- ***Fundamental rights and freedoms***
- ***Jurisdiction***
- ***Director of Public Prosecutions,***
- ***Legality of Office,***
- ***Power to prosecute,***

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

H.C. CIVIL CASE NO. 1176 OF 2004

KAMAU JOHN KINYANJUI …………………………….….……….. PLAINTIFF

V E R S U S

THE HONOURABLE THE ATTORNEY GENERAL…………….. DEFENDANT

JUDGEMENT OF NYAMU & EMUKULE JJ

This Judgement relates to the Originating Summons dated 29-10-2004 and filed on 1-11-2004 by the Applicant, Kamau John Kinyanjui (*hereinafter called "the Applicant")* against the Attorney-General in respect of the decisions of our brothers B.P. Kubo J. and L. Kimaru Ag. J. delivered on 24th September, 2004, in which they enhanced the Applicant's sentence from that of a fine to a custodial sentence of four (4) years in addition to the fine imposed by the Lower Court.

The application is expressed to be brought under the provisions of Section 3, 60, 70, 72, 77 and 84 of the Constitution, the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual Practice and Procedure Rules 2001, the Judicature Act, the Civil Procedure Act (***Cap 21, Laws of Kenya***), and enabling provisions of the law, for:-

(i) ***Determination of the following Questions***

(a) Whether the office of "**Director of Public Prosecutions"** assuming operations at the Attorney General's office is established as an office in the Public office at all material times to the institution, hearing and determination of High Court Criminal Appeal No. 544 of 1999 as consolidated with (Criminal Revision Number 13 of 1999 at Nairobi);

(b) Whether the Office of Director of Public Prosecutions properly, lawfully represented the Republic and lawfully conducted on behalf of the Republic the said Criminal Appeal Number 544 of 1999 as consolidated with Criminal Revision Number 13 of 1999 at Nairobi was unconstitutional, illegal, void and of no effect;

(c) whether the prosecution on behalf of the Republic by the said

"Director of Public Prosecution" of the said Criminal Appeal Number 544 of 1999 as consolidated with Criminal Revision Number 13 of 1999 at Nairobi violated the Applicant's fundamental rights under Section 70, 72, 77 and 79 of the Constitution;

(d) whether the Applicant's fundamental rights as enshrined in Section 70, 72, 77 and 79 of the Constitution have been violated in the said Criminal Appeal Number 544 of 1999 as consolidated with Criminal Revision Number 13 of 1999 at Nairobi;

(e) whether the judgment and Orders made in the said Criminal Appeal No. 544 of 1999 as consolidated with Criminal Revision Number 13 of 1999 at Nairobi violate the Applicant's fundamental Constitutional rights stated above and the rules of natural justice and deprive the Applicant of his liberty without the due process of the law;

(ii) **FOR ORDERS THAT**

(a) A declaration that the judgment and orders of the High Court made on the 24th of September, 2004 and 8th October, by Hon. Justice B.P. Kubo and L. Kimaru Ag. J) committing the plaintiff to prison for contempt of court in Criminal Appeal Number 544 of 1999 as consolidated with Criminal Revision No. 13 of 1999 was a violation of the Applicants' fundamental rights under Section 70, 72, 77, and 79 of the Constitution of Kenya;

(b) A declaration that the Ruling and Order of the High Court (B.P. Kubo J. and L. Kimaru Ag. J.) made on the 24th September, 2004 and 8th October, 2004 in the said Criminal Appeal Number 544 of 1999 as consolidated with Criminal Revision Number 13 of 1999 at Nairobi was unconstitutional, illegal, void and of no effect;

(c) an order that the Plaintiff/Applicant be released from custody forthwith;

(d) general damages

(e) on such other orders, writs and/or directions as are just and appropriate to safeguard the Constitutional rights of the Plaintiff/Applicant's fundamental rights under Section 70, 72, 74, 77 and 79 of the Constitution of Kenya;

(f) Costs and interest where applicable.

The Originating Summons was supported by the Affidavit of the Applicant sworn on 29th October, 2004, and the following six grounds, namely;-

(i) that the Hon. Judges B.P. Kubo J. and L. Kimaru Ag. J. in sentencing the Plaintiff Applicant to prison while altering sentence in High Court Criminal Appeal Number 544 of 1999 as consolidated with Criminal Revision Number 13 of 1999 acted without regard to the due process of law;

(ii) that the Honourable Judges B.P. Kubo J. and L. Kimaru Ag. J. in sentencing and committing the Plaintiff and Applicant to prison while altering sentence in Criminal Appeal Number 544 of 1999 as consolidated with Criminal Revision Number 13 of 1999 acted pursuant to a trial whereby the Applicant was not afforded a fair hearing by an independent and impartial court established by law inter alia by the delegation of the constitutional prosecutorial powers of the Attorney General to non-existing office and/or person in the Kenya Constitution, statutes and public office, namely the Director of Public Prosecutions.

(iii) that the Honourable Judges B.P. Kubo, J. and L. Kimaru Ag. J. in sentencing and committing the Plaintiff/Applicant to prison in High Court Criminal Appeal Number 544 of 1999 as consolidated with Criminal Revision Number 13 of 1999 violated the fundamental constitutional rights of the applicant;

(iv) that the Honourable Judges B.P. Kubo, J. and L. Kimaru Ag. J. in sentencing and committing the Plaintiff/Applicant to prison while altering sentence in High Court Criminal Appeal Number 544 of 1999 as consolidated with Criminal Revision No. 13 of 1999 acted in breach of the rules of natural justice;

(v) that the Applicant shall suffer irreparable loss and damage and that the Originating Summons the subject of this judgment may be rendered nugatory if a conservatory order is not granted;

The Supporting Affidavit sets out in thirty (30) paragraphs the evidence in support of the above captioned grounds, and in so far as concerns the substance of this judgment on factual and other legal grounds, paragraph 16 is, in our view material and it says-

(16) **THAT** ……… during the hearing of the said Criminal Appeal and revision, I did not receive a fair hearing by an impartial court in that:-

(a) Criminal Appeal No. 544 of 1999 had received negative publicity by the press ……. depicted me as a heinous| crook – which negatively impacted and influenced the court in the said appeal and revision thereby approaching the hearing and judgment with a predetermined mind.

(b) it is apparent from the judgment by the comments made by the learned judges from the language used to justify enhancement of the sentence at page 41 of the judgment inter-alia the following excerpts,

(i) …….. the deceased persons, families not only lost their beloved ones but insult was added to their loss by the Appellant stealing from them what was due to them as compensation,

(ii) He did not take the opportunity. Instead he filed an appeal;

(iii) the Appellant’s action was callous in the extreme. It was also insensitive.

(c) The judges of the superior court and in particular his Lordship Acting Justice L. Kimaru, intimidated my counsel on record Mr. Ngang’a Thiong’o to abandon several substantive arguments in support of my grounds for appeal and opposition to the said revision who wilted at the hour of need after immense pressure thereby causing a miscarriage of justice to my case;

(d) that further to paragraph c hereof, the following took place during the hearing of the said appeal and revision;

(i) that during the submissions by my said Advocate Ng’ang’a Thiong’o Mr. Philip Murgor appearing as Director of Public Prosecutions kept on interrupting my said Advocate without any or any justifiable ground and the court sustained the same;

(ii) their Lordships refused and/or neglected to record several substantive arguments and grounds by my said Advocate;

(iii) when I noticed the same I urged my said Advocate to protest against the same but his Lordship Kimaru Ag. J. intimidated my said Advocate by ordering him to proceed or wind up his submissions;

(iv) that ….. my then Advocate wilted at the hour of need by giving up very arguable grounds in support of my case.

In the course of argument before us, Mr. Nyandieka learned Counsel for the Applicant cited many reported cases which we shall revert to in the course of this judgment.

The Republic was ably represented by the Director of Public Prosecutions Mr. Keriako Tobiko who

urged the Republic's case against the Applicant. He too relied upon the grounds filed herein. The other facts and background of the appeal to the two Judge Bench have been duly and fully set out in the dissenting judgment of our brother Hon. Mr. Justice Ibrahim, and we will not repeat them here. In our view, the Application herein raised three issues, namely firstly whether this court has jurisdiction to determine the issues raised in the Application, secondly, whether the Director of Public Prosecutions Philip Kipchirchir Murgor had the constitutional right to prosecute the Applicant and thirdly whether the Appellate and Criminal Revision Court did not afford the Applicant the right to a fair hearing as guaranteed by the Constitution and thereby violated the Applicant's rights under the Constitution and also breached the rules of natural justice.

In summary, our conclusions on these issues will be as follows-

(1) This court has jurisdiction to determine the question before us contrary to both the submission proffered by the learned Director of Public Prosecutions, and our brother's dissenting judgment;

(2) The office of the Director of Public Prosecutions was legally and therefore properly constituted and is validly existing in law. The Director of Public Prosecutions had both the Constitutional and Statutory power to prosecute the Applicant in the High Court Criminal Appeal No. 544 of 1999 and Criminal Revision No. 13 of 1999.

(3) The Applicant's constitutional rights and rules of natural justice were never violated.

JURISDICTION

It is said that jurisdiction goes to the very root of any action because without the investure of jurisdiction the court has no foundation upon which to act, it would be as good as a ***"Kangaroo court".*** **I**n fact this alleged lack of jurisdiction was the first point upon which Mr. Keriako Tobiko, the learned Director of Public Prosecution attacked the application herein. We therefore turn our close attention to this all important issue upon which the application lies or dies.

It was the learned Director of Public Prosecutions case that this court has no jurisdiction to enquire into the decision made by a court of concurrent or co-ordinate jurisdiction, he cited Section 60 of the Constitution which establishes the High Court as a superior court of record, which shall have or has unlimited original jurisdiction and powers as may **be** conferred on it by this Constitution or any other law. The Judges of the High Court are the Chief Justice and such other number of Judges (called Puisne judges) as may be prescribed by Parliament. The number of judges is prescribed by the Judicature Act, ***(Cap 8, Laws of Kenya)***

The learned Director of Public Prosecutions argued that once a judge of the High Court had determined a matter, no other judges or judge, of the High Court had jurisdiction to entertain any application arising from such determination by such judge or judges of the High Court. Their supervisory jurisdiction extended only to the subordinate courts or other inferior tribunals. In this regard learned Director of Public Prosecutions cited to us not less than six decided cases, and these are-

(i) Kombo -Vs- Attorney-General (1995 – 1998) I E.A. 168.

As our brother Justice Ibrahim has relied heavily on this case, in his dissenting judgment, it is necessary for us to restate the context of the decision in that case by Hon. Mr. Justice Ole Keiwua (***as he then was)***.

In that case the Applicant had been found guilty and reported for having committed an election offence by the election court. He made an application to the High Court under the provisions of Section 84 (1) and (6) of the Constitution saying, that the finding by the election court was *ultra vires* Section 10 and 44 of the Constitution which define the election court a s a court of limited jurisdiction, and that such finding infringed the Applicant's fundamental rights to a fair trial under Section 77 of the Constitution,

infringed the Applicant's right to be presumed innocent; exposed the Applicant to double jeopardy, that the Applicant was compelled to give evidence against himself and was a breach of Section 82 of the Constitution in which the Applicant was entitled to equal protection under the law. The Court held ***inter alia***

> (1) All the Applicant's complaints were criticisms on how the election court had acted and this was in the nature of an appeal which appeal did not lie to a court of co-ordinate jurisdiction as the election court and was further an attempt to circumvent the provisions of Section 44 (5) of the Constitution which provide against any appeal from all decisions of the election court . The election court had sat as a High court in terms of Section 44 (1) of the Constitution whereas the present application was made to the High Court pursuant to the provisions of Section 84 (1) of the Constitution;
>
> …… the High Court sitting pursuant to the provisions of Section 84 of the Constitution cannot override decisions of the same High Court exercising its jurisdiction under Section 44 of the Constitution;

The next case to which the learned Director of Public Prosecutions relied upon was the decision of Cullinam J, of the Supreme Court of Trinidad and Tobago in ***RAO & ANOTHER –VS- DIRECTOR OF PUBLIC PROSECUTIONS (1987) L.R. C. (Const.) 400*.** In that case the Plaintiffs /Applicants under Section 17 of the Constitution of Fiji (which is identical to Section 84 of the Constitution of Kenya) applied to the Supreme Court of Fiji for orders that they had been denied a fair hearing by an independent and impartial tribunal, as guaranteed by Section 10 of the Constitution (similar to our Section 77 of the Constitution of Kenya). The basis of the claim was that at their trial for murder before Turivaga C.J. in the Supreme Court, the Chief Justice had refused, *inter alia* their application for Change of venue. The Defendant that is, the Director of Public Prosecutions and the Attorney-General applied to have the applications struck out as vexatious and an abuse of the process of the court. The court dismissed the Applicants' application as being unsustainable and as such frivolous and vexatious, amounting to an abuse of the process of the court, since no executive or administrative acts were involved, the defendants were not proper parties; the proper respondent was the Supreme Court and, since all judges of that Court had equal power, authority and jurisdiction, one judge of the court could not review the decision of another judge of it.

In **HINDS –VS- ATTORNEY – GENERAL & ANOTHER [2002] L.R.C. 284**, a decision of the Privy Council arising out of an appeal from the Supreme Court of Barbados, construing Section 24 (1) of the Constitution of Barbados which is almost identical to Section 84 (1) of our Constitution) held-

> ***"……. It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal . As it is a living, so must the Constitution be an effective instrument. But Lord Diplock's salutory warning remains, pertinent; a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge based on constitutional grounds, has been made and rejected. ……. The appellant's complaint was one to be pursued by way of appeal against conviction, as it was, his appeal having failed, the Barbalon Courts were right to hold that he could not try again in fresh proceedings based on Section 24"***

The Privy Council construed Section 14, (identical to our Section 84) of the Constitution of Trinidad and Barbados in the case of **THAKUR PERSAD JAROOO Vs. ATTORNEY-GENERAL [2002] 5 L.R.C 258.**

In that case the Appellant ***Jaroo*** who had purchased a motor vehicle in good faith was informed by the vehicle inspectors that the motor vehicle was suspected to have been stolen, and he took it to the Police for investigation.

The police took their time, and did not reply to his or his Advocates inquiries. He decided to bring an

Originating motion as provided by the Constitution alleging violation of his constitutional right to property. In response the Attorney-General filed an affidavit stating that the engine and chassis numbers had been interfered with. The Applicant did not challenge the Affidavit, the court of first instance dismissed the constitutional motion, holding that the appellant had failed to establish that he was entitled to possession of the motor vehicle, he had in view of the uncontroverted evidence been unable to prove that the vehicle was his property; it was also for the authorities having discovered that the vehicle was stolen, lawful to detain the vehicle to enable the authorities to conduct the enquiries, and to preserve it as an exhibit for evidential purposes. The Court of Appeal dismissed the appeal and raised the question whether, when there was an obvious available common law remedy, a constitutional motion was an appropriate route for the Appellant's application. On further appeal to the Privy Council, the Privy Council held at 273 of their decision **inter alia -**

> ***"…… the appropriateness or otherwise of the use of the procedure afforded by Section 14 (1) must be capable of being tested at the outset when the person applies by way of originating motion to the High Court. All the court has before it at that stage is the allegation. The answer to the question whether or not the allegation can be established lies in the future. The point to which Lord Diplock drew attention (in*** *Harritison –Vs- Attorney General (1979) 31 WIR. 348 at 349****)*** ***was that the value of the important and valuable safeguard that is provided by Section 14 (1) would be diminished if it were to be allowed to be used as a general substitute for the normal procedures in cases where those procedures are available. His warning of the need for vigilance would be deprived of much of its value if a decision as to whether, resort to an originating motion was appropriate could not be made until the Applicant had been afforded an opportunity to establish whether or not his human rights or fundamental freedoms had been breached***
>
> ***. ……. their Lordships respectfully agree… with the Court of Appeal that, before he resorts to this procedure, the Applicant must consider whether having regard to all the circumstances of the case, some other procedure either under the common law pursuant to statute might not more conveniently be invoked. If another such procedure is available resort by way of originating motion, will be inappropriate and will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse."***

The Privy Council concluded…. *that they agreed with the Trinidad of Tobago Court of Appeal that for the appellant to proceed in this case by way of a Constitutional motion was an abuse of the process, and that the appellant was not entitled to a declaration in these proceedings that his* ***constitutional rights have been infringed, and the appeal was dismissed."***

The learned Director of Public Prosecutions relied upon the case of Lady Justice ***Roselyn Naliaka Nambuye, High Court Misc. Application No. 264 of 2004****)* on the narrow point of **Waiver** in which Nyamu, J. held that the Applicant having taken part in the proceedings had waived her right to challenge the tribunal proceedings both under the Constitutional jurisdiction and even under judicial review jurisdiction.

We can pronounce on this point at once and say that there is no basis for this submission. The Applicant had appealed against his conviction, and the Attorney General had applied for Revision of the Appellant's sentence. Such Appeal did not constitute a waiver of the Applicants constitutional right under Section 84 (1) of the Constitution.

ANALYSIS OF THE CONSTITUTIONAL PROVISIONS Sections 3, 60, 70, 72, 77 and 84 **AND THE CONSTITUTION OF KENYA PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE AND PROCEDURE** RULES **2001 (**L.N. No. 133 of 2001)

We deemed it extremely important to set out at some length the authorities upon which the learned Director of Public Prosecutions relied for the proposition that this court lacks jurisdiction to entertain the

Applicant's Originating Summons and in view also of our colleague Mr. Justice Ibrahim's dissenting judgment in this matter, primarily on the issue of jurisdiction. As we shall presently demonstrate, neither the ***KOMBO –Vs- ATTORNEY GENERAL*** Case **(supra)**, nor the decisions cited of the courts of the other Commonwealth jurisdictions with nearly identical constitutional provisions to our Section 84 (1) of the Constitution, have held that the High Court has no jurisdiction to entertain an application under their provisions of the Constitution. We will also demonstrate that the decision of Mr. Justice Ole Keiwua ***(as he then was)*** in the ***Kombo – Vs- Attorney General i***s clearly distinguishable from this case.

In the application at hand the Applicant's Originating Summons was filed pursuant to the provisions of Section 84 (1) of the Constitution alleging that his rights were contravened when his Appeal was heard by a two judge bench of the High Court. For clarity of the matter, we set out in full the provisions of Section 84 (1) of the Constitution.

> **" 84 (1)** ***subject to subsection (6) if a person alleges that any of the provisions of Section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to their (or in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is l****awfully available, that the person (or that other person) may apply to the High court for redress.*
>
> **(2) t*he High Court shall have original jurisdiction -***
>
> > ***(a) to hear and determine an application made by a person in pursuance of sub-section (1).***
> >
> > ***(b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3),***
>
> ***(3). If in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of Sections 70 to 83 (inclusive), the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious.***
>
> ***(4)………………***
>
> ***(5)………….***
>
> ***(6) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this Section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court.)***
>
> ***(7) A person aggrieved by the determination of the High Court under this Section may appeal to the Court of Appeal as of right."***

Before we however delve into the jurisdiction conferred upon this Court by Section 84 of the Constitution it is necessary to put into context, the other provisions upon which the Applicant has brought this application. The application is expressed to be brought under the provisions of Sections 3, 60, 70, 72 and 77 of the Constitution of Kenya.

Section 3 of the Constitution is a declaratory provision that the constitution is the Constitution of the Republic of Kenya and has the force of law throughout Kenya, and subject to Section 47 (regarding amendment or alteration of the Constitution), if any other law is inconsistent with it, the constitution shall prevail, and the other law shall, to the extent of the inconsistency be void.

Section 60 of the Constitution established the High Court as a superior court of record with unlimited

original jurisdiction in civil and criminal matters and ***such other jurisdiction and powers as may be conferred by this Constitution or any other law. (underlining ours).***

Section 70 of the Constitution is both a declaratory and important provision because it is the basis of the fundamental rights and freedoms that every person in Kenya is entitled to the fundamental rights and freedoms of the individual ….. that is the right without regard to race, tribe, place of origin or residence or other local connexion, political opinion, colour, creed or sex but only subject to the rights and freedoms of others, and the public interest, to each and all of the following-

- ***· -life, liberty, security of the person and protection of the law……….***
- ***· -protection of conscience, of expression and of assembly and association.***
- ***· -protection of the privacy of his home and other property and from deprivation of property without compensation.***

This application concerns the liberty of the person and protection under the law. Section 72 of the Constitution provides that no person shall be deprived of his personal liberty save as may be authorized by law on the matters prescribed by that section including, in execution of the sentence or order of a court whether established in Kenya or some other country, in respect of a criminal offence of which he has been convicted (Section 72 (1) (a)). The Applicant herein was duly convicted by a court of competent jurisdiction in Kenya.

Section 77 of the Constitution prescribes that if a person charged with a criminal offence, unless the charge is withdrawn is to be afforded a fair hearing by an independent and impartial court or tribunal established by law within a reasonable time, and is presumed innocent until he is proved, or has pleaded guilty.

In the matter at hand, the Applicant has filed the subject Application pursuant to Section 84 (1) of the Constitution alleging that his rights in terms of those provisions of the Constitution were contravened when his matter was heard by a two judge bench. The Applicant's counsel states that the application falls under Rule 9 of the Constitution of Kenya, (Fundamental Freedoms and Freedoms of individual) Practice and Procedure Rules 2001 *(**Legal Notice Number 133 of 2001**) (the Fundamental Rights and Freedoms of the Individual Rules*).

Rule 9 of the said Fundamental Rights and Freedoms of the Individual Rules provides -

> ***9. "where contravention of fundamental rights and freedoms is alleged otherwise then in the course of proceedings in a subordinate court or the High Court, an application shall be made directly to the High Court.***

Rule 11(a) of the said fundamental rights and freedoms rules provides the procedure by which such an application may be made or brought to court. It says –

> **1*1 (a) "Applications under rules 5 and 9 of these Rules shall be made by originating summons and the procedure laid down under Order XXXVI of the Civil Procedure Rules shall, as far as practicable, apply."***

The fundamental rights and freedom rules are made pursuant to the provisions of Section 84 (6) of the Constitution. Under Rule 9, an applicant may commence an action by way of an Originating summons as stipulated in the said Rule 11(a). It was common ground that there are no pending proceedings in either the subordinate court or the High Court. The question is whether proceedings finalized in the High Court can constitute or form a basis of a Constitutional application.

In our view they can, so long as an applicant can demonstrate any contravention of his fundamental rights and freedoms under Sections 70 to 83 (inclusive) of the Constitution. Section 84 (1) of the Constitution is only subject to Section 84 (6) of the Constitution, (that is to say, compliance with the rules made under that Section). In our view, a Judge's order can be challenged under Section 84 (1) of the

Constitution as long as an applicant is able to bring himself within the provisions of Sections 70 – 83 (inclusive) of the Constitution in respect of the order complained of, or proceedings.

In the case of **LABSONS LTD. –VS- MANULA HAULIERS & LIMITED T/A as TAUSI TRAVELLERS** (Milimani Commercial Courts H.C.C.C. No. 204 of 2003) at page 13 and 14, Justice Nyamu delivered himself on that question as follows:

> ***"Fundamental rights occupy a special position in the scheme of the Constitution and constitute the hallmark of any proud democratic state such as Kenya's. The guarantee and enforcement of fundamental rights gives an added spice to the quality of life. Quality of life is one of the values our Constitution strives to advance and enhance. Section 84 in my opinion guarantees the right to file a constitutional application if any of the fundamental rights and freedoms in Sections 70 to 83 (inclusive) of the Constitution has been is being or is likely to be contravened or any of these provisions contravened. The filing of an application is itself a fundamental right under Section 84 but other rights to be protected are guaranteed by Section 70 to 83 including the limitations to each right. Under Section 84 there is no limitation to this particular right in articulating the right by having access to the court, except for failure to adhere to the rules made under Section 84 (6)"***

At page 16 of his judgment, the learned Judge states:-

> ***"Should my own order be constitutionally challenged, I would gladly pass on the file to my next colleague in order to maintain a respectable aloofness in a matter I am involved in."***

Section 84 (1) aforesaid clearly states that the fundamental right to approach the High Court for a constitutional redress is **"without prejudice to any other action** with respect to the same matter which is lawfully available. This includes an appeal to a higher court. An application under Section 84 (1) and (2) is not an appeal. An Appeal against an enquiry under the two sub-sections is provided for under Section 84 (7).

We consequently find no distinction between the principle applied in the case of ***MAHARAJ –VS- ATTORNEY GENERAL OF TRINIDAD & TOBAGO (No. 2) [1978] 2 ALL E.R. 670*** and the situation we are dealing with here.

As this is a jurisdiction which is not quite appreciated, and yet it is very clear that it exists, it is necessary to give some background and the consequent decision by the Privy Counsel in the ***Maharaj case.***

The appellant Maharaj a barrister, was committed by the High Court of Trinidad and Tobago, to seven days jail for contempt of court. He immediately made an ex parte application to another Judge, of the High Court of Trinidad and Tobago, claiming in pursuance of Section 6 of the (1962) Constitution of Tobago and Trinidad, redress for alleged contravention of his right under Section 6 of the Constitution not to be deprived of his liberty except by due process of law. The redress claimed was an immediate release from prison pending the determination of the motion and damages for wrongful detention and false imprisonment against the Respondent, the Attorney General, as representative of the State. The judge ordered the Applicant's release from prison forthwith. The third judge, on hearing of the motion, dismissed the motion and ordered the applicant to serve the remaining six days which he did.

He appealed to the Court of Appeal and pending the appeal, he sought and obtained leave to appeal to Judicial Committee of the Privy Council which allowed the Appeal on the ground that the Judge who had made the committal had failed to specify sufficiently the nature of the contempt charge against the appellant before committing him to prison and held in consequence that the committal order was invalid.

However, the Trinidad and Tobago Court of Appeal dismissed the Appellant's application holding that although a High court Judge had jurisdiction under Section 6 of the Constitution to grant the appellant redress for contravention of his constitutional rights which resulted from something done by

another High Court Judge acting in his judicial capacity, the failure of the Judge to inform the appellant of the nature of the contempt charged did not contravene his rights under Section 1 (a) of the Constitution. On the second appeal to the Juridical Committee of the Privy Council against the decision of the Court of Appeal, the Committee held –

> ***(i) the claim for redress in the motion fell within the original jurisdiction of the High Court under Section 6 (2) of the Constitution since it involved an enquiry into whether the procedure adopted by the Judge before committing the appellant to prison had contravened the appellant's rights under Section 1 (a) of the Constitution, not to be deprived of liberty otherwise than by due process of law, and did not involve an appeal in fact or substantive law from the Judge's decision that he was guilty of conduct amounting to contempt of court. Accordingly Scott J. though of equal rank to the Judge who made the Committal order had jurisdiction to entertain the motion. Moreover, the Attorney General was the proper respondent to the motion by virtue of Section 19 (2) of the State Liability and Proceedings Act 1966 since the redress claimed under Section 6 was against the state for contravention by its judicial arm of the appellant's constitutional rights….."***

Section 1 of the Constitution of Trinidad and Tobago (1962) is similar to Section 70 of our Constitution, and Section 6 (1) of the said Constitution is similar to Section 84(1) of the Kenya Constitution and Section 6 (2) of the said Constitution is identical to Section 84 (2) of the Kenya Constitution. Both provisions say that the High Court shall have original jurisdiction – to hear and determine an application by a person in pursuance of subsection (1). This is clearly a distinct jurisdiction from the one conferred on the High Court under Section 60 as underlined above contemplate such additional jurisdiction.

The jurisdiction conferred upon the High Court in respect of contravention of Section 70 – 83 of the Constitution is thus an original jurisdiction to conduct an enquiry. The original jurisdiction is confined to an enquiry on process followed and whether there was a violation of fundamental rights and procedures. Neither the Executive, Parliament or the Judiciary are immune from any such original inquiry by the High court, nor indeed is the highest court in the land, the Court of Appeal immune from such an enquiry.

It is important to observe that the High Court –exercising its original jurisdiction under Section 84 does not sit on appeal on itself. Its original jurisdiction under Chapter (V)- ***Protection of Fundamental Rights and Freedoms of the individual (Bill of Rights****)* of the Constitution, is separate and completely distinct from the function performed or exercised under the other jurisdiction pursuant to Section 60 of the Constitution or any other Section as Section 10 & 44 (see ***KOMBO'S Case****)*. It is not a question of rank at all otherwise the framers of the Constitution or any other section would not have vested this jurisdiction in the High Court only.

Our attention was drawn to the decision of Ole Keiwua J. (*as he then was*) in the case of ***Kombo – Vs- Attorney General (supra)*** to which we have already made reference. That case arose from an election Petition brought under Sections 10 and 44 of the Constitution, the National Assembly and Presidential Elections Act, and the Election Offences Act. This case was heavily relied upon in the dissenting judgment of our learned brother Hon. Mr. Justice Ibrahim. On our part we seek to depart from that decision for the following reasons-

(1) With regard to the Constitutional Interpretation, no section of the Constitution is superior to another. Thus Sections 10 and 44 thereof are as constitutional as is section 84 (1). The finality given by Section 10 & 44 is not necessarily taken away by Section 84 (1) and (2).

(2) With regard to the manner of conduct of the election court, Hon. Mr. Justice Ole Keiwua who in fact appeared to have conducted some enquiry clearly makes findings that none of the fundamental rights and freedoms provisions 70-83 of the Constitution were in fact violated at all by the Election court.

With the greatest and due respect to the learned Judge it is not clear to us whence he found jurisdiction to adjudicate on that matter outside Section 84 (1) and (2) of the Constitution when he shared the same rank as the Election Court. In our respectful view, he could only have found the jurisdiction to make the pronouncements or findings on this by virtue of Section 84 (1) and (2) of the Constitution.

(3) the learned Judge at page 173 of the judgment appears to regard a complaint concerning possible violations or contraventions of Sections 70 – 83 as amounting to an appeal which appeal does not lie to a judge of coordinate jurisdiction from the election court. Were this view to be correct, then the learned judge ought not to have taken a step further in making findings on whether or not the complaints were properly grounded under Sections 70 – 84 of the Constitution.

As stated above we have held that the enquiry under Section 84 (1) and (2) of the Constitution, is an unique jurisdiction and it has nothing to do either with rank or seniority. It seems then that Mr. Justice Ole Keiwua exercised the jurisdiction without acknowledging its uniqueness. What conclusion the learned judge would have reached had he found contraventions?. We suspect he would have looked up at the horizon where we are now standing in giving this judgment.

(4) Whilst on this point of jurisdiction, what the critics thereof are saying is that the unique jurisdiction conferred upon the High court (**not in one or group of judges**) by Section 84, should probably be conferred on a court other than the High Court. However, and even then, it does not solve the problem, because such court would still be exercising the same jurisdiction, including making enquiries on decisions of their colleagues of the same or co-ordinate jurisdiction.

It therefore needs to be stated, for avoidance of any doubt, that the problem may arise at any level, and it is perhaps better that enquiry is done by the High Court in exercising its original jurisdiction, as there is a right of appeal to the Court of Appeal as is provided in Section 84 (7) of the Constitution.

(5) Under rule 10 (of the Fundamental Rights and Freedoms Rules), where proceedings are pending in the High Court it is acknowledged that there is original jurisdiction. For the same court to invoke that jurisdiction, how then can the jurisdiction cease when the matter is completed whereas the empowering Section 84 (1) of the Constitution does not differentiate between *"pending"* and ***"completed"*** proceedings?

The answer in both situations is that the jurisdiction is to carry out an enquiry as it is clearly stated in the ***Maharaj –Vs- Attorney-General of Trinidad and Tobago*** (No. 2) **(supra).**

If for instance in the current case, or in the Kombo -Vs- Attorney-General case (supra) the Applicant or Applicants were not heard that would itself have been a violation of their right to be heard by an independent and impartial court.

With regard to Section 12 of the Government Proceedings Act (***Chapter 40, Laws of Kenya)*** which requires that civil proceedings by or against the Government shall be instituted in the name of the Attorney-General, as the case may be, Section 6 of the Judicature Act ***(Chapter 8, Laws of Kenya)*** protects every judge or judicial officer from liability or suit in respect of any act done or ordered by him in the discharge of his judicial duty whether or not within the limits of his jurisdiction, with the important proviso that, he at the time, in good faith believed himself to do or order the act complained of thus meaning that it is permissible to bring an action concerning violation of fundamental rights and freedoms, and that no arm of Government can possibly hide behind those provisions to claim immunity. If that be so, who then, shall act as the guard of guards, including the judiciary. We fell into the temptation of invoking Lord Denning **"WHAT NEXT"** I**N THE LAW o**n the Chapter with the heading ***"The Judges Themselves."*** where at page 330 he makes the following observation-

"There remains the most touchy question of all. May not judges themselves sometimes abuse or misuse their power? It is their duty to administer and apply the law of the land. If they should

divert it or depart from it - and do so knowingly - they themselves would be guilty of a misuse of power. So we come up against Juvenal's question (the Roman jurist) – Sed quis custodiet ipsos custodes? But- who is to guard the guards themselves?)

Lord Denning answered that question himself by suggesting that because of their long tradition since **Magna Carta** let the judges be the guards against the misuse of power and therefore abuse of freedoms.

In our case the guard of guards is the Constitution and the law. So for instance, should an allegation or a complaint of contravention by a judge or other judicial officer of a person's or complainant's fundamental rights or freedoms be proved, the person to be held liable is the Attorney – General. This is because by virtue of the said Section 12 of the Government Proceedings Act the Attorney-General was the proper respondent since the orders claimed under Section 6 of the Judicature Act would be against the state for contravention by its judicial arm of such person's or complainant's constitutional rights. That was exactly the position in the ***Maharaj –Vs- the Attorney-General of Trinidad and Tobago*** (supra). This means that the Judiciary, like the other arms of Government, the Legislature and the Executive is subject to the Constitution but is the ultimate guarantor of those fundamental rights and freedoms, subject to its immunity under the Judicature Act.

In this situation therefore, the court has power to make such orders, issue such writs and give such directions it may consider appropriate for the purpose of enforcement of any of the provisions of Section 70 – 83 **(inclusive)** of the Constitution. This, in our view includes an award of damages where appropriate.

The apparent immunity conferred by Section 6 of the Judicature Act upon the court with regard to judicial work is subject to good faith provisions and is not a licence for the judges or other judicial officers to do anything under the sun. What, we may ask, would happen to a litigant who without a hearing or due process of law is handed a written ruling at the door of the Court? He must in our view have a constitutional redress regardless of the status of the judicial officer handing down such a ruling at the door.

The power to challenge such a contravention of fundamental rights or freedoms is clearly reserved under Section 84 (1), and the High Court has the original jurisdiction to enquire into such contravention and make necessary finding orders etc. under Section 84 (2) of the Constitution. The contention otherwise must therefore fail.

OFFICE OF DIRECTOR OF PROSECUTIONS The question whether the office of the Director of Public Prosecutions was properly constituted was satisfactorily addressed in the case of ***ADAN KEYNAN WEHLIYE –VS- REPUBLIC (H.C.C.C. NO. 2003)*** judgment of Nyamu, Lady Justice Kasango and Makhandia JJ.) and the effect of that judgment is that the creation of the office of the Director of Public Prosecutions on 5th December, 1996 was constitutionally proper.

The Court in that case accepted that Section 24 of the Constitution empowered the President to constitute a public office amongst other offices, and also that there is no provision in the Constitution that directs the manner in which such constitution of the office should be exercised. It is therefore not necessary for the President to gazette such a creation of a public office although gazettement would …. be desirable. In any event with regard to Philip Kipchirchir Murgor there was gazettement of his appointment as Director of Public Prosecutions in gazette Notice No. 5098 of 5th July, 2005.

As regards the question whether or not he had prosecution powers, the answer to this is to be found in understanding the powers of prosecution reserved to the Attorney- General under Section 26 (3) and the power to delegate such powers under Section 26 (5) of the Constitution and Section 83 of the Criminal Procedure Code. The powers are to be delegated to officers subordinate to him under the Constitution, and to officers he orders in writing to exercise the powers vested in him by Section 81 and 82 and Part VIII of the Criminal Procedure Code. The delegation is to offices designated and not to individual officers. So once the offices are designated as so provided, the holders of those offices at any particular time, have the necessary prosecution powers under both the Constitution and the Criminal Procedure

Code.

The office of Director of Public Prosecutions was by Legal Notice No. 331 of 1996 designated for purposes of Section 26 (5) of the Constitution of Kenya and Section 83 of the Criminal Procedure Code with regard to the powers of the Attorney -General vested in him by Section 26 (3) and 26 (4) of the Constitution, and by Sections 81 and 82 and part VIII of the Criminal Procedure Code.

It was not therefore necessary to designate office again upon the change of the individuals holding that office.

The challenged Director of Public Prosecutions Mr. Philip Kipchirchir Murgor who was appointed with effect from 19th May, 2003 had his appointment gazetted on 5th July, 2004. Such Gazettment was only for purposes of information, and did not affect the validity of his appointment on 19th May, 2003. Further as Legal Notice Number 331 of 1996 was still valid, and had not been revoked at the time the Applicants Appeal No. 544 of 1999, consolidated with Criminal Revision Number 13 of 1999 were prosecuted by the said Philip Kipchirchir Murgor, the conduct of the said prosecution by the said Philip Kipchirchir Murgor was done in the valid exercise of the powers delegated to the office of the Director of Public Prosecutions by the Attorney-General pursuant to the said Legal Notice Number 331 of 1996. The claim by the Applicant that he was prosecuted by an unqualified prosecutor is not therefore tenable and we reject it.

There are besides further reasons why we should reject the Applicant's arguments. Firstly although the Interpretation and General Provisions Act (Chapter 2, Laws of Kenya) does not apply to the Interpretation of the Constitution, the function of the office is public prosecutions, and under Section 123 (8) of the Constitution the Court is entitled to hold that the holders of the office of Director of Public Prosecutions have been performing those duties as prosecutors. Section 123 (8) of the – Constitution provides:-

> ***(8) "No provision of this Constitution that a person or authority shall not be subject to the direction or control of any other person or authority, in exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this constitution or any other law."***

The power to commence, to take over and terminate any criminal prosecution is vested in the Attorney-General under Section 26 (3) of the Constitution. Under Section 26 (5) of the Constitution the powers conferred upon the Attorney-General may be exercised by him in person or by officers subordinate to him acting in accordance with his general or special instructions. A Director of Public Prosecutions being an officer subordinate to the Attorney-General, can act as prosecutor under the general direction or special instructions of the Attorney-General.

Further by virtue of Legal Notice Number 71 of 1st July, 2005, and made pursuant to the provisions of Section 47 of the Interpretation and General Provisions Act, (Cap 2 Laws of Kenya) the Title of ***"Deputy Public Prosecutor"*** *s*hall be replaced for the purposes of all written laws with the title ***"Director of Public Prosecutions"*** . The notice was to take effect from 5th December, 1996, the date when the office of Director of Public Prosecutions was established. The Legal Notice is in the nature of subsidiary legislation, and such legislation may be made to have retroactive effect in terms of Section 28 of the Interpretation and General Provisions Act, thus has effect of replacing reference in Section 83 of the Criminal Procedure Code (Cap 75, Laws of Kenya) from*"Deputy Public Prosecutor"* to **"***Director of Public Prosecution***s"** and those changes were to take effect from 5th October, 1996.

In relation therefore to Philip Kipchirchir Murgor, we find that he as Director of Public Prosecutions, had authority to prosecute not only pursuant to Section 26 (5) of the Constitution but also pursuant to Section 83 of the Criminal Procedure Code. The Prosecution of the Applicant by the said Philip Kipchirchir Murgor was therefore both constitutionally and legally in order. The Applicant's contention to the contrary must therefore fail.

ALLEGED VIOLATION OF THE APPLICANT'S CONSTITUTIONAL AND FUNDAMENTAL RIGHTS & FREEDOMS

It was the Applicant's contention that his rights were violated and did not receive a hearing before a fair and impartial court in that his counsel was intimidated and abandoned several substantive arguments in support of his grounds of appeal, that the Director of Public Prosecutions, Philip Kipchirchir Murgor, kept on interrupting his counsel, and that his Advocate was caused to wilt away at his hour of need and giving up arguable grounds in support of his case.

The Applicant offered no material to support these contentions. For instance, no copies of proceedings were attached to enable us examine the record and see the veracity or otherwise of the allegations nor were any particulars of the alleged contravention pleaded, given or proved. In the result therefore there is no cause for this court to interfere on the merit of the decision by our brothers and we reject these contentions.

CONCLUSION

Having conducted the enquiry in exercise of the original jurisdiction conferred upon us by Section 84(2) of the Constitution we find no contraventions have been proven nor were any particulars (as stated above) of the alleged intimidation or proof of any protests on the process found to offend the relevant provisions of the Constitution. For those reasons the application is dismissed. We make no order as to costs.

Dated and delivered at Nairobi this 13th day of December, 2005.

…….…….…………………………..

J.G. NYAMU

JUDGE

……………………………….

M.J.ANYARA EMUKULE

JUDGE

<p style="text-align: center;" center;"=""> **JUDGEMENT OF IBRAHIM J.**

The applicant, Kamau John Kinyanjui who was at all material times an Advocate of the High Court of Kenya was convicted by the Chief magistrate in Criminal Case No. 2247 of 1996 for the offence of stealing (Contrary to Section 283 of the Penal Code) on 24th May, 1999. He was sentenced to pay a fine of Kshs.50,000/= on each of the accounts he was convicted of, in default he was to serve 12 months' imprisonment on each count. He paid the fine. There was a further order that he restitutes to the Attorney General the balance of monies received on his Client's behalf but which he had not remitted to them.

The Attorney General was aggrieved by the said conviction and appealed against and asked for the enhancement thereof. The applicant on his part appealed against the conviction and sentence. The Attorney General's application for revision and the Applicant's appeal were consolidated and heard by Justice, Kubo and Justice Kimaru in the High court. The High Court delivered its judgment on 24th September 2004, in which it upheld the conviction of the trial court but made the following orders on sentence:

(a) The fine of Kshs. 50,000/= under each of the counts on which the Appellant was convicted was upheld and retained but the default sentence of 12 months imprisonment on each such count was set aside.

(b) The Appellant in addition to the fine was sentenced to 4 years imprisonment on each of the courts of which he was convicted, and the said sentences were to run concurrently.

The Applicant was aggrieved by this decision and on 1st November 2004 lodged in the High Court, this Originating Summons under, Inter alia, Sections, 3, 60 70, 72, 77 and 84 of the Constitution; alleging the violation of his Constitutional and fundamental rights and seeking determination of several Constitutional questions.

On the same day that he filed the Constitutional applications the applicant also filed an application by way of Chamber Summons under a Certificate of urgency. The Applicant apart from Certification of the urgency of the application sought an order that the court grant him a "Conservatory Order" for his immediate release from prison on his own recognizance pending the hearing and final determination of the Originating summons referred to above. The Applicant withdrew this application on 5th July, 2005 when this matter was placed before the Honourable Chief Justice with a view of giving directions and empanelling a Constitutional Bench of more than one judge. On the said date this bench was nominated to hear the Originating Summons. In the said Summons, the applicant sought the following:-

(**i) Determination of the following questions.**

(a) whether the office of "Director of Public Prosecutions" assuming operations at the Attorney General's office is established as an office in the Public office at all material times to the institution, hearing and determination of High Court Criminal Appeal number 544 of 1999 as Consolidated with Criminal Revision Number 13 of 1999 at Nairobi.

(b) Whether the office of "Director of Public Prosecutions", Properly, lawfully represented the Republic and lawfully conducted on behalf of the Republic, the said Criminal Appeal number 544 of 1999 as consolidated with Criminal Revision Number 13 of 1999 at Nairobi was unconstitutional, illegal, void and of no effect.

(c) Whether the prosecution on behalf of the Republic by the said "Director of Public Prosecution" of the said Criminal Appeal number 544 of 1999 as Consolidated with Criminal Revision Number 13 of 1999 at Nairobi violated the applicant's fundamental rights under Section 70, 72, 77, and 79 of the Constitution.

(d) Whether the applicant's fundamental rights as enshrined in Sections 70, 72, 77, and 79 of the Constitution have been violated in the said Criminal Appeal number 544 of 1999 as consolidated with Criminal Revision Number 13 of 1999 at Nairobi.

(e) Whether the Judgment and Orders made in the said Criminal Appeal Number 544 of 1999 as consolidated with Criminal Revision Number 13 of 1999 at Nairobi violated the Applicant's fundamental Constitutional Rights stated above and the rules of natural justice and deprived the Applicant of his liberty without the due process of the Law.

(ii) For Orders that:-

(a) a Declaration that the judgment and Orders of the High Court made on the 24th of September, 2004 and 8th October, 2004 (Hon. Justice B.P. Kubo and L. Kimaru Ag.J) committing the Plaintiff/applicant to Prison in Criminal Appeal No.544 of 1999 as consolidated with Criminal Revision No. 13 of 1999 was a violation of the Applicant's fundamental rights under Section 70, 72, 77 and 79 of the Constitution of Kenya.

(b) A Declaration that the Ruling and Order of the High court (B.P. Kubo J. and L. Kimaru, Ag. J.) made on the 24th September, 2004 in the said Criminal Appeal Number 544 of 1999 as Consolidated with criminal Revision Number 13 of 1999 at Nairobi was unconstitutional, illegal, void and of no effect.

(c) An Order that the Plaintiff be released from custody forthwith.

(d) General Damages.

(e) All such other orders, writs and/or directions as are just and appropriate to safeguard the Constitutional rights of the Plaintiff/Applicant's fundamental rights under Section 70, 72, 74, 77 and 77 of the Constitutional of Kenya.

(f) Costs and interests where applicable.

The applicant cites 5 grounds for his application and these are:

(i) That the Honourable Judges B.P. Kubo, J. and L. Kimaru Ag. J. in sentencing and committing the Plaintiff/applicant to prison while altering sentence in High Court Criminal Appeal number 544 of 1999 as consolidated with Criminal Revision No. 13 of 19999 acted without regard to the due process of the law.

(ii) That the Honourable Judges B.P. Kubo, J. and L. Kimaru Ag. J. in sentencing and committing the Plaintiff/Applicant to prison while altering sentence in Criminal Appeal Number 544 of 1999 as consolidated with Criminal Revision No. 13 of 1999 acted pursuant to a trial whereby the applicant was not afforded a fair hearing by an independent and impartial court established by law, inter alia, by the delegation of the attorney General to non-existing office and/or person in the Kenyan Constitution , Statutes and public office namely the Director of Public Prosecutions.

(iii) That the Honourable Judges B.P. Kubo, J. and L. Kimaru Ag. J. in sentencing and committing the Plaintiff/applicant to prison while altering sentence in High court Criminal Appeal Number 544 of 1999 as consolidated with Criminal Revision No. 13 of 1999 violated the fundamental constitutional rights of the applicant.

(iv) That the Honourable Judges B.P. Kubo J. and L. Kimaru Ag. J. in sentencing and committing the Plaintiff/applicant to prison while altering sentence in High Court Criminal Appeal number 544 of 1999 as Consolidated with Criminal Revision No. 13 of 1999 acted in breach of the rules of natural justice.

(v) The applicant shall suffer irreparable loss and damage and the Originating Summons filed herein may be rendered nugatory if a Conservatory Order is not granted.

The application was supported by an affidavit sworn by the applicant on 29th October, 2005. The Respondent; the Attorney General did not file any Replying Affidavit but lodged in court a Notice of Preliminary Objection dated 12th November, 2004 in respect of the Chamber Summons dated 29th October, 2004 which was subsequently withdrawn.

At the hearing, the Attorney General represented by the Director of Public Prosecutions, Mr. Tobiko opposed application substantially on matters of law. The first points of law or grounds that Mr. Tobiko

raised were jurisdictional ones and it behoves upon this court to deal with the said points of law at the outset and before embarking on the consideration and determination of any other issue. Mr. Tobiko submitted that:-

1. This court had no jurisdiction to interfere with the decision of another Court of co-ordinate jurisdiction.

2. That the Applicant having lodged an Appeal against the decision of the High Court, all the grounds raised in this application can be dealt with and determined by the Court of Appeal.

3. Under the provisions of Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual). Practice and Procedure Rules, 2001 made under the Provisions of Section 84 (6) of the Constitution, it is not permissible for any party aggrieved and has concluded proceedings in the High court or any higher court to attempt to re-open the matter under the guise of enforcing Fundamental rights.

I am of the view that the said points of law taken together do raise issues of the jurisdiction of this court and it is essential that they be dealt with first. The rationale for this approach was well settled by the court of appeal in the case – OWNERS OF THE MOTOR VESSEL "LILLIANS" –VCALTEX OIL (KENYA) LIMITED, (1989) KL**R. 1 at p. 14 when Nyarangi, J.A. said:-**

> **"With that I return to the issue of jurisdiction and to the words of Section 20(2) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down *tools in respect of the matter before it the moment it holds the opinion that it* is *without jurisdiction*………………..**
>
> > **It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined……………………."**

The three Justices of Appeal Nyarangi, Masime and Kwach delivered separate Judgments but were unanimous in dismissing the appeal on the ground of lack of jurisdiction by the High court. Ideally, the question of jurisdiction of the court ought to be raised or taken at the earliest opportunity in any proceedings. This is because such a point of law has the potential of disposing the entire case thereby saving precious judicial time and expense to the parties. In the present case, the Respondent through the Director of Public Prosecutions raised the question of Jurisdiction during the hearing of the application and reply thereto.

This does not affect the Respondent's right to raise the question of jurisdiction as it is always pertinent and crucial whether a court has authority or power to decide matters that are litigated before it and if so, the extent of such authority or power. As Nyarangi J.S said in the **"Lillian S"** case at page 15:-

> "……………. I see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the courts should hear and dispose of that issue without further ado."

In light of the foregoing, I propose to consider and determine the said question of jurisdiction raised by the Respondent before delving into any other issue, fact or evidence. In my view, we have to establish the court's jurisdiction if any, and thereafter its nature and extent. I think that the Grounds 1 and 2 are inter related and intertwined and ought to be considered together:-

Ground 1 and 2

- That this court had no jurisdiction to interfere with the decision of another court of co-ordinate jurisdiction

AND

- That the applicant having lodged an Appeal against the decision of the High court, all the grounds raised in this application can be dealt with and determined by the Court of Appeal:-

Mr. Tobiko, the Director of Public Prosecutions in presenting and arguing these grounds submitted inter alia, that

- - The Court had no jurisdiction to interfere with the decision of another court of Co-ordinate jurisdiction.

- - Even if such jurisdiction existed then it was discretionary and not automatic,
- - In such a case the Jurisdiction shall be exercised in the most exceptional of cases and circumstances, for instance, where the complainant has no other alternative remedy or relief or where gross violation or infringements as opposed to mere irregularities have been disclosed.
- - In the present case, the so-called infringements are mere allegations devoid of any particulars and clear evidence. The alleged complaints all raise issues of law.
- - All the grounds are appealable and can be dealt with by the Court of Appeal.
- - The applicant has exercised his right of appeal and there is a pending appeal in the Court of Appeal
- - This court cannot escape sitting on judgment of the decision of another bench of the High court.
- - How can this court order the release of the Applicant from custody when there is a conviction by another court in the High court.
- - The powers of this court is unlimited under section 60 of the Constitution but not limitless.
- -The Constitution must be interpreted in a purposeful manner so that it does not lead to chaos.
- - This court ought not diminish the values and course of the administration of justice.
- - The hearing of this application and grant of the orders sought may negate the very purpose of the constitution and nothing would stop a person convicted by the Court of Appeal or other subordinate courts to seek similar relief's.
- - The Applicant is seeking orders from this court without the setting aside of the conviction.

These are some of the arguments articulated by the Respondent. In his response through his counsel Mr. Nyandieka, for the applicant, inter alia, argued that:-

- - Section 84(2) gives this court original jurisdiction in so far as it involves an inquiry.
- -The proceedings herein are not an appeal on the substantive findings
- - Application is based on Section 84 of the constitution which ought to be distinguished from the jurisdiction conferred by section 60 on the High court.
- - Inquiry of the alleged violation of fundamental rights and freedoms under section 84 of the constitution and findings on the substantive merits leading to the conviction are two different things.

When hearing Criminal Appeal No. 544 of 1999, as consolidated with Criminal Revision No. 13 of 1999 the High court in a bench of two Judges of the High court Justice, B.P. Kubo and L. Kimaru was exercising its appellate jurisdiction under section 347 of the Criminal Procedure Code against sentence and its reversionary powers under section 362 of the Criminal Procedure code to consider a reference by the Attorney General for enhancement of the sentence. These jurisdictions and powers are donated by statutes. However, the original source of Judicial authority power and jurisdiction of the High court emanate from sections 60(1) of the Constitution which provides as follows:-

"60 (1) There shall be a High court, which shall be a superior Court of record, and which shall

have unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution or any other law.” ***(emphasis mine)***

I am of the opinion that the High court when hearing and determining the appeal and reference referred to above and which were duly consolidated, was exercising its powers under section 60 of the Constitution. The High court has other jurisdictions and authority to supervise Civil and Criminal proceedings before a subordinate court or court martial under the provisions of section 65(2) and (3) which reads as follows:-

“65(2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or Court Martial, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts.”

In the absence of any other provisions under the Constitution there can be no doubt and I do hold that in law there is **one High court of Kenya** which is constituted and manned by the Honourable Chief Justice and other Judges (not less than 11) as may be prescribed by Parliament (See section 60(2) of the Constitution). There are no two or more High Courts. We can only have judgments, rulings, Orders and other decisions given by a specific judge, or specific judges (bench or benches) if empanelled in accordance with the law. The High court as an institution is an inanimate body that must be run, and activated, managed and controlled by animate organs authorized by law. There are the Judges who must of the essence be human beings. According to the constitution and the interpretation thereof of this court, the judges of the High Court as must of necessity in law be of equal rank and standing. This is because the jurisdiction, authority and powers under section 60 of the Constitution are conferred on the High Court as a Constitutional institution or body and not on the individual judge. It follows that when exercising and invoking the jurisdiction of the High Court under say section 60 of the Constitution or any other part or provisions of the Constitution or statute, all judges are of equal ranking and standing. Each decision under any provision of the constitution, statute or other law have the same effect and force of law as it is not the personality, age, excellence or seniority in being appointed to the Bench or the number of judges sitting in a particular case that gives the decision the force of law but the **Jurisdiction** of the High court given under section 60 which establishes it in the first place. Section 60 is the mother of the High Court of Kenya.

It follows that it does not matter in what **“type”** of High Court (if I may use the word), a judge is sitting when hearing a particular case, be it a “Constitutional Court” under section 84, a “civil or “criminal Court” under section 60 or specific statutes (other law), or an “election court under section 44. It is the jurisdiction of the court as an institution under the constitution or any other law that is paramount and not the attributes of the judge or judges constituting such a court or type or nature of proceedings or case at hand at any given time.

It is my view therefore that the framing of ground 1 in the Respondent’s submissions or such submissions is incorrect in law – i.e that this court (the High court) had no jurisdiction to interfere with the decision of another court of co-ordinate jurisdiction. As I have pointed out, there is only one **ONE** High court under the Constitution with specific jurisdiction conferred on it by Section 60(1) of the constitution. There is no “other or another court of co-ordinate jurisdiction.” There are no two, three or more High courts. There is only “a High court” as singularly created and established by the said provision. For emphasis the section commences as follows:

“There shall be a High court …………” (emphasis mine).

I refer to the decision of Justice Ole Keiwua (as he then was) in the case KOMBO V ATTORNEY GENERAL (1995-1998) 1 EA, 168 **which was referred to us. At p. 174 the Judge was dealing with a challenge of a decision of the High Court in an election petition under section 10 and 44 of the constitution. In this challenge, the applicant in the said case invoked the provision of sections 84(1) and (6) just like this case saying that the finding by the election court was ultra vires Section 10 and 44 of the constitution. The judge said as follo**ws:-

“I also accept the contention that the High court is a Court of record in all its different constitutions and capacities of section 84 or by virtue thereof or under section 44 of the constitution. That contention makes the submission that a High court sitting pursuant to the provisions of section 84 thereof can override the same court exercising its constitutional Jurisdiction under section 44 untenable. It must be remembered that the High Court constituted under Section 44 is without exception, such a powerful institution. On that it is composed of three judges of the High court. It is also my view that an application under Section 84(1) of the Constitution must have its basis upon an allegation that any of the sections of the constitution from section 70 to 83 have been contravened. The jurisdiction under section 84 of the constitution is unavailable to whoever alleges that section 10 and 44 of the Constitution have been infringed.”

I am persuaded by the aforesaid statements and decision with regard to the jurisdiction of the High Court sitting in different capacities. As a result of the foregoing, I do hereby hold that this court being the High court of Kenya cannot interfere with its own decision made exercising its criminal jurisdiction under section 60 (1) of the constitution, the Penal Code and the Criminal Procedure Code. To do so would amount to the High court sitting on appeal of its own judgment or decision. This in itself would be illegal and unconstitutional. The proper court to appeal to is the Court of Appeal which is constitutionally conferred with this jurisdiction under Section 64(1) of the Constitution. It reads:-

“64 (1) There shall be a court of Appeal which shall be

a superior court of record, and which shall have such

jurisdiction and powers in relation to appeals from the

High Court as may be conferred on it by law.”

On its part, Section 3(1) and (2) and of the Appellate Jurisdiction Act, Chapter 9 of the Laws of Kenya stipulates the exact jurisdiction of the court of Appeal. It reads:-

“3(1) the Court of Appeal shall have jurisdiction to hear and determin

e appeals from the High Court in cases in which an appeal lies to the

court of Appeal.

(2) For all purposes of and incidental to the hearing and determination

of any appeal in the exercise of the jurisdiction conferred by this Act, <u>the</u>

<u>court of Appeal shall have, in addition to any other power, authority and</u>

<u>jurisdiction conferred by this Act, the power and jurisdiction vested in</u>

<u>the High Court.</u>

(3) In hearing of an appeal in the exercise of the jurisdiction conferred

by this Act, the <u>law to be applied shall be the law applicable to the case in the Court</u>.” (emphasis mine)

In exercise of its appellate jurisdiction over the High Court, the Court of Appeal through the Constitution is conferred with the power, authority and jurisdiction vested in the High Court. This is in addition to any other power vested in the Court of Appeal. This demonstrates the immense powers authority and jurisdiction of the only and highest appellate court under our law at present over the High

Court. To me, therefore, the Court of Appeal is vested with such jurisdiction that it can correct and make amends to virtually all wrongs done by the High Court. This include such acts, omissions and/or conduct during trials and other hearings which are alleged to have violated a party's Constitutional rights.

I therefore, hold that the Court of Appeal is the proper court and forum for the Applicant to ventilate and articulate his complaints and rights. The Applicant has already lodged an appeal in the court of Appeal which is pending. I am aware that under Section 84(1), strictly, this is not a bar to the applicant making an application to enforce the Protective provisions of Sections 70 to 83 of the Constitution. I will deal with this aspect under Ground 3, shortly. However, I wish to restrict the application of the aforesaid provisions at this stage to the issue whether the order sought in this application would "interfere" with the decision of the High Court in Criminal Appeal No. 544 of 1999, as consolidated with High Court Criminal Revision No. 13 of 1999. Also, to the extent that I deal with Ground No. 2 , as to the implications of the pending Appeal and whether this is an adequate redress.

The Applicant has submitted that these proceedings are not an APPEAL on the substantive findings on the merits made by the criminal court. He contends that the application herein is an **inquiry** of the alleged violations of his fundamental rights and freedoms as protected by section 70, 72, and 77 of the constitution. It is my view that any answers to the questions put forward for this court's determination, the possible grant of the Declarations sought, the order of release from custody and general damages sought would certainly interfere with the decision of the High Court in the Consolidated suit herein. There can be no doubt that if successful, any decision made by this court would interfere and purportedly reverse the decision of the criminal court. Whatever name one gives to the process it would amount to this court sitting on judgment of the said decision. To me, this would amount to an appeal against the said decision. There are no two ways about it.

A careful scrutiny of the questions proposed for the determination of this court, the grounds and statement of facts in the supporting affidavit are substantially criticisms of how the criminal court acted and the conduct of the two Judges during the hearing. Upon consideration I am of the view and hold that this is truly in the nature of an appeal. Taken together with the reliefs sought it can be nothing but an appeal which invokes constitutional provisions and grounds. I am of the opinion that all the questions and grounds raised in the application can adequately if not wholly be dealt with and determined by the Court Of Appeal. The matters dealing with the legality and constitutionality of the office of the Director of Public Prosecutions and Due Process visà- vis Sections 72 and 77 of the Constitution can be raised and be determined in the Appeal to be heard by the Court of Appeal.

I therefore, do hereby hold that this application is in the nature of an appeal which appeal does not lie to a judge or judges of Co-ordinate jurisdiction as the Criminal Court and is further, an attempt to circumvent the provisions of Sections 65(2) of the Constitution and Section 3 of the Appellate Jurisdiction Act which give jurisdiction to the court of Appeal to hear such appeals. A proper appeal is pending in the said court and it ought to be heard and determined there.

This brings me to Ground 3 raised by the Respondent relating to the jurisdiction of this court.

> Ground 3. - Under the provisions of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 made under the provisions of Section 84 of the Constitution, it is not permissible for any party aggrieved and has concluded proceedings in the High Court or any higher court to attempt to re-open the matter under the guise of enforcing fundamental rights.

I have considered arguments by both the applicants Counsel and the Director of Public Prosecutions. In my view the aforesaid Constitutional rules contemplate three (3) scenarios when an application to enforce the fundamental rights and freedoms of the individual under section 84 (1) can be made. There are:-

1. Where an accused person in a criminal case or a party to a civil suit a subordinate court alleges contravention of his fundamental rights or freedoms under Sections 70 to 83 inclusive of the

Constitution in relation to himself.

(2) Where violation of fundamental rights and freedoms is alleged in any proceedings pending in the High Court.

(3) where contravention of fundamental rights and freedom is alleged otherwise than in any proceedings in a subordinate court or the High Court.

Such an interpretation and conclusion is clear from a careful reading of the aforesaid rules made under Section 84 (6) of the Constitution. For the purposes of this application it would be useful to set out the essential part of the said Rules in their entirety. They are read as follows:-

"Legal Notice NO. 133 THE CONSTITUTION OF KENYA IN EXERCISE of the powers conferred by Section 84(6) of the Constitution of Kenya, The Chief Justice makes the following Rules:-

THE CONSTITUTION OF KENYA (PROTECTION OF THE INDIVIDUAL) PRACTICE AND PROCEDURE RULES, 2001

……………………………………………………

2. Where an accused person in a criminal case or a party to a civil suit in a subordinate court alleges contravention of his fundamental rights or freedoms under Sections 70 to 83 inclusive of the Constitution in relation to himself, he shall apply informally to the presiding magistrate during the pendency of the proceedings before the court to file a reference to the High Court to determine the question of the alleged violation.

3. ………………………………………………………..

4. ……………………………………………………….

5. ………………………………………………………..

6. ………………………………………………………..

7. ………………………………………………………...

8. While the reference to the High Court is pending; all proceedings in the subordinate court shall be stayed pending the determination of the reference.

9. where contravention of fundamental rights and freedom is alleged otherwise than in the course of proceedings in a subordinate court or the High Court, an application shall be made directly to the High Court.

10. (a) Where violation of fundamental rights and freedoms is alleged in any proceedings pending in the High court, application for determination of the question shall be made by Notice of Motion in the matter and in the case of Order L of the Civil Procedure Rules, as far as practicable, apply.

(b) Pending the determination of such question; all further proceedings shall be stayed.

………………………………………………………….

11. ………………………………………………………….

12. Any appeal from the decision of the High Court to the Court of Appeal under Section 84

(7) of the Constitution shall be governed by the Court of Appeal Rules.

Made on the 17th September 2001

BERNARD CHUNGA

CHIEF JUSTICE "

During the hearing and in particular during his reply to the submissions of the D.P.P. Mr. Nyandieka stated that the present application was made under Rule 9 of the above-mentioned Rules. There is no dispute that Rules 3 and 10 are applicable where the alleged violations are made during the pendency of proceedings in the subordinate court and the High Court respectively. It is my view that the alleged violations could be **within** the respective proceedings or **outside** the proceedings or the court but intended to either interfere with the individual's rights to a fair trial or with enjoying other protective rights generally which as a result, may also interfere with his free, voluntary and independent participation in the proceedings at hand and to prosecute his cause of action or defend himself, without any threats, coercion or intimidation. As correctly submitted by Counsel for the applicant, the proceedings in question here have been concluded and judgment delivered on 24th September, 2004. There is no pending proceedings in the High Court in respect of Criminal Appeal No. 544 of 1999 as consolidated with Criminal Revision Number 13 of 1999 and therefore in effect, Rule 10 would not apply. Is Rule 9 applicable to this case? Again, the Rule says:-

"9. Where contravention of fundamental rights and

freedoms is alleged otherwise than in the course of

proceedings in a subordinate court or the High Court,

an application shall be made directly to the High Court." (emphasis mine).

It is my opinion that this is a short rule with simple and clear language."Contraventions of rights and freedoms is alleged otherwise than in the course of proceedings" - To me these words mean that the allegations under Rule 9 are those which allege contraventions of fundamental rights and freedoms not in any judicial proceedings or litigations whether pending or concluded. The words "**otherwise than in the course of proceedings"** exclude any alleged contraventions **during any proceedings**. It would be any allegations of contraventions made **"anywhere else"** than in the course of proceedings in a subordinate court or in the High Court. Examples of such contraventions or violations would abound in all spheres of life and interactions. e.g allegations of violations:-

- during arrest or interrogations by the police,

- in the decision to indict or charge a suspect, by the Attorney General or the police,

- refusal to grant of the revocation of a trade license, public transport license, liquor licensing, etc.

- in the compulsory acquisition of property,

- in the admission of students at public universities or other public educational institutions,

- during procurement or tendering for services and goods by state corporations and other public bodies,

- in applications for national identification cards, or passports,

- during elections of councilors to local authorities. etc.

The possible situations for the invocation and application of Rules 9 are almost boundless and limitless. This is because they apply to all alleged contraventions of fundamental rights and freedoms except those made in connection with contraventions during the pendency of proceedings in the subordinate courts and the High Court.

It is the applicant's case that Rules 9 is applicable to alleged violations after the determination and conclusion of proceedings in the High Court and in effect also in subordinate courts. In view of the interpretations that I have given to Rule 9 above, I do not agree with or accept this argument. Concluded and determined Judicial proceedings, or cases in both the subordinate courts and the High court cannot in law be the subject of an inquiry or investigation under the provisions of Section 84 (1), and the Rules made there under. If this was the intention of Parliament directly or the Chief Justice through the powers conferred on him under Rule 6, they would have said so in clear and unequivocal terms as the rest of the substantive provisions of the Constitution and the Rules.

The applicant by this application and submissions wants to confer on the High Court a jurisdiction it does not have. The Supreme Court of Zambia in the case of **ZAMBIA NATIONAL HOLDINGS LIMITED & ANOTHER –V- ATTORNEY GENERAL OF ZAMBIA, 1994 1 LRC** discussing a question of jurisdiction had this to say:

> **"The term "Jurisdiction" should first be understood. In one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which the court has to take cognizance of matters in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation. Such limits may relate to the kind and nature of the actions and matters of which the particular court has cognizance or to the area over which the Jurisdiction extends, or both."**

I wholly agree with the foregoing. Jurisdiction is donated to or given to a court of law and the court is bound to apply the said jurisdiction and its limitations. It cannot arrogate to itself jurisdiction by interpretations or trying to comprehend the intentions of Parliament when the words in legislation are clear and obvious and where there is no ambiguity. I am persuaded by the school of thought that the jurisdiction of the High Court is unlimited but not limitless since the court must exercise its jurisdiction in accordance with the law. In the aforesaid Zambian case, the Supreme Court held:- at page 105:-

> **"In order to place the word 'unlimited' in act 94 (1) in its proper perspective, the jurisdiction of the High Could should be contrasted with that of lesser tribunals and courts whose jurisdiction in a cumulative sense is limited in a variety of ways. For example, the Industrial Relations Court is limited to cases under a single enactment over which the High court has been denied any original**

jurisdiction. The local courts and subordinate courts are limited as to geographical area of operation, types and sizes of awards and penalties, nature of cause they can entertain and so on. The jurisdiction of the High court on the other hand is not so limited; it is unlimited but not so limitless since the court must exercise its jurisdiction in accordance with the law. Indeed, act 94 (1) must be read as a whole including phrases like 'under any law and such jurisdiction and powers as may be conferred on it by this Constitution or any other law; It is inadmissible to Construe the word "unlimited" in vacuo and then to proceed to find that a law allegedly limiting the powers of the court is unconstitutional. The expression unlimited jurisdiction should not be confused with the powers of the High court under the various laws. As a general rule, no cause is beyond the competence and authority of the High Court; no restriction applies as to type of cause and matters as would apply to the lesser courts. However, the High Court is not exempt from adjudicating in accordance with the law including complying with procedural requirements as well as substantive limitations such as those one finds in mandatory sentences or other specifications of available penalties or, in civil matters, the types or choice of relief or remedy available to litigants under the various laws or causes of action."

Again, I am persuaded by the aforesaid sound elucidation of the law. Although the High Court has unlimited original jurisdiction under section 84(1) and (2) together with sections 60(1) of the Constitution with regard to the enforcement of sections 70 to 83 of the constitution, it is still bound by all the laws that govern the exercise of such jurisdiction. In the present case, it is not one of any limitation that the applicant has presented to the court. To the contrary, to me it is one where the High Court does not have the said jurisdictions purportedly or intended to be invoked, as it does not exist. In a useful passage in the case of GARTHWAITE –GARTWAITE (1964) 2 ALL E.R, 233,Diplock LJ at 241-423 said:-

"…………………………………………………………… this distinction between the strict and the wide meaning of the expression "Jurisdiction" was of little importance in the case of the superior courts so long as they did not owe their origin to statute, for there was no need to distinguish between non-existence of a power and settled practiced not to exercise

an existing power. However, in the case of courts created by statute as the supreme court of Judicature, comprising the high court and the court of Appeal, has been since 1873, the court, has no power to enlarge its jurisdiction in the strict sense, but it has power to alter its practice proprio motu within the limits which it imposes on itself by doctrine of precedent, subject, however, to any statutory rules regulating and prescribing its practice and procedure made pursuant to any rule making power contained in the statute."

I find myself guided by the foregoing reasoning and principles. This court even when sitting as a "Constitutional Court" or constitutional division of the High court exercising unlimited and extremely wide powers, authority and jurisdiction under section 60 and 84 of the constitution, must ensure that it does not enlarge its jurisdiction there under. In this case, in my view the grant of the orders sought i.e inquiry of the conduct of proceeding in the criminal court would amount to an appropriation and /or usurpation of the jurisdiction of the Court of Appeal lodged by the Applicant.

Before concluding my judgment in this application, I think that it is essential I make my observations or comments in respect of the decision of the case of MAHARAJ –V- ATTORNEY GENERAL OF TRINIDAD AND TOBAGO (1978) 2 ALL ER 670 which was cited to the court by both parties. There has been a lot of debate and discussion of this case in our courts in the recent past .It is important that the unique facts of this case is understood. In the said case, the appellant, Mr. Ramesh Lawrence Maharaj of the Bar of Trinidad and Tobago and with whom I had the privilege to go on a 5 - week tour and study of the U.S.A Judicial System in 1993; was on the 7th April 1975 committed to seven days imprisonment for contempt of court by his namesake, Justice Sonny Gulab Maharaj. He was committed for something he said during arguments in a case in which he was representing his client. In 1975, there was no right of appeal to the court of Appeal in Trinidad and Tobago, from an order of a judge of the High Court finding a person guilty of contempt and ordering him to be punished for it. Mr. Ramesh Maharaj was not a party in the suit and was only the attorney of one of the parties. The Judge did not make plain to him of the particulars of the specific nature of the contempt with which he was charged. It would appear that there were no proceedings, only an order. The applicant sought an immediate means of collateral attack on the order of Maharaj J. on the very day of his committal he applied ex parte by notice of motion to the High Court in purported pursuance of 5.6 of the Constitution claiming redress for contravention of his constitutional rights under section 1 of the constitution claiming redress for contravention of his constitutional rights under 5.1 of the constitution and for a conservatory order for his immediate release on his own recognizance pending the final determination of his claim. According to the proceeding in the Privy Council, the application was placed before another High Court Judge, Justice Braithwaite who ordered the appellant released from prison forthwith. In his reasons in writing given later, the Judge said that on the evidence before him, the appellant had made out a prima facie case that his rights under section 1 (a) of the constitution not to be deprived of his liberty without due process of law had been contravened. The substantive motion, however, did not come before Braithwaite J, but before another Judge, Scott J. After an intermittent hearing extending over 13 days he dismissed the motion on 23rd July, 1975 and ordered the appellant to serve the remaining six days of his sentence of imprisonment. His ultimate ground for dismissing it was that the High court had no jurisdiction under S. 6 to entertain the motion since to do so would in his view, amount to exercise by one judge of the High Court of an appellate jurisdiction over another judge of the High Court. This would be inconsistent with the equal power, authority and jurisdiction by which Section 5(2) of the Supreme Court of Judicature Act 1962 is vested in the judges of the High court. The appellant appealed to the Court of Appeal and also to the Judicial Committee of the Privy Council. The Privy Council found in his favour but the Court of Appeal ruled against him on the issues which had remained unresolved, one of which was whether the High court had jurisdiction under Section 6 of the Constitution to grant the appellant redress for an alleged contravention of his constitutional rights resulting from something done by a judge when acting in his

judicial capacity. The Court of Appeal answered this question in the affirmative and found in his favour on this question.

However the Court of Appeal dismissed two other grounds of appeal i.e

> (i) Whether the failure of Maharaj J. to inform the appellant of the specific nature of the contempt of court with which he was charged before committing him to prison for it contravened a constitutional right of the appellant in respect of which he was entitled to protection under Section 1(a) of the Constitution and if so,
>
> (ii) Whether the appellant was entitled by way of redress to monetary compensation for the period that he had spent in prison.

As one would expect, the appellant again appealed to the Privy Council and the question of jurisdiction was revisited. The majority of members of the Council led by Lord Diplock held:-

> **" ………Nevertheless on the face of it the claim for redress for an alleged contravention of his constitutional rights under Section 1(a) of the Constitution fell within the original jurisdiction of the High court under Section 6(2). The claim does not involve any appeal either on the fact or on substantive law from the decision of Maharaj J that the appellant on 17th April 1975 was guilty of conduct that amounted to a contempt of court. What it does involve is an enquiry into whether the procedure adopted by the judge before committing the appellant to prison for contempt contravened a right to which the appellant was entitled under Section 1(a) not to be deprived of his liberty except by due process of law. Distasteful though the task may well appear to a fellow judge of equal rank, the constitution places the responsibility for undertaking the enquiry fairly and squarely on the High Court."**

The applicant has relied on this decision in this application and so has the Respondent who has even asked the court to follow it. First and foremost, it is important to point out that our section 84(1) of our Constitution and Section 6 of the constitution of Trinidad and Tobago then are similar but not the same. There are salient differences which have drastic legal implications. Section 6 of the said constitution provided as follows:

> "6 (1) For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of the foregoing sections or section of this Constitution has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High court for redress.
>
> **(2) The High court shall have original jurisdiction –**
>
> **(a) to hear and determine any application made by any person in pursuance of subsection (1)**

of this section and (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) thereof, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of any of the provisions of the said foregoing sections or section to the protection of which the person concerned is entitled to.

(3) (3) if any proceedings in any court other than the High court or the court of Appeal any question a rises as to the contravention of any of the provisions of the said foregoing sections or section the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless in his opinion the raising of the question is merely frivolous or vexatious.

(4) Any person aggrieved by any determination of the High Court under this section may appeal there from to the Court of Appeal.

(5) Nothing in this section shall limit the power of Parliament to confer on the High court or the Court of Appeal such powers as Parliament may think fit in relation to the exercise by the High Court or the Court of Appeal, as the case may be of its jurisdiction in respect of the matters arising under this chapter."

A careful study and reading of these provisions will show that Section 6 (1) and (2) are substantially similar to our provisions in section 84(1) and (2) of the constitution but with a significant difference. The Trinidadian and Tobagon Section (1) and (2) do not provide for the making of rules by the Chief Justice with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under the said provisions. Our section 84(1) is subject to subsection

(6) which reads as follows:- "

(6) The Chief Justice may make rules with respect to

the practice and procedure of the High court in relation

to the jurisdiction and powers conferred on it by or under

this section (including rules with respect to the time within

which applications may be brought and references may be

made to the High court."

The immediate former Chief Justice Bernard Chunga on 17th September 2001, in exercise of this power made the present Constitutional practice and procedure Rules. The said Rules are now part and parcel of the Constitution and in particular Section 84 (1). As indicated earlier, the Trinidad and Tobago Constitution does not have such provisions or rules. However, it will be noted that Section 6(3) of the said constitution provides for in effect, complaints or contraventions in any proceedings in subordinate courts to be referred to the High Court. These provisions are contained in our Rules 1, 2, 3, 5, 5, 6, 7, and 8 and are elaborate. They provide for not only the substantive law but also the procedure.

Our Rules then go further than the Trinidad and Tobago

Constitution and provide for the procedure where the allegations

of fundamental rights and freedoms are made in any proceedings

pending in the High Court. As stated earlier, our section 84 and the

Rules do not expressly make any provisions for the law and procedure for alleged contraventions within proceedings in the High court after the determination and conclusion of proceedings, in the High Court or even in the Court of Appeal. This is the distinction between our law and that in Trinidad and Tobago (at the time). In Kenya today, we have rules made under section 84(6). Section 84(1) is subject to section 84(6). I do hold that our Rules of Practice and Procedure in relation to Section 84(1) are made in accordance with the law and are now Part and parcel of our constitution. This court, the High court which has original jurisdiction to enforce the protective rights and freedoms is bound to follow and apply the said Rules as it is the law of the land and of great significance, it is made under the Constitution . I have already said enough about the jurisdiction of the Court and the significance thereof. Had the Rules not been made or if they provided differently, then there is no doubt that I could possibly have reached a different decision. As it is this court must apply the law as it is and in particular as the laws in question are constitutional provisions. As much as the High Court and all courts for that matter must be jealous of protecting the Fundamental rights and freedoms of the Individual as enshrined in the constitution but such enforcement must still be within the existing law, the Constitution of Kenya.

An appreciation of the above will perhaps demonstrate why I have, in the recent past applied the **MAHARAJ CASE** when Rules 10 (a) and (b)were involved specifically in two cases in the course of this year. In those cases, I was bound to stay proceedings pending any enquiry into the alleged violations in those cases as Rule 10 (2) is mandatory and not discretionary. Even if Rule 10 (2) was not mandatory such that an automatic stay was not inevitable; in an appropriate case, I would have no hesitation in applying the principles laid down in the **MAHARAJ CASE** or the interpretation of the law thereof, regarding the jurisdiction of the High Court in making such an enquiry. I would probably have applied the interpretation given by the Chief Justice Isaac Hyatali of Trinidad and Tobago in the Court of Appeal which in the end was upheld by the Privy Council when he said:-

"Section 6(1), however, is the provision which confers jurisdiction on the High Court. In my opinion, its language is sufficiently wide and

general to permit an applicant to pursue a claim for redress in any case in which he alleges in relation to himself, that a person exercising the plenitude of legislative, executive or judicial power, has contravened or threatens to contravene the provisions securing the applicant's rights and fundamental freedoms. A judge of the High Court is therefore not excluded from the preview of section 6 (1). It is true that in dealing with such an application , a judge may be required to consider the merits and validity of an order made by another judge of equal jurisdiction but, in so doing, he would be exercising no more than the original jurisdiction, expressly vested in him by the provisions of Section 6 (1). In my judgment, an application there under in respect of a judge's order is, strictly speaking, a complaint that such an order is unconstitutional on the ground that it infringes the applicant's rights and fundamental freedoms and cannot be regarded as an appeal stricto senso, to the High Court against the validity of an order made in the same court by another judge……"

As I have said the situation is different in the present case due to the enactment of our Practice and procedure Rules in 2001. To this extent the **MAHARAJ CASE** is distinguishable from the application before this court.

In my view, therefore if there is an apprehension that the existing Rules made in 2001 are wanting or in any way limit or qualify any of the Protective rights and freedoms or the Law relating to their effectual enforcement then, there is nothing to prevent the Chief Justice in making the Rules or even the Legislature in reconsidering Section 84, from removing any limitations or improving on the rights and freedoms guaranteed by the Constitution, respectively. Finally, it is important to remember that the Application herein does not challenge the Rules of Practice and Procedure made under Section 84 (6) but to the contrary invokes them and specifically Rule 9. The question whether the Rules or any one of them are consistent with the substantive provisions of the Constitution (Ss. 70 – 83) and could possibly arise in some other proceedings in the future. They do not arise in this case and the court can only apply the said Rules, as it is bound to do. Finally, as I understand the decision of my two brothers and the majority, this court has the jurisdiction under Section 84 (1) and (2) of the Constitution read together with Rule 9 of the Practice and Procedure Rules, 2001 to enquire whether, inter alia, the Criminal Court in sentencing and committing the applicant to prison while altering the sentence violated the fundamental rights and freedoms of the applicant. If this is the correct position and I am wrong and/or it is so confirmed ultimately, if this matter goes further, then in my view, it would be a matter of great concern in our Constitutional jurisprudence and Constitutional Law. This is because, it would mean that an aggrieved party from a decision of highest court in the country., the Court of Appeal would have a right to apply to the High Court under Section 84 (1) and (2) and Rule 9 and seek redress where there are allegations of contraventions of fundamental rights and freedoms during proceedings in the Court of Appeal whether the said proceedings are pending or concluded. In my humble view , the resulting situation would be a *reductio ad absurdum.* I cannot see how the High Court can in any situation review or enquire into the proceedings or decisions of the Court of Appeal which is constitutionally and under other Laws, a higher and more superior court. Such a situation would certainly lead to judicial chaos in the administration of justice in our country. And if this happens, the Legislature must move poste haste to prevent a

constitutional and jurisprudential crisis. Perhaps, it is high time to establish a fully-fledged and appropriately empowered Constitutional Court to deal with such situations to prevent a nonsense being made of the Law, Judicial hierarchy, doctrine of precedent and finality of litigation.

For the foregoing reasons, I would dismiss the application herein, the Originating Summons dated 29th October, 2004 with no order as to costs.

Dated and delivered at Nairobi on this 13th day of December, 2005.

MOHAMMED K. IBRAHIM

JUDGE