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Wanyiri Kihoro vs. Attorney General: New Insights on the Protection and Enforcement of Fundamental Rights and Freedoms in Kenya

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Introduction

The Court of Appeal decision in *Wanyiri Kihoro vs The Attorney General*[1] is a milestone[2] in Kenya's poor history of constitutional litigation. This opportune decision by the country's highest appellate court also heralds a new dawn in the protection and vindication of fundamental rights and freedoms as against the State's continued, consistent and concerted abuse of those rights and freedoms.

Notwithstanding the protection guaranteed in the constitution against invasion of a citizen's liberty, Wanyiri Kihoro was held incommunicado for 74 days after being unlawfully arrested by his arresters who had no warrant of arrest when they arrested him (Wanyiri Kihoro) on the night of 29th/30th July 1986. During his 74 day illegal confinement, Wanyiri Kihoro, then undergoing pupillage in a Mombasa Law firm, alleged that he had been assaulted, tortured and subject to inhuman and degrading treatment by police officers. He alleged he had been unlawfully humiliated and forced to undress before a panel of police officers, that he was severely beaten with pieces of timber and broken chairs, that he was kept naked in a cell flooded with cold biting water, that he was not given any food, that he was denied any opportunity to sleep, that his feet got blistered due to standing for many hours in cold water, that he suffered great mental and psychological torture and that he was subjected to brutal physical pain.

In his plaint dated 2nd May 1987 and filed in the High Court on 4th May, 1987, Wanyiri Kihoro claimed his rights under Section 72 (protection of right to personal liberty), 74 (protection from inhuman and degrading treatment) and 81 (protection of freedom of movement) of the constitution had been contravened.

In its written statement of defence dated 9th September 1987 and filed on 14th September 1987, the State admitted that it had arrested Wanyiri Kihoro but that his arrest was consistent with the requirements of the *Police Act* and *Criminal Procedure Code*. The allegations of severe torture, debasing, inhuman and degrading treatment were denied. Besides, the State also stated that Wanyiri Kihoro was treated like all other prisoners. The State said that Kihoro underwent "normal interrogation" and that he was not tortured.

In his plaint Wanyiri Kihoro prayed for a declaration that his fundamental rights under Section 72, 74 (1) and 81 of the Constitution had been contravened and further he sought aggravated compensation for contravention of his rights under section 84 (2) of the Constitution.

That was the case at a glimpse.

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Kenya's experience in constitutional litigation broadly illustrates a judicial abdication from adjudicating on what are perceived as "Political" Constitutional Claims.[3] Courts are wary to entertain and uphold claims to enforce the fundamental rights and freedoms under Chapter 5 of the Constitution of the Republic of Kenya. The reluctance of the High Court in the vindication, protection and enforcement of fundamental rights and freedoms is well illustrated in the cases of *Kamau Kuria vs Attorney-General*[4] and *Maina Mbacha and Two Others vs Attorney-General*[5] In both these cases, the High Court held that since no standard procedural rules had yet been established under Section 84 of the Constitution, no constitutional court of original jurisdiction existed to hear matters under the Bill of Rights in the Kenyan Constitution.[6]

In *Raila Odinga vs The Attorney-General and the Detainees Review Tribunal,*[7] the respondent's preliminary objection to strike out an application on behalf of Raila Odinga seeking certain declarations and orders relating to the constitutionality, validity and legality of Raila's detention was based on the fact that he had instituted his case by way of an originating motion rather than by suit as required by the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules.*[8] The respondents argued that an originating motion was unknown in Kenyan law.

However, C.B. Madan, then acting Chief Justice declined to uphold the preliminary objections and held that: "In my opinion the procedure to commence an action by originating motion is known, it is recognised and it is in addition to commencement of an action by plaint." He then referred to the case of *Olive Casey Jaundo v Attorney-General of Guyana.*[9] In that case, the privy council interpreting a provision identical to our section 84 (6) of the constitution in a situation where no rules of procedure for the judicial enforcement of fundamental rights and freedoms had been made held that where no such procedure has been prescribed, the court can be approached through any of the existing procedures such as originating motion, plaint or petition.

The *Jaundo* case is complemented by the 1967 decision of a Ugandan Constitutional Court in the case of *Uganda vs Commissioner or Prisons Ex Parte Matovu.*[10] Here the court was faced with, among other questions, the legality and constitutionality of the detention of a subject. The court observed about the application before it:

"In our view, the application, such as it was as presented to the High Court in the first instance was defective, Indeed but for the fact that the application concerns the liberty of a citizen, the court would have been justified in holding that there was no application before it."

That position cannot be further from the truth and it need not be over-emphasised. It is therefore common ground that:

(i) No procedure need be expressly or explicitly laid down in order for a court to entertain and to enforce fundamental rights under the law and the constitution.[12]

(ii) Where a procedure or form is adopted in enforcing, vindicating or protecting a right and the procedure is for any reason defective its form should not defeat its substantive essence by denying a citizen redress on such a mere technicality.

Prior to the filing of the Wanyiri Kihoro case in 1987, the High Court had already demonstrated its surprising unwillingness to entertain cases intended to enforce, protect and/or vindicate fundamental rights and freedoms under the constitution as already avered to above. That position became a consistent pattern in the face of growing state authoritarianism in the 1980's, notwithstanding the two aforementioned widely held truths as regards Constitutional Litigation. According to the *Amnesty International Report* for 1987, between 1986 and 1987[13] more than 81 Kenyans were arraigned in court and convicted

for political offences such as failing to report a felony, possessiong or distributing seditious publications, sabotage and taking of illegl oaths. Even lawyers who represented critics of the government in court were not spared by the imposing power of the Kenya Government.[14] Further reading on this is necessary.[15]

The case subject matter of this paper, *Wanyiri Kihoro vs The Attorney-General*[16] was initially filed in the High Court on 4th May 1987 during the subsequent of Kihoro's detention. Hence unlike cases filed to challenge violations of fundamental rights and freedoms expeditiously and urgently, there was no such expendition or urgency in Kihoro's case since what were sought here were declarations to the effect that Kihoro's rights had been violated in addition to compensation for such violation. Hence, it was convenient to file a plaint to originate the action.

A plaint is the standard mode of invoking the jurisdiction of a court unless another mode of invoking the jurisdiction of a court is expressly provided. The plaint is, however, a very slow method of moving the court especially where the rights of a citizen are at stake; a party for example has to begin by giving a 30 day notice of intention to sue the *Attorney-General* under the *Government Proceedings Act* [17] Thereafter, the plaint is drawn and when filed, the court must then issue a summons to enter appearance to the defendant. Once this is done, which may take a week or more, the defendant may then file his or her defence. Depending on when an appearance is filed by a defendant, time to file a defence may vary. However, a defendant may have a whole month within which to file a memorandum of appearance and defence. Thereafter the parties must then draw and agree on issues if the case is in the High Court. There is no time limit. The defence may refuse to approve the issues for quite some time. In Kihoro's case for example, the issues were agreed and confirmed by the deputy Registrar of the High Court on 10th November 1987, six months after the case was filed. Admittedly therefore, a plaint is a slow procedure for instituting urgent cases relating to breach of fundamental rights and freedoms. However, as we saw the Kihoro case posed no urgency as the reliefs sought in the main suit were declaratory of past conduct.

In any event we have seen the hostility of the judiciary in entertaining rights related cases. The judiciary could therefore not be conviniently approached through the originating motion which is a quicker and faster approach of moving a court. In addition, the prerogative writs under order 53 of the *Civil Procedure Rules*[18] had become as unavailable as a mirage to citizens claiming breach of their fundamental rights. There had already developed a consistent pattern of denial of leave to apply for these orders by the High Court, hence citizens such as Mirugi Kariuki, Mukaru Nganga, Mohamed Ibrahim and Charles Rubia, among others, were denied access to the remedies of certiorari, mandamus and prohibition when they needed them most to challenge State infringement on their liberty.[19]

There being no other avenue for Wanyiri Kihoro to approach the court without procedural difficulties and since there was no expedition or urgency in his case, his advocates correctly chose to institute his case by way of a plaint. That way, the State had no chance of striking out his case on a preliminary point or a technicality as is habitual when the State is faced with cases it cannot defend on merit such as those involving breaches of fundamental rights and freedoms.

The Finding of the High Court

The proceedings in the High Court were presided over by Rauf J., an expatriate contract judge whose pro-estalishment leanings made him suitable to hear and determine the case for the State.

When the case first came before him on 13th January 1988, Rauf J. allowed a defence application that the case be heard in camera "for obvious state security reasons". Said

Rauf, in making the order: "In view of the present status of the plaintiff, I deem it reasonable and I so order all proceedings in this case ... be held in camera. All records of proceedings, pleadings, affidavits, formal order and correspondence etc. in this case shall remain secret from any unauthorised persons."

The State relied on Section 77 (11) (b) of the Constitution which enables a court to hold a trial in camera in the interests of defence, public safety or public order. Under the notorious *Preservation of Public Security Act,*[20] Public Security (read order) presupposes a state of emergency, a grave national calamity, an impending breakdown of law and order, something nationally major and calamitous. It is inconceivable that proceedings in a court case would endanger Public Order as such. The court relied on its own myopic and narrow view of its power to order a trial in camera. The court in so doing was in effect inhibiting publicity of police brutality and State repression. Essentially, the court was acting in complicity with the State in keeping in secrecy abuses and excesses of power.

This position is further amplified in the submission of the State that since Wanyiri Kihoro was a Mwakenya operative, the court should take judicial notice[21] of the danger he (Wanyiri Kihoro) posed to State Security and Public Order. As such, the State submitted that it was justified in the circumstances to detain Kihoro for 74 days! This submission is reminiscent of the now oft-quoted holding of in *Willy Mutunga v R*[22] to the effect that "Once peace and stability disappear rights go overboard without a whimper". In effect the court ruled that constitutional rights exist and are enforceable only when law and order prevails. Curiously, courts in Kenya hardly ever and in fact never require the State to prove that public order and/or security is under threat even by mere possession of purported seditious literature or involvement in the so-called dissident groups.

The High Court was faced with the not very easy question as to the standard of proof required to prove an allegation of a breach of a right or freedom. Rauf J. cleverly wrapped up the evidencve without making a finding as to its truth or otherwise. On this point, he was not ready to invoke judicial notice of the fact that dissidents are usually tortured while in police custody though he was ready and did accept to take judicial notice of the fact that 'Mwakenya' posed a security threat to Kenya. After examining various contraditions and variations of the evidence before him, Rauf J. preferred not to make a holding on the evidence although as a judge in a court of the first instance, and having seen and heard the witness, he really ought to have come to a finding.

Having come to no conclusion on the evidence before him, Rauf J. proceeded to set out the standard of proof required in view of the allegations in question. I must hasten to say here that the High Court was wrong and purposely so in purporting to give a standard of proof based on a warped, flawed and totally misconceived view of what breach of a citizen's right entails. The High Court in my view acted on the premises that rights are a hallowed arena of conflict. Said Rauf J:

> "... in a case where the claim for damages is based on allegations of serious criminal nature such as assault, torture and violation of fundamental rights the standard of proof is much higher than just a balance of probabilities. It is not as high as in criminal cases, "beyond reasonable doubt", and certainly not as low as in general civil cases."[23]

After comparing the new standard he was ingeniously creating Rauf J. said that the allegations in question were akin to those partaining to fraud and trespass. He therefore purported to justify his thesis by alluding that the alleged crime was enormous and sought the proof to be clear. Hence concluded Rauf:

> "Applying that standard one does not require to emphasize too strongly that the allegations of torture and violations of fundamental rights are of utmost gravety; so ought the standard of proof to be considerably high."[24]

(b) The Court of Appeal Finds Differently on the Standard of Proof Required

Undoubtedly the Court of Appeal found no difficulty in reversing the high standard of proof set up by Rauf J. in the High Court.

On his part Kwach J.A. held:

"Faced with sharply conflicting factual and medical evidence the Judge naturally found it difficult to decide where the truth lay and took refuge in purporting to raise the standard of proof required in a case such as the one before him." Continued Kwach J.A. after setting out Rauf J's flawed Statement of the standard of proof:

"In taking this course, (of comparing the burden required in the case before him and that found in other cases the judge was plainly wrong because he was faced with a straightforward civil claim involving allegations of assault and torture."

Kwach J.A. then observed that at least he was satisfied that the appellant had on a balance of probabilities proved that he suffered mental torture in the hands of his captors and that he was entitled to judgment on that basis.

Needless to say, the Court of Appeal removed from the abyss of ingenious judicial craftship litigation intended to compensate victims of their rampant ordeals of police torture and harassment. It is not debatable that prisoners incarcerated for what are conceived as political offences are often tortured, mistreated and harassed in prison. In any event State security often employs its undue wrath on innocent citizens severally even to disperse allegedly illegal gatherings or when simply effecting an arrest.

The Court of Appeal's finding is as such as opportune as it is appropriate.

The Court of Appeal however left unanswered the perplexing question whether or not the State prevented defence witnesses (police officers) from producing documentary evidence and in particular medical reports prepared while the appellant was in prison which evidence showed the appellant was tortured. Gachuhi J. felt this evidence was unnecessesary though I do not take his view to be a conclusive finding.

Also unaswered was the submission by the Appellant's lead counsel, Gibson Kamau Kuria, that since Wanyiri Kihoro was held in a protected area where information about the goings-on there would not be corroborated by independent evidence, then the State by virtue of having special knowledge[25] of such goings on, had in addition the burden of proving that special information.

That notwithstanding, the Court of Appeal was emphatic that to prove allegations involving breach of rights involves no more than proving claims in ordinary civil cases, here the law could not be much clearer. The government must now hasten to end torture and similar abuses, if for no other reason, that unless such conduct is stopped the public coffers will soon go drier than they already are.[26]

How Long can the Police hold a Suspect under the Law? The View of the High Court

The High Court did not have to find on evidence whether or not Wanyiri Kihoro was held for 74 days in police detention. The fact that Wanyiri Kihoro was held for 74 days without being brought to court by the police was admitted by the State in its defence.

In the submission of the State in the High Court, it was argued that Wanyiri Kihoro

was arrested on suspicion of a cognisable offence pursuant to the *Criminal Procedure Act*[27] and the *Police Act*28. The State relied on Section 72 (1) (e) of the constitution and Section 36 of the *Criminal Procedure Act* and the fact that Kihoro was held on suspicion of having committed treason, to justify his 74 day detention as reasonable. The court was even invited to take judicial notice of persons belonging to 'Mwakenya' as if it was a grouping whose members could justifiably be held for indefinite periods by the police by virtue of the mere allegation that they were members of Mwakenya.

Though correct, Rauf J. timidly observed that Section 36 of the *Criminal Procedure Code* seemed to be inconsistent with Section 72 (3) of the constitution. That is so since the former purports to enable police officers to hold suspects for more than 24 hours before charging them in cases where the offence "appears to the officer to be of a serious nature," while as the constitution makes no such exception and requires suspects charged with any offence to be brought to court within 24 hours of their arrest[29] or within two weeks if they are charged with a capital offence.

However, Rauf J. was anxious to justify the 74-day detention. Hence, he agreed with the submission of the State that it had not been practicable to bring Wanyiri Kihoro before the court earlier than 10th October 1986 (after holding him for 74 days) when his continued custody was "eventualy legalised with the Detention Order". Curiously, Rauf J. said:

> "... the serious and complex nature of the offence involved namely seditious document and treason perforce required the police to hold the plaintiff for 74 days as it was not practicable to complete the investigations before 10-10-1986. The time taken by the state to decide on the course of action was reasonable. This is amply demonstrated by the state's eventual resort to the *Preservation of Public Security Act.*"

In addition to the foregoing and without any foundation or substrata and without evidence other than the submissions of the state, Rauf J. went ahead to hold:

> "I need not state that the 'Mwakenya' group has been recently enjoying a perverse notoriety in the local press and radio for its anti-government activities as revealed in our courts during numerous trials in which many a curprit was put behind the bars for long periods. I take a judicial notice of this fact."[31]

Rauf J.'s judgment can in the least be described as an injudicious ingenuity. There is no greater absurdity than to take judicial notice of transient political circumstances and situations which are determined by the powers that be.

At law, judicial notice may be taken with or without inquiry. Where judicial notice is taken without inquiry, the facts so noticed are of such notoriety and so generally known as to give rise to the presumption *that all* persons are aware of it. A court must, however, when acting on information supplied to it especially as regards political matters make an inquiry before taking judicial notice. Quite clearly Rauf J. made no inquiry before taking judicial notice as he did. In so doing, he not only erred in law but acted without impartiality by taking for granted unproven averments. In effect, he expressed his disapproval of the "Mwakenya" movement in much the same way the government did. To illustrate the absurdity of Rauf J.'s ruling an example or two will suffice. Judicial Notice without inquiry is taken for obvious facts such as that a fortnight is too short a period for gestation for a human being, that a cat is kept for domestic purpose, that a postcard is a kind of a document that can be read by anyone, that the life of a fly does not exceed 7 days etc.

Though "Mwakenya" was obviously anti-establishment the court did not invite any evidence why that was so and even if there was no sufficient reason, the court did not invite evidence to prove that the movement had the capacity to realise its alleged

treasonable intentions or to endanger public order. In essence, the court vindicated the widely held government view that divergence of opinion was treasonable. It is such views that render the freedoms and rights guaranteed in the constitution ineffectual.

How Long Can the Police Hold a Suspect under the Law? The View of the Court of Appeal

The Court of Appeal did not agree with Rauf J. at all. The Court of Appeal without hesitation held that Section 36 of the *Criminal Procedure Code* to be inconsistent with Section 72 (3) (b) of the constitution, in so far as the former purports to empower policemen to *detain* suspects longer than is allowed by Section 72 (3) (b) of the constitution.

> Kwach J.A. held: 'The judge held that it was (the holding of Kihoro for 74 days) legal and the reason he gave was that treason is a grave offence, and that investigations are usually complex in nature... with respect, I am unable to agree with the learned judges reasoning because the police said right from the beginning that they arrested the appellant on suspicion of being a member of an unlawful society and being in possession of seditious documents.'

Kwach J.A. further observed that the state had always resorted to the device of a holding charge where it was not immediately possible to take a final decision on the offence with which a suspect is to be ultimately charged. Kwach J.A., in his leading judgement found that Rauf J.'s finding that Kihoro was held for a reasonable period was not only illegal but was unsupported by any evidence!

The Court of Appeal restated the 1954, East African Court of Appeal decision in *Njuguna s/o Kimani and Others v R*[33] to the effect that:

> "The notion that the police can keep a suspect in custody and prolong their questioning of him by refraining from formally charging him is so repugnant to the traditions and practice of English Law that we find difficulty in speaking of it with restraint."

The Court of Appeal then conclusively held that the Constitution of Kenya does not permit the police or any law enforcement agency, for that matter, to break the law in order to detect crime.

In his judgment, Gachuhi J.A. observed that there was no reason why the police did not bring Wanyiri Kihoro before a magistrate to obtain permission to detain him in police custody for further investigation so long as they complied with the law. Hence and with adequate reason the Court of Appeal held that Rauf J. quite clearly misapprehended the evidence and his findings could not therefore stand.

On Quantum of Damages

Having found for the appellant, the question that next arose was the quantum of damages the respondent was required to pay the appellant to compensate him for wrongful detention and mental torture.

The appellant had prayed for aggravated compensation for contravention of his constitutional rights which included both an element of compensation and also of a signal of the court's disapproval of the conduct of the police. The appellant had relied on the

case of *Jamakhana v Attorney-General* a case from Solomon Islands where the applicant was awarded compensation of $7,000 for contravention of his fundamental right (personal liberty) by the respondents when he was prevented from leaving the Solomon Islands.

Though the Court of Appeal declined to award punitive damages it did admit it had the jurisdiction so to do in an appropriate case. In the result, the appellant was awarded KShs.400,000/- as compensatory damages which is what the Court of Appeal felt as reasonable compensation for loss and injury suffered by the appellant.

It is noteworthy that the appellant did not succeed on the allegations of inhuman and degrading punishment. That notwithstanding the court held that the appellant was entitled to a declaration that his rights under Section 72 and 74 (1) of the constitution had been contravened.

The appellant was similarly awarded costs of the appeal and the costs of the proceedings before the High Court.

On the Right of Appeal

Anyone familiar with constitutional litigation is well aware of the perennial question as to whether or not there is a right of appeal pursuant to Section 84 of the Constitution. That section is the enforcement section of all the fundamental rights and freedoms under Chapter 5 of the constitution.

Following the decision in *Anarita Karimi v R*[34] a divided Court of Appeal (majority 2-1) held that (the Court of Appeal) did not have jurisdiction to hear an appeal from a decision of the High Court given in the exercise of its jurisdiction under Section 84 of the constitution irrespective of whether such a decision was final or interlocutory.

Several cases brought under section 84 of the constitution and which have had as much merit as the Wanyiri Kihoro case have been denied a second chance in the Court of Appeal. Hence in spite of the advantages of instituting suits to enforce fundamental rights and freedoms other than by a plaint, decisions of the High Court are treated as final in view of the Anarita Karimi (No. 2) decision. A five-judge bench Court of Appeal will now be constituted to determine whether or not the Court of Appeal should depart from its own decision in *Anarita Karimi* (No. 2). This follows divided opinion in the High Court, Court of Appeal and in legal circles about whether a right of appeal under Section 84 of the constitution is maintainable. The five judge bench will now sit following a successful application to that effect in the case of *Madhupaper International Ltd v The Attorney-General and Others*[35] in which three Court of Appeal judges are to set up the full bench as a matter of urgency so that it could come up with a binding decision.

One obviously notes the uncertainty of the finality of constitutional litigation before the full court comes up with a decision once and for all. For now, lawyers, judges and the Kenyan public are at least sure that a plaint is the only certain way to originate a case based on alleged branches of fundamental rights and freedoms whose finality is in the Court of Appeal. Until we get the full bench ruling, and if our courts remain largely pro-establishment then citizens must content themselves with the originating human rights cases with the slow and arduous procedure of a plant.

On Access to the High Court Generally

The fact that plaints remain the most suitable manner of approaching the High Court to enforce fundamental rights is supported by the amendment of Order 53 of the *Civil Procedure Rules* by legal Notice No. 164 of 1992. Following that amendment the necessity of obtaining leave to apply for the prerogative orders of mandamus, prohibition and certiorari was abolished. This has had a far reaching implication on applications made for

prerogative writs since the High Court can no longer grant a stay of an order sought to be challenged by a prerogative remedy. This is because in making an application for leave to apply for prerogative orders, such leave operated as a temporary stay of the orders sought to be reviewed pending the court's determination

Curiously, the amendment came soon after the government had suffered two major losses pursuant to leave being granted in two cases. The first of these cases was *In the matter of an Application by Nairobi Law Monthly for Leave to apply for an order of certiorari.*[36] In this case the High Court granted the *Nairobi Law Monthly* leave to apply for a certiorari to quash a decision made by the Attorney-General under Section 52 of the Penal Code declaring all past, present and future issues of the *Nairobi Law Monthly* to be prohibited publications. Leave was granted and as such the Attorney-General's ban was lifted pending the *inter partes* hearing. However, when the application came up for the *inter partes* hearing the Attorney-Genenal declined to defend his ban and instead revoked the Gazette Notice slamming the ban. In effect, the Attorney-General pre-empted the court from making a finding as to the constitutionality of his powers to ban publications. In the result, this blanket power to ban publications continues to be reserved in him unchallenged.

The second case in which the government found itself discomfited was that of *James Njenga Karume vs the Attorney-General*[37] James Njenga Karume then an MP left KANU and joined the opposition Democratic Party of Kenya in 1992 soon after the repeal of Section 2A but prior to the dissolution of the Sixth Parliament. The constitution requires defecting MPs to lose their seats automaticaly in such circumstances. However the High Court granted Njenga Karume leave to apply for a certiorari to enable him to quash a Gazette Notice published by the Speaker declaring his parliamentary seat vacant. Nine days later the Court of Appeal stayed that High Court order.[38] That was in May 1992. Soon thereafter, the Attorney General pushed Legal Notice No. 164 of 1992 through the six Parliament and as such forever erased the necessity for leave and as such automatic stay of orders in prerogative orders.

It is, however, now clear that the Attorney-General's purported amendment of Order 53 of the Civil Procedure Rules was *ultra vires*. The Attorney-General invited the Rules Committee established by Section 81 of the *Civil Procedure Act* to amend order 53. In so doing the said Rules Committee proceeded without jurisdiction since amendments to order 53 can only be made pursuant to the provisions of the *Law Reforms Act*.[39] The Law Reform Act is the statutory authority for these prerogative orders which were only incorporated in the Civil Procedure Rules by Legal Notice No. 299 of 1957. Already, the High Court (Shields J.) has already ruled *ultra-vires* the amendment to the effect that leave can be sought to apply for certiorari six months after a decision has been made. This is because Section 9 (4) of the *Law Reform Act* which the parent statute of order 53 of the Civil Procedure Rules specifically provides that a certiorari must be sought within six months of the decision sought to be quashed and not later.[40]

One may, however, take solace in the changing attitude of the High Court on applications made to it under Section 84 of the Constitution. That must be so since it would plainly appear that litigation for prerogative writs, though primarily intended as remedies given to persons injured by the exercise of administrative or judicial power is *prima facie* an ineffective alternative for seeking urgent and quick relief. In fact, we predict that prerogative writs may soon become a vexed area of conflict as the recent history of Section 84 of the constitution illustrates.

Luckily, the High Court has largely changed its perception of applications brought to it under Section 84 of the Constitution. This changed attitude is a welcome shift from its earlier position as stated in *Maina Mbacha vs Attorney-General*[41] and *Kamau Kuria vs Attorney-General.*[42]

An example of this shift is the decision in *Rev. Lawford Ndege Imunde vs The Attorney General.*[13] Here, the state attempted to strike out the applicant's constitutional application seeking to declare an earlier conviction as null and void as it followed grave violations of his fundamental rights. The court declined to upphold the objection and opined that in view of the high duty imposed by the Constitution (to it) it would hesitate before limiting access to the High Court.

In view of the entirety of the foregoing the Court of Appeal decision in Wanyiri's case is for many reasons opportune.

Conclusion

Quite correctly and for the reasons alluded to above the Court of Appeal's judgment is a giant step forward in the protection and enforcement of fundamental rights and freedoms in Kenya.

Briefly the decision is momentous because it demonstrates beyond doubt that:

(i) Institution of a suit by a Plaint to enforce fundamental rights and freedoms is a simpler albeit lengthy procedure of enforcing fundamental rights and freedoms.
(ii) The supremacy of the Constitution cannot be subordinated to justify illegal confinement of suspects for inordinate periods. Further that Section 36 of the Criminal Procedure code is in contravention of Section 72 (2) (b) of the Constitution.
(iii) The police are not entitled to break any law at all in their efforts to detect crime.
(iv) The allegations made to justify treatment of suspects must be examined against concrete evidence before the court, and further that courts must only make findings on the basis of facts before them.
(v) The standard of proof where there is an allegation of breach of a fundamental right or freedom is equivalent to that found in civil cases, that is on a balance of probabilities.
(vi) The police must not hold suspects for periods longer than is allowed by the law without charging them or at least seeking the court's leave to hold them longer than the law permits.
(vii) Compensation in monetary terms (i.e damages) is an entitlement of a citizen whose rights are proved to have been violated or breached. Further, in appropriate cases; punitive damages are awardable.
(viii) There is a right of appeal where a suit to enforce fundamental rights and freedoms is instituted by way of a plaint, hence there is a second chance to be heard and as such a chance to challenge the holding of the court of first instance.

That being so, the decision is a welcome development in Kenya's Constitutional jurisprudence. The highest court has, for the first time, awarded damages for breach of fundamental rights and freedoms under the constitution. It is hoped however; that courts will strictly adhere to the principles it has so forcefully brought into new life.

Footnotes

1. Court of Appeal Civil Appeal No. 151 of 1988 (before Mr. Justice Richard Otieno Kwach, Mr. Justice J.M. Gachuhi and the late Mr. Justice Masime). Judgement delivered 17th March, 1993.
2. See Cover Story, *Society,* Weekly Issue No. 16 of April 19, 1993, pp. 10 to 13; and pp. 8 to 9.
3. Githu Muigai, "The Judiciary and the Search for philosophy of law: The case of Constitutional Adjudication," in Kivutha Kibwana, *Law and the Administration of Justice,* International Commission of Jurists (Kenya Section), Nairobi 1992; at 101.

4. High Court of Kenya at Nairobi, Miscellaneous Civil Application No. 550 of 1988 *(See Nairobi Law Monthly,* 33 (March/April 1959).
5. High Court of Kenya at Nairobi Miscellaneous Civil Application No. 3-6 of 1989 See (*Nairobi Law Monthly*[38] (July/August, 1989).
6. For further reading see Algeisa M. Vasquez, "is the Kenyan Bill of Rights Enforceable After 4th July 1989" *The Nairobi Law Monthly* No. 20 December 1989/January 1990 the operativeries of Section 84 of the Constitution is now no longer a contested issue, see Kathurima Inoti, "Enforcement of Fundamental Rights in Kenya: to Righting some of the Initial wrongs," *The Nairobi Law Monthly* No. 42 April/May 1992.
7. Miscellaneous Civil Application No. 104 of 1986.
8. Chapter 21, of the Laws of Kenya.
9. (1971) 3 WLR 13
10. (1966) E.A. 514
11. See especially at p. 51 of column F.
12. One should read a further view here by, Kiraitu Murungi and Gibson Kamau Kuria, "The Law, *Practice* and *Procedure* relating to applications for the writ of habeas corpus and subjiciedum in Kenya," *The Advocate,* September 1984 pp. 7 to 12.
13. Kenya Torture, Political Detention and Unfair Trials.
14. Among these were Kamau Kuria and his clients Wanyiri Kihoro and Mirugi Kariuki. Similarly Dr. John Khaminwa and his clients Stephen Mwangi Mureithi, Ngotho Kariuki and Hon. George Anyona.
15. For further reading see:
    (i) Kathurima Inoti, *Emergency Powers in Kenya,* LL.M. Thesis, University of Nairobi, 1989.
    (ii) Albert Umma, *Preservation of Public Security through Restraint of Personal Liberty, Verfassuncy und Recht* in Ubersee 21 (4) 1988.
    (iii) Gitau, Kariuki James, *The Kenya Detention Laws: of the Doctrine of Civil Necessity and the Anomaly of State Exaitement,* LL.B. Dissertation, University of Nairobi 1992.
    (iv) Nation Team, "KANU kills move on Detention Law" *Daily Nation,* April 29, 1993 p.1 and 5.
    (v) Amos Marenya and Patrick Mwangi, "Ex-Detainees speak out", *The Standard,* April 29, 1993, p.1 and 2.
    (vi) *The Weekly Review* Friday May 7th, 1993.
    (vii) Cover Story, "Police on Trial," *Society,* weekly issue No. 16 April 19, 1993.
16. High Court Civil Case No. 1793 of 1993; Eventually Civil Appeal No. 151 of 1988 between *Wanyiri Kihoro and The Attorney General.*
17. Chapter 40, Laws of Kenya.
18. Chapter 21 of the Laws of Kenya.
19. See Kiraitu Murungi and Gibson Kamau Kuria, "The Law and practice relating to Applications for the writ of habeas corpus," *Op. cit.* note 12.
20. Chapter 54, Laws of Kenya
21. Pursuant to Section 60 of the *Evidence Act* Chapter 80 of the Laws of Kenya.
22. High Court Miscellaneous Criminal Applicatin No. 101 of 1982.
23. See page 21 of Rauf J.'s Judgement.
24. See page 22 of Rauf J.'s Judgement.
25. See Section 112 of the *Evidence Act Op. cit.* note 21.
26. For a reading on similar abuses, See: (i) *The Nairobi Law Monthly,* Torture and Death in custody" No. 42, April/May 1992. (ii) Kenya Human Rights Commission, "Slow Torture: A report on the Deprivation of Medical care to the Treason 4 in Kenya", December 24, 1992.
27. Chapter 75 of the Laws of Kenya. First schedule of the Act (p.121/122) cited.
28. Chapter 24 of the Laws of Kenya
29. The Constitution of Kenya (Amendment) Act No. 4 of 1988 empowered the police to detain suspects of capital offences for fourteen days before taking them to court.
30. See page 19 of Rauf J.'s Judgement.
31. See page 20 of the Judgement of Rauf J.
32. See Durand, *Evidence for Magistrates,* Vol. 1.
33. (1954) XXI EACA 316 at 319
34. No. 2 (1979) KLR 102.
35. Civil Application No. NAI 23 of 1993 (UR 12/93)

36. Miscellaneous Civil Case No. 647 of
37. High Court Miscellaneous Application No. 388 of 1992.
38. See, *The Speaker of the National Assembly vs James Njenga Karume* Civil Application No. NAL 92 of 1992 in the *Nairobi Law Monthly*, No. 45 August/September p. 41-42.
39. Chapter 26 of the Laws of Kenya.
40. See Pheroze Nowrojee, "Mandamus, prohibition and certiorari — practice, procedure and values, *"The Nairobi Law Monthly,"* November/December 1987 pp. 12 to 16.
41. *Loc.cit.*, note 4 above.
42. *Loc.cit.*, notes, above
43. Miscellaneous Criminal Application No. 180 of 1990.