source of legal authority. The eighteen-century French philosopher Jean Jacques Rousseau (1712-78) felt that to merit obedience the law must have the status of a social contract freely agreed by free citizens. In direct contrast the English jurist John Austin (1790-1859) argued that laws are basically nothing more than a series of commands from the ruler to the ruled. At the same time in Germany Friedlich von Savigny (1779-1861) described law as thing that grows naturally out of a nation's spirit, environment and history.

There is thus a conflict between what law is. In this same vein there is a conflict as to what justice is. To crown it all the conflict between law and justice sets in.

The lawyer\textsuperscript{14} who was addressing his students and said that he could tell them what law is and not justice must have had in mind the conflict between law and justice. Law is not justice and yet courts go by law to dispense justice.
Let us suppose that there was an unjust law and a judge followed it to the letter and arrived at a decision solely on following the law. Can the judge be said to be just? Can the decision be seen as just? This poses an even harder question. Can a judge be said to be just because he followed the law to the letter while the outcome of his decision is obviously unjust?

These questions are difficult to answer in a word. But they underline the conflict in law and justice. If a law does not realise justice can it be said to be a good or bad law? Perhaps one would then give the escapist answer that it boils down to what one considers justice to be. But such an answer is not good enough. John Rawls concedes that there is a conflict between law and justice when he says:

"It is obvious ..... that law and institutions may be equally executed and yet be unjust. Treating similar cases similarly is not a guarantee of substantive justice."  

Undoubtedly the conflict in law and justice is a notorious one and many people have fallen victims. Our courts have found themselves at a loss in deciding cases which put the law and justice on the balance.

The conflict of law and justice is really depressing. How can our courts resolve such a pathetic situation? The following passage may seem to have an answer:

"May I ask you also in your own progress in the law not to rely over much on legality - on the technical rules of law - but ever to seek those things which are right and true, for there alone will you find the road to justice. When you set out on the road you must remember that there are two great objects to be achieved: one is to see that the laws are just: The other that they are justly administered. Both are important but of the two the more important is that the
law should be justly administered. It is of no use having just laws if they are administered unfairly by bad judges or corrupt lawyers.\textsuperscript{18}

To achieve justice, the most important thing would then be to seek the true spirit of the law to mitigate any unjust laws. It is our contention that justice should and must be seen to be of a value of a higher rank than the law. The law should never hamper justice. As such justice can never be subordinate to the law as the following poem would show:

"Yet law-abiding scholars write; law is neither wrong nor right. Law is only crimes. Punished by places and times."\textsuperscript{19}

Thus laws could be different but justice must be universal. Laws can be imposed upon a people but justice can never be imposed upon a people by dint of the imposition of the said laws. This thought brings us to another important issue:

1:8:0 THE CONCEPT OF "AFRICAN" JUSTICE VIS-A-VIS "ENGLISH" JUSTICE

No people can claim to be the repository of justice. It would therefore seem not in order to associate justice with a particular people. But as we have seen, just as in law, the definitions of justice vary. This is true when we look at the understanding of justice in the eyes of the colonial masters vis-a-vis those of the African natives.

Our courts have a tremendous influence from the British legal system. In fact our legal system seems to be a copy cat of the British one. Both the High Court and the Court of Appeal have British judges. The present Chief Justice\textsuperscript{20} is a British. The Judicature Act\textsuperscript{21} underscores the influence of the English law to our legal system. It provides \textit{inter alia}:
"The jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with:

a) the constitution

b) subject thereto, all other written laws, including the Acts of parliament of the United Kingdom cited in part I of the schedule to this Act, modified in accordance with part II of that schedule;

c) Subject thereto and as far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed at that date.

British justice, it can be argued, is different from the perception of justice in native tribal sense. To many people the punishment of crime for the vindication of an abstract thing called justice is still prevalent. This is due largely to a confusion in the mind between what is true meaning of crime and sin. Sins are not always crimes and the state is not concerned to vindicate violations of the moral law.

Kenya like many African countries did not escape colonial justice. This type of justice was of very little significant to the African. The colonial masters did not actually bring justice. Rather it was a sham of justice as Mr. Mc Greggor in his speech introducing the native tribunals ordinance explicitly says:

".....It is, I think, a truism Sir, that it is not nearly so important to give the native justice as it is to make him understand that he is getting justice." 

Thus the native only needed to understand that he was getting justice even if what he was getting was injustice. And the colonial masters could have their share of fun in making the native see injustice as justice. For example, the colonial
masters made the natives understand that they (colonial masters) came in order to bring them (natives) civilisation and not to colonise them!

Up to today the vestiges of colonial justice can be seen in our courts and this is a spectacle for the African: The presiding judge sits in his official robes of scarlet with assessors, counsel in their robes and the prisoner in the dock—the crowd of spectators kept back by a policeman in uniform. A repetition of an English scene in African surroundings, often of a primitive nature. The whole atmosphere obviously unsuited to African mentality.

As one listens to the proceedings one realises that the British working of justice is inundated with intricating labyrinths. The court procedure is not understood by the prisoner and yet this is his case. Everything must revolve around him and his life is at stake for if he is convicted the repercussions are dire. If he is guilty and wishes to admit it, he is often told to plead not guilty. If he desires to explain he is told that he must remain silent. To those who can afford a counsel for their defence some legal arguments may enable the guilty to escape or the judge may give the prisoner the benefit of the doubt because the assessors have decided to chance their luck and advise the judge against conviction. For an African to escape on a technical point may be good law but it is often not good justice from the African point of view. An African native chief in the course of conversation to an English judge captures this scenario aptly. This is what he said to that English judge:

"You English are a great people, but can you explain why laws have been introduced which to many of my people seem unreasonable and absurd? You punish us for things
which have always been allowed by tribal law and custom and in many cases do not explain why we must alter our old habits. I can understand that things are now different and that the ways of the white men are not the same as those of the African, but it seems unfair to impose rules and regulations without discussing the necessity with the chiefs. It is true that in important cases you white judges sit with assessors but often the assessors feel that the judge has made up his mind and they do not like to disagree. The interpreters are often strangers to the tribe and do not understand the people and the local languages. Many are ready to take bribes. What you call evidence we cannot understand and we are not often allowed to explain the matter in our own way."

It becomes evident that a good deal of the pomp and ceremony of the English penal system was and still is out of touch with the native needs. The pertinent and germane questions we should now ask ourselves are: Does the British justice augur well for our people? Do we need to retain it in the name of justice?

The English themselves knew that the kind of justice they brought the natives was a sham. In a reply to some enquiries addressed to a white police officer who had been many years in East Africa and with respect to a question how far on the whole did he find native court satisfactory he said:

"Personally, after all my experience I have little time for them (courts). They are 'cracked up' far beyond what they really are." 28

The officer's statement goes a long way to show exactly how the colonial masters 'cracked up' the courts for their own designs thereby leaving justice to suffer.

So far we have been talking of justice in a broad sense. It is now time to narrow down and look at the dichotomy of justice
in any court. This falls into two kinds namely civil justice and criminal justice. The two kinds are found in civil litigation and criminal proceedings respectively.

Civil litigation is the process for the resolution of disputes which the parties have been unable to resolve themselves. They come to the court for a decision on a point of law, or more frequently, on facts over which they cannot agree. Typically, litigation in the civil courts is a personal injuries action arising out of say, a road accident in which the plaintiff wants damages. Each side comes with its witnesses who are examined and cross-examined. The lawyers make their opening and closing speeches and the judge decides the case which is heard in open court. (The belief that justice should be done in open court and in public is deeply rooted, but in fact an extraordinary number of cases are heard behind closed doors.)

A civil trial is broadly similar in its basic character to a trial in the criminal courts—both following the main features of what is known as the common law “adversarial system of dispute settlement.” On the continent of Europe the “inquisitorial system” has the judges calling and examining the witnesses, with the lawyers for the parties playing a subsidiary role. The judges have read a full statement of the evidence before the trial in the pre-trial dossier. There are few rules of evidence, anything relevant is generally deemed to be admissible. In the common law system by contrast, it is the parties rather than the judge who decide how to run the case. Typically the judge will have seen no papers about the case when the trial starts. He knows nothing about it. It is the parties not the judge who call and examine the witnesses. If a relevant witness is not called
by either side, the judge will not regard himself as entitled to call him for the court. The judge may ask an occasional question to a witness but basically he is like the umpire in a tennis match watching the parties hitting the ball over the net simply calling the score and the result and ensuring that the lawyers keep the rules.

1:10:0 CRIMINAL JUSTICE

Everyone has opinions about the problems of the criminal justice system. Questions of crime and punishment are permanently fascinating. The media devote endless space to reporting and discussing the issues. There are frequent parliamentary debates and politicians of all persuasions deliver themselves of strongly held views as to what should be done.

For the broad mass of the general public, the main concern is probably that villains should not "get away with it" and that they should receive appropriate heavy sentences from the courts. The police naturally share the same basic attitude. Civil libertarians are concerned more with the position of the accused and tend to emphasize the ways in which the system is tapped in favour of the state and the danger of miscarriage of justice. For them the criminal justice process seems to bear heavily on the individual and to give him little chance.

In criminal proceedings the state is a party to the proceedings and the defendant is the other. Offences which touch the state are usually prosecuted with a lot of vigour and here the question of justice to the defendant becomes highly suspect as we shall see later.
NATURAL JUSTICE

In as much as the concept of justice is elusive, there seems to be no bone of contention with respect to natural justice.

The principle of natural justice traces its origin in the natural law school. This school regards positive law as based on a higher law ordained by God or by divine or natural reason thus giving the legal system a sanctity it would not otherwise possess.29

The history of natural justice is older than the common law itself and it is known to other systems other than the common law; the Greeks and the Romans had it.

Other people find the history of natural justice based on the scripture:

"Doth our law judgeth any man before it heareth him and knoweth what he doeth?"30

The principle of natural justice is not only so important in any legal system but to any system one can think of. In Wiseman v Borneman31, Lord Morris emphasised on this principle. Said he:

"My Lords, that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of law."32

The foregoing underscores the duty imposed on our judges as far as our courts are concerned. And indeed not only the Kenyan courts but all courts and similar institutions the world over.

Before we go any further on this salient principle let us examine what natural justice is. Natural justice is a name given to two fundamental and at times ethical rules which are deemed to be necessary for the proper exercise of power. The two rules are
expressed in the latin maxim thus:

1. "Audi Alteram Partem" This means that a person affected by a decision has a right to be heard. It literally means "hear the other party."

2. "Nemo judex in causa sua". This means that no man shall be a judge in his own cause. A person making a decision must not be biased. Even the likelihood of bias in this connection is as good (or is it as bad?) as the actual bias.

Two Luganda proverbs capture those two rules above. The first rule is to be found in the proverb "Tosala qwa kawala nga tonnawulira gwa kalenzi" which literally translates as "Do not decide the girls' case until you have heard the boys."

The second rule is captured by the proverb "Enkima tesala gwa kibira" which would literally be translated as, "The monkey does not decide an affair of the forest."

As far as the United States is concerned these rules have been given the title the "due process of law." This is a wider sense and emphasises the importance of these rules hence becoming the basis of all laws.

It will be observed that these rules have been incorporated into statute law and constitutions of many countries as the Bill of rights.

The reasons for the need actually to comply with the rules of natural justice were aptly put by Megarry, J in John v Rees: "It may be that there are some who would decry the
importance which the courts attach to the observance of the rules of natural justice. When something is obvious they may say: 'Why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard?' The result is obvious from the start. Those who take this view do not, I think, do themselves justice. As everybody who has any thing to do with the law well knows, the path of the law is strewn with examples of open and shut cases which somehow, were not, of unanswered charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.37

There are many cases we can give to illustrate the application of the rules of natural justice. But an example of a case in each rule will suffice. Let us begin with the Audi alteram partem rule. Here we have the case of Cooper v Wandsworth Board of works.38

In this case Cooper's house had been demolished by the Wandsworth board of Works and he sought redress. The Board of works had the power to demolish houses and this is what it did in this case. Cooper argued that he had not been given notice hence the action was illegal and a trespass.

The court was clear that Cooper should have been given a hearing even if the Board had power to demolish the house.

Willes J. had this to say:

"I apprehend that a tribunal which is by law invested with power to affect the liberty of her majesty's subjects is bound to give such subjects an opportunity of being heard before it proceeds and it's a rule of universal application and founded on the truest principles of natural justice."39

The Cooper case is a very important one as it in fact
illustrates the initial reaction of the courts in England to the vast increase in regulatory statute law which took place in England in the second half of the 19th century, and it represents the first phase of the development of natural justice. Its frequent citation in the modern case law has elevated the decision to a classic.

In the *nemo judex in causa sua* rule we have the case of *Dimes v Grand Junction Canal* as a classic example.

To ensure a fair trial, the judge must have no interest himself in any matter that he has to try. He must be impartial. No person can be a judge in his own cause. This does not merely mean that a judge must not take bribes - that, of course, goes without saying - but we go further and say that he must not have the slightest interest in the result of the case.

In *Dimes v Grand Junction Canal* the Lord Chancellor of the day, Lord Cottenham, was a shareholder in the Grand Junction canal company. He had ninety-two shares in it. The company had a dispute with a Mr. Davies who claimed that the canal was his property. He placed a bar across it and threw bricks into it. The company applied for an injunction against the man. It was granted by the Vice-Chancellor and on appeal to Lord Cottenham the Lord Chancellor affirmed the decree. Lord Cottenham did not disclose that he was a shareholder in the company. The House of Lords, after consulting the judges held that the decree must be set aside. In the course of his speech Lord Campbell said:

"No one can suppose that Lord Cottenham would be in the remotest degree, influenced by the interest that he had in this concern, but it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. It will have a most salutary influence when it is known that, in a case in which the Lord Chancellor of England had an interest, his decree..."
In that case the Lord Chancellor had a money interest: but any kind of interest is a bar. If a judge is a relative or a personal friend of one of the parties, he is disqualified. Indeed, if there are any grounds on which anyone might think that he might be biased in favour of one side or the other, he must not sit to try the case.

**CONCLUSION**

We have attempted to lay a basis on at least an idea of justice from whence our courts should base their decisions. The courts should thus proceed on the premise that they are courts to dispense justice so that their decisions do not smack of injustice which is a concept, as we have seen, easier to envisage.

It is our contention that it matters not who the parties are before the court in order for the court to dispense justice. Justice must be for all the nature of the case before the court notwithstanding. If the nature of a case influences the court to mete out some kind of "justice" which the court would not have meted out were it not for the nature of the case, then the true sense of justice is marred in this instance, and the decision of that court is, for the purpose of this paper, null and void. Indeed the ends of justice will have fizzled out and it would have been better not to have thought of that court as a court competent to do its work.
In the coming chapters we shall try to examine whether our courts aberrate from the channel of justice and if so, whether this aberration amounts to justice in the eyes of the courts. To do so we are compelled to look at cases and instances where the individual citizen and the state are the parties battling it out in court. We pick on the state as a party because of the obvious amount of influence the state can have on virtually all institutions that one can think of and that of course includes the courts.

The next chapter will be taken up by the discussion of the courts for they are the fora for dispensing justice. And when we talk of courts we are in fact having the whole judiciary in mind. In order for the courts to dispense justice they must have strong pillars and a firm foundation. We intend to examine such intrinsic ingredients of the court in the following chapter.
CHAPTER II
THE COURTS - THE FULCRUM OF JUSTICE

2:1:0 HISTORICAL BACKGROUND OF THE COURTS IN KENYA

There is no dispute that the courts are the main arbiters of disputes arising out of conflicts between the individuals themselves and between the individuals and the state. The role of the courts is instrumental in maintaining harmony in a respectable society. The decisions of the court are given the sanctity they deserve and the state machinery is always ready to sanction those who flout the decisions by the courts. So important are these decisions that sometimes the livelihood and indeed the life of a person depend on the mercies of the court. The decision of a court can send a man to the gallows and in the same breath it can save him from the same.

How did the courts - these institutions which bear this noble role in our society - come about? The Kenyan legal system as we mentioned in the first chapter is a legacy from the British. Therefore, when we talk of the Kenyan legal systems we must ask ourselves how the British came to leave us with their legal system. This in turn requires us to explain firstly how the British found their way into Kenya. And it all narrows down to colonialism.

Professor Wolff elucidates the reasons for the British colonialism for Kenya and East Africa in general. He says:

"The imperialists included men of widely divergent basic interests and motivations. Some favoured on expanding the British empire because it offered a wider field for Englishmen to fulfil a 'civilising mission.' Some favoured imperialism for security or military reasons. Others justified their position in terms of
the economic benefits which they argued, a greater
British empire would convey to Britain."

From this quotation it is clear that Wolff sees the essence of British imperialism as being fundamentally based on an economic background.

There can be no doubt that British imperialism in Kenya was geared towards the expropriation of human and natural resources for the benefit of the mother country. And since this exploitation would smack of injustice, it was camouflaged by the excuse that this was a mission to bring civilisation to the savage natives of Africa.

The naked fact is that colonialism had to be justified and the British did this easily by the magic of the word "civilisation." The natives had to be brought out from the world of darkness into the world of civilisation in order that they might come to the accepted standards of development with Europe serving as the measuring rod.

To facilitate the crucial role of imperialism the British promulgated laws in Kenya and hence the birth of the English legal system in Kenya. The courts fall within this legal system. Obviously this system was imposed on the natives to the advantage of the colonial process. The customary laws of the indigenous people of Kenya could remain in force as long as they did not interfere with the exploitative nature of imperialism.

It is therefore safe to argue that the degree of the administration of justice in the colonial era was largely
determined by the extent of the socio-economic manipulation of
the courts by the coloniser to meet his needs.

Though colonialism as it then existed is now gone, our
courts cannot, we submit, claim to be free of the colonial
heritage. Yet the courts can rid themselves of the vestiges of
colonial justice. Schofield J has a suggestion in this
connection. He advises:

"..... in a developing country a judge must by the
very nature of society, have to make a greater
effort to understand the people he has to deal
with and this is particularly so where, as in
Kenya, we have a very mixed community."2

Thus the judges must bear in mind that the circumstances
under which they are operating in have changed, namely, the
colonial era is a thing of the past. With this in mind we ought
to see court decisions not given to meet the ends of colonialism
but the ends of a free society.

2:2:0 CONCEPTS OF JUDGE AND COURT

Everybody would seem to have a clear indication of who a
deep judge is and what a court is. Though the judge is the actual
person who delivers judgements it is felt better to talk of a
"judgement of the court" rather than a "judgement by or of a
djuge." It would seem to me that the reason for this is that it
would be wrong to personalise a judgement. And in any case when
two parties go to court they have in their mind that the court
will dispense justice irrespective of the individual judge in
question. The court is an institution while the judge is an
individual. Judges come and go but courts are always there.
But we need not split hairs in this issue. When we mean the role of courts in dispensing justice we also mean the role of judges because the judges and courts are inseparable. For the purpose of a case you have to have a judge and a court. Thus the term "judgement of the court" is preferred as a matter of verbal semantics.

Theodore Becker attempts to construct a general functionalist theoretical analysis of courts applicable to all societies:

"A court is a man or body of men with power to decide a dispute, before whom parties or their surrogate present the facts of the dispute and cite existent, expressed, primary normative principles (in statutes, constitutions, rules, previous cases) that are applied by that man or those men, who believe that they should listen to the presentation of facts and apply such normative principles impartially, objectively, or with detachment ... and that they may so decide and as an independent body."3

This analysis suffices. We note that it is very important that the court must function as an independent body. This means that the independence of the judiciary is a sine qua non in dispensing justice. We shall be dealing with the independence of the judiciary later in some more details.

2:3:0 SEPARATION OF POWERS

The court forms part of the judiciary and this can be traced from the doctrine of separation of powers.

Basically the doctrine of separation of powers provides for a division of power among the three organs of the state. These organs are the executive, the legislature and the judiciary.
The doctrine of separation of powers must be used to ensure that the members of the society are not subjected to the arbitrariness of the governmental system. The doctrine aims at providing checks and balances of the governmental powers to the advantage of the subjects.

The doctrine of separation of powers is a western developed bourgeois political-legal theory which has a long historical background. Nevertheless it emerged as a coherent theory of government in the 17th century with the emergence of scholars like Locke and Montesquieu who are responsible for its subsequent development.

Montesquieu can be said to be the founder of the present day doctrine. In his book L'esprit de Lois, he laid emphasis on a constitutional framework of government based on political liberty and tranquility of mind based on the theory that each person had his own safety. This sought a decentralisation of power from a single organ of government as this would jeopardise the rights of the people: the subject saw the executive as the organ that is necessary for the execution of public resolutions and policy; the legislature as that responsible for the enactment of laws and the judiciary as that trying the course of individuals.

The doctrine of separation of powers is categorical that the same person should not form part of more than one of the three organs of the state; that one organ should not control or interfere with the function and exercise of the power of another organ; and lastly that one organ should not perform the functions of another. This ensures that the fundamental rights and
liberties of the citizen are upheld and that the administration of justice is achieved in a systematic and co-ordinated manner.

There is a dichotomy in this doctrine. In the pure doctrine the different organs are totally separated from each other to the extent of a clear distinction existing between their functions. The persons who comprise the three branches are kept separate and distinct, none being allowed to be a member of the other organ. The US adheres to this pure doctrine.

Some other countries have deviated and modified this on the strength of the argument that the strict observance of the pure doctrine is not a necessary embodiment of modern government.

The upshot is that there is the other type of separation known as the partial doctrine. This operates through a partial fusion of government powers so that for example, the head of government and the cabinet are both part of the executive and the legislature. Here the legislature and the Executive are interrelated but the judiciary is independent under this system of government. Kenya has this sort of system.

2:4:0 RULE OF LAW

The rule of law is another device for the control of the arbitrariness of the government. Basically, the Rule of Law means that the people should obey the law and be ruled by it. This includes the government. The government should also be subjected to the law and must not be seen to be above the law. If the government were not subjected to the law, then it would do whatever it wanted with the people and this would mean
oppression. The Rule of Law denotes respect for the law and the attendant obligation to obey it.

A.V Dicey is widely regarded as one of the foremost exponents of the Rule of Law. He set down three constitutional practices which he categorised as composing the Rule of Law as a political-constitutional doctrine:

1. No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law in the ordinary legal manner before the ordinary court of the land.

2. No man is above the law, but every man whatever be his rank or condition is subject to the ordinary law and amenable to the ordinary tribunal.

3. The general principles of the constitution (e.g. the right to personal liberty) are the result of judicial decisions.

Dicey has been criticised with respect to his formulation of the Rule of Law, especially what critics have perceived as his parochial concern with English practice. That notwithstanding, we submit that, the government must maintain the Rule of Law and if it falls short of this, it is the duty of the court to make sure that the government does so just like anybody else. It has been observed that in political matters where the government has an interest the Rule of Law tends to be whittled so that the rights of the individual are made to suffer. Sir Charles Newbold in "The Role of a Judge as a policy maker" outlined the
functions of the courts when such a state of affairs arises. Said he, "It is the function of the courts to be conservative, so as to ensure that the rights and duties of the individual are determined by the Rule of Law. Where under the constitution a duty is cast upon the courts to give decisions in matters which are primarily political, the judges should ever bear in mind that, unlike the executive, they are not responsible to the community for their political actions."i0

We might add that the Rule of Law has it that there ought to be a government of law and not of men.

2:5:0 THE INDEPENDENCE OF THE JUDICIARY

The discussion on the independence of the judiciary must form a very significant part in this chapter because if the courts are to be the fulcrum of justice they must operate in a system where the independence of the judiciary is a practical reality.

As we have already seen this organ (judiciary) is deeply rooted in the doctrine of separation of powers. This doctrine not only recognises the judiciary but envisages an independent judiciary.

The importance of judicial independence in traditional conceptions of judge and court is well expressed by an American lawyer Henry Lummis:

"The moment a decision is controlled or affected by the opinion of others or by any form of external influence or pressure, that moment the judge ceases to exist. One who pronounces a decision arrived at even in part by other minds is not a judge ... the courts must be above intimidation, control of influence or they cease to be courts."11 (Emphasis added).
Lummis is thus clear that if the court arrives at a decision because of extraneous reasons, that is to say, other reasons than the court is bound to take in its work, then that decision cannot be said to be just. It is also clear that the functions of courts cannot be legitimation of political authority and interpretation of policy goals at the whims of the power that be.

Kenya at the wake of independence had in mind an independent judiciary which would hold sway in the independent Kenya. Y.P Ghai a well known constitutional historian writes:

"Kenya (at the time of the inception of Kenyan Independence) was to be a country where the rule of law was to be supreme, individual rights in the context on a non-discriminating society were to be fundamentally safeguarded. Legislative and executive powers were to be accordingly circumscribed and the judges were to be established as watchdogs over the new scheme. The establishment within the constitution of a Bill of Rights which was to be supreme over the ordinary law and executive action; whose amendment was through a complex and difficult process." 12

The separation of powers Ghai talks about, that is, between the judiciary, the legislature and the executive is established in the Kenya Constitution12. However, to the dismay of many people on 11th August, 1988, the Amendment Act passed three readings in Parliament and as a result the judges of the High Court of Kenya held tenure at the "pleasure of the President"! This was a proper emasculation of the Judiciary though at the time of writing this dissertation the security of tenure of judges had been restored.

Thomas Erskine, an English barrister, gave the rationale for the independence of the legal profession in the course of
indicating what he believed was the proper way of discharging his professional duties. He said:

"I will for ever, at all hazards assert the dignity, independence and integrity of the English bar; without which, impartial justice, the most valuable part of the English Constitution can have no existence, from the moment that any advocate can be permitted to say he will or will not stand between the crown and the subject arraigned in the court - from that moment the liberty of England are at end".14

This is a strong belief in the independence of the legal profession and all in this profession should aspire towards that standard. An advocate must not refuse to take up a case because the government has an interest and he fears that he will be harassed. He must be a courageous advocate as Richard Du Cann says:

"The barrister is bound to accept any brief which will take him into the courts in which he professes to practise.... This really means that he may not refuse a brief simply because he does not think much of the lay client's chances or because he thinks the facts of the case unsavoury".15

Lord Denning also puts emphasis on the same point above:

"The second quality which becomes a lawyer is courage. Every Counsel for an accused man must spare no effort to defend him no matter how much public opinion is against the man, no matter how distasteful is the task and no matter how small a fee. He must make the most of every flaw and every gap in the net which seems to be closing round the unhappy man. He must say everything on his behalf that can properly be said".16

In Kenya the Advocates Act17 and the Law Society of Kenya Act18 are the statutes which Kenya has enacted to enable the
advocates to discharge his difficult tasks in the aid of administration of justice.

Having an independent judiciary is no doubt a very welcome thing in any society. In fact any respectable society must have an independent judiciary. It is because of such a judiciary that high standards of justice can be maintained. Shimmon Shetreet, a leading authority on judges has this to say on this account:

"Judges are the central figures in administration of justice and the most significant... The quality of justice in any society is very much dependent upon the men selected to occupy the seat of judgment in that society... If they are independent, courageous and maintain high standards, the people will be judged justly and will enjoy adequate protection under the laws of the society in which they live"19

Mutatis Mutandis the absence of the independence of the judiciary in a society can bring catastrophic consequences as Sydney Smith observed:

"Nations fall when judges are unjust because there is nothing which the multitude think worth defending; but nations do not fall which are treated as we are treated ... And why? Because this country is a country of the law; because every judge is a judge of the peasant as well as for the palace; because every man's happiness is safeguarded by fixed rules from tyranny or caprice. The christian patience you may witness, the impartiality of the judgement seat, the disrespect of persons, the disregard of consequences."20

The caprice and tyranny of the executive can sometimes result to the chaotic society Sydney Smith envisions in the above quotation. But if there is an independent judiciary the executive power will be kept at bay so that it does not injure the human rights which are supposed to be so jealously safeguarded. Former Chief Justice Bhagwatti of the Supreme Court of India generally characterised the role of the judiciary with regard to the safeguards of human rights:
"The judiciary has to be ever alert to repel attack, gross and subtle, against human rights and they have to guard against the danger of allowing themselves to be persuaded to alter or construct human rights out of misconceived concerns of state interest or concealed political preferences or sometimes ambition or weakness or blandishment of fear of executive."

The independence of the judiciary is really important as we have seen. How then can governments ensure that there is this independence? How can the independence of the judiciary be safeguarded?

Y.P. Ghai remarked that the independence of the judiciary is better insured "by insulating the appointment of judges from political influence by granting them a high degree of tenure."

Judges are human beings with human weaknesses. They have to make a livelihood and they therefore value their employment and they happen to be employed by the government which is sometimes a party to a case. This puts the judges in a very tight situation as their employer would certainly want "favours." The only way the judges can be independent from such demands from their employer is to be certain that their tenure in office is secure and cannot be played around with. In 1959, at New Delhi, the International Commission of Jurists reasoned along this line as follows:

"An independent judiciary is an indispensable requisite of a free society ... The principle of irremovability and the security of tenure until death or until a retiring age fixed by statute is reached, is an important safeguard of the Rule of Law ... The reconciliation of the principle of irrevocability of the judiciary with the possibility of removal in exceptional circumstances necessitates that the grounds or removal should be before a body of judicial character assuring at least the same safeguards to the judge as would be allowed to an accused person in a criminal trial."
We believe that the same safeguards given to judges should be extended to Magistrates and other similar judicial officers because all have to grapple with cases where the government is involved. The independence of the judiciary should be complete and should start at the grass-root level.

It is therefore unfortunate that our Constitution does not expressly provide for the security of tenure of Magistrates. Magistrates are supposed to be manning the subordinate courts and that is where really most cases start. A magistrate hears on average more cases than a judge even if the nature of the cases he tries might not be as sensitive as the cases the High Court hears in respect of the so-called "matters touching on the security of the state." The decisions of the subordinate courts are not binding on other courts but the decisions of the High Court are. This again might be seen as another reason the judges must have security of tenure because their decisions have a most far-reaching effect.

2:5:1 "NO AMOUNT OF THREAT WOULD SWAY ME."*4

Though the security of tenure of office of magistrates is not expressly provided for in our constitution, we submit that the government must not be allowed to influence the magistrates so that they can dance to its tune. This would be like giving something with the right hand and taking it back with the left hand. The magistrates must not spare any effort to inculcate to the minds of the executive that they are in the legal profession in which the independence of the judiciary must be kept sacrosanct.
I was highly impressed by a ruling given by a former Principal Magistrate (now a judge) which I will proceed to give. It is a ruling which all other magistrates should emulate as it depicts the independence of the judiciary in subordinate courts.

In a certain case S. O. Oguk, a Principal Magistrate had released the accused person on bail. Apparently some people were not happy that he had granted the accused person bail and they had promptly started unjustified and unwarranted attacks directly at him personally. Said the intrepid Magistrate:

"I have been on this bench for more than ten years and I wish to warn that no amount of threats would sway me one way or the other from my sworn duty to administer justice in accordance with the law based only on the evidence adduced before the court. Such threats have instead strengthened my determination to dispose of this case without fear or favour in a way that can fully be tested on appeal. I will also not hesitate to deal very firmly with likely cases of contempt of court as it is my duty to maintain the dignity of this court and to champion on the cause for the independence of the judiciary in this country."

The prosecution had asked yet again for an adjournment. They had been unable to start off their case as the complainant was evasive and had not given a statement. Normally, the court would be compelled to dismiss a case when the complainant has not attended on a day fixed for hearing after he has been notified of the case.

The Principal Magistrate agreed with the forceful submissions by the defence counsel that the request for adjournment had no merit but he said,

"Nevertheless, with or without merit, I am prepared to allow the adjournment so as to give those who are waging malicious attacks on the court, no further room for excuse if the case is finally dismissed."
Such are the kind of rulings we would like to see as a close look at the magistrate's ruling shows a magistrate who is committed to defend the independence of the judiciary.

2:6:0 THE JUDGE AS AN IMPARTIAL UMPIRE IN THE ADVERSARIAL SYSTEM OF DISPUTE SETTLEMENT

An independent judiciary makes it conducive for a judge to be an impartial umpire in court. In both civil and criminal proceedings it is absolutely important the the judge does not favour any party.

In Kenya we have the adversarial system of dispute settlement. This means that the two parties appearing in court battle it out and the judge's role is supposed to be that of a disinterested party. In fact the judge is not even supposed to have had knowledge of the case before it is brought to court.

In the adversarial system the parties are supposed to be in a battle field and the 'stronger' party wins the day. The party with the stronger case gets the judgement.

The notion that the judge is supposed to be a disinterested party has always been problematic. This is because this can result to injustice. Suppose that one party is represented by a Lawyer when the other is not. Should the judge be a disinterested party and ignore the fact that the unrepresented party is disadvantaged and might end up losing the case purely because of this disadvantage?. Shouldn't the judge intervene? But then if he intervened would it not seem as if he is taking the role of an advocate of the unrepresented party?.
Our submission is that the judge’s role should and must be to ensure that justice is done to the best of his capabilities. Just as the Principal Magistrate, as we saw, was prepared to allow the adjournment with or without merit, every judge should champion the cause of justice for the law should not be allowed to over-ride justice. If a certain law will lead to an unjust result then the judge must make sure that the unjust result is mitigated by an interpretation of that law so that the unjust result does not occur.

There are instances the executive influences the legislature to legislate laws which are obviously unjust. These unjust laws are legislated so that the executive can have its way and say that what it is doing is within the provisions of the law. Thus the executive can and does use the legislature as a rubber stamp to its whims. It is our contention that in such instances the Judiciary must come up very strongly and declare these laws unjust and void.

Though we are operating in an adversarial system of dispute settlement this must not be seen to mean that our courts should just sit and construe unjust laws even if the executive is operating within these laws. The judge in this case must take a more active role and construe the law in such a manner as not to cause injustice to any of the parties.

In the next chapter we consider the constitution which as the supreme law of the land must be respected by the judges in its constructions in order to dispense justice to the people the constitution seeks to protect.
CHAPTER III

THE CONSTITUTION OF KENYA—A FOUNTAIN OF JUSTICE?

3:1:0 Introduction

In dispensing justice, the courts must follow the Constitution for the Constitution is the fundamental Law of the Land. Indeed the Constitution has been called the first law².

Professor B. O Nwabueze defines a Constitution as a formal document having the force of law by which the society organizes a government for itself, defines and limits its powers and prescribes the relations of its various organs inter-se, and with the citizens³. Therefore lawful government must derive its legality from a Constitution for a Constitution creates a government and not the other way round.

Nwabueze's definition encampases the narrow sense the term Constitution has often been associated with, namely a document having a special sanctity which sets out the framework and principal function of the organs of a government within a state and declares principles by which those organs must operate.

Not all countries⁴ have a Constitution as a document and therefore in the broad sense the term Constitution refers to the whole system of a government and the collection of rules which establish and regulate that government.

The two senses the term Constitution is understood to be seem to have the bottom-line that the Constitution is "to be understood as the process by which political action is limited and at the same time given form".⁵
George Anyona observes that the Constitution is so important and sacred that he likens it with a law from God. He observes:

"The Constitution like Rousseau's Social Contract, is the political equivalent of the Ten Commandments and all Holy Writ. The sanctity or the Constitution is the equivalent to the sanctity of the covenant....The covenant stood between God and the forces of evil, so the Constitution stands between the people and tyranny."  

Our courts must therefore take our Constitution very seriously for indeed the Constitution is a 'sacred law'.

3:2:0  THE STORY OF THE KENYA CONSTITUTION

The story of the Kenya Constitution really begins in 1902 when the British Colonial government promulgated the East African Order in Council setting the manner in which the Kenya Protectorate was to be administered. Between then and 1919 seven other orders in Council were promulgated to deal with various specific aspects of colonial administration.

1920 saw the promulgation of the Kenya Protectorate Order in Council to provide for "Protectorate" Status to Colonial Rule. This Order was given various amendments in 1934, 1948, 1954 and 1955 to provide for situations brought about by the lightened nature of the armed struggle for independence.

Meanwhile the coastal strip which had a separate legal structure was specifically provided for by the Kenya Colony Orders in Council of 1921 and 1939.

The declaration of a state of emergency in 1952 and political development in the decade between 1950 and 1960 saw great many changes in the Colonial Legal Order obtaining in
Kenya. Extensive amendments to the various orders in Council providing for Colonial administration were overhauled so that the first version of the present day Kenya Constitution was contained in the 1958 Kenya Order in Council. That Constitution was outright rejected by the nationalists. It was seen as what it was: an attempt to entrench minority privileged interests. It was not acceptable even to the settler ruling class of the day. It was basically antagonisms brought about by the rejection of this Constitution that led to the famous Lancaster House Independence bargain that culminated in the promulgation of 1963 Kenya Order in Council whose preamble stated as follows:

"This Order makes fresh Constitutional provisions for Kenya conferring internal self-government under the Constitution established by the Order"

It further provided as follows:

"There will be a Central Legislature Constituting of Her Majesty and a National Assembly. The National Assembly will comprise a Senate and a House of Representatives. The Constitution divides Kenya into seven regions and the Nairobi Area and establishes a Regional Assembly for each region. The Constitution defines the respective Legislative powers of the Central Legislature and of the Regional Assemblies and the respective executive authority of the Government of Kenya and the regions. Responsibility for defence, external affairs and internal security is reserved to the governor. The Constitution regulates the financial relationship between the Government of Kenya and the regions and also contains provisions dealing with the police, the judicature, the respective public service of the Government of Kenya and the regions, Land (Including the establishment of a Central Land Board) and Local Government".
After several months of intense bargaining between various interests and groups who felt threatened by the acquisition of independence by the protectorate and Colony of Kenya, the 1963 Order in Council was amended and was brought into force by the Kenya Independence Order in Council of 1963. (Legal Notice No.718 of 1963) whose preamble read as follows:

"By virtue of the provision of the Kenya Independence Act, 1963 Kenya will attain fully responsible status within the Commonwealth. On 12th December 1963. This Order makes provision for a new Constitution for Kenya from the date."

That Order in Council contained the Kenya constitution in substantially the same form as it is today save for the subsequent amendments.

3:3:0 THE SUPREMACY OF THE CONSTITUTION

It is a truism that the Constitution is the supreme law of the land. Therefore the supremacy of a country’s Constitution should be manifest in that country’s system of justice.

The Kenya Constitution is the instrument which brought in being the entire state and government machinery that exists today. Through the fundamental freedoms which it guarantees to individuals the Constitution prescribes the basis for the economic and social institutions of the country. Its influence and its power are all pervading.

Professor B.O Nwabueze speaks of the supremacy of a Constitution as he writes:

"A Constitution is, or is supposed to be the product of the exercise of the Constituents power inherent in any people. It is an
The Constitution of Kenya derives its authority from section 3:

"This Constitution is the Constitution of the Republic of Kenya and shall have the force of Law throughout Kenya and subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other Law shall, to the extent of the inconsistency, be void"

Section 47 mentioned in the foregoing is concerned with the procedure of amendment. It provides:

"A Bill for an Act of Parliament to alter this Constitution shall not be passed by the National Assembly unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly (Excluding ex officio members)".

The above section has sparked off some argument as to the supremacy of the Constitution. The argument is that the Legislature seems to have the upper hand as far as the laws of the land are concerned as all laws emanate from the Legislature. Section 47 of the Constitution allows the Kenya Constitution to be amended and this would seem to indicate that Parliament takes the day. We seem to enter into a vicious circle, namely, the Constitution is the supreme law of the land, and this Constitution can be amended and hence the supreme law of the land to this extent is altered; yet parliament must follow the provisions of the Constitution to amend it. We are put into a situation where we ask ourselves between the egg and the chicken
Which came first? So, between the Constitution and Parliament which is supreme?.

Professor Kenneth Wheare attempts to answer this question:

"Here clearly the legislature makes the amendment of the Constitution? The answer would seem to be that if the Legislature is bound to follow the procedure laid down in the Constitution and to observe the requirements concerning majorities there inserted, the legislature is to that extent controlled by the Constitution and the Constitution is to that extent supreme over the legislature."?

The upshot of Wheare's contention is to underline the supremacy of the Constitution even if it can be amended. Parliament cannot just amend the Constitution without following the Constitutional requirement. The onus of amending the Constitution must lie on Parliament as the Constitution cannot amend itself.

As far as Kenya is concerned, the supremacy of the Constitution must not only be asserted as far as our municipal laws are concerned but also with respect to laws outside Kenya which have a bearing on the Kenyan Citizens. This was held Obiter in the East African court of Appeal, the predecessor of the present court of Appeal for Kenya in East African Community v R10.

"It is quite clear that the Constitution of Kenya is paramount and any law, whether it be of Kenya, of the (Erstwhile East African) Community or of any other country which has been applied in Kenya, which is in conflict with the Constitution is void to the extent of that conflict."11
There are a number of cases one can give to illustrate the supremacy of a Constitution. The American case of *Marbury v Madison* is usually quoted in this respect. This famous case rests on Article VI, section 2 of the American Constitution which provides:

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

In *Marbury v Madison*, Marbury applied to the supreme court, by virtue of the Judiciary Act 1789, for a writ of Mandamus to compel the new Secretary of State, James Madison, to deliver a commission which had been signed and sealed by the Secretary of State in the outgoing administration, John Marshall (now the Chief Justice). Marshall saw fit not to disqualify himself from this case but instead proceeded to hold that by virtue of Article III, Section 2 of the Constitution, he had jurisdiction to issue a writ of Mandamus (which was held to be rightly sought) when exercising an appellate but not an original jurisdiction. He held that in so far as the Judiciary Act authorized Marbury's direct suit, it offended against the Constitution and to this extent the Act was null and void.

The supremacy of the Kenya Constitution can be seen in a number of cases. For the purpose of this paper, we shall only give two cases for they will suffice to bring out this supremacy.
The first case is Re Maanqui. In this case an African widow had applied for letters of administration in respect of the estate of her deceased husband. It had been the practice of the High Court prior to this case not to grant letter of administration to Africans. Justification for this curious practice was attributed to the then applicable Indian Acts (Amendment) Act section 9 of which provided that all Indian Acts applied to Africans with reference to certain specific matters. The subject "probate and administration" was not enumerated as one of such matters.

The discriminatory character of the said statute being common ground, Farrel J, acted on general concept deemed right and just, in law, and without being addressed on authority held:

"It is agreed by both counsel who appeared before me that 5.9 of the Indian Acts (Amendment) Act is discriminatory within the meaning of S. 26 (2) (Now 8. 82(2) and (3) of the Constitution, and I do not think I need say more than that the section (so far at any rate as if affects the application to Africans of the Indian Probate and Administration Act) is discriminatory."

The Constitution in the above case prevailed. Parliament had to find a solution for the conflict between the Constitution and the subordinate law (5.9 of the said Indian Acts (Amendment) Act. This it did by deleting Inter alia the said 5.9 by dint of the Statute Law (Miscellaneous) Amendments Act, 1968.

Then there is the recent case, Margaret Maqiri Ngui v R. In this case, a woman of 34 years of age had been charged with robbery with violence contrary to section 296(2) of the penal code. This offence carries a mandatory death penalty and
with the consequent hardship of the trial, to the accused who was ailing in custody she applied to the trial Magistrate's Court for bail. Her application was refused, the ground being that section 123 of the Criminal Procedure Code provides;

"The High Court may, save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence, direct that a person be admitted to bail or that bail required by a subordinate court or police officer be reduced".

The four exceptions to the Judicial bail power had not always been part of the Criminal Procedure Code. They were introduced, progressively by the Statute Law (Miscellaneous Amendment) Act of 1978, and the Statute Law (Miscellaneous Amendments) (No.2) Act of 1984.

The Constitution (and currently in its s. 72(5)) has always provided that:

"If a person arrested or detained (on suspicion of having committed, or being about to commit an offence) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him he shall be released either unconditionally or upon reasonable conditions including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial".

It is on the strength of this provision that the application in Nqwi was based. The applicant sought an order "that section 123 of the Criminal Procedure Code as amended to the extent that it purports to make admission to bail unavailable to the applicant....is void as being inconsistent with section 72 (5) of the Constitution".
Sir Alfred Simpson, CJ, who delivered the judgement of the three man Bench observed that the state of Criminal Procedure code, prior to the 1978 amendment, "was in accordance with the common law and with section 60 (1) of the Constitution, which gives the High Court unlimited original Jurisdiction in Civil and Criminal matters and such other Jurisdiction and powers as may be conferred on it by this Constitution or any other law".

Counsel for the Republic had submitted that parliament had the power to reduce the Jurisdiction of the High Court, so long as the process of so doing fell within the terms of the Constitution, that the said amendments to S.123 (3) of the CPC were not contrary to the Constitution, and hence correct in law.

The High Court disagreed:

"We cannot agree that S.123(3) as amended is in conformity with the Constitution. Whereas S.72 (5) of the Constitution makes release on bail mandatory only in certain prescribed circumstances it is applicable to all offences. The amendments to S.123(3) have the effect of prohibiting the High Court from granting bail in the cases of murder, treason, robbery with violence and attempted robbery with violence in any circumstances". (my emphasis).

Counsel for the Republic had also argued the State's case on the basis of S.70 of the Constitution which provides that the "fundamental rights" is to have effect for the purpose of affording protection to the various right as set out:

"Subject to such limitations of that protection as are contained in these provisions, being limitations designed to ensure that the enjoyment of these rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest".
He argued that the said amendments to the CPC "were an expression of the legislature's concern for the public interest", but this submission was rejected by the court in these terms:

"The Constitution...gives the legislature no power to make such amendments unless enacted under the provisions of and embodied in the Constitution. The limitations referred to in 5.70 are limitations contained in the provisions of chapter V and there is no limitations qualifying the mandatory provisions in S.72(5)."

Thus the court held firmly that S. 123(3) of the CPC was inconsistent with the Constitution..... not only S.72(5) but S.60(1) and is accordingly void.

Nevertheless the court applying its discretion as if the offending amendments to the CPC had never existed, squarely turned down the instant application for bail citing the practice in Kenya prior to the 10th November, 1978 and the temptation to abscond as the offence charged carries a mandatory death penalty, as reasons for the denial of the bail application.

In this case, though the accused was not granted bail, the bottom line is that the Constitution is supreme and the other laws must accord to it.

3:4:0 THE CONCEPT OF CONSTITUTIONALISM: CONSTITUTION IN EXECUTIVE CONTROL

The term constitutionalism is derived from the term Constitution and has to do with the degree of the Constitutional function as a real limit and the way the State is administered; it is the rule that limits the power of a state and endeavors to
restrain the state and restrict it in the channel of fairness and justice.

The Constitution being the creator of the government, becomes a pillar to which all obedience of those who hold governmental power should be directed. This is because disobedience to or ignorance of the strict Constitutional prescriptions of rule by those who hold the reins of power is itself an annullment of reality of the lawful existence of that government. And "nothing can destroy a government more quickly than its failure to observe its own laws, or worse its disregard of the charter of its own existence."²⁴

De Smith writes on Constitutionalism and says:

"Constitutionalism is practised in a country where the government is genuinely accountable to an entity or organ distinct from itself where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organise in opposition to the government in office and where there are effective legal guarantees of fundamental civil liberties enforced by an independent Judiciary."²⁵

Constitutionalism therefore checks despotism and makes a government be accountable to the people. The government emanates from the people and therefore it must not use the power it has been given by the people to exploit them.

It is a basic tenet of Constitutional law that the Constitution regulates the affairs of the state viz-a-viz the individual. It also sets out checks and balances between the various organs of the State. Thus a Constitution springs from the notion that a government shall never be absolute but a limited one, that the essential values of the society are
realised, the exercise of governmental power which is requisite for such realisation should be controlled by law so as not to be itself destructive of the values it was intended to promote. As we have said before, this therefore calls for strict adherence to the Constitution by not only the governed but also those who wield power within the state. No one including the government should be above the law. Lord Denning put it this way:

"To every subject to the land no matter how powerful, I would use Thomas Fuller's words over three hundred years ago. 'Be you ever so high, the law is above you.'"26

The courts are the guardian of the Constitution and their duty is in all circumstances to enforce its provisions as they are interpreted in the courts27. The courts should not allow the executive to flout the Constitution for the courts would be failing in their noble job as the custodian of the Constitution.

The executive can be a very dangerous organ of the government if it is not checked by dint of Constitutionalism so that those who express variant views against the executive are not robbed of their political rights and being subjected to arbitrary arrests, detention, exile and confinement which is against the letters and spirit of the Universal Declaration of Human Rights, to which Kenya is a signatory.

The sad state of affairs described in the foregoing paragraph held sway from June 198228 when the Constitution was amended to make KANU (Kenya African National Union) the sole legal Political Party (de jure). It is indeed very sad that the executive can amend the Constitution to correspond or give effects to its dictates! This in effect defeats the concept of
Constitutionalism. Mr. Henry Wariithi a member of parliament was on 2nd March 1966 riled by this sad act of the executive. He expressed his concern thus:

"It is no doubt that the Constitution is the highest law in the land and we know how important it is. But we have noticed in Africa one could only say that the importance of the Constitution depends upon the government of the day. We have seen several Constitutions being flouted in the course of a few months."

3:5:0 THE INTERPRETATION OF THE CONSTITUTION BY OUR COURTS: WHOSE BENEFIT?

If it is a sin for the executive to flout a Constitution, what can it be for the courts to do the same? The courts being the guardian of the Constitution would be committing an unforgivable sin if they allowed themselves to be manipulated to construe the supreme law of the land in an untoward manner. Yet this is a reality in our courts.

When the State takes a person to court for whatever reason, the courts should display their impartiality as this is a matter which touches on the liberties of the individual which are guaranteed by our Constitution. The accused person goes to court with awe and it must be expected that the court will safeguard his basic rights and not be moved by the caprice of the state should that caprice be there.

The Kenya Constitution lays down a Bill of rights through which the individual is guaranteed some of the basic freedoms, liberty and other safeguards that are necessary for the enjoyment of a person's life. When an accused person is brought to
court, the court must ensure that these safeguards are honoured. These safeguards include inter alia:

(i) that if a person is charged with a criminal offence then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(ii) that a person charged with an offence shall be presumed innocent until he is proved or pleads guilty.

(iii) that a person charged with an offence shall be informed as soon as is practical and in a language that he understands and in details the nature of the offence charged.

(iv) that he shall be permitted adequate time to prepare for his defence and also permitted to defend himself either by himself or a legal representative of his choice.

(v) that he has a right to cross-examine the prosecution witness either by himself or his legal representative.

(vi) that such accused person shall be given the assistance of an interpreter freely if they cannot understand the language used at the trial.

It is our submission that the above safeguards and others that can be said to constitute human rights need not be granted expressly by the constitution because these rights by their very nature and essence, exist and are capable of existing even without any prescription. These rights are inalienable and
inherent in mankind; any attempt to interfere with them or stifle and strangulate them is usually met with a lot of unending and unyielding resistance. The courts must at all times help protect these rights very jealously.

Judge Tanaka beautifully said of human rights in a dissenting opinion:

"The existence of human rights does not depend on the will of a state: neither internationally on its law or any other legislative measure, nor internationally on treaty or custom, in which the express or tacit will of a state constitutes the essential element. A state or states are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the state is no more than declaratory."

In the highly publicised case of Githunguri v R, the former late Chief Justice Madan who is well reputed in the Kenya Judiciary for being a foremost crusader for Justice in our courts asked of the Constitution:

"We also speak knowing that it is our duty to ask what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the Constitution if it fails to give effective protection to their fundamental rights". (my emphasis)

It therefore becomes highly suspect when a judge fails to make the Constitution give effective protection to the fundamental rights of the individual as is expected. One begins to question the competence of such a judge. Or better still one wonders what such a judge has up his sleeves. This is because some of the pronouncements made by our judges are very untoward
and lack any legal sense. In fact I would characterise them as very unconstitutional statements.

The interpretation of the Constitution by some of the High Court judges is done for the benefit of the state rather than the individual even where the individual obviously is protected by the Constitution against harassment from the state. The judges who flout the provisions of the Constitution so that they can please the state which is their employer do not understand justice as envisaged by the letter and spirit of our National Anthem. This leaves us wondering whether to them justice means to please the employer first and then the rest can only benefit incidentally.

Let us examine some of the instances where the provisions of the Constitution have been flouted for reasons which are highly suspect.

In Mathew Ondeyo V David Onyancha and Another Justice Tanui in dismissing the application which challenged the KANU nomination procedure said:

"I do not agree that any statute, rule or regulation which ousts or tends to oust the jurisdiction of the High Court is inconsistent with the Constitution and void".

This statement lacks legal substance. The correct position as the learned judge knew, or ought to have known is that it is only the Constitution which can delimit the Jurisdiction of the High Court. And further more as was declared by the court of Appeal for Kenya, the unlimited and original jurisdiction of the High Court can be ousted only by an express provision in the Constitution.
Therefore any statute, rule or regulation which ousts the jurisdiction of the High Court is void. NOW KANU made nomination procedures which ousted the Jurisdiction of the High Court and the learned judge agreed that KANU could do that. This is clearly saying that KANU is supreme. KANU being the only Political Party at the time of the above application and being the Party in power deserved justice and not the applicant. In other words the learned judge saw justice to be for the benefit of the powers that be.

In Kamau Kuria v. A.G4 and Maina Mbach and Two Others v A.G4 the High Court on both occasions declared that section 84 of the Constitution which gives the Court Jurisdiction when a private citizen fears for infringement of his right is operative as the Chief Justice had not set out the procedure to be followed.

In Maina Mbacha the learned Justice Norbury Dugdale in his ruling said, Inter alia,

"It can be seen that section 84 of the Constitution is not operative. This means that the originating motion brought under section 84 of the Constitution has no legal foundation and there is no merit in the application which amounts to nothing in fact or in law".

It is on record that Justice Dugdale in this case acknowledged that the application had been brought both under 5.60 and 84 of the Constitution. The Kenya Constitution creates the High Court and grants it unlimited original jurisdiction under section 60(1). Yet the court did not address itself to the jurisdictional issue under the grant of "unlimited orginal
Jurisdiction” of the said section. The court failed to concede that it had Jurisdiction to hear the matter and dismissed it with costs.

Justice Norbury Dugdale an expatriate judge in Kenya has always raised hue and cry in the manner he construes the law in matter where the government has an interest. Numerous calls have been made for his removal from the bench.

It is interesting to note what another expatriate judge had said of section 84 of the Constitution. Justice Shields was very categorical about the operativeness of S. 84 of our constitution:

"The Constitution of this Republic is not a toothless bulldog nor is it a collection of pious platitudes. It has teeth and in particular these are found in S.84.... It might be thought that the newly independent states who in their constitutions enacted such provisions were eager to uphold the dignity of the human person and to provide remedies against those who wield power".

In this case the High Court acting under the grant of original jurisdiction of S. 84 sought to discover if the applicant’s right not to be subjected to torture under S. 74 of the constitution had been contravened. It was found in this case that this right had been contravened and the applicant was awarded damages.

Section 84 of the constitution is therefore very operative contrary to the untoward reasoning of Justice Dugdale. In fact, apart from the Felix Marete Case, the High Court had four other previous rulings in which the court adjudicated these cases pursuant to section 84.
In Stanley Githunguri v A.G. the High Court empowered by the jurisdictional grant in S. 84 found that S. 73 of the constitution had been contravened by an abuse of process, amended the application and granted a prohibitory order. In Raila Odinga v A.G. the court still acting under the grant of original jurisdiction of S.84 held in dicta that the failure of a rule making authority to tailor procedural rules to enforce rights created by the constitution does not invalidate the court's constitutional power.

In Margaret Magiri Ngui as we already saw the applicant successfully applied under S. 84 of the constitution for an order that the application for bail be heard by the High Court. The court held S. 123 of the CPC to be inconsistent with S. 72 of the constitution.

And in John Harun Mwau V.R the Kenya Court of Appeal held that there is of course the right to apply for redress under S. 84 of the constitution.

When the constitution is perverted and construed to favour those who wield power, it ceases to be a fountain of justice and becomes a mere farce with respect to its supremacy. This interpretation of our courts to make sure that the whims of the state override the rights of the citizen must be condemned in the strongest terms possible.

In the following chapter we shall see in more details some of the courts decisions in their bid to dispense justice if that is what they envisage justice to be since the courts have the duty of dispensing justice, anyway.
By dint of the courts' decision, we can appraise justice as envisaged by our courts. As we have seen in the foregone chapters, the courts must be guided by some intrinsic principles in their task of dispensing justice. And if the courts flout these principles, then we submit that they must be seeing justice in a different way as would be expected; this cannot be justice within the letter and spirit of this paper.

It is our view that the real test whether our courts dispense justice can be seen when the courts have to decide on cases where the State power is an interested party. The State power is the employer of the judges and therefore it can have tremendous amount of influence on the decision of the court. Most cases where the State power is a party are political cases such as treason and sedition. Here we find great difficulties as these are offences against the State power itself.

According to the principles of Natural Justice as we saw earlier, these political cases ought to be tried by independent judges and not by the State power which is an interested party. The State power cannot be a judge in its own cause any more than anyone else. But here is the point where divergent political philosophies come into play. The totalitarian philosophy puts the safety of the State power
above all else and says that the police and judges are only instruments to secure its safety and to carry out the government policy. The individualist philosophy regards human personality as the supreme value and says that every individual in the country is entitled to be protected by the judges against arbitrary action on the part of the State power.

We support the individualist philosophy and so does our constitution as everyone is entitled to a fair trial even when he is accused of a political offence; and he can only be assured of this if the judges are independent of the State power.

Our courts have always found themselves in a position where they have to make decisions in very sensitive cases. These cases are termed sensitive because they "touch on the security of the state". Sometimes one is left wondering what security of the state means as some of the accused persons brought to court do not appear in the least to threaten the security of the state which has all the machinery at its disposal to protect itself.

We are of the view that at no time should a judge subscribe to the totalitarian philosophy which is to the effect that the judges are only an instrument to secure the safety of the State power and carry out its policy. That would mean that the State power is the judge of its own cause and against the principle of natural justice. The State power like anyone else is subject to the law and must
abide by the tenets of our constitution. And the judges must spare no effort to declare so in their judgements.

We shall now proceed to look at the courts' decisions and see whether they reflect justice as we understand it in this paper. In doing so, we shall focus on different areas, for example, sedition, murder, abuse of court process, to name but a few. We pick on these cases as we feel that the state power was hovering around them and therefore affected the decisions reached. But this is only a hypothesis. We shall test it by analysing those cases.

It is our opinion that this chapter will be incomplete if we do not look at a case decided during the colonial era. This case will help us see whether our courts have changed in their approach to cases in order to dispense justice in the era when colonialism is no more; whether or not they envision justice as the colonial courts.

**COLONIAL JUSTICE**

*R.v. Kenyatta et al*

This case took place when Kenya was still in the shackles of colonialism. Kenya was undergoing a stage of turmoil and this was as a result of the deprivation of the Kenyans of their political and socio-economic rights by the colonialists. In turn political organisations were being formed as a form of resistance.

Kenyatta and his colleagues Paul Ngei, Richard Achieng Oneko, Kung'u Karumba, Fred Kubai and Bildad Kaggia were arrested on the eve of 20th and 21st October 1952 when the declaration of a state of emergency was made by the Governor, Sir Evelyn Baring.
The trial of Kenyatta and others started in November of the same year and ended in March 1953.

Kenyatta was charged with managing a proscribed organisation, to wit, Mau Mau. The others were charged with assisting in the management of Mau Mau. All of them were charged being members of the said organisation.

Mau Mau was first declared to be an unlawful society on 12th August, 1950.

The trial took place at Kapenguria in a classroom. It was conducted by a magistrate, Mr Thacker, a retired High Court judge who had been especially appointed to hear the case.

The evidence adduced by the prosecution witnesses against Kenyatta and his co-accused leaves a lot to be desired. The magistrate ought to have rejected that evidence and acquitted the accused persons.

One witness, Colman Kageena testified that in March 1950 he had drank with Kenyatta and other people in one Joram Waweru's shop and afterwards Kenyatta was involved in the initiation of two people into Mau Mau in Waweru's house. Kageena's story was heavily destroyed on cross examination, Kenyatta denied the closeness alleged by this witness.

The prosecution adduced other evidence on Mau Mau initiation ceremonies to implicate Kenyatta and his co-accused but this was neither convincing nor corroborative.
Rawson Macharia, the key witness in the trial, testified against Kenyatta but after the trial he confessed that his evidence had been wholly false and that the evidence of many other prosecution witnesses had been false too. In fact Macharia and other witnesses had been coached very carefully by the colonial officers on what to say and they had been bribed to lie.

Macharia was subsequently charged and convicted of perjury but this did not make any changes to the charges made against Kenyatta and the others.

The magistrate thus believed the prosecution evidence and convicted the accused persons. He sentenced them to the maximum sentence, i.e. seven years and also recommended restriction for all of them. Said he in sentencing them:

"You have much to answer for and for that you will be punished. The maximum sentence which this court is empowered to pass is the sentence I do pass, and I can only comment that in my opinion it is inadequate for what you have done. (emphasis mine).

This shows how hostile the magistrate was. This trial raises a number of issues which show clearly a manifestation of injustice.

The trial was conducted at Kapenguria, a restricted area. One had to acquire a permit first in order to go there. Applications by the defence to transfer the case to Nairobi or an accessible place was refused. The alleged offence was not committed anywhere near Kapenguria. Thus in this case the concept of trial in an open court cannot be
said to have been upheld as this place was too far, remote and inaccessible. Furthermore some relatives of the accused persons and also some advocates were refused entry into the court.

There was a lot of hostility against the leading defence counsel, D.N. Pritt. In fact he was charged with contempt of court for a cable he was alleged to have sent to British Parliament complaining about the conduct of the trial. He was not found guilty of the same.

The choice of the magistrate is also very curious as Mr Thacker was a retired judge who had a record of being ruthless with African nationalists. It was later learnt that he, like Macharia, was heavily rewarded for his role in the trial.

The evidence adduced by the prosecution could not have been satisfactory to warrant a conviction. The burden of proof in criminal proceedings lies on the prosecution and entertainment of doubt must be resolved in the acquittal of the accused. But it seems that the magistrate was only interested in the prosecution's evidence. Slater sums it thus:

"The magistrate accepted practically every application, motion or submission made by the prosecution.... and rejected practically every application, motion or submission by the defence. He accepted as truthful every witness called by the prosecution no matter what their character or history, however improbable their stories were, how gravely they contradicted themselves or how badly their stories were shaken in cross-examination; and at the same time he
rejected as untruthful every witness
called by the defence no matter what
their character or history, however
fully they were corroborated or however,
intrinsically probable their stories
were."

We can entertain no doubt that this trial was a
depiction of injustice at its worst. This was the kind of
"justice" the Africans got from the colonial masters. Of
course the rigours of going through the trial was meant to
hoodwink the world that the British are committed to justice
as manifested in the "open trial". But this, in our view,
was just formalising the trial. The decision had already
been made well before the trial began.

Strange enough the decision in this case has not been
overruled by our courts even after the coming of
independence.

4.3.0 MURDER REDUCED TO MANSLAUGHTER

R.v. Frank Joseph Sundstrom*

This is another case which smacked of injustice. Like
the Kenyatta case it was heard by an English judge.

The accused, Frank Joseph Sundstrom was a member of the
United States Navy since July 1979. While serving as a
fireman apprentice on board the U.S.S. La Salle, he arrived
in Mombasa as a member of the crew on August 3rd, 1980.
Within a few hours of his arrival and never having been in
Kenya before, he found himself in a night club known as
Florida club. He purchased some beer and made the
acquaintance of a girl called Ms Mwangi who agreed to go to bed with him for a sum of Ksh. 100. This she did in Florida House, some distance away. They then returned to the night club after which the girl brought another man to Florida House and slept with him.

On return, the accused met Njeri, a friend of Mwangi. With her he drank some beer and partook some marijuana or bhang. Njeri also agreed to sleep with the accused in return for Ksh. 300. They proceeded to another room in Florida House, purchasing some more beer on the way.

After having slept with her, the accused and Njeri drank some more beer. They then came to blows, Sundstrom apparently having taken money from Njeri's purse. The fracas was so violent that Sundstrom smashed a bottle on Njeri's head and jabbed her with the broken bottle inflicting the wound which led to her death. He was slightly injured.

The accused was charged with murder but this was later reduced to manslaughter on the application by the state counsel. The accused pleaded guilty to the lesser charge and was sentenced to enter into his own recognisance without sureties in the sum of Ksh. 500 conditioned that he shall keep peace and be of good behaviour for the next two years while in Kenya. Thus the accused went scotfree in a judgement made in the interest of justice.

Let us look more closely at the judgement. The lesser charge of manslaughter was based on the defence of
intoxication. But the facts and circumstances of the accused and the way he recalled the incident of the murder explicitly show that he could not have been "too drunk to know what he was doing." There is evidence that on realising that he had killed, he ran away, hired a taxi and returned to the club. He managed to cover the blood on his clothes by soiling them.

Now, let us look at the provisions of the Penal Code which deal with intoxication as a defence. At the outset we must indicate that intoxication per se cannot be a defence to any criminal charge except as provided in section 13 (1) of the penal code, that is to say that intoxication can only be a defence where a person, at the time of the act or omission did not know that such act was wrong or did not know what he was doing. Other exceptions are:

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person.\(^9\)

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such action.\(^10\)

It is therefore clear that the accused could not hide behind the defence of intoxication as provided by Section 13 (2). He got drunk on his own volition. He was neither forced to get intoxicated through beer or bhang and neither did he claim to have been temporarily insane. The judge's consideration of self-defence could not have held water as one finds that the accused himself had removed money from the deceased's purse.
The judgement raised hue and cry even in our Parliament. Judge Leslie Gerald Eyre Harris did not act in the interest of justice. The reasons for this can be speculated.

I would view the decision of this case to have been premised on racial discrimination which is contrary to our constitution. Here clearly there is a white man who kills a black girl. The case is decided by a white judge and the decision he comes up with smacks of injustice. The incidence of racial sentiments must therefore come into play.

I would also argue that Justice Harris did not believe that everybody is equal before the law irrespective of their social class. Here you have a miserable prostitute against a man in the petty bourgeoisie class as the accused person; the judge must therefore make the law protect his class. And this Justice Harris did.

The upshot of the case is that some judges will sacrifice justice to protect those in the class they belong to. Thus they can be said to understand justice for only a specific class.

4.4.0 SEDITION

R.v. David Fredrick Onyango Olopp

This case illustrates how critics can find themselves at the mercy of the court which has the state interest at heart.
The facts of this case are that David Onyango Oloo was a first year Bachelor of Arts student at the University of Nairobi. He was first brought to a Nairobi court on the 7th August 1982 charged with the offence of possessing a seditious publication entitled, "A PLEA TO COMRADES" contrary to section 57 (2) of the Penal code. He pleaded not guilty.

The particulars of the offence were that while travelling home following the government's closure of the university on August 2nd 1982, he was arrested with the said publication among his files and books at Voi enroute to Mombasa. On August 1st 1982 there had been an attempted Coup D'état by some members of the Kenya Airforce. This had necessitated the closure of the university.

Throughout the trial the accused maintained his plea of not guilty. Two advocates (Messrs C.P. Onono and R.O. Kwach) who were representing him withdrew from the case after the accused refused to plead guilty. He blamed the two for their withdrawal and also the prosecution for threatening him to plead guilty and get a down graded charge.

As for the publication being seditious, the accused challenged the court to distinguish between sedition and criticism in the following terms:

"Where is the demarcation point where somebody says that here constructive criticism stops and this is where sedition begins?"
The accused maintained that when writing the publication he had no seditious intentions. Now, the Penal code by dint of Section 56 (1) allows criticism for example where a publication intends to show that the government has been misled or mistaken in any of its measures.¹²

The court was not convinced that the document was published bona fide and convicted the accused and sentenced him to five years imprisonment.

In this case the accused raised a very important issue when he argued that the publication in question was constructive criticism. This in the interest of justice called upon the court to dispose of this defence but this issue was not even addressed to by the High Court when the case came up for appeal. Two High Court judges (Abdulla F.E. and Sachdeva JJ) dismissed his appeal against both conviction and sentence. With regard to the issue of constructive criticism the court said;

"We do not intend to give the appellant gratuitous publicity which he appears desirous of seeking, of going through the document "PLEA TO COMRADES" in this judgement and pointing out why various parts of it are seditious."

It is our submission that the court here was running away from its duty. We fail to understand why the court should fail to give reasons as to its findings. It is not enough to say an offence has been committed. The court must go a step forward and clear out any doubt that the said offence has not been committed. In this case the court should have stated clearly why it was not of the opinion
that the publication was not a constructive criticism instead of using the escapist approach to dispose of the issue. In any case there is really no offence called "sedition" in our penal code. Rather the offence encompasses the term "seditious intentions."

That the court failed to give reasons to justify the decision arrived at leaves one with the apprehension that the accused person was not given a fair trial. It is as if the court had already decided on the guilt of the accused.

The background of this case is important in analysing the decision of the court. The university students during the attempted Coup had been invited by the members of the Airforce who had attempted to overthrow the government to participate in a demonstration against the government on August 1st, 1982. This was followed by the closure of the university and the arrest and charging of seventy students with sedition.

The incidence of offences like sedition and treason are used by the state to silence its critics because the powers that be fear that these critics can cause the down-fall of the ruling class by 'misleading' the masses. The state, as it would seem in this case, would not spare any effort to silence the critics by using the members of the judiciary who are "more executive minded than the executive."
The facts of this case are that on 13th March, 1984, following an ex parte application on behalf of the four persons detained under Regulation 6 of the Public Security (Detained and Restricted Persons) Regulation (L.N. 234 of 1978) for leave to issue a writ of habeas corpus subjiciendum granted leave in the form of an order requiring the respondent, the commissioner of prisons to show cause why Kamonji Kang’aru Wachira, George Moseti Anyona, Dr Edward Akeng’o Oyugi and Koigi Wa Wamwere should not be released.

In compliance with that order the commissioner of prisons appeared represented by the A.G.

The advocates representing the detainees relied on four grounds on which they contended that the detentions were illegal. These grounds were as follows:

1. the statements served on the detainees as required by section 83 (2) (a) of the constitution failed to specify in detail the grounds on which they were detained.

2. The statements were not served within 5 days of the commencement of their detention in accordance with the provisions of section 83 (2) (a).

3. Notifications of the detention of two of the detainees namely, Wachira and Oyugi, were not published in the Gazette within 14 days of the commencement of their detention, thus contravening the provisions of section 83 (2) (b) of the constitution.
(4) The public security (Detained and Restricted Persons) Regulation 1978 (L.N. 234 of 1978) and the Public Security (Detained and Restricted Persons) Rules 1978 (L.N. 235 of 1978) were not properly laid before the National Assembly in accordance with the provisions of S. 66(1) of the Preservation of Public Security Act.\(^4\)

Kamonji Wachira was arrested on 29th June 1982 and served with a detention order dated 13th July 1982 and a statement of grounds on 15th July 1982. His detention was gazetted on 15th July, 1982. Thus, he had been in custody for 17 days before he was served with a statement of reasons and, for 15 days before his detention was gazetted. Dr. Oyugi was arrested on 15th June, 1982, served with a detention order dated 13th July, 1982 and a statement of reasons on 15th July, 1982. His detention was gazetted on 13th July, 1982. Thus he had been in custody for 30 days before he was served with a statement of grounds and for 28 days before his detention was gazetted.

It was not disputed that in the case of each of the four detained persons the detention was notified in the Gazette within fourteen days of the detention order and after service of the detention order and so the learned judge ruled that ground 3 must fail. His reasoning was:

"A person may be arrested in the course of police inquiries of criminal offence or activities which might justify a report to the Minister responsible for making detention orders. Subsequently such a person while still in custody might be served with a detention order... Detention ...... commences on the date of the detention order where a person is already in police custody and
in other cases, with the service of the detention order."

This interpretation in our view creates a lacuna in the law. The learned judge seems to say here that it matters not how long a person is held in police custody. If detention begins on the date of the detention order, how can the days the detained person was held in custody be accounted for? Between the date the detained person was arrested and the date of the detention order, can the detained person be said to have been within lawful custody? Certainly not. Section 72 (3) of our constitution requires that any person arrested or detained upon reasonable suspicion of having committed, or being about to commit, a criminal offence shall be brought to court within twenty-four hours (save where the person is arrested for an offence punishable by death).

As for the first ground, namely, the insufficiency of grounds for detaining the four, the learned judge agreed that the stereotype statement served on the four detainees merely informed them that they had engaged themselves in activities and utterances which were dangerous to the good government of Kenya. The statement had read:

"You have engaged yourself in activities and utterances which are dangerous to the good government of Kenya and its institutions and in the interest of the preservation of public security your detention has become necessary."

In this statement, the judge was of the view that it contained insufficient information to enable the detainees
to know what has been alleged against them. He added that surely other information could have been furnished without endangering the security of the state or the safety of informants.

Nevertheless the judge ruled that insufficiency of details in a statement furnished under section 83 (2) (a) of the constitution does not render the detention invalid as insufficiency is a matter of procedure; in his opinion it is not a condition precedent but a condition subsequent. Thus, the first ground also failed.

The other grounds were also dismissed by the court. For our purpose in this paper, it will only suffice to say that the court rejected them and therefore the detained persons were held to be legally detained.

We note that the court refused to go behind the detention order to find out whether the reasons were sufficient to warrant the detention. It would seem that it can suffice for the state to give flimsy reasons to justify the detention of a person and the court will not question this. Whatever reason the state gives (and even perhaps none at all) the court will satisfy itself with it. This is a very dangerous stand by our courts. Given that a detention order is indefinite, we submit that the court must satisfy itself that the detention order is valid and that includes the reasons behind that order. Otherwise, the courts will have ceased to be the custodian of the enjoyment
of the citizen’s fundamental rights as envisaged by our constitution.

4.6.0 ABUSE OF COURT PROCESS

Stanley Munga Githunguri v. R

This is probably so far the best case I know of which asserts the independence of the judiciary and justice in its fairest sense. It is a landmark case in our judicial system.

The beginning of the proceedings in this case lay in the launching of criminal case No. 4565 of 1984 - R v. Stanley Munga Githunguri, i.e. the applicant in the present application, in the Chief Magistrate’s Court, Nairobi. Mr Githunguri had been charged with four counts alleging contravention of the Exchange Control Act. Two of the offences were alleged to have been committed in 1975 and the third in 1979. The fourth count was an alternative to the third count.

The applicant raised a reference under section 67 (1) of the constitution in the constitutional court of Kenya.

Now Section 67 (1) provides:

"Where a question as to the interpretation of this constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law, the Court may, and shall if a party to the proceedings so requests, refer the question to the High Court."
Mr Githunguri through his counsel referred to the constitutional court the following five questions.

1. If the office of the A.G. makes a decision not to institute or undertake any criminal proceedings against any person, is the power conferred under section 26 (3) exhausted or spent?

2. Does the exercise of the power conferred on the office of the A.G. under S 26 (3) have to be fair and reasonable, or can it be exercised arbitrarily or oppressively?

3. Is it a proper exercise of the powers conferred under Section 26 (3) to institute criminal proceedings against a person charging him with offences allegedly committed over 8 years ago and investigated about six years ago following a full inquiry, and after the office of the A-G had then decided not to institute or undertake criminal proceedings and to close the files?

4. Notwithstanding the powers conferred upon the office of the A-G by Section 26 (3) of the constitution, does the court have an inherent power and a duty to secure fair treatment for all persons who come or are brought before the court, and to prevent abuse of its process?

5. Is such a charge or charges against any person preferred 9 years after their alleged commission and six years after a full inquiry in respect thereof and five years after the decision of the office of the A.G not to prosecute and to close the file:

(a) vexatious and harassing; and/or
(b) an abuse of the process of court; and/or
(c) contrary to public policy?

The constitutional court (Simpson C.J., Sachdeva, Mbaya, J.J.) answered the five questions referred to the court as follows:

"1. If the office of the A.G. makes a decision not to institute or undertake any criminal proceedings against any person, the power conferred under S. 26 (3) of the constitution is not exhausted or spent."
2. The exercise of the power conferred on the office of the A.G. under S. 26 (3) should be fair and reasonable and should not be exercised arbitrarily or oppressively.

3. It is a proper exercise of the power conferred under Section 26 (3) (a) to institute criminal proceedings against a person charging him with offences allegedly committed over nine years ago following a full inquiry and after the office of the A.G. has then decided not to institute or undertake criminal proceedings and to close the file provided that nothing further has been done such as for example, informing the person that no proceedings will be instituted or returning to him or disposing of any property involved.

4. Notwithstanding the powers conferred on the office of the A.G. by S. 26 (3) of the constitution, the High Court (and not any subordinate court) has an inherent power and duty to secure fair treatment for all persons brought before the court or a subordinate process of court.

5. The preferment of a charge against any person nine years after the alleged commission of the offence charged six years after a full inquiry in respect thereof and five years after the decision of the office of the A.G. not to prosecute and to close the file is:
   (a) vexatious and harassing
   (b) an abuse of the process of court, and
   (c) contrary to public policy
   unless good and valid reasons exist for doing so, such as for example the discovery of important and credible fresh evidence or the return from abroad of the person concerned. Thus the chief magistrate was according to the constitutional court at liberty to proceed with the trial unless the A.G. in the light of, to quote the constitutional court, "our answers decides (as we hope he will) to terminate the proceedings, or the accused applies for a prerogative order."

The A.G. refused to terminate the proceedings as hoped by the constitutional court. The applicant after obtaining leave made an application to the High Court asking it to make an order prohibiting the magistrate from further
proceedings to hear the criminal case No. 4568 of 1984 - R v Stanley Munga Githunguri.

The application for the order of prohibition was heard by two judges (Aluoch, Schofield JJ) of the High Court who were unable to agree upon a unanimous decision.

By virtue of the powers thereunto enabling him, the then Acting Chief Justice Madan, made an order divesting the two learned judges who were seized of the application for order of prohibition. He also further made an order that the application be heard de novo by three judges of the High Court. The judges were Madan Ag. CJ, as the presiding Judge, Gicheru and Aganyanya JJ.

The three judges made it clear at the outset that they were in no way sitting in appeal on the opinions set out by the Constitutional Court but this did not prevent them from commenting on the judgement of the Constitutional Court.

Firstly they were respectfully of the opinion that the applicant's five questions were wrongly referred to the Constitutional Court under Section 67 (1) of the constitution. They were of the opinion that the five questions ought to have been brought to the High Court Under Section 84 (1). This would have rendered the application defective but said the three judges.

"In the interest of justice we will treat the application before us as having been made, and to deem it amended and to have been brought under section 84 (1)."
The state vehemently opposed the application but this did not move the court. The court ruled that though there is no time limit to the prosecution of serious offences except where a limitation is imposed by statute (and there was no such statutory limitation imposed in respect of the four charges the applicant faced), two indefeasible reasons made it imperative that the application must succeed. First, as a consequence of what transpired and also being led to believe that there would be no prosecution the applicant may well have destroyed or lost the evidence in his favour. Secondly, in the absence of any fresh evidence, the right to change the decision to prosecute had been lost in this case, the applicant having been publicly informed that he would not be prosecuted and property restored to him. It was for these reasons that the applicant would not receive a square deal as explained and envisaged in section 77 (1) of the constitution. The prosecution would therefore be an abuse of the process of the court, oppressive and vexatious. The prohibition order was therefore issued. The court finished its ruling in this way:

"Stanley Munga Githunguri, you have been beseeching the court for an order of prohibition. Take the order. This court gives it to you. When you leave here raise your eyes up unto the hills, utter a prayer of thanksgiving that your fundamental rights are protected under the juridical system of Kenya. Order: Prohibition to issue as prayed"
Indeed this was a judgement which protected the fundamental rights of an individual unlike many other judgements.

It is not quite clear why the state was reviving the charges against Mr Githunguri after such a long time and given the circumstances of the case. But this move by the state can be construed as a move to harass a citizen.

Mr Githunguri had been a very prominent figure in the banking and financial life of Kenya. At the time the state was attempting to revive the charges he had become a prominent businessman.

For whatever reasons the state wanted to harass Mr Githunguri, the constitution protected him as it was given the right interpretation by Justice Madan and the two other judges. The late Justice Madan is highly acclaimed as a gallant struggler for justice and the rule of law. We highly doubt whether the Githunguri case would have ended the way it did had it not been for the ardent commitment for justice as depicted by the three judges, Justice Madan presiding.

4.7.0 HABEAS CORPUS

Stephen Mbaraka Karanja v R

This application ended the tragic story of Stephen Mbaraka Karanja.

On April 29th 1988 Justice A.M. Akiwumi dismissed this application with costs. Justice Akiwumi's order granting
costs to the Republic marked probably the first time the High Court had made an order for costs in a criminal application. The Habeas Corpus application was made under the Rules made under section 389 (2) of the CPC which have no provisions regarding costs.

The Saga of this application has its history as follows:

On Friday May 22, 1987 the firm of Messrs O.T. Ngwiri & Company made an application\(^1\) under Section 389 of the CPC seeking:

(i) An order that directions on the nature of habeas Corpus do issue directed to the Director of C.I.D. to have the body of one Stephen Mbaraka Karanja produced before the Honourable court at such a time as the judge may direct.

(ii) An order that the Director of C.I.D., do appear in person or by his authorised agent together with the original of any warrant or order of detention to show cause why Stephen Mbaraka Karanja should not be forthwith released.

It had happened that on 7th April, 1987 at Ngumo Bus Stop, Nairobi, Karanja had been arrested by C.I.D. Officer one Maina, and no charges had been preferred against him.

On Wednesday May 27th, 1987 the application came up for hearing before Justice Dereke Schofield when Mr Njenga Muchiri, a state counsel from the A.G.'s office informed a stunned court that Karanja could not be produced because he had already been shot dead on April 12th, 1987.

Neither the widow of the deceased nor the widow's advocates had been informed of the death of the deceased by May 27th, 1987, a whole 45 days since the shooting.
Justice Schofield ordered an affidavit to be presented to him duly sworn by some of the officers involved in the shooting saying the body could not be produced. This was done. From this affidavit, Karanja had been shot dead by a police officer in an Eldoret Forest. The police said that Karanja had tried to escape from police custody.

When the matter came before the court on June 4th, 1987 an order was made for the exhumation of the body, and an independent post-mortem, be carried. The judge made a remark that the police failure to inform the widow of the death of her husband was "callous to the extreme".

But the police could not produce the body. Following this failure the lawyers acting for the deceased's widow made an application before Justice Schofield that the Director of C.I.D. be committed to civil jail for contempt of that order, namely, to produce the body of Stephen Mbaraka Karanja.

But on August 11th, 1987, Miller C.J. stood over the matter and ordered that it be taken over by any other judge. His reasons were that this was necessitated by the interest of the judiciary vis-a-vis the public generally. No formal applications were made, heard and settled in respect of the transfer.

Justice Dereke Schofield protested this move and quit from the bench and went back to his mother country England.

Much later, on April 13th 1988, Chief Justice Miller gave a further reason for disqualifying Justice Schofield
from further hearing of the habeas corpus application in respect of Stephen Mbaraka Karanja. The Chief justice indicated that he had been "supplied with secret documents" by the office of the A.G. He did not disclose the nature of the secret documents or the procedure adopted by the office of the A.G. to supply him with the same.

Justice Schofield out of the way, the application landed on Justice Akiwumi who ruled that the respondent did not have the custody or control of Karanja, dead or alive, at the material time and that should end the application. He therefore dismissed the application with costs to the respondent.

The whole saga raises a number of things which smack of injustice but we are concerned here with the way the Chief Justice intervened. His intervention leaves a lot to be desired. Firstly, he removed the proceedings from Justice Schofield in a very curious manner; no application was made, heard and determined. If the state had felt that it would not get a square deal in this matter, it would have made an application to get the matter heard by another judge. This, it did not do. Yet the Chief Justice acted suo moto and intervened. This was not his case. He acted against the principles of natural justice. The parties should have been heard.

Secondly, Chief Justice Miller gave "reasons" why he stopped Justice Schofield from continuing with the matter
much later. And further the reasons advanced are very curious.

In our view, the case would have caused the state and the police force much more embarrassment. To prevent this, the state had to interfere with the independence of the judiciary and ironically using the Chief Justice himself!

4.8.0 **KANU RULES: OUSTER OF HIGH COURT'S JURISDICTION?**

Mathew Ondeyo Nyaribari v David Onyancha & Another

The ruling in this case shows the court's approach to matters where the interests of the ruling party lie. The courts are reluctant to address themselves to the constitutionality of the ruling party's rules.

In this suit the plaintiff was the unsuccessful candidate in the KANU nomination held on February 22nd, 1988 at the West Mugirango Constituency. He filed the suit on April 25th, 1988 and named D.A. Onyancha, M.P., as the first defendant and Mr Mbaria Maina, the District Commissioner for Kisii District as the second defendant.

The plaintiff being duly qualified, had stood for KANU nomination with the first defendant at the said constituency which was conducted by the second defendant, in his capacity as the returning officer.

The plaintiff had stated in his plaint that contrary to the KANU Nomination Rules, registers were not verified and were not used at the polling stations for the nomination exercise; that from the results KANU registered voters who