



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 447 OF 2015

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 25 (C), 27, 29 (A), 47, 50 AND ARTICLE 157 (11) OF THE CONSTITUTION OF KENYA, 2010 IN THE MATTER OF CHIEF MAGISTRATES CASE NO. 120 OF 2013 AT MIMILIMANI, REPUBLIC VS JOHN ATELU OMILIA & 4 OTHERS

BETWEEN

JOHN ATELU OMILIA.....1ST PETITIONER

COLLINS OUMA MUSIKOYO.....2ND PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

INSPECTOR GENERAL.....2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS.....3RD RESPONDENT

P C FESTO WAMWAYI- NO. 62377.....4TH RESPONDENT

AP CPL BENJAMIN CHEDOTUM- NO. 217879.....5TH RESPONDENT

JUDGEMENT

Introduction

Criminal law and procedures are safeguards against the indiscriminate application of criminal laws and the wanton treatment of suspected criminals. Specifically, they are designed to enforce the constitutional rights of criminal suspects and accused persons, beginning with initial police contact and continuing through arrest, investigation, trial, sentencing, and appeals.

The Petitioners case

The petitioners were tried and acquitted in criminal case number 120 of 2013 jointly with other persons with the offence of Robbery with violence contrary to section 295 as read with section 296 (2) of the Penal Code.^[1]The offence carries death penalty if proved. The petitioners could not immediately raise

the bond/bail of Ksh.1,000,000/=, hence they respectively remained in custody from January 2013 to 12th April 2013 and 19th December 2014.

The petitioners aver that as early as 26th January 2013, Charles Ndegwa Wahito and Wilfred Kanja Mburu, who were their co-accused persons in the said case recorded statements with the police in which Charles Ndegwa Wahito admitted knowing the perpetrators of the offence while Wilfred Kanja Mburu admitted being part of the gang and none of them mentioned or implicated the petitioners.

The petitioners aver that the prosecution wilfully withheld the above evidence from the court, even though the statements were recorded on between 24th January 2013 and 2nd February 2013 and that the DPP charged them with such a serious offence knowing that they were innocent, which was a great abdication of his constitutional responsibility. The petitioners further aver that the above evidence only came out during their cross-examination and the statements were not supplied to them are required before the trial began.

First Respondents Response

The first Respondent filed grounds of opposition on 1st March 2016 stating *inter alia* that the petition does not disclose constitutional violations and ought to be transferred to the commercial division.

Third Respondents Response

The DPP filed a Replying affidavit sworn by Spira Laura dated 20th June 2016 deposing *inter alia* that there was sufficient evidence to mount the prosecution and that the trial was fair.

Petitioners Advocates submissions

Counsel for the petitioners submitted that charging the petitioners with a capital offence without sufficient evidence was a breach of a fair hearing, and that withholding crucial evidence from the court was a mockery of the criminal justice system and that prosecutors must be satisfied that there is sufficient evidence to provide a realistic prospect of conviction.[2] Counsel also referred to the National Prosecution Policy and the two components of the decision to prosecute, namely, admissible sufficient evidence and public interest, hence, the decision to prosecute was commenced without proper factual foundation[3] and that failure to investigate the case is a breach of a fair trial[4] and cited breach of article 47 of the constitution. On damages, counsel urged the court to award Ksh. 25,000,000/= .

First Respondents submissions

The first Respondent adopted the submissions by counsel for the third Respondent.

Third Respondents submissions

Counsel submitted that the third Respondent acted in accordance with article 157 (11) of the constitution, that the petitioners are at liberty to institute private prosecution against the third and fourth Respondents, that the witness statements were supplied and that the petitioners did not prove violation of constitutional rights[5] and that the petitioners are not entitled to the reliefs sought.

Whether this petition raises constitutional issues

It is convenient to state that a constitutional question is an issue whose resolution requires the interpretation of a constitution rather than that of a statute.[6] This court ought to discourage invocation of the constitutional process where there exists parallel or alternative statutory remedies. The determination of the issues whether or not the DPP acted within his constitutional mandate; whether or not the petitioners rights were violated if the prosecution was undertaken without any factual basis; and whether or not the prosecution was an abuse of process; and whether or not the prosecution withheld crucial

evidence and if so, whether the prosecution was under a constitutional duty to disclose such information require the interpretation of the constitution to determine whether or not their rights were violated.

This court cannot deviate from its own duty of determining acts which amount to infringement of constitutional rights of the citizens. In my view, every act of the state and its organs must pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. In cases of violation of fundamental rights, the Court has to examine as to what factors the court should weigh while determining the constitutionality of the actions complained of. The court should examine the case in light of the provisions of the Constitution. When the constitutionality of an act of state agents is challenged on grounds that it infringes a fundamental right, what the court has to consider is the “*direct and inevitable effect*” of such actions. In my view, actions that infringe on fundamental rights unless they can be demonstrated to fall within exceptions under article 24 of the constitution are out rightly unconstitutional.

It is important for the court to address its mind to the question of the ambit of the courts' duty to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights as intended in our transformative constitution to ensure that the normative value system created by the Constitution permeates the common law. Even though, the petitioners could properly have sued for malicious prosecution, to me, the above issues are justiciable controversy appropriate and ripe for judicial determination, hence, the need for this court to determine the constitutionality or otherwise of the said allegations their acquittal notwithstanding.

Whether the prosecution violated the petitioners constitutional rights

It must be borne in mind that the Constitution must be interpreted in a broad way and not in a narrow and pedantic sense. Certain rights have been enshrined in our Constitution as fundamental and, therefore, while considering the nature and content of those rights the Court must not be too astute to interpret the language of the Constitution in so literal a sense as to whittle them down. On the other hand the Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure subject, of course, to permissible restrictions.^[7]

The Respondents have a statutory and constitutional duty to protect constitutional rights of the citizens. In determining whether or not the Respondents violated the provisions of the constitution, the importance of the constitutional role entrusted to them, has to be kept in mind. In other words, the court has to examine the acts complained of viewed against the background of the Constitution, and, in particular, the constitutional rights of the petitioners and the constitutional obligations of the Respondents, and satisfy itself that the actions complained of sufficiently renders the respondents liable.^[8]

The law enjoins the DPP to be scrupulously fair to an alleged offender and to ensure fair investigation and fair trial and also to ensure that the citizens constitutional and fundamental rights are not violated. It is the duty of the courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments into these rights.^[9]

The evidence adduced is that the DPP was fully aware who the perpetrators of the offence were. This had not been contested. The police had statements clearly pointing to the persons who committed the offence. Despite being aware and having in their possession clear statements and admissions from some of the accused persons, the police went ahead and charged the petitioners with such a serious offence which attracts the death penalty. Further, the police withheld these statements from the petitioners and the court only for them to emerge during cross-examination of the petitioners after they were placed on their defense.

The decision whether or not to prosecute is very important. It can be very upsetting for a person to be prosecuted even if later found not guilty. However, a decision not to prosecute can cause great stress and upset to a victim of crime. Therefore, the DPP must carefully consider whether or not to prosecute or whether or not to institute a prosecution. The prosecutor should remain fiercely independent, fair and courageous. The responsibilities entrusted to the Director of Public Prosecutions and the police, demand nothing less.

The role of the prosecutor is not to obtain a conviction: it is to lay before a court what it considers to be credible evidence relevant to what is alleged to be a crime. The DPP has a duty to see that all available legal proof of the facts is presented; it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing: his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.[10]

But in the end it may come back to the words of Christmas Humphreys QC:- “It is the duty of prosecuting counsel to prosecute, and he need not rise to his feet and apologize for so doing. It is not unfair to prosecute.”[11] And again -

“Always the principle holds that Crown counsel is concerned with justice first, justice second and conviction a very bad third.”[12]

D.A. Bellemare, M.S.M, Q.C put best the often difficult course for the prosecutor when he said:-

“It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where to appropriate, to recognize mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach, always guided by fairness and common sense.”[13]

A prosecution should not proceed if there is no reasonable prospect of a conviction being secured. This basic criterion is the cornerstone of the uniform prosecution policy adopted in worldwide. The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, tends to undermine the confidence of the community in the criminal justice system.

It has never been the rule in this country that suspected criminal offences must automatically be the subject of prosecution. A significant consideration is whether the prosecution is in the public interest. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue those cases worthy of prosecution. The initial consideration in the exercise of this discretion is whether the evidence is sufficient to justify the institution or continuation of a prosecution.

A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the accused. There is a continuing obligation to assess the evidence as the matter proceeds. The decision as to whether there is a reasonable prospect of conviction requires an evaluation of how strong the case is likely to be when presented in court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the accused and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course, there can never be an assurance that a prosecution will succeed. Indeed, it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and pursuing a futile prosecution resulting in the unnecessary expenditure of public funds.

When evaluating the evidence regard should be had to the following matters:- **(a)** *Are there grounds for believing the evidence may be excluded bearing in mind the principles of admissibility at common law and under statute?* **(b)** *If the case depends in part on admissions by the accused, are there any grounds for*

believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the accused?(c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the accused, or may be otherwise unreliable?(d) Does a witness have a motive for telling less than the whole truth? (e) Whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute. (f). whether the alleged offence is of considerable public concern and (g) the necessity to maintain public confidence. As a matter of practical reality the proper decision in most cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution.

In order to advance the rule of law, and in particular to protect the principle that all are equally subject to the law, the DPP (and therefore his officers) must be independent. The Constitutional provision in Article 157 (10) of the Constitution 2010 ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person is made free of any external influences. In the words of John Kelly TD, the prosecution system “*should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so.*” [14] The following observations are useful to bear in mind:-

“...the use of prosecutorial discretion should be exercised independently and free from ANY interference. Prosecutors are required to carry out their duties without fear, favour or prejudice—impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ...That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one.” [15]

The role of the prosecutor excludes any notion of winning or losing; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings. [16] It is said that the prosecutor acts in the general public interest and so it must be. That is where he prosecutor’s ultimate loyalty and responsibility lie.

Considering that there was clear evidence pointing to the perpetrators of the offence, the DPP in my view acted on clearly insufficient evidence and without proper factual foundation which to me was abuse of his prosecutorial powers, hence the prosecution was totally unjustified, malicious and a breach of the constitutional provisions which require an accused person to be supplied in advance with all the evidence against him.

The prosecutor is an administrator of justice, an advocate, and an officer of the court; the

prosecutor must exercise sound discretion in the performance of his or her functions. No explanation has been offered why the DPP opted to charge the petitioners in court yet he had clear evidence pointing at the perpetrators. The duty of the prosecutor is to seek justice, not merely to convict. In my view, the prosecution was not only malicious, but also an abuse of court process. Abuse of process has been defined as something so unfair and wrong with the prosecution.

The concept of constitutional "Tort"

The question that follows is whether or not the petitioners ought to have instituted a suit claiming damages for malicious prosecution as opposed to a constitutional petition. It is important for the court to address its mind to the question of the ambit of the courts' duty to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights as intended in our transformative constitution to ensure that the normative value system created by the Constitution permeates the common law.

Michael Wells [17] argues that:-

*" officers may harm persons in many ways. When an official inflicts a physical injury, causes emotional distress, publishes defamatory statements, or initiates a malicious prosecution, the victim's traditional recourse is a tort suit brought under common law or statutory principles. But an alternative to ordinary tort may also be available. The growth of damage remedies for constitutional violations in the decades following *Monroe v. Pape*' has encouraged litigants to frame their cases as breaches of the Constitution. These litigants may sue for damages....., or assert the damages cause of action implied from the Constitution In either case the Court's task is to fix the boundary of constitutional tort. It must determine whether the plaintiff has a good claim for breach of a substantive constitutional right, or instead must sue under ordinary tort law."*

A "constitutional tort" refers to a private civil suit brought to redress a constitutional violation.^[18] Constitutional torts are violation of one's constitutional rights by a government servant. "Constitutional tort" actions are an avenue through which individuals can directly appeal to the Constitution as a source of right to remedy government-inflicted injury. This sort of access is a recent phenomenon. Before the twentieth century, the Constitution primarily served a structural function, with litigation focused on the limits of government power. Suits seeking to hold government liable for individual injuries were brought in state courts pursuant to the common law. It was not until the U.S. Supreme Court decisions in *Monroe vs. Pape*^[19] and *Bivens vs. Six Unknown Named Agents of Federal Bureau of Narcotics*^[20] that individuals began arguing that the Constitution entitled them to damages for wrongful injury.

When examined as an individual remedy, it becomes clear that the "constitutional tort" action has had more than a narrowing influence on rights. By shifting the attention of the courts to the injury suffered by individuals, "constitutional tort" actions have influenced courts, encouraging the establishment of constitutional rights that both protect individuals from governmental injury and regulate the discretion of the government to inflict injury. As a result, the concept of individual harm is now incorporated into the substance of many constitutional rights. Instead of having a wholly negative effect on the scope of constitutional rights, the "constitutional tort" remedy contributes to a broader process of rights definition where abstract constitutional provisions are translated into terms relevant to individuals' injuries. Regardless of whether or not one can justify monetary awards for constitutional rights violations on compensation or deterrence grounds, as an individual remedy, the "constitutional tort" action serves a unique role in the range of remedies courts use to enforce the Constitution. The "constitutional tort action sets and enforces limits on governmental discretion in a way that structural injunction and other remedies cannot.

"Constitutional tort" actions compensate and deter constitutional rights violations. That is, remedying an individual's injury with a damage award which enforces the Constitution and sets adequate monetary disincentives to unconstitutional action. "Constitutional tort" actions are not only about rights protecting individuals from certain forms of injuries but also about norms that regulate government action; a court determines both that the plaintiff has a right rooted in the law and that a defendant has a correlative duty to the plaintiff to avoid violating that right. Thus, a protective right in a sense imposes a correlative duty on the government.

A court must bear in mind constitutional norms when deciding whether the case before it is in principle one in which the wrong doer should be held liable. The principles themselves, are embodied in a test, focusing on the subjective question as to whether the conduct complained is consistent with constitutional norms. The particular question to be decided in this matter is the liability of the state for acts committed by its agents while on duty.

The principles of liability for malicious prosecution and their application have therefore to be developed to accord more fully with the spirit, purport and objects of the Constitution. This means that the existing principles of common-law of tort have to be understood and applied within the normative framework of the Constitution.

Purpose of constitutional remedy

It is now an established principle that violations of fundamental human rights must be remedied. Kriegler

J. Properly captured this in the Constitutional Court of South Africa case of *Ntanda Zeli Fose vs. The Minister of Safety and Security* where he expressed himself that:-

“..... our object in remedying these kinds of harms should, at least be to vindicate the constitution, and to deter its further infringement. Defense speaks for itself as an object, but vindication needs elaboration. Its meaning, strictly defined, is to “defend against encroachment or interference.” It suggests that certain harms, if not addressed, diminish our faith in the constitution. It recognizes that a constitution has as little or as much weight as the prevailing political culture affords it. The defense of the constitution—its vindication is a burden imposed not exclusively, but primarily on the judiciary. In exercise of our discretion to choose between appropriate forms of relief, we must carefully analyses the nature of a constitutional infringement and strike effectively at its source....”[21]

The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights. Therefore, when the court moulds the relief by granting 'compensation' in proceedings under Article 23 of the constitution or seeking enforcement or protection of fundamental rights, it does so under the public law by way of penalizing the wrongdoer and fixing the liability for the public wrong on the State which has failed in its public duty to protect the fundamental rights of the citizen. The payment of compensation in such cases is not to be understood, as it is generally understood in a civil action for damages under the private law but in the broader sense of providing relief by an order of making 'monetary amends' under the public law for the wrong done due to breach of public duty, by not protecting the fundamental rights of the citizen or by subjecting the citizen to acts which amount to infringement of the constitution.

It is thus now well settled that award of compensation against the State is an appropriate and effective remedy for redress of an established infringement of a fundamental right under the constitution. The quantum of compensation will, however, depend upon the facts and circumstances of each case. I accept in principle that constitutional damages as a relief separate and distinct from remedies available under private law is competent because a violation of a constitutional right must of necessity find a remedy in one form or another, including a remedy in the form of compensation in monetary terms.

A constitutional remedy has the following objectives **(a)** the vindication of the fundamental rights so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights; **(b)** the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of State at all levels of government; **(c)** the punishment of those organs of State whose officials had infringed fundamental rights in a particularly egregious fashion; and **(d)** compensation for harm caused to the petitioner in consequence of the infringement of the petitioner's fundamental rights.[22] Appropriate relief' in terms of the Constitution is relief that is required to protect and enforce the Constitution.[23] Depending on the circumstances of each particular case the relief might be a declaration of rights or such other relief as might be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it necessary to do so, the courts might even have to fashion new remedies to secure the protection and enforcement of these all-important rights.[24]

Damages

On the quantum of damages, award of damages entails exercise of judicial discretion which should be exercised judicially and that means that it must be exercised upon reason and principle and not upon caprice or personal opinion.[25] The jurisprudence that has emerged in cases of violation of fundamental rights has cleared the doubts about the nature and scope of the this public law remedy evolved by the Court. The following principles clearly emerged from decided cases:[26]

1. *Monetary compensation for violation of fundamental rights is now an acknowledged remedy in public law for enforcement and protection of fundamental rights;*
2. *Such claim is distinct from, and in addition to remedy in private law for damages for tort;*

3. *This remedy would be available when it is the only practicable mode of redress available;*

4. *Against claim for compensation for violation of a fundamental right under the constitution, the defence of Sovereign immunity would be inapplicable.*

I note that arriving at the award of damages is not an exact science, and also I am aware that no monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entail.^[27] When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law.^[28]

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in helping the court arrive at a reasonable award. The court must consider and have regard to all the circumstances of the case. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss.

Considering the nature of the violations of the constitutional rights, the above legal principles and bearing in mind the fact that it may not be easy to quantify violation of fundamental rights and freedoms, particularly the agony of being subjected to criminal proceedings, and taking into account the period the petitioners were in custody and the length of the trial, and the genuine fear of the possibility of being sentenced to death if convicted, I find that the petitioners are entitled to an award of damages. Doing the best I can, I find that an award of a global sum of Ksh. 2,000,000/= to each of the petitioners would be reasonable compensation for violation of their rights.

Accordingly, I enter judgement as follows:-

i. **A declaration** be and is hereby issued that chief magistrates criminal case number 120 of 2013 in which the petitioners were tried and acquitted of the offence of Robbery with violence was instituted without any factual foundation or basis and was malicious and an abuse of police powers and prosecutorial powers vested in the DPP.

ii. **A declaration** be and is hereby issued that the Police and the DPP were under a legal duty to disclose to the petitioners all the prosecution evidence at the earliest opportunity possible and failure to disclose crucial evidence to the petitioners and the court amounted to abuse of the law and violation of the petitioners rights and prejudiced the petitioners.

iii. **A declaration** be and is hereby issued that the prosecution of the petitioners in criminal case number 120 of 2013 was commenced without any factual basis.

iv. **That** judgement be and is hereby entered in favour of the petitioners against the Respondents jointly and severally in the sum of **Ksh. 2,000,000/=** for the first petitioner and **Ksh. 2,000,000/=** for the second petitioner by way of general damages.

v. **That** the above sum shall attract interests at court rates from date of this filing petition until

payment in full.

vi. ***That*** the Respondents do jointly and severally pay the costs of this Petition to the petitioner plus interests thereon at court rates.

The petitioner claims for compensation for Human Rights Violations.

Orders accordingly

Signed, Dated and Delivered at Nairobi this **19th** day of **May** 2017

John M. Mativo

Judge

[1] Cap 63, Laws of Kenya

[2] Counsel cited Michael Sistu Mwaura Kamau & 12 Others vs Ethics and Ant--Corruption Commission & 4 Others {2016}eKLR

[3] Counsel cited R. vs Attorney General exp Kipngeno Arap Ngeny HC CIV APP No. 406 of 2001

[4] Counsel cited Thomas Mboya Oluoch & Another vs Lucy Muthoni Stephen & Another NBI HCCC No. 1729 of 2001

[5] Anarita Karimi Njeru cited. Also cited Kirugi & Another vs Kabiya & 3 Others {1987}KLR 347 and Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others {2013}eKLR

[6]<http://www.yourdictionary.com/constitutional-question>

[7] See Mudholkar J in Sakal Papers v Union of India AIR 1962 SC 305 at p 311

[8] 1986 (1) SA 117 (A)

[9]Bradley J. in Edward A. Boyd and George H. Boyd v. Unites States (1884) 116 U.S. 616

[10] Per Rand J in Boucher v R {1954} 110 CCC 263 at 270

[11] {1955} Crim LR 739 at 741

[12] Ibid p.746.

[13] Infra

[14] <http://www.paclii.org/fj/other/prosecutors-handbook.pdf>

[15]Extract from a Speech by Anna Katzmann, SC at a dinner of the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007. (Now the Hon. Anna Katzmann, Judge of the Federal Court of Australia).

[16] (see Boucher v the Queen (1954) 110 CCC 263, 270).

[17] Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 Chi.-Kent. L. Rev. 617 (1997). Available at: <http://scholarship.kentlaw.iit.edu/cklawreview/vol72/iss3/3>; University of

Georgia Law School. The author wishes to thank Jack Beerman, Karen Blum, Dan Coenen, Tom Eaton, Richard Fallon, and Richard Nagareda for helpful comments on a draft of this article.

[18] Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 Chi.-Kent. L. Rev. 617 (1997). Available at: <http://scholarship.kentlaw.iit.edu/cklawreview/vol72/iss3/3>

[19] 365 U.S. 167 (1961)

[20] 403 U.S. 388 (1971)

[21] *Fose vs Minister of Safety and Security* 1997 (3) SA 786 (cc) 1997 (3) SA p786 , citation 1997 (3) SA 786 (cc)

[22] *Fose vs Minister of Safety and Security* 1997 (3) SA 786 (cc) 1997 (3) SA p786 , citation 1997 (3) SA 786 (cc)

[23] *Ibid*, per Ackermann J, Chaskalson P, Mahomed DP, Langa J, Madala J, Mokgoro J, O'Regan J and Sachs J

[24] *Ibid*

[25] *Mbogo & Another vs Shah*{1968} EA 93

[26] V.K. Sircar, *Compensation for Violation of Fundamental Rights, a new remedy in Public Law Distinct*

from relief of damages in tort, <http://ijtr.nic.in/articles/art7.pdf>

[27] *Koigi Wamwere v Attorney General*{2015} eKLR

[28] *Attorney General v Ramanoop* [2005] UKPC 15, [2006] 1 AC 338