REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

PETITION NO.181 OF 2010
IN THE MATTER OF SECTION 84(1) OF

THE CONSTITUTION OF KENYA
AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 77 OF THE CONSTITUTION OF KENYA

BETWEEN
MOHAMED KORIOW NUR.....PETITIONER

VERSUS
THE ATTORNEY GENERAL.....RESPONDENT

RULING

In the Petition dated 20th April, 2010 the applicant seeks;

> **(a) That this Honourable Court be pleased to declare that the failure by the Respondent to supply the Petitioner with both audio and visual tapes amounts to a breach of the Petitioner's right to a fair hearing as enshrined in Section 77(2) of the Constitution.**
> **(b) That this Honourable Court be pleased to declared that the evidence sought to be relied upon by the Respondent in the Criminal Case was obtained by or through the process of entrapment and is therefore inadmissible.**
> **(c) That this Honourable Court be pleased to issue an order of Certiorari to remove into the High Court and quash the decision made by the Respondent on 13th March, 2007 to charge the Petitioner in Criminal Case (Makadara) No.17 of 2007.**
> **(d) That this Honourable Court e pleased to issue an order of Certiorari to remove into the High Court and quash the entire proceedings in Criminal Case (Makadara) No.17 of 2007.**
> **(e) That this Honourable Court be pleased to grant the Petitioner general damages for breach of his Constitutional rights.**
> **(f) That this Honourable Court be pleased to grant the Petitioner costs of this Petition.**
> **(g) That in the alternative to the above reliefs, this Honourable Court be pleased to issue an order of mandamus compelling the Respondent to forthwith supply the Recorded Evidence in the mater in the form of both audio and visual tapes to the Petitioner.**
> **(h) That this Honourable Court be pleased to make any such further orders as it deems just.**

If the applicant succeeds on the issue of whether the entrapment is illegal or not, then the second issue would have no relevance to this determination. It means if the prayer for entrapment succeeds, the other issue would be overtaken by events. In that regard, I wish to deal with the issue of entrapment first. In doing so, it is essential to state the two schools of thought that are in existence or operation:

> **"Here we must remember concerned as we are in expounding an aspect of the constitution bearing on social defence and individual freedom, that humanism is the highest law which enlivens the printed legislative text with which the life breath of civilized values. The Judge who forgets this rule of law, any day regrets his nescient verdict some day. ....**

The basic facts which have given rise to this case need to be narrated but the law we have to settle reminds us, not of a quondam minister, the appellant, but of the numerous indigents, being unversed in the arcane implications of Article 20(3) and unable to stand up to rough handling despite Section 161(2). Law-in-action is tested by its restless barks and bites in the streets and its sting in hostile camps, especially when the consumers are unaware of the essential contents of the protective provisions, and not by its polished manners and sweet reasonableness in forensic precincts. The pulse of the agitated accused, hand-cuffed and interrogated, the rude voice and ready rod of the head constable and the psychic strain, verging on consternation, sobbing into involuntary incriminations, are part of the scenario of police investigation which must educate the Court as it unveils the nuances of Article 20(3) and its inherited phraseology. A people whose consciousness of rights is or, a land where legal services at the incipient stages are rare and an investigative personnel whose random resort to third degree technology has ancient roots – these and a host of other realistic factors must come into the Court's ken when interpreting and effectuating the constitutional right of the suspect accused to remain silent. That is why quick surgery, when constitutional questions affecting the weaker numbers are involved, can be successful failure. We are cognizant of the improved methods and refined processes of the police forces, especially the Vigilance wings and Intelligence squads with special training in expert investigation and use of brains as against brawn…..On the strength of this first information, in which the appellant, her son and Ors. Were shown as accused persons, investigation was commenced. During the course of the investigation it was that she was interrogated with reference to a on string of questions, given to her in writing. Skipping the details of the dates and forgetting the niceties of the provisions, the gravamen of the accusation was one of acquisition of assets disproportionate to the known, licit sources of income and probable resources over the years of the accused, who occupied a public position and exercised public power for a long spell during which, the police version runs, the lady by receipt of illegal gratification aggrandized herself-a pattern of accusation tragically and traumatically so common against public persons who have exercised and exited from public power, and a phenomenon so suggestive of Lord Acton's famous dictum. The charge, it is so obvious, has a wide-ranging scope and considerable temporal sweep, covering activities and acquisitions, sources and resources private and public dealings and nexus with finances, personal and of relatives. The dimensions of the offences naturally broadened the area of investigation, and to do justice to such investigation, the net of interrogation had to be cast wide. Inevitably, a police officer who is not too precise, too sensitive and too constitutionally conscientious is apt to trample underfoot the guaranteed right of testimonial tactiness. This is precisely the grievance of the appellant, and the defence of the respondent is the absence of the 'right silence', to use the familiar phrase of 20th century vintage……What are the defences open Under Section 179 1. P.C. read with Section 161(1) Cr. P.C.? Two exculpatory channels are pointed out by Sr Rath, supplemented by a third paramount right founded on constitutional immunity against testimonial self-incrimination. To itemize them for ready reference, the arguments are that (a), 'any person' in Section 161(1) excludes an accused person, (b) that questions which form links in the chain of the prosecution case-these include all except irrelevant ones-are prone to expose the accused to a criminal charge or charges since several other cases are in the offing or have been charge-sheeted against this appellant and(c) the expansive operation of the benignant shield against self-accusation inhibits elicitation of any answers which the accused apprehends may throw inculpatory glows. This wide vindication, if valid, will be the biggest interpretative bonus the court can award to criminals as it foredooms to failure of criminal justice and police truth tracking, says the learned Advocate General. True, courts self-criminate themselves if they keep the gates ajar for culprits to flee justice under the guise of interpretative enlargement of golden rules of criminal jurisprudence.

The Constitution and the criminal

The inherent quandary of the penal law in this area springs from the implanted dilemma of exacting solicitude for possible innocents forced to convict themselves out of their own lips by police tantrums and the social obligation of the limbs of the law and agencies of justice to garner truth from every quarter, to discover guilt, wherever hidden, and to fulfil the final tryst of the justice system with society. Which is to shield the community against criminality by relentless pursuit of the culprit, by proof of guilt and punishment of crime, not facilitation of the fleeing criminal from the chase of the appointed authorities of the State charged with the task of investigating, testing, proving and getting punished those whose anti-social exploits make citizens' life vulnerable.

The paradox has been put sharply by Lewis Mayers: "to strike the balance between the needs of law enforcement on the one hand and the protection of the citizen from oppression and injustice at the hands of the law-enforcement machinery on the other is a perennial problem of statecraft. The pendulum over the years has swung to the right. Even as long ago as the opening of the twentieth century, Justice Holmes declared that 'at the present time in this country there is more danger that criminals will escape justice than that they will be subject to tyranny. As the century has unfolded, the danger has increased.

Conspiracies to defeat the law have, in recent decades, become widely and powerfully organized and have been able to use modern advances in communication and movement to make detection more difficult. Lawbreaking tends to increase. During the same period, an increasing awareness of the potentialities of abuse of power by law-enforcement officials has resulted, in both the judicial and the legislative spheres, in a tendency to tighten restrictions on such officials, and to safeguard even more jealously the rights of the accused, the suspect, and the witness. It is not too much to say that at mid-century we confront a real dilemma in law enforcement. In consequence, there is clearly discernible a tendency to re-examine the assumptions on which rest our complex of rules and doctrines which offer obstacles, perhaps wisely, to the discovery and proof of violations of law. In such a re-examination, the cluster of rules commonly grounded under the term 'privilege against self-incrimination', which has for many decades been under attack, peculiarly calls fox restudy. In the words of Wigmore, 'Neither the history of the privilege, nor its firm constitutional anchorage need deter us from discussing at this day its policy.

As a bequest of the 1600's. it is but a relic of controversies and convulsions which have long since ceased…..Nor does its constitutional sanction, embodied in a clause of half a dozen words, relieve us of the necessity of considering its policy….A sound and intelligent opinion must be formed upon the merits of the policy."

Justice Douglas made this telling comment:

As an original matter it might be debatable whether the provision of the Fifth amendment that no person "shall be compelled in any criminal case to be a witness against himself" serves the ends of justice (1952).

These prologuic lines serve as background to a balanced approach to the crucial question posted before us.
A police lapse

Before discussing the core issues, we wish to note our regret, in this case, at a higher level police officer, ignorantly insisting on a woman appearing at the police station in flagrant contravention of the wholesome proviso to Section 160(1) of the Cr.P.C. Such deviance must be visited with prompt punishment since policemen may not be a law unto themselves expecting others to obey the law. The wages of indifference is reprimand, of intransigence disciplinary action. If the alibi is that the Sessions Court had directed the accused to appear at the police station, which is no absolution for a police officer from disobedience of the law. There is public policy, not complimentary to the police personnel, behind this legislative proscription which keeps juveniles and females from Police Company except at the former's safe residence. May be, in later years, community confidence and consciousness will regard the police force as entitled to better trust and soften the stigmatizing or suspicious provisions now writ across the Code.
It is necessary, to appreciate the submissions, to remember the admitted fact that this is not the only case or investigation against the appellant and her mind may move around these many investigations, born and, unborn, as she is confronted with questions. The relevance of this factor will be adverted to later.

Setting the perspective of Article 20(3) and Section 161(2).

Back to the constitutional quintessence invigorating the bank, on self incrimination. The area cove red by Article 20(3) and Section 161(2) is substantially the same. So much so, we are inclined to the view, terminological expansion apart, that Section 161(2) of the Cr.P.C. is a parliamentary gloss on the constitutional clause. The learned Advocate General argued that Article 20(3), unlike Section 161(1), did not operate at the anterior stages before the case came to court and the accused's incriminating utterance, previously recorded, was attempted to be introduced. He relied on some passages in American decisions but, in our understanding, those passages do not so circumscribe and, on the other hand, the land mark Miranda v. Arizona 384 US 7 436 (1966) ruling did extend the embargo to police investigation also. Moreover, Article 20(3), which is our provision, warrants no such truncation. Such a narrow meaning may emasculate a necessary protection.
There are only two primary queries involved in this clause that seals the lips into permissible silence, (i) is the person called upon to testify 'accused of any offence', (ii) Is he being compelled to be witness against himself? A constitutional provision receives its full semantic range and so it follows that a wider connotation must be imparted to the expressions' accused of any offense' and to be witness against himself. The learned Advocate General, influenced by American decisions rightly agreed that in express terms Section 161(2) of the code might cover not merely accusations already registered in police stations but those which are likely to be the basis for exposing a person to a criminal charge. Indeed, this wider construction, if applicable to Article 20(3), approximates the constitutional clause to the explicit statement of the prohibition in Section 161(2). This latter provision meaningfully uses the expression 'expose himself to a criminal charge'. Obviously, these words mean, not only cases where the person is already exposed to a criminal charge but also instances which will imminently expose him to criminal charges. In Article 20(3), the expression 'accused of any offence, must been formally accused in praesenti not in future-not even imminently as decisions now stand. The expression 'to be witness against himself means more than the court process. Any giving of evidence, any furnishing of information, if likely to have an incriminating impact, answers the description of being witness against oneself.
Not being limited to the forensic stage by express words in Article 20(3), we have to construe the expression to apply to every stage where furnishing of information and collection of materials takes place. That is to say, even the investigation at the police level is embraced by Article 20(3). This is precisely what section 161(2) means. That Sub-section relates to oral examination by police officers and grants immunity at that stage. Briefly, the Constitution and the Code are coterminous in the protective area. While the Code may be changed the Constitution is more enduring. Therefore, we have to base our conclusion not merely upon Section 161(2) but on the more fundamental protection, although equal in ambit, contained in Article 20(3).
In a way this position brings us nearer to the Miranda mantle of exclusion which extends the right against self-incrimination, to police examination and custodial interrogation and takes in suspects as much as regular accused persons. Under the Indian Evidence Act, the Miranda exclusionary rule that custodial interrogations are inherently coercive finds expression (Section 26), although the Indian provision confines it to confession which is a narrower concept than self-crimination.

We have earlier spoken of the conflicting claims requiring reconciliation. Speaking pragmatically, there exists a rivalry between societal interest in affecting crime detection and constitutional rights which accused individuals possess. Emphasis may shift, depending on circumstances, in balancing these interests as has been happening in America since Miranda there has been retreat from stress on protection of the accused and gravitation towards society's interest in convicting law breakers. Currently, the trend in the American jurisdiction according to legal journals, is that 'respect for (constitutional) principles is eroded when they leap their proper bounds to interfere with the legitimate interests of society in enforcement of its laws……' (78 Couch v United States, 409 U.S. 322, 336 (1972). Our constitutional perspective has, therefore, to be relative and cannot afford to be absolutist, especially when torture technology, crime escalation and other social variables affect

the application of principles in producing humane justice….To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): 'It is not admissible to do a great right by doing a little wrong…. It is not sufficient to do justice by obtaining alp roper result by irregular or improper means. 'Not only, does the use of the third degree involve a flagrant violation of Law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'it is a short cut and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists, you are not so likely to use your wits. (384 US 448)' We agree with the conclusion expressed in the report, that 'The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public.' [IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 5 (1931),]

'Again we stress that the modern practice of in custody interrogation is psychologically rather than physically oriented, As we have stated before, "Since Chambers v. Florida, 309 US 227 (84 L. Ed. 716), this Court has recognized that coercion can be mental as well as physical and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. "Blackburn v. Alabama, 4 L. Ed.2d 242. Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics. These texts (384 US 449) are used by law enforcement agencies themselves as guides. It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the 'principal psychological factor contributing to successful interrogation is privacy being alone with the person under interrogation.' (Inbau & Reid, Criminal Interrogation and Confessions (1962, at 1.) The efficacy of this tactic has been explained as follows:

'If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more (384 US 450) reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law. '[O'Hara, Fundamentals of Criminal Investigation (1956) at 99].

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspects guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, (Inbau & Reid, supra at 34-43,87) to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already that he is guilt. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance. One writer (384 US 451) describes the efficacy of these characteristics in this manner:

'In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgement of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to take without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable. (O'Hara, Supra at 112)
The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. Where there is a suspected revenge-killing, for example, the interrogator may say:

'Joe, you probably did not go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him and that's why you carried a gun-for your own protection. You know him for what he was, no good. Then when you met him he probably started using foul, abusive language and he gave some indication that (384 US 452) he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe?' (Inbau & Reid, supra, at 40).
Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defense explanation. This should enable him to secure the entire story. One text notes that "Even if he fails to do so, the inconsistency between the subject's original denial of the shooting and his

present admission of at least doing the shooting will serve to deprive him f a self-defense 'our' at the time of trial." (Ibid).

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the "friendly-unfriendly" or the "mutt and Jeff" act. A thorough and intimate sketch is made of the versatility of the arts of torture developed officially in American country calculated to break, by physical or psychological crafts, the morale of the suspect and make him cough up confessional answers. Police sops and syrups of many types are prescribed to wheedle unwitting words of guilt from tough or gentle subjects. The end product is involuntary incrimination, subtly secured, not crudely traditional. Our police processes are less 'scholarly and sophisticated, but?

Another moral from the Miranda reasoning is the burning relevance of erecting protective fenders and to make their observance a police obligation so that the angelic article [20(3)] may face up to satanic situations. Says Chief Justice Warren:

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifty Amendment right is, of course, not lessened in the slightest in each of the cases, the defendant was thrust into an un-familiar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in Miranda, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in Stewart, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the produce of free choice. (8, 9). It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carried its own badge of intimidation . to be sure, this is not physical intimidation, but it is equally destructive of human dignity. [Professor Sutherlands recent article, Crime and Confession, 79 Harv 1 Rev 21, 37 (1065)]. The current practice of incommunicado interrogation is at odds with one of our Nation's (384 US 458) most cherished principles – that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of free choice." *(See Civil Appeal NO.315 of 1978 in the Supreme Court of India 2SCC424 Nandini Satlpathy vs. P. L. Dani and Anr.*

In **Branna v. Peek [1947] 2ALL ER 572, Lord Goddard** held at page 573 that:

"There is another point of much greater public importance. The Court observes with concern and disapproval the fact that the police authority at Derby thought it right to send a police officer into a public house to commit an offence. It cannot be too strongly emphasized that, unless an Act of Parliament provides for such a course of conduct – and I do not think any Act of Parliament does so provide – it is wholly wrong for police officer or any other person to sent to commit an offence in order that an offence by another person may be detected. It is not right that police authorities should instruct, allow or permit detective officers or plain clothes constables to commit an offence so that they can prove that another person has committed an offence. It would have been just as much an offence for the police constable in the present case to make the bet in the public house as it would have been for the bookmaker to take the bet if in doing so he had committed an offence. I hope the day is far distant when it will become a common practice in this country for police officers to be told to commit an offence themselves for the purpose of getting evidence against someone; if they do commit offences they ought also to be convicted and punished, for the order of their superior would afford no defence".

In **R. Hasham Jiwa, E.A.C.A (1949) 90**, the Court of Appeal at pages 92 and 93 considered Lord Goddard's comments in **Brannan v. Peek, [1947] 2 ALL ER. 572** and held at page 93 that:

"Where a police spy himself persuades someone to commit an offence he may lay himself open to adverse comments from the Bench as did the police constable in Brannan v. Peek".

In **Nottingham City Council v. Amin, [2000] 2 All ER** at page 950, the Court held that:-

"It seems to me that the Court has adopted a fairly consistent line. On the one hand, it has been recognized as deeply offensive to ordinary notions of fairness if a defendant were to be convicted and punished for committing a crime which he only committed because he had been incited, instigated, persuaded, pressurized or wheedled into committing it by a law enforcement officer".

In **R v. Latif, R. v. Shahzad, [1966] 1 All ER**. 353 the Court held at page 360 that:

"Given that Shahzad would probably not have committed the particular offence of which he was convicted, but for the conduct of Honi and the custom officers, which included criminal conduct, how should the matter be approached? If the Court always refuses to stay such proceedings, the perception will be that the Court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice and bring it into disrepute".

In the case of **Teixeira De Castro v. Portugal [1998] ECHR 52** at pages 10 and 11, the Court held that:-

> **"In the instant case, it is necessary to determine whether or not the two police officers' activity went beyond that of undercover agents. The Court notes that the Government have not contended that the officers' intervention took place as part of an anti-drug trafficking operation ordered and supervised by a judge. It does not appear either that the competent authorities had good reason to suspect that Mr. Teixeira de Castro was a drug trafficker; on the contrary, he had no criminal record and no preliminary investigation concerning him had been opened. Indeed, he was not known to the police officers, who only came into contact with him through the intermediary of V.S and F.O….In the light of these considerations, the Court concludes that the police officers' actions went beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed. That intervention and its use in the impugned criminal proceedings meant that, right from the outset, the applicant was definitively deprived of a fair trial".**

In the Landmark case of **R V. Loosely, [2001] UKHL 53, Lord Nichols of Birdenhead** at paragraph 1 set out the law on entrapment as follow:

> **"1. Every Court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle Courts ensure that executive agents of the state do not misuse the coercive, law enforcement functions of the Courts and thereby oppress citizens of the state. Entrapment, with which these two appeals are concerned, is an instance where such misuse may occur. It is simply not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That would be entrapment. That would be misuse of state power, and an abuse of the process of the Courts. The unattractive consequences, frightening and sinister in extreme cases, which state conduct of this nature could have are obvious. The role of the Courts is to stand between the state and its citizen and make sure this does not happen".**

At paragraphs 23 – 29 of the **Loosely** case, supra, **Lord Nicholls** of Birkenhead considered the limits to the type of police conduct which in any set of circumstances were acceptable and the factors to be taken into account as follows:

> **"23. Accordingly, one has to look elsewhere for assistance in identifying the limits to the types of police conduct which, in any set of circumstances, are acceptable. On this a useful guide is to consider whether the police did no more than present the defendant with an unexceptional opportunity to commit a crime. I emphasize the word unexceptional. The yardstick for the purpose of this test is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances. Police conduct of this nature is not to be regarded as inciting or instigating crime, or luring a person into committing a crime. The police did no more than others could be expected to do. The police did not create crime artificially.**

McHugh J had this approach in mind in **Ridgeway v The Queen (1995) 184 CLR 19, 92**, when he said:

> **"The State can justify the use of entrapment techniques to induce the commission of an offence only when the inducement is consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity. That may mean that some degree of deception, importunity and even threats on the part of the authorities may be acceptable. But once the State goes beyond the ordinary, it is likely to increase the incidence of crime by artificial means.'**
>
> **This is by no means the only factor to be taken into account when assessing the propriety of police conduct. The investigatory technique of providing an opportunity to commit a crime touches upon other sensitive areas. Of its nature this technique is intrusive, to a greater or lesser degree, depending on the facts. It should not be applied in a random fashion, and used for wholesale 'virtue-testing', without good reason. The greater the degree of intrusiveness the closer will the court scrutinize the reason for using it. On this, proportionality has a role to play.**
> **Ultimately the overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute. Lord Steyn' formulation of a prosecution which would affront the public conscience is substantially to the same effect: see R v Latif [1996] 1 WLR 104, 112. So is Lord Bingham of Cornhill CJ's reference to conviction and punishment which would be deeply offensive to ordinary notions of fairness: see Nottingham City Council v Amin [2000] 1 WLR 1071, 1076. In applying these formulations the court has regard to all the circumstances of the case. The following comments may be made on some circumstances which are of particular relevance.**
>
> **The reason for the particular police operation. It goes without saying that the police must act in good faith and not, for example, as part of a malicious vendetta against an individual or group of individuals. Having reasonable grounds for suspicion is one way good faith may be established…**
> **The nature and extent of police participation in the crime. The greater the inducement held out by the police, and the more forceful or persistent the police overtures, the more readily may a court conclude that the police overstepped the boundary: their conduct might well have brought about commission of a crime by a person who would normally avoid crime of that kind."**

In **Regina v. Dianna Rose Moon, [2004] EWCA. Crim.2872**, the Court relied on the **R v. Loosely** case, supra, to quash the

conviction holding that entrapment has been established.

In **R v. Mack, [1988] 2S.C.R. 903**, the Court held at pages 2, 3 and 4 that:

> **Entrapment occurs when (a) the authorities provide a person with an opportunity to commit an offence without acting on a reasonable suspicion that this person is already engaged in criminal activity or pursuant to a bona fide inquiry, and, (b) although having such a reasonable suspicion or acting in the course of a bona fide inquiry, they go beyond providing an opportunity and include the commission of an offence… As far as possible, an objective assessment of the conduct of the police and their agents is required. The predisposition, or the past, present or suspected criminal activity of the accused, is relevant only as part of the determination of whether the provision of an opportunity by the authorities to the accused to commit the offence was justifiable. Further, there must be sufficient connection between the accused's past conduct and the provision of an opportunity, since otherwise the police suspicion will not be reasonable…**

The absence of a reasonable suspicion or a bonafide inquiry is significant in assessing the conduct of the police because of the risk that the police will attract people otherwise without involvement in a crime and because it is not a proper use of the police power to randomly test the virtue of people. The presence of reasonable suspicion or the mere existence of a bona fide inquiry will, however, never justify entrapment techniques: the police may not go beyond providing an opportunity regardless of their perception of the accused's character and regardless of the existence of an honest inquiry.

The following factors may be considered in determining if the police have gone further than providing an opportunity:

> **(1)…**
> **(2)…**
> **(3) The persistence and number of attempts made by the police before the accused agreed to committing the offence;**
> **(4) The type of inducement used by the police including: deceit, fraud, trickery or reward;**
> **(5) the timing of the police conduct, in particular whether the police have instigated the offence or become involved in ongoing criminal activity;**
> **(6) Whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;**
> **(7)…**
> **(8)…**
> **(9) The existence of any threats, implied or express, made to the accused by the police or their agents;**
> **(10) Whether the police conduct is directed at undermining other constitutional values. This list is not exhaustive."**
> **See also pages 44, 45, 46, 47, 58, 62, 67, 68, 71, 75, 76, 81, 82 and 86.**

In **State of Ohio v. Doran, 5 Ohio St. 30 187 (1983)** the Court analyzed subjective and objective entrapment.

In **Keith Jacobson v. United States**, Supreme Court of the United States 503 U.S 540 (1962) the Court held at page 9 that:

> **"In their zeal to enforce the law, however, Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute….Where the Government has induced an individual to break the law and the defense of entrapment is at issue, as it was in this case, the prosecution must prove beyond reasonable doubt that the Defendant was disposed to commit the criminal act proper to first being approached by Government agents".**
> ***See also pages 5 and 7.***

In the **People of the State of New York v. Edward D. Isaacson, Court of Appeals of New York, 44 N.Y. 2D 511 (1978)**, the Court held at page 4;

> **"that even when entrapment is not established, the Court may be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction."**

What are the facts in this petition?

According to **Mr. Jeremiah Kaluma Buchianga** from Kenya Anti-Corruption Commission, he was assigned to investigate an alleged grabbing or acquiring of a piece of land LR. NO.209/16441meant for Racecourse Primary School in Nairobi by an individual developer. On 13th march 2007 the head teacher of Racecourse Primary School **Mrs. Gitonga** sent him a document which he had earlier requested with a message that the proprietor **Northern Construction Company** wanted to meet him. He alleges that on the same day he received a call on his cell phone from a man who identified himself as Sheikh with a view to meet him in town. They agreed to meet in town but **Mr. Buchianga** equipped himself with a tape recorder to record the conversation between him and the said Sheikh.
After preparing the tape recorder and all the necessary steps, **Mr. Buchianga** called **Mr. Sheikh** so that they could meet on 14th March 2007 at Hilton hotel. Together with other officers they proceeded to town and met **Mr. Sheikh** at Stanley along

Kimathi Street. **Mr. Buchianga** then secretly switched on the tape recorder and began by asking Sheikh why he had called him. It was then **Mr. Sheikh** asked him to make a favourable investigation report about the acquisition so that the land could not be repossessed from him. In return for such a report he promised to do anything that was asked for. It is alleged that the agent engaged in a mock bargaining that led to settling of 1 million shillings payable in two installments of Kshs.500,000/= each. It was then agreed the first installment would be paid the following day. On 15th March, 2007 together with five other officers, **Mr. Buchianga** proceeded to an agreed venue with a view to arrest **Mr. Sheikh** if he bribed him as he promised the previous day. **Mr. Sheikh** who is the petitioner herein arrived at the scene and allegedly gave a brown A4 size envelope which contained Kshs.500,000/=. He was promptly arrested and charged with three counts namely;

Count 1: Offering a benefit contrary to section 39(3((b) as read with Section 48(1) of the Anticorruption and Economic Crimes Act, No.3 of 2003. Particulars of the offence
Mohamed Koriow Nur: On 14th day of March, 2007 at Sarova Stanley Hotel, along Kimathi street within Nairobi area, corruptly offered a benefit of Kshs.1,000,000/= to Mr. Jeremiah Kaluma Buchianga, an investigator with Kenya Anti-Corruption Commission, as an inducement to prepare a favourable report in respect of an investigation on the allocation of a parcel of land LR. Number 209/16441, whose allocation was subject to investigation by the said Commission a matter in which the said Commission was concerned.

Count II: Offering a benefit contrary to section 39(3) (b) as read with section 48(1) of the Anti Corruption and Economic Crimes Act, No.3 of 2003

PARTICULARS
Mohamed Koriow Nur: On 15th day of March, 2007 at Home Park Caterers along Harambee Avenue within Nairobi area, corruptly offered a benefit of Kshs.500,000/= to Mr. Jeremiah Kaluma Buchianga, an investigator with Kenya Anti-Corruption Commission, as an inducement to prepare a favourable report in respect of an investigation on the allocation of a parcel of land LR. Number 209/16441, whose allocation was subject to investigation by the said Commission a matter in which the said Commission was concerned.

Count III: Giving a benefit contrary to section 39(3) (b) as read with section 48(1) of the Anti Corruption and Economic Crimes Act, No.3 of 2003.

PARTICULARS
Mohamed Koriow Nur: On 15th day of March, 2007 along Wabera Street within Nairobi area, corruptly gave a benefit of Kshs.500,000/= to Mr. Jeremiah Kaluma Buchianga; an investigator with Kenya Anti-Corruption Commission, as an inducement to prepare a favourable report in respect of an investigation on the allocation of a parcel of land LR. Number 209/16441 whose allocation was subject to investigation by the said Commission a matter in which the said Commission was concerned.

It is the Petitioner's case that in mid March 2007 he received several calls from a gentleman who introduced himself as **Buchianga** who stated that he was an investigator with Kenya Anti Corruption Commission. It is contended that the said officer informed the Petitioner that he was carrying out an investigation with respect to the allocation of the land adjacent to Racecourse Primary school. The said agent insisted that the petitioner must meet him, otherwise he would write his investigation report in such a manner as to implicate him in alleged fraud and in acquisition of the land. **Mr. Buchianga** further intimated to the petitioner that his report was dependant was whether the petitioner reached an agreement with him or not. As a result the petitioner met with **Mr. Buchianga**. It was then that **Mr. Buchianga** turned the conversation in the direction of performance and reward when he talked of what he could do for the Petitioner. The said officer also confirmed to the petitioner that what he proposed to do did not constitute an offence and that he would not be charged. The petitioner's advocate made a lot of reliance on the conversation between the agent which took place on the 14th March 2007. It is contended that at the point of engaging in the conversation the petitioner was not under investigation by KACC or anyone else in regard with the offence of corruption or any other offence. It is also contended at the time, neither the police nor anyone else had reason to suspect that the petitioner was involved or engaged in an act of corruption. In addition none of the petitioner's properties or his assets were under any form of threat, therefore the petitioner had no motivation or reason to bribe or offer any inducement to anyone. It is therefore contended that the respondent had no reason to set in motion the process of investigating the petitioner by the use of agent provocateurs or otherwise at all.

Mr. Macharia learned counsel for the petitioner submitted that the conduct of **Mr. Buchianga** as set out in the conversation was clearly unjustified, illegal and amounted to a clear case of entrapment. The behavior or conduct exhibited by the said officer amounted to entrapment for the following reasons;

(a) He undeniably committed an offence with a view to inducing an innocent citizen to commit a related offence so that he could then charge him with that offence;
(b) He induced, coerced and enticed an innocent party to discuss a transaction that he later claimed amounted to an offence which the person would otherwise not have committed, and

(c) The conduct amounts to a general testing of the virtues of innocent members of the public by the state which is not permissible.
Mr. Macharia learned counsel for the petitioner extensively referred to the conversation between his client and the agent and concluded that the same amounted to entrapment which was not intended by his client.

In order to understand whether there was entrapment and whether the petitioner had the intention to commit the charges that were preferred against him, it is pertinent to quote some parts of the conversation. It is important to understand the conversation was conducted in Kiswahili. Hereunder are some of the pertinent issues and discussions which goes to the substratum of the

application for my determination.
Jeremiah: Kwa sababu wewe ndiyo umeeniita (It is you who called me)

Nur : Vile mimi nasema (what I am saying)
Jeremiah : ama uko na maneno yoyote wewe useme (If you have anything/issue, you say)

Nur: Maneneo kama gani (what issue)
Jeremiah: Mmh

Nur : Manene gani (repeats what issue)
…..

Nur: Na mimi nataka

Jeremiah: Mmh
Nur: ile unaweza andika hii maneno report nzuri (write a good report)

Jeremiah: mmh
Nur : Ee sio lazima ukate (It is not must)

Jeremiah : Eee, unajua wakati watu wanaongea (you know when people are talking)
Nur : Mmh a, ah, sikiza (listen)

Jeremiah: Unajua sasa wewe ndiyo mwenye shida (you know, it is you who has a problem)
Nur: Wewe Ndio mwenye shida mzee ndiyo

Jeremiah : Na mimi nimekuja kwa sababu nimekuamini (I came because I trust you)
Nur : Ndiyo (Yes)
….
Nur : Hata kama wewe nafunga mimi shauri yako vile mimi nasema
(If you charge/arrest me, it is upto you)

Jeremiah : Sasa nikufunge kwa nini?(where would I arrest you)
lNur: nasema (what I am saying)

Jeremiah: Kama unataka kitu Fulani (If you want something)
Nur: Mmh

Jeremiah : Wewe ndio unasema (It is you to say)
Nur: Eee

Jeremiah: Si ndiyo hiyo sasa
Nur: Alafu

Jeremiah: Si ndiyo sasa
Nur: Eeh
Aah

Jeremiah : (laughs) eeh mzee najua naweza haribu kazi (you know, I can spoil my work)
Nur: Halafu unaandika report mzuri (write a good report)

Jeremiah: Unajua naweza haribu kazi mzee
Nur: Unaandika ile report mzuri (write a good report)
…..

Nur: Kwa hivyo ile kitu mimi naomba wewe fanya….wacha tumalize. (Do what I am asking for and let us finish)
Jeremiah; Sisi naweza fanya, yaa (I can do it)

Nur: …(unclear)…..ngoja kidogo.
Jeremiah: Lakini sikiza nikuambie (listen I tell)

Nur: Mmh
Jeremiah : nafikiri hatuelewani (we are not understanding each other)

Nur: Kwa nini? (why)
Jeremiah; Sisi naweza fanya. Hiyo kitu umesema, hiyo unataka

Nur: Ndiyo (we can do what you want)
Jeremiah: Lakini ile upande mwingine sasa…(what about the other side)

Nur : Mimi niko tayari (I am ready)
Jeremiah : Lakini hujaniambia vile uko ready (you have not told me how you are ready)

Nur : Unajua….mimi niko ready. Wewe ndiyo nani unakae nayeye, unasema nani, watu ngapi, wewe ndiyo utafanya budget yako

Jeremiah : Si budget (Budget)

Nur: Mmmm
Jeremiah : Naangilia uzito wa kesi (Look the weight of the work)

Nur: Uzito wa kesi (weight of work)
Jeremiah : Eeee

Nur : Sasa unataka ngapi (How much do you want)
Jeremiah : (laughs) unataka ngapi? Siwezi kukuambia usione kama niko na nanii sana (I cannot tell you so that)

Nur: Sasa utaongea (Let's talk now)
Jeremiah: Aaa aa unajua wewe ndiyo uliinita na nataka kujua ile kitu umeniitia.

Nur: Unajua mimi (You know you are the one who called me. I would like to know the reason).
Jeremiah: Hivyo ndivyo inafanyagwa.
…..

Jeremiah; Sitaki uone mzee kama niko na haja ya kuumiza mzee sana (I do not want you to see that like I am oppressing/hurting you)
Nur: Hapana hapana (I told you)

Jeremiah: na nilikwambi
Nur: Wewe sikia wewe ni mu-meru wewe ni mtu wa kwetu

Jeremiah: Ehe
Nur: Unaelewa

Jeremia: Yaa
Nur; Sasa wewe ongea, ongea na roho mzuri, mimi hapana niko mahali na finya (talk in good faith)

Jeremiah: Wewe nataka useme ndio nikuambie kama ni sawa ama si sawa (I want to say so that I can tell/say whether it is OK or not)
Nur: Mimi nasema

Jeremiah: Mmmm
Nur: Ile wewe …

Jeremiah: Mmm
Nur; Sasa ile wewe unajua…(unclear)

Jeremiah: Mmmm
Nur: Unajua sasa unajua

Jeremiah: Ehe
Nur: Unajua sitaki nizungumze alafu unifanyie hiyo kitu ni makosa nimefanya (I would not like to talk and then, I have committed an offence)

Jeremiah; Ehe
Nur; Sio hiyo ni mbaya (That is bad)

Jeremiah: Kivilpi?(How?)

Nur: Unajua….pesa Fulani ile inakua.
Jeremiah: Mmmm

Nur: Unajua itakuwa imetoka
Jeremiah: Aa aa sisi tuko na wewe hapa sisi wawili (We are here the two of us)

Nur: Aah
Jeremiah: Mmmm

Nur: Nikupe five hundred?(I give five hundred)
Jeremiah: Five hundred thousand?(Five hundred thousand)

Nur: Mmmm
Jeremiah: Aah Mzee unajua…okay unasema ulilipa ngapi hiyo kiwanja?(You are saying you pay how much for that land).

Nur: Kwa hiyo nililipa milioni kumi
Jeremiah: Milioni Kumi?

Nur: Eee
Jeremiah: Na unaongea juu ya five hundred thousand (you are talking about five hundred thousand)

Nur: Lakini sasa, iko watu wengine pia wako. Iko wakubwa, iko wengine wanatokea. Sio eti mtu mmoja peke yake.

Jeremiah: *Na usha wa fanyia kitu* (you have done something for them)

Nur: *Nani huyo* (Who is that?)
Jeremiah: *Hii wa City hall*

Nur: *Kufanyia maana yake nini* (to do what for them)
Jeremiah: *Mimi nasema wamejitokezea kufanya namna gani.*

Nur: *Mimi najua hiyo kitu, hakuna mtu, kitu hata Mtoto ukizaa umfuate bibi. Hakuna kitu mtu anaweza fanya peke yake.*
Jeremiah: *Ye nyewe mpaka usaidiwe* (until you are assisted)

Nur: *Kwana uki*
Jeremiah: *Mpaka msaidiane.*

What is the respondent and affected party's position on the issues raised by the petitioner? Their position is that the petitioner prima facie and without doubt bribed **Mr. Jeremiah Buchianga** and the petition is an attempt to delay the trial of the criminal case. They also contend that there was no entrapment of the petitioner by **Mr. Buchianga**. And that the petitioner was charged upon confirming the sufficiency of the evidence obtained by KACC. I have read all the documents, affidavits, submissions and authorities submitted by the parties herein. I have also scrutinized the conversation between the petitioner and Mr. Buchianga in detail in order to understand and determine the issue in dispute. Having done so, I make the following determination.

In all disputes, the role of the court is to stand between the State and its citizens and make sure that one does not cross the dotted lines without reasonable and proper explanation. The law is that it is not acceptable that the State through its agents should instruct its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. That could be a misuse of State of power and an abuse of the process of the court. The unattractive consequences, frightening and sinister in extreme cases which the State conduct of this nature to have are obvious. No doubt, the Kenya Anti Corruption and Economic Crimes Commission whose agent tape recorded the conversation of 14th March 2007, is a creature of the statute, their activities must be confined to the four corners of the Act. It is an act for prevention and not conceptionalizing for purposes of entrapping people. Section 7 of the Kenya Anti-corruption and Economic Crimes Act, the function and the purpose of the Commission is to investigate. The question is whether conceptionalizing or creation of an offence for purposes of entrapping citizens is one of the components of its functions. Section 7(1) (d) the Commission is to advice and assists on the ways in which a person's they eliminate corrupt practices. It is also clear under section 7(1) (g) that the Commission has a responsibility to educate the public on the dangers of corruption and to enlist and foster public support in combating corruption and economic crimes. The petitioner says that he was informed an agent was looking for him and the telephone number was given to him by the headmistress of the school. The Petitioner says he sought the assistance of the agent and that is what **Mr. Macharia** called germane to the issues set down for my determination.
From the conversation, it is clear that it is the agent who is probing the Petitioner to come up with something which is not known to the Petitioner. The applicant is at loss of what he is being asked by the agent. The applicant is also prepared for the worst if he has done anything wrong but the agent makes it clear the applicant is not a suspect for any offence**. Mr. Macharia** learned counsel for the Petitioner submitted that from the conversation it is clear that the agent is the one repeatedly inviting the Petitioner to do something he did not intend to do. He referred me to one of the conversations where the agent says we are not understanding each other**. Mr. Macharia** also submitted that the Petitioner did not have *mens rea,* the intention to bribe the agent which is a component of a crime. He also contended that the agent found a citizen who had no intention of committing a crime and that the agent planted the intention in his mind**. Mr. Macharia** submitted that the request by the Petitioner for the agent to write a good report does not necessarily mean that the applicant was asking for a false or a distorted report. He also contended that there was no single evidence saying that the applicant acquired the land illegally since the land did not actually belong to him.

Essentially, entrapment is a complete defence and it does not matter that the evidence against the person is overwhelming or that his guilt was undisputed. The court must refuse to convict an entrapped person not because his conduct falls outside the proscription of the statute but because even if his guilt is admitted, the methods and manner employed on behalf of the State to bring about the evidence cannot be countenanced.
In law entrapment is viewed as a type of lawlessness by law enforcement officers. It is a substitute for skillful and scientific investigations. It is a tactic which is rationalized under the theory that the end justifies the employment of the illegal means.
Entrapment occurs if the action or the omission of the investigating officer in dealing with a person would likely have induced a normally law abiding citizen to commit a crime which he would not have committed if the normal and the requisite warning was administered. Because entrapment usually depends on the conduct of the State agent, the courts will not take into account the defendant's conduct, character, intent or criminal history. In doing so, the court must address itself to the various surroundings and peculiar circumstances such as transactions, receding the offence, the suspect's response to the inducement, the gravity of the offence and the difficult of detecting the commission of certain crimes.

In my view, every law abiding citizen would likely commit a crime if sufficiently motivated. In determining whether entrapment occurred, it is important to analyze and scrutinize how much and what manner of persuasion, pressure and cajoling was brought to bear by the law enforcement agent to induce persons to commit crime. Entrapment entails;

(1) The use of one pressure
(2) Creating an unusual motive
(3) Making the crime unusually attractive
(4) Creating an opportunity to commit a crime.
(5) Criminal plan originated by State agents.
(6) Gaining the confidence of the accused by taking reasonable steps to assure that the person was not being set up.
(7) Outrageous police conduct.

It has been submitted by **Mr. Macharia** that it is the State agent who commences the request for the bribe and by doing so, he breached a cardinal principle of law which was to warn the suspect and have a disclaimer in place. Here the suspect was not a habitual criminal and there is no evidence that he was under investigation for any offence. No doubt the applicant was never charged with any crime and was never investigated for bribery before the current incident. It means there was no reason to believe that he was involved in criminal activities which the agent was interested to discover. From the conversation it is clear that it is the State agent who is couching the applicant as to how the crime is to be committed. The agent states;

"naangalia uzito wa kesi"

meaning that in making an offer you must have in mind the nature, the weight and the volume of the case. It is the State agent who is couching the applicant by asking him for an offer for the issue to be concluded. Clearly, it is the State agent who made persistent and consistent extraction from the applicant so that the request could be resolved. The applicant makes it very clear, that he does not want to break the law.

It cannot be too strongly emphasized that is wholly wrong for a police officer to induce a person to commit an offence in order that an offence may be detected by the said officer. It is not also right that the Kenya anti Corruption Commission should instruct, allow or permit and direct its officers to commit an offence so that they can prove that another person committed an offence. The respective part of the conversation earlier quoted is a clear testimony that the agent played significant or a leading role in the commission of the crime that was preferred against the petitioner herein. There is no ground for saying that the Petitioner had originally intended to commit the crime which he was charged with. The assurances of the said agent whose sole aim and intention was to disarm the applicant of his care and caution towards him, is a material aspect in the commission of the crime subject of this determination. From the moment the State agent disarmed and gained his confidence, the Petitioner ceased to be cautious and was motivated to commit the three counts subject of this determination. In law where a police officer persuades someone to commit an offence he may lay himself open to adverse comments from the court. As already stated, judicial response to entrapment is based on the need to uphold the rule of the law. An accused person is not excused because he is less culpable although he may be, but because the State agent behaved improperly. In my view, the State created crime is unacceptable and improper. To prosecute in such circumstances as the case of the Petitioner would be an affront to the public conscience as such a prosecution would not be fair. It is not the role of State agent to lure, incite, instigate or assist in the commission of a crime which was not initially intended by the accused person. The important questions to be answered in addressing the issue of entrapment and the bar against self incrimination.

(1) Was the petitioner entitled to the sanctuary of silence if the State agent was in possession of evidence incriminating him in the commission of a crime?
(2) Is it sufficient that he was a potential not to distort and distract a candidate who was concerned with the commission of a c rime.
(3) Does the bar against self incrimination operate merely with reference to a particular acquisition in regard to which the police investigator interrogates?
(4) Was it right for the State agent to expose the Petitioner to the perils of inculpation?
(5) Does the constitutional and statutory shield of silence swing into action or can it barricade an accused person against incriminating interrogation at the stages of police investigation?
(6) What other parameters of permissible and impermissible interrogation and answers?

The express terms of section 78, 79, 80 and 84 of our repealed Constitution cover the issues raised by the Petitioner. The express provisions cover, not merely, charges already registered in the police stations but those which are likely to be the basis for exposing a person to a criminal charge. Instances which will eminently expose a person to criminal charges must be addressed with caution and care. Any giving of evidence, furnishing of information and tape recording is likely to have an incriminating impact answers, the description of being a witness against oneself. In a way, this position brings me nearer to the mantle of exclusion which extends the right against self incrimination to the police examination and custodial interrogation and takes suspect as much as regular accused persons on the same line. In my view, the first obligation of criminal justice system is to secure justice by seeking and substantiating through proof. Of course the means must be as good as the ends and the dignity of the individual and the freedom of the person cannot be sacrificed by the result, however worthy the ends.

We have to draw up clear lines between the whirlpool and the rock so that the safety of the society and the worth of human persons may co-exist in peace. It is not admissible to do a great right by doing a little wrong or transgressions on a individual fundamental rights. It is not sufficient to do justice by obtaining a proper result but through irregular and improper means involving the fragrant violation of the basic and minimum rights of the accused or suspect. Such a procedure or method tends to make police and prosecutors less zealous in the search for the objective and dispassionate evidence. It is a short cut which makes the State agents lazy and un-enterprising. It also lowers and erodes the steam in which the administration of justice is held by the public. No doubt that the Petitioner was put into an unfamiliar atmosphere and through friendly but sometimes menacingly police interrogations which had the potentiality for compulsion was made to make invitations, requests and offers which he did not intend. The State agent did not afford appropriate safeguards at the outset of the interrogations so that the intention to commit the crime was not planted upon the accused person. In my view, if an accused person is asked to explain his apparent connections with a crime under investigation, the questions put to him may assume inquisitorial character resulting in temptation to commit the crime. The temptation to place an accused person unduly to borrow beat him if he be timid or push him to a corner and to entrap him into a fatal contradiction which is so painful, makes the system of investigations so odious as to give rise for demand for its total abolition. The constitutional guarantees, belt into circumstances, where evidence is obtained in improper and unlawful manner, is the concern of this court and for this purpose, concrete directions must be spelt out. To leave the situation fluid after a general discussion may not be proper where gloomy realities in the dark recess of the law has to perform. Law is what law does and not what the law says. This realization obligates us to set down concrete guidelines to make the law a working champion of life. I am afraid I cannot give any guidelines save what is necessary for this determination.

The applicant has maintained that he had no previous convictions and would never have committed the offence, had it not been

for the intervention of the State agent. It is clear that the applicant had no criminal record and no preliminary investigations concerning him had been opened. Indeed he was not known to the officers allegedly investigating the grabbing of the school land. In such circumstances the use of undercover agents must be restricted and safeguards put in place even in course of cases concerning the fight against land grabbing. While the rise in organized crime undoubtedly requires appropriate measures be taken, the right to a fair administration of justice nevertheless holds such a prominent place, that it cannot be sacrificed for the sake of expedience. In any case, a distinction had to be drawn between cases where the undercover agents' action created a criminal intent that had previously been absent and those in which the offender had already been predisposed to commit the offence. In the instant case, it is necessary to determine whether or not the agent's activities went beyond that of undercover agent trying to uncover an offender who had already a predisposed intent to commit the offence. The necessary inference from the circumstances is that the State agent did not confine himself to investigating the applicant's criminal activities in an essentially passive manner but exercised an inference such as to incite the commission of an offence. There is nothing to suggest that without the intervention of State agent, the applicant would have committed the offences charged. That intervention and its use in the charges meant, that right from the outset the applicant was definitively deprived of a fair trial.

I agree that there are occasions when it is necessary for the police to resort to investigatory techniques in which the police themselves are the reporters and the witnesses of commission of a crime. Sometimes the particular techniques adopted is acceptable, sometimes it is not. For even when the use of these investigatory techniques is justified, there are limits to what is acceptable. All in all, in order to bring the evidence collected within the inhibition clause, it must be shown, not only that, the person making the statement was an accused at the time he made it and that it had a material bearing on the criminality of the maker of the statement but also that he was compelled to make the statement. What is clear is that the State agent conditioned the mind of the applicant to some extraneous process as to render the making of the conversation involuntary and therefore extorted and distorted. The police must understand and appreciate that each individual by virtue of his guaranteed dignity, has a right to a private enclave, where he may lead live without overbearing investigatory invasion or even crypto-coercion administered against him. That is basic or minimum guarantee afforded to all persons in our Constitution.

It has been submitted by **Mr. Mule** learned counsel for the State that the reference to entrapment is tantamount to asking the High Court to adjudicate the criminal case and that the High Court cannot do so. He also contended that this court does not have any evidence and the issues being raised can and should be properly raised before the trial court where parties would have the opportunities to cross examine and challenge the production of evidence. He further contended that by asking this court to determine the issues is an attempt to take over the trial before the lower court. It was the submission of **Mr. Mule** that it is for the trial court to construe the purport and purpose of the conversation. All the issues raised are the issues for determination before the lower court. My answer is that if the police can interrogate to the point of self incrimination, the subsequent exclusion of that evidence at the trial hardly helps because the harm has already been done. The police will prove through other evidence what they have procured through entrapment which would in essence defeat the right to a fair trial. In my view self-incrimination testimony is obviated by intelligent constitutional mechanism and anticipation. It goes without saying that the police must act in good faith and not for example, as part of a malicious vendetta against an individual. Having reasonable ground for suspicion is one way, good faith may be established but having grounds for suspicion of a particular person is not always essential. The greater the inducement held out by the police and the more forceful or persistent overtures, the more readily a court would conclude that the police overstepped the boundary. The conduct of a police officer may have brought about commission of a crime by a person who would normally avoid crime of that kind. In assessing the weight to be attached to police inducement and incitement, regard is to be had to the suspect's circumstances including his vulnerability. The facts in this case are that the State agent lured the Petitioner into committing an act forbidden by law for which the State is now seeking to prosecute him. The criminal justice system, in my humble view would be compromised by allowing the State to prosecute and punish someone whom its agent has caused to transgress or expressly or impliedly participated in the commission of the crime. The question is not whether the criminal proceedings would be a fair determination of guilt but whether they should have been brought at all. In **Amato vs The Queen (1982) 69CCC** it was held;

"The repugnance which must be experienced by a court on being implicated in a process so outrageous and shameful on the part of the State cannot be dissipated by the registration of a conviction and the imposition afterwards of even a minimum sentence. To participate in such injustice upto and including a finding of guilt and then to attempt to undo the harm by the imposition of a lighter sentence, so far from restoring confidence in the administration of justice, would contribute to the opposite result."

In my view, it would be deeply offensive to ordinary notions of fairness, if the petitioner were allowed to go for trial, convicted and punished for committing a crime which he only committed because he had been incited, instigated, persuaded or pressurized into committing it, by a State agent. In short, it is the State agent who had given the Petitioner the opportunity to break the law. There is no evidence to show that the Petitioner would have behaved in the same way, if the opportunity and the assurances had not been offered to him by the State agent. The ultimate question which must always be addressed is whether the administration of justice will be brought into disrepute because the process of the court is being used to prosecute for an offence that was artificially created by the misconduct of a State agent. In addressing and determining that question, the court must have in mind;

(1) Whether the conduct of the State agent induced the offence.
(2) Whether the State agent had reasonable grounds for suspecting the accused was likely to commit the particular offence or a similar offence and that the agent was acting in the course of a bona fide investigations.
(3) Whether before the inducement the accused had the intention of committing the offence or a similar offence if an opportunity arose in the absence of the State agent.
(4) Whether the offence was induced as a result of persistent opportunity, threats, deceit, offers of reward or other inducement that would not ordinarily associated with the commission of the offence.

Taking into consideration the above factors, this court concludes that the actions and conduct of **Mr. Buchianga** went beyond those of undercover agent because he instigated the offence and that there is nothing to suggest that without his intervention and participation, the offence would have nevertheless been committed. As they say, one touch of nature which makes the judges keen is the love of justice in action and concern for human values and dignity. This concern has made judges to maintain a fair State where the rights of the members of public and that of individuals are cautiously balanced. The court must broaden

fundamental rights to fulfil human dignity and universal enjoyment of rights. Consequently the court must outlaw illegitimate and unconstitutional procedures before they find their firm footings. In my humble view the silent cause of the final fall of the tall tower is the first stone obliquely and obliviously removed from the base. It is a guarantee, dignity and integrity and the inviolability of the fundamental rights of the individual. In short the police must not be allowed to use a sneaky strategy of foul methods in order to achieve ulterior motives. I hope the day is far distant when it will become a practice in this country for police officers to be told to commit the offence themselves for the purposes of getting evidence against someone. If they commit the offence, they ought to be charged, convicted and punished because they are accomplices in the commission of a crime. I think, I have said sufficient to drive home the anxious point that the cherished principle which prescripts compulsory self accusation or incrimination should not be dangerously overbroad or allowed as in this case. Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle, court ensures that the Executive agents do not misuse the coercive and law enforcement actions and thereby oppress citizens of the State. Entrapment with which this application is concerned is an instance which misuse may occur.

As earlier stated the role and duty of the court is to stand between the State and its citizens and make sure injustice does not occur. If it happens, the courts must intervene in favour of the citizens to ensure there is a possibility of a playing ground which is open and even to the two players. In this case the court must intervene in favour of this indigent and illiterate pastoralist who was entrapped by inducement and opportunities created by the State agent. The applicant was not made aware of the essential contents of the protective provisions of the Constitution, Penal Code and the criminal Procedure Code, which he was entitled as a matter of right. He was unversed in the arcane implication of his conduct and that of the State agent. His consciousness of his rights was nil. May be that was actuated by his lack of education or his origin from a place where legal service is rare or nonexistent. That may have motivated the State agent to behave in the manner he proceeded against the applicant. Nonetheless, it was illegal and unlawful. It cannot stand. The applicant was not made aware of his basic fundamental and essential rights. There is no substitute to the inalienable rights bestowed upon the applicant by our Constitution. It cannot be taken away in any manner whatsoever and howsoever, the State thinks of his conduct. It is universal to all Kenyans including this pastoralist. Consequently the prayers in the Petition dated 20th April 2010 be and is hereby allowed with no orders as to costs.

Dated, signed and delivered at Nairobi this 30th day of September 2011.

M. WARSAME
JUDGE