Yaqoob & 6 others v Republic (Criminal Appeal E022 of 2023)
[2025] KEHC 7119 (KLR) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7119 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E022 OF 2023

WM KAGENDO., J

MAY 29, 2025

BETWEEN

YOUSUF YAQOOB ..... 1ST APPELLANT

YAQOOB IBRAHIM ..... 2ND APPELLANT

SALEEM MUHAMMAD ..... 3RD APPELLANT

BHATTI ABDUL GHAFOOR ..... 4TH APPELLANT

BAKHSH MOULA ..... 5TH APPELLANT

PRABHAKARA NAIR PRAVEEN ..... 6TH APPELLANT

PAK ABDOLGHAFAR ..... 7TH APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the conviction and sentence in Mombasa Chief Magistrate's Court in Criminal Case No.1255 of 2014 as consolidated with Criminal case No.1528 & Criminal Case No.1493 of 2014 22nd February 2023. [Hon. Mutuku Chief Magistrate)

JUDGMENT

Background and Representation

1. On the 21st of March 2023, the firm of Browne and Browne Advocates, filed a document dated 20/03/2023. It is headed, Petition of Appeal. It was however just a one-page document whose contents indicate that actually, it is a notice of intention to appeal. It was in respect to the 7 Appellants.

2. That document was accompanied by an email, also dated 20/03/2023, in which the said firm requested the Chief Magistrate Mombasa, to supply them with the certified copies of the proceedings and judgment in Criminal Case Number 1255 of 2014.

3. On the 23/03/2023, the Firm of Muthee Soni and Associates filed a Petition of Appeal on behalf of the 6 of the Appellants. It is dated 23/03/2023 and it raised 7 grounds of appeal. It was in respect to 6 of the Appellants. Probaker Nair Pravever was omitted.

4. Separately on 26/07/2023, the firm of Omondi Ogutu and Associates filed an application dated 26/7/2023 being Mombasa High Court Misc. Application number E098 of 2023 praying for extension to file an appeal out of time. They annexed a petition of appeal in respect to Pak Abdolghafer.

5. The 2 files were mentioned severally as the record was being prepared.

6. On 22/07/2024, Mr. Rajoro Advocate then appearing for the 6th Appellant indicated that the record was now complete. The court directed that it be served on all the parties.

7. At this point, there was some push and pull over the representation, but eventually the other law firms ceded the representation to the firm of Browne and Browne Advocates to represent the 1st to the 6th Appellants who are said to be Pakistanis.

8. The firm of Omondi, Ogutu and Co. Advocates remained on record for the 7th Appellant said to be from Iran.

9. It was also agreed that the two appeals be consolidated and the later file was closed.

10. The other significant issue was the application for bond pending appeal that the firm of Brownie and Browne filed. The same was however abandoned so that we concentrate on the main appeal.

11. Eventually directions were given that the now consolidated appeal would be heard by way of written submissions.

12. The issue of the death of one of the crew members Usman Gani during the arrest, search and seizure of the vessel also came up. We had a few mentions and the OCS Kilindini police station made some efforts which he updated the court during the mentions. That issue remained unsettled.

13. In the meantime, I called for a social inquiry report to help address some of the concerns raised such as the death of that Usman and the ill health of some of the aged appellants.

14. The reports headed sentence review report were filled by Mr. Muthoka, a probation order.

15. Ms. Peris Ogega, the learned advocate for the Respondent raised some concerns over the same since they were headed 'Resentencing reports 'yet the court had called for a social inquiry reports.

16. The court granted the respondent leave to file further submissions in respect to those reports which they did.

The Charge

17. The Appellants were charged with the offence of trafficking in narcotic drugs, contrary to section 4 (a) of the *Narcotic Drugs and Psychotropic Substances Control Act* No 4 of 1994.

The particulars of the charge were : -

> On diverse dates between 2nd day of July 2014 and 18th July 2014 at Kilindini Port Mombasa Berth No 8 within Mombasa County, jointly with others not before court were found,

trafficking by conveying in the cargo deck of ship Amin Darya also known as Al Noor narcotic drug namely Heroin to wit 377.224 kilograms of creamish granular heroin valued at Kshs 1,131,672,000/-, liquid heroin to wit 33,200 liters valued at Kshs 189,000,000/= and 2,4OO litres of diesel mixed with heroin valued at Kshs 1,440,000/- all with a market value of ksh.1,322,122,000/- (one billion, three hundred and twenty-two million, one hundred and twelve thousand shillings) in contravention of the said Act.

18. The state called a total of 35 witnesses and Appellants gave their defence. They were convicted and sentenced to life imprisonment on 10th March, 2023, after a trial spanning close to 10 years. The Appellants have been in custody from the time of arrest.

The Case In Snapshot

19. From the evidence, on record, the genesis of this case is some intelligence that (PW5) Major Athman Dengereko Kaifani had received prior to 01/07/2014. Consequently, on 01/07/2014 he intercepted a ship at 20.20 hrs. at Ras Ukowe. PW5, who was then the commanding officer of the Kenya Navy Vessel; Nyayo, said he spotted and contacted the ship through the Universal Channel used by all Mariners. His evidence was that he was at 6 Nautical Miles from Ras Ukowe and the other ship was 6 Nautical Miles ahead of him.

20. PW5 testified that the crew of the vessel he contacted was very co-operative and they gave their details as name: Alnoor registered in Bashir, Iran carrying white cement. He said he found this information in convenient (sic) within his intelligence that the ship by that name was trafficking in narcotics. He therefore reported his find through the command and shadowed the vessel up to Kipini where he handed over to Major Phillip Muluma (PW11) on 02/07/2014 at 0.556 am.

21. Major Phillip was then the commanding officer of the Kenya Navy Vessel – Umoja and after taking over from PW5, they escorted the vessel together with his crew including PW6, Captain Kipkorir Keter.

22. PW6 testified that he was also aboard the Kenya Navy Vessel Umoja. That on 03/07/2014, he noted the ship they were escorting had changed cause from '210' to 190'. He contacted the vessel who said the agent had told them to proceed to Zanzibar. PW11 Over heard this conversation and he took over and directed the ship to go to Mombasa.

23. Subsequently, (PW7) Captain Ali, was called to captain the ship. He was escorted by the Officer in Charge Kilindini CP Mbaya, 3 other officers from the Maritime police unit (PW10, PW9 and 12.) These 4, meet the rescue and captained it to the Mtongwe Anchorage. Later that day, at 3pm. PW8, Ian Abdulaziz –a KPA Marine Pilot, shifted the ship from the Mtongwe Anchorage to Berth number.

24. According to the prosecution the search on the ship began on 3/07/2024 at the Mtongwe berth where a quick search was conducted by Chief Investigator Gerald Mutiso (PW25). The documents such as passports PEXT 81-90 were recovered. The search then continued on 04.07/2014 after the ship was piloted to the berth number 8. Between the 4th and the 7th of August 2024, the search team offloaded and sifted through some 258 one tone bags of cement and other small bags of genuine cargo on the ship's cargo deck.

25. The 7th of July 2014 marked the turning point of the search as it yielded the results being the recovery of the "suspicious package" PEXT 7. Following this find, there appears to have been some confessions from the crew that there were similar bags in the ship's ballast and the diesel tanks.

26. Samples were taken from the recovered bag, the ballast water, and the diesel and were taken for analysis.

27. Eventually all the water and diesel were pumped out and more suspicious substance recovered. The same was sampled, tested and the accused persons charged in court.

28. In the intervening period some Kenyan agents/ or people said to be connected to the ship and its cargo were arrested and charged. 30. The trial court, however, upon a full hearing acquitted this group. These were: A10, A11 and A12, the three locals, who according to the prosecution, were supposedly part of the local network being shipping and clearing agents.

29. The trial court had earlier on in the ruling at the close of the prosecution case, on 23/11/2017, found that A6 and A8, who were on board the subject vessel at all material times had no case to answer. The court found that there was no evidence that the accused were official crew members and that in fact they were apprentices and that consequently they could not be held responsible for the cargo the ship carried and could not therefore have been trafficking in any narcotic drug that may have been on the vessel.

30. Consequently, only the crew members were convicted hence this appeal.

31. The other notable highlights of the case were the death of one crew member Usman and the much-publicized destruction of the vessel and its cargo.

Role of the Appellate Court

32. It is now well settled law that the appellate court's role is to review the trial court's decision, re-evaluate the evidence, and make its own independent findings, ensuring justice and fairness, while acknowledging the trial court's advantage of seeing and hearing witnesses:

33. The Court of Appeal in *Chwanya v R* Cr. Appeal 70 of 2021 (2024) KECA 391; cited comparative common law jurisdictions as demonstrated in the decision of the Supreme Court of India in *Ganpat v State of Haryana* (2010) 12 SCC 59. 4. where the court set out the principles to be borne in mind by a first appellate court while dealing with appeals and stated thus:

> a. There is no limitation on the part of the appellate Court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.
>
> b. The first appellate Court can also review the trial court's conclusion with respect to both facts and law.
>
> c. It is the duty of a first appellate Court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
>
> d. When the trial Court has breached provisions of the *Constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question."

Grounds of Appeal

34. As earlier pointed out, there were two sets of grounds of appeal; they can be summarized inter alia, as follows: -

i. The learned trial magistrate erred in law and in fact by convicting the accused persons in proceedings that were conducted in a language that they did not understand; a purported translator who masqueraded and was allowed by the court to participate in the proceedings did not produce any testimonials, credentials or certification in proficiency and capacity to translate technical judicial proceedings for the benefit of all parties concerned;

ii. The learned magistrate erred in law and fact by relying on evidence whose chain of custody could not be ascertained to convict and sentence the appellants/applicants.

iii. The learned magistrate erred in law and fact by relying on evidence whose origination, source or chain of custody could not be ascertained or verified to convict and sentence the appellants/applicants.

iv. The Appellants/Applicants were ordered to be taken to Court to take Plea purely on account of an alleged 'retrieval' of a 'suspicious package' (page 51 record of proceedings) which had not been subjected to any or further examination, thereby prejudicing the entire process

v. The leaned trial Magistrate erred in law and in fact by convicting and sentencing the appellants to life imprisonment by relying solely on her own assessment but not borne out by the evidence which, in any event, was flawed.

vi. The learned trial magistrate erred in law and fact by relying on planted evidence whose search and collection was in the absence of the appellants'/applicants' legal counsel's representation, which was not made available as a matter of right.

vii. The learned trial magistrate erred in law and fact by shifting the burden of proof to the appellants.

viii. The trial court destroyed the evidence upon which the conviction and sentence accrued by reason of which the Appellants are held in the absence of any evidence that sustained the charge, conviction and sentence.

ix. The record of proceedings does not contain evidence of the real particulars of the ship that was destroyed at sea by presidential executive order, whether it was Al Noor or Amin Darya

x. The appellants/applicants were arrested, searched ad traumatized with complete disregard to their status as foreigners, without a warrant, without the presence of a representative of their foreign mission or embassy staff, as well as absence of a legal representative to witness the horror of a search from 2nd July 2014 to 18th July 2014.

xi. The trial was conducted without due regard to the provisions of the *United Nations Convention on the Law of the Sea* (*UNCLOS*) 1982 which is the Mother law that governs all activities in national as well as international waters, as well as all other Conventions, Treaties and Agreements to which the Republic of Kenya is a Party and a Signatory, in furtherance of Article 2(5) of the *Constitution* of Kenya, 2010.

xii. The destruction of the evidence, in particular the shelling and blowing up of the vessel, which vessel had been 'intercepted' and unlawfully arrested while on international waters, in the middle of the sea in the full glare and witness of the whole world while the trial was still underway, on the orders of the head of state of the republic of Kenya who witnessed the exercise... was a clear indication that the case the accused were facing had already been determined.

xiii. That the learned magistrate erred in law when she failed to find that the key ingredients of the offence laid out under section 4 (a) of the *Narcotic Drugs and Psychotropic Substances (Control) Act* No 4 of 1994 were not established.

xiv. That the learned magistrate erred in law and misdirected herself in law totally ignoring all the issues before her by way of submissions and/or fact at the time of trial where the accused person was denied the right to an interpreter proficient in Farsi/Persian.

xv. That the learned magistrate erred in law and in fact when she held that the circumstantial evidence on record linked the Appellant with commission of the offence in question whereas extenuating factors in play weakened the whole case against him.

xvi. That the learned magistrate erred in law and in fact in disparaging and/or disregarding the Appellants defense consequently shifting the burden of proof to the Appellants.

The Trial

35. The prosecution called a total of 35 witnesses while for the accused persons swore affidavits and they were crossed examined. They also called one witness.

The Evidence

36. As noted above, the respondent called a total of 35 witnesses, they were:

i. PWI Hamisi Salim Masaa – Senior Assistant Commissioner of Police. He was the lead investigator and he deployed others.

ii. PW2 William Kailo Muyoki – A Government Analysist. He analysed several samples and prepared his report EXT. 44.

iii. PW3 John Menga. Also, a government analyst, he prepared several reports which he produced as PEXT 11, 12, 27, 33 and 37.

iv. PW4 – Patrick Mugo James – A seizure Registrar. He produced the seizure certificate PEXT. 31.

v. PW5 – Captain Athman Ndegereko Kai from a Kenya Navy. Then the In charge - Mv Nyayo. He was the first contact with the vessel in issue. He shadowed it and handed over to PW11.

vi. PW6 – Captain Kipkorir Keter. A Kenya Navy Officer, the second in command of the MV Umoja. Together with PW11, and their crew , they took over from PW5 and Mv Nyayo.

vii. PW7 – Was Captain Ali Abodi Abdalla – a Senior Marine Pilot. He piloted the ship to the Mtongwe Harbor.

viii. PW8 – Was Abdulaziz Ahmed Mzee – A Senior Marine Pilot. He piloted the ship from the Mtongwe Anchorage to Berth 8.

ix. PW9 was CI Mbaya Gikandi of the Marine Police – escorted the ship to the berth once it was intercepted.

x. PW10 CIP Simon Simoto – the DCIO Kilindini Maritime Police – escorted the ship to the Harbor.

xi. PW11 Major Phillip Mulumba – commanding officer Kenya Navy Ship -Umoja. He took over from PW5 and he is the one who instructed the ship to go to proceed Mombasa.

xii. PW12 Adama Banafa – The one in charge of KPA – Maritime Operation Assisted in moving the ship to berth 8 and also in the search. He also towed the ship away.

xiii. PW13 – Shaban Omar Tayari – a Marine Engineer. He inspected the vessel and produced his reports- PEXT. 63, 54 and 65.

xiv. PW14 – Gulam Karim Dadi. An Operations Manager at Multi Port International Company. He provided bags and a bagging machine during the search.

xv. PW15 – Abdi Rahim Hassan Ahmed. Principal Operations Officer at KPA. He discharged the goods, provided 200 drums to empty the water from the ballast and the oil tanks.

xvi. PW16 – Lewis Juma Malova search and Rescue Officer – He examined the global positioning systems gadget for the ship – PEXT 66 and he produced the report – PEXT 68.

xvii. PW17 was Wilfred Josephat Kaliubi Head of Safety – Kenya Maritime Authority. He examined the books record in respect to the Seamen – PEXT. 69 – 79.

xviii. PW18 Joram Wambua Kateyo – Chief Lab Technician – Ministry of Mining. He analyzed 10 samples of calcium Sulphureous and produced his report PEXT. 80.

xix. PW19 – IP Mohammed Ali – His evidence was in respect to Khalid.

xx. PW20 was Wilfred Nyuyo Okumu – a pollution Control Inspector – KPA. He assisted in draining the water from the ship's ballast.

xxi. PW21 was Dancan Sandagi a Supervisor of Pollution Control International KPA. He also assisted in draining the water from the ship's ballast.

xxii. PW22 was Midan Ndhiwa – Welding and Fabrication. He cut a 30-40 inches hole in the ship to assist retrieval of bags.

xxiii. PW23 – CIP Peter Mulinge – from GSU headquarters. He recorded and guarded the exhibits recovered from the ship.

xxiv. PW24 – PC Antony Kinyanjui – CID Mombasa CSC. He took photographs – 106 – 279.

xxv. PW25 CIP Gerald Mutiso from Anti – Narcotics Unit – Nairobi. He was part of the Investigating Team.

xxvi. PW26 was Thuma Mwamutiwa a Superintendent Inspector of mines. He sampled the contents of the 250 jumbo bags found in the vessel.

xxvii. PW27 – CIP Alex Mungeta – A document examiner. He examined some documents recovered in the vessel and produced his reports PEXT. 101 – 105.

xxviii. PW28 – David Changway Terer – an Investigation with E A CC. He arrested the 12th accused person.

xxix. PW29 was CPL Daniel Hamisi – a Police Officer attached to Safaricom. He analyzed some Mpesa Statement and produced his report – PEXT. 114.

xxx. PW30 was CPL Ngate Samuel. From Anti-Narcotics Police Unit Mombasa. He assisted in the arrest of the 10th accused person.

xxxi. PW31 was Mohammed Said Mujibi – a diver with the Kenya Navy – Mtongwe. He assisted in retrieval of the substance from the ship's tank.

xxxii. PW32 – Joseph Kiago Kahurumie Chief Manager Port Operation – KRA. He did not complete his evidence.

xxxiii. PW33 – CIP Benjamin Mwauso. He took photographs of both the interior and exterior of the ship and the contents in ship. He also took a DVD of the destruction. He did not produce the same.

xxxiv. PW34 – CPL Joseph Wafula Wanjala of CID Anti-Narcotics Unit. He was part of Investigating team.

xxxv. PW35 – Ruth Mwende- also part of the Investigating Team

All the 12 accused persons filled written affidavits and were cross examined.

Analysis of the Facts and the Law

37. For ease of analysis, the court sieved and grouped the evidence and issues under 3 subtitles:

i. The identity, seizure or arrest of the ship.

ii. The search, recovery, sampling, weighing, storage and destruction of the exhibits

iii. Other technical or procedural aspects.

There were, of course, areas of overflow.

Which and Whose Ship is was in Issue

38. The law

> Many treaties apply at sea and in relation to the sea. The United Nations Convection on the Law of the Sea of 1982 (*UNCLOS*) is considered to be the fundamental expression of the rules governing general relationships and jurisdictions at sea. In effect, it is a "constitution" for the sea. Other treaties deal with issues that are not specifically "maritime" in nature, but which can apply both at sea and on land. For example, many of the provisions in the Rome Statute of the International Criminal Court apply equally to conduct perpetrated at sea and on land. Sometimes the way in which a general treaty rule is applied at sea requires some adjustment or a slightly different understanding, precisely because the sea is not the same as land territory. One example is the fundamental rule about when the right of a State to use force to defend itself is activities.

39. *UNCLOS* is clearly the most significant piece of international law that is specifically aimed at governing the sea and regulating conduct at sea. However, there are many other treaties which are specifically designed to regulate or govern some aspect of State relationships at sea or conduct at sea.

40. Another treaty which addresses a matter of universal concern to States and which contains some special additional rules for application at sea is the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (1988 Convention.)

41. *UNCLOS* also contains a general rule on this issue. States have long recognized that the trafficking of drugs by sea is a major criminal enterprise and needs to be addressed in more detail than provided for in *UNCLOS*. As a consequence, when they came to negotiate the 1988 Convention, States took the opportunity to provide greater detail on how to implement the general authorization found in *UNCLOS*. The maritime crime of trafficking drugs by sea. (*Maritime Crimes Manual Guidelines*) at page 4.

42. Article 108 of *UNCLOS* deals with Illicit traffic in narcotic drugs and psychotropic substances. It states: -

    a. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas' contrary to international conventions.

    b. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such traffic.

43. Article 17 of the *United Nations Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances* deals with Illicit Traffic by Sea. It states:

    1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.

    2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.

    3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.

    4. In accordance with paragraph *3* or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, inter alia: (a) Board the vessel; (b) Search the vessel; (c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

44. Article 27 of *UNCLOS* relates to Criminal jurisdiction on board a foreign ship: It states:

    1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

        (a) if the consequences of the crime extend to the coastal State;

        (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;

        (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or

        (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

    2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.

3. In the cases provided for in paragraphs *1* and *2*, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken

4. In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.

5. Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.

45. Article 110 of *UNCLOS* is the Right of visit. States;

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that: (a) the ship is engaged in piracy; (b) the ship is engaged in the slave trade; (c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109; (d) the ship is without nationality; or (e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph *1*, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible considerations.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply mutatis mutandis.

46. According to the International Maritime Organization, the general mechanism for establishing a ship's nationality and for regulating shipping is registration of the ship in a particular State. By linking a ship to a State, the system of ship registration indicates that State has the right to protect that ship in international law.

47. Article 91 of the United Nations Convention on the Law of the Sea (*UNCLOS*) states-

Nationality of ships

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

66. Article 92 of the *UNCLOS* deals with the Status of ships. It states:

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

48. Other identifying marks include the registration documents and the International Maritime Organization number.

Which and Whose Vessel was it?

49. In this particular case, the evidence shows that the ship was not flying any flag. All the prosecution witnesses starting with the Kenya navy officers who were the first contact, PW5,6, and 11, to the maritine police officers who directed it to the Mtongwe berth being PW10,11 and 12 stated as much. This was supported by the two captains who brought the ship into the anchorage; PW7 and 8.

50. PW13, Shaban Omar Tayari, a maritime engineer with Kenya maritime Authority and a Port State Control Officer inspected the subject vessel and her documents. He testified that he was able to ascertain the owner of the vessel and even wrote to him. His evidence was as follows:

(page 223)

> .... My duties include inspecting all vessels dockings at the Port of Mombasa for security purposes...
>
> On 4/7 /2014. I was on duty. The Head of the department sent me to a ship called Amin Darya at the Port's Berth No 8. The ship was suspected to be carrying narcotic drugs. I got there at 11.00 am. I was received by K.P.A officers. One Hamisi Masa allowed me to get into the ship at around 2.00 Pm. The vessel's crew were there. I can't recall their number...

51. .... I had earlier been prevailed (SIC) from getting into the ship because of ongoing investigating herein. I was not introduced to the investigators. One Bwanamaka introduced me to the ship's captain. Both Maka and the captain are there (points at accused 1 and accused 12 in the docks. I asked the captain to give me the ship's records for my investigations. He said they had been confiscated by the officers carrying out the investigations. Bwanamaka later gave me the records. He told me he was the vessel's agent. He gave me the name of his captain....

52. I inspected the records I inspected the records with him and the captain. They included the ship's cargo safety equipment certificates and cargo ship safety radio certificates. international Oil Pollution Prevention Documents, International Oil Pollution Prevention Documents, Minimum safe Manning Certificates and Certificate of Registration. I returned all the documents to the Captain upon inspection. All but one certificate were valid. The Minimum Safe Manning Certificate had expired. I had noted the documents in K.M. A's Form A in my possession... (exhibit 63)"

53. ... I also checked the ship's safety in the company of its engineer. I can't recognize him now. It is standard practice to carry out such inspection for security purposes. The ship had several defects. I noted in K.M.A Form B. the Form is here duly executed. I kept a copy and handed the original to the ship's captain. I produce the copy (p Exhibit 64) Code No l7 was faulty. It required rectification of some parts before a ship departs. The faults are identified in the Form. A ship is not allowed to depart before such

defects are rectified. Code No 30 also had problems. This would have made the ship to be grounded. I identified several defects on this. Code as well. The ship would to be detained until the faults were rectified. Some luggage was being offloaded from the ship as a carried out the inspection. I also prepared K.M. A Form C on the same date. It is used to detain an unseaworthy by ship. The Captain and I signed the form. I kept a copy while the Captain took the original" I produced the copy in evidence (P exhibit 65). I gave the information of the ship's detention to K.M.A , K.PA and other officers concerned. The vessels owner was notified of the action as well. The owner is stated in a document in possession of someone outside the court. I can't tell the name now..."

Under cross examination, on whether he knew the owners of the subject vessel PW11 stated as follows:

101. .... I am the one who authorizes release of the affected ship by preparing Form D. I didn't complete it as I learnt that the ship was destroyed. I did fill Form D later remarking that the President ordered the destruction of the ship. Form D is with an officer outside the court who asked me not to come with it. I don't know why he made this decision.

54. I had written to the ship's owner. The officers checked the documents in my possession and retained others. I either consulted google or checked our records to find out the owner of the ship. I found out the owners. The investigating officers advised me that I didn't require to bring some of my documents to court. The documents concerned are in my bag.

55. We must bear in mind that unfortunately the ship was destroyed before any cross examination was done so the defence did not have a chance to challenge these findings.

56. The court had nevertheless visited the scene on 27th August 2014 when the evidence was taken and the ship produced. The record however does not have any remarks as to the appearance of the ship.

57. The ship was also photographed by two officers from the scenes of crime. One produced his photographs numbers 106 to 279 accompanied by his certificate. This is PW24, Whereas the other, PW33, did not produce his work including the video recording.101

58. PW7 the senior marine captain testified that upon boarding the vessel, he questioned the captain as to the flag. This is at page 171 of the proceedings. He testified that The captain said that registration was provisional and he was seeking registration under a Zanzibar flag.

59. In his defence the captain of the vessel stated that the ship was flying an Iranian flag and the owner was HAJI Ibrahim whom he had met in Iran. None of the other defences witnesses clarified the issue as to the flag. They all testified that they were hired by an agent and they flew to Iran where they found the vessel already loaded.

60. From all this, one can safely conclude that the vessel had no flag. It had also had two names and two sets of registration documents. One set- for Al Noor registration number 1082 showing the port of loading as Mombasa on 22/5/2014 and the other set documents for the vessel- Amin Darya showing its registration as IMO 8630784. Its identity was therefore unknown or not defined and we can safely conclude that it was without nationality.

The Interception at Sea:

61. PW5, Major Athuman Ndengereko Kalfani, the Captain of Kenya Naval Ship - Nyayo, that was the first to contact the vessel Amin Darya in his evidence in chief stated as follows:

> .....The legal instruments that guide me on my work are the *Constitution* and the law of Kenya. Later national law also applies am aware on the combinational of the law of the sea.

We have the right to challenge all vessels at sea and to enforce our laws. We have the right to board another vessel. The circumstances leading to breaching are diverse....

62. They include a vessel that refuses to stop when required, when there is a scrutiny on any vessel that we believe is committing an offence. When we suspect that vessel is committing an illegality, we challenge it. We do so under channel Uhf 16. This is a universal channel at sea used by all marines. We establish communication. There is a set of questions we ask When the vessel responds we determine if the information received is sufficient or if there is a need to send men called the boarding team....

63. Going into the particular case, this is what he said;" On 1/7/2014 I do recall I was on duty. At 1915 hours I was at Kenya Naval Base. Mada in Lamu county. We were prepared to leave for patrol. I am with my ship and crew. I had 41 men. At 20: 20 hours my Navigating officer reported a contact which is a ship, a few meters from ours. We could not tell what type it was as it was dark. We proceeded to challenge the vessel...We proceeded to challenge the vessel. We were 6 nautical miles from Ras Ukowe. I was within the territorial. It was 6 nautical miles ahead of our vessel. I challenged the vessel. They were very co-operative. I wanted to know their identity. They said they were M/V Al Noor integrated in Busahir in Iran. They said they were having white cement. They said they had 7 Pakistanis, 2 Indians and 1 Iranian. They said that the last port of call was Sharjah in the United Arab Emirates. They said their next port of call was Mombasa Kenya. When I got this information, I found it inconvenient with the intelligence that I had of the ship by that name trafficking in narcotics. 101. I cannot remember the date I had received the said intelligence....

    111. I reported through the chain of command. I then shadowed the vessel this means ensuring that the vessel goes to the direction it should without raising suspicion. I did so up to Kipini. another warship from our fleet called Umoja took over the shadowing duties. The commanding officer was Major Philip Mulumba. The hand over was at 05.56 am on 2/7/2012. There were other vessels at sea but not close to mine or Al Noor. I had maintained a distance of about 5 miles from Al Noor within that distance, we can see the vessel. My ship also had the ...lights on.

64. Under cross examination he stated that though he had a chart showing the location of the subject ship, he was not the one who prepared it and that even the recording he had made of the conversation with the captain was not produced in court. Regarding the chart he had and the movement of the subject ship noted thereon he stated thus:

    (page 152)

    ...The chart says that Motor Boat Al Noor indicated that they were altering course to Kenya. The chart is written by our people, not by the accused persons.'

65. PW6, Captain Kipkorir Keter of Kenya Navy Ship Umoja stated that he took over escort duties of vessels that had been intercepted by KNs Umoja. He stated as follows: ...

    (page 153)

    I communicated via UHF radio channel 16. I asked for the last port of call. I was told it was Sharjah in UAE. I asked the next part of call. I was told it was Mombasa. I asked the number of personnel on board. I was told 7 Pakistanis, 2 Indian and 1 Iranian. The cargo was to be with white cement. I got all this from a vessel called Al Noor. I was told the name by those on board....

    When the vessel changed course, we communicated and asked them why they altered the course. It was during my watch. They said that the agent had told them to proceed to

> Zanzibar not Mombasa. I was the one who asked the question. He said that he had talked to his agent. He did not disclose the name of his agent. My commander heard the same communication. He came to the bridge. He took over my duties. He communicated with the captain of the vessel. He took over the command and the communication... Finally, we arrived in Mombasa on 3'd July 2014.

66. Under cross examination on the point of actual interception PW6 stated as follows:

(page 156)

... Interception means getting into contact. It was off Lamu. We took over the vessel at Mtondani. I have marked the place in red. I do not recall the distance but it was within 2O3 Nautical minutes. It was not 6 nautical miles. The vessel was in motion. The time was about 05.50 hours" It took us roughly 8 hours to reach the vessel from Lamu....

67. Darya but that he learnt from his Captain that Amin Darya is also known as Al Noor.

68. PW11 Philip Mulumba, a major of the Kenya Navy based in the Navy Base at Mtongwe Mombasa, stated that his duties included patrolling territorial waters and interception of contraband goods. He stated as follows:

(page 209)

> .... On 1/7/2014 I received a phone call from Lt Colonel Wambua who directed me to establish communication with a ship called MV Al Noor which had been intercepted in Kenya's territorial waters. I was also able to contact KNS Nyayo. I linked up with the Ships in our waters on 2/7/2014. I linked up with MV Nyayo. The latter ship was to hand over MV Al Noor which it was escorting after intercepting it. The ship was handed to me for escort to Kilindini Port Mombasa. I contacted the captain of the Ship through radio and escorted it to the Port. I can't recall the name of the Captain. He told me its last Port of call was in the U.A.E. The next Port of call was Mombasa. it reportedly carried white cement. .....He explained that the ships agents advised the changes of destination. I directed the Captain to proceed to Mombasa as planned. Our rules don't allow change of destination of a ship under escort. The captain obeyed my instructions that the ship should proceed to Mombasa. We arrived at the Pilot station area Off Mama Ngina Drive at around 11.00 am. I handed over the ship to captain Abdile of K.P. A and the Marine Police."

Analysis

69. The evidence of the 3 Kenya Navy Officers PW5, PW6 and PW11 involved at the interception of the vessel is at variance when it comes to where exactly it occurred. Whereas PW5 stated it was about 6 nautical miles within the territorial sea, PW6 stated that it was within 203 nautical miles and that it took the Navy ship 8 hours to reach the vessel from Lamu. That certainly was not within the 12 nautical miles territorial sea but within the 220 nautical miles Exclusive Economic Zone.

70. PW5 also stated that they had standard procedures regarding interception and that if they determined that information sought and obtained via the universal communication channel was not sufficient, they would send a boarding team to the vessel involved.

71. In this instance, the vessel was co-operative as per PW5's evidence. They obtained information regarding; the composition of the crew, being 7 Pakistanis, 2 Indians and 1 Iranian; the registration of the vessel, being Iran; cargo, being cement; last port of call being Sharjah, UAE; next port of call, being Mombasa and further that the vessel's name was Al Noor.

72. PW11 also stated that they had intelligence about a vessel by the name Al Noor being involved in narcotics trafficking and hence became suspicious and a decision was made to shadow the vessel which changed to "escort" to Mombasa Port when the Captain is said to have changed course for Zanzibar.

73. The defence submitted that the circumstances as relayed by the two witnesses amount to a vessel that was exercising freedom of navigation and/or innocent passage.

74. The respondent's position is if there was reasonable suspicion of trafficking in narcotics then the recourse would be as set out in international law.

75. The fundamental concept is that all nations have the right to navigate the high seas and other international waters freely, without undue interference from other states. Freedom of navigation is a principle of international law, enshrined in the Law of the Sea convention (*UNCLOS*) stating that ships flying the flag of any sovereign state should not be interfered with in international waters, except as permitted by international law.

76. The manner of interception at sea is elaborately set out in the relevant conventions. If indeed a ship is without nationality, the interdicting state has to have national jurisdiction that provides the authority to take jurisdiction over the vesse'.

77. The *Constitution* of Kenya, 2010, specifically articles 2(5) and (6) provides for the automatic incorporation of general rules of international law and ratified treaties and conventions into Kenyan.

    The Law

    article 2(5) .... the general rules of international law shall form part of the laws of Kenya.

    shall form part of the law Kenya.

78. For our purposes in this case the relevant conventions are the 1988 Vienna Convention commonly known as the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances that Kenya ratified on 19/10/1992 (information available on relevant convention site), the United Nations Convention on the Law of the Sea commonly known as *UNCLOS* that Kenya ratified on 2/3/1989 (information available on the convention site) and the general principles of International Law.

79. Kenya is also member of the International Maritime Organization (IMO) since 1973. The IMO is a specialized agency of the United Nations responsible for maritime safety, security and the protection of the marine environment. As a coastal, port and flag state it has significant interests in maritime transport and navigation. The IMO assigns a unique ship identification number to each vessel which remains unchanged and is a crucial identifier for ships, facilitating tracking, safety and regulatory compliance (information available on relevant site.

80. Article 17(3) of the 1988 *Vienna Convention* covers illicit traffic by sea and provides as follows:

    (3) A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.

81. Article 27 of *UNCLOS* on criminal jurisdiction on board a foreign ship:

    provides as follows:

Article 27

Criminal jurisdiction on board a foreign ship

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

    a. if the consequences of the crime extend to the coastal State;

    b. if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;

    c. if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or

    d. if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.

82. Territorial sea is defined under article 3 *UNCLOS* as;

    Article 3

    Breadth of the territorial sea

    Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

83. The procedures regarding interception of a foreign vessel are clearly set out. In our case it was not proved that subject vessel was intercepted within the territorial sea as to confer jurisdiction under Article 27.

84. Pw16 who inspected the vessel's GPS stated that it was not functional. The intercepting team on the other hand did not produce the recording of the conversation with crew of the subject vessel and also their own GPS coordinates at the time of interception. Their evidence as reproduced above, was also at variance. We must bear in mind that the burden of proof lies upon the prosecution. Therefore, the exact point of interception was not proved.

85. This leads us back to the 1st Issue of the vessel identity and the court's jurisdiction.

86. We have already found that the identity of the ship was not firmly established. It had no flag and even though that did not immediately translate into being without nationality, the other indicia of nationality were not helpful as she had different registration details. Further the owner was not availed and the vessel had no agent. PW7 testified that he is the one who looked for a local agent since he noted that some crew members were unwell. That made it impossible to contact the flag state. Basically, we can conclude that this was a suspicious vessel in the high seas because the exact point of interception was not fully established.

87. What are the obligations of the coastal state under such circumstances? Articles 108 and 110 of *UNCLOS* provide the answer.

    Article 108 deals with Illicit traffic in narcotic drugs or psychotropic substances it states:

    1. All States shall cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high sea contrary to international conventions.

2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the cooperation of other States to suppress such acts.

88. Article 110 on the Right of visit and states:

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

(a) the ship is engaged in piracy;

(b) the ship is engaged in the slave trade;

(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;

(d) the ship is without nationality; or

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph *1*, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained. 4. These provisions apply mutatis mutandis to military aircraft. 5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

89. Having established that the ship had no flag and its identity and nationality was not established, and Kenya has the requisite legislation ,we can safely conclude that the coastal state has the right to visit under articles 108 and 110 of *UNCLOS* and consequently the coastal state had jurisdiction.

Arrest, Search and Sampling

90. We leave the issue of the ship and move on to the arrest, search and recovery then we shall make a wholesome determination.

91. As earlier noted the case started with the interception by PW5, and whether lawful, or otherwise, we now have a ship, being escorted by PW6 and PW11 towards Mombasa.

92. The Kenyan Maritime Unit was then called in and PW7 the Kenyan Captain, escorted by PW9 and 10, directed it to the Mtongwe Anchorage .PW7, stated that when he first heard of the ship it was about 4 miles from the nearest point of land. (Pages 166 and 168 of the proceedings)

93. At this point as the ship under arrest?

What is an Arrest?

94. Part III of our *Criminal Procedure Code* deals with General Povisions Arrest, Escape and Retaking

95. Section 26 of the *CPC* deals with the Power to detain and search aircraft, vessels, vehicles and persons. It provides;

    i. A police officer, or other person authorized in writing in that behalf by Inspector-General of the National Police Service, may stop, search and detain—any aircraft, vessel or vehicle in or upon which there is reason to suspect that anything stolen or unlawfully obtained may be found; or any aircraft, vessel or vehicle which there is reason to suspect has been used or employed in the commission or to facilitate the commission of an offence under the provisions of Chapters XXVI, XXVIII and XXIX of the *Penal Code* (Cap. 63); or

    any person who may be reasonably suspected of having in his possession or conveying in any manner anything stolen or unlawfully obtained

    ii. No person shall be entitled to damages or compensation for loss or damage suffered by him in respect of the detention under this section of an aircraft, vessel or vehicle.

    iii. For the purposes of this section, "aircraft", "vessel" and "vehicle", respectively, include everything contained in, being on or attached to an aircraft, vessel or vehicle, as the case may be, which, in the opinion of the court, form's part

96. Sections 118 to 121 of the *CPC* deal with execution of warrant to search; They state:

    i. Power to issue search warrant;

    Where it is proved on oath to a court or a magistrate that anything upon, with or in respect of which an offence has been committed, or anything which is necessary for the conduct of an investigation into an offence, is, or is reasonably suspected to be, in any place, building, ship, aircraft, vehicle, box or receptacle, the court or a magistrate may by written warrant (called a search warrant) authorize a police officer or a person named in the search warrant to search the place, building, ship, aircraft, vehicle, box or receptacle (which shall be named or described in the warrant) for that thing and, if the thing be found, to seize it and take it before a court having jurisdiction to be dealt with according to law. (*Act No 22 of 1959*, s. 12, *Act No 10 of 1983*, Sch.)

    ii. Execution of search warrants; A search warrant may be issued on any day (including Sunday), and may be executed on any day (including Sunday) between the hours of sunrise and sunset, but the court may, by the warrant, authorize the police officer or other person to whom it is addressed to execute it at any hour. (*Act No 10 of 1983*, Sch.)

97. Persons in charge of closed place to allow ingress and egress (1) Whenever a building or other place liable to search is closed, a person residing in or being in charge of the building or place shall, on demand of the police officer or other person executing the search warrant and on production of the warrant, allow him free ingress thereto and egress therefrom and afford all reasonable facilities for a search therein. (2) If ingress into or egress from the building or other place cannot be so obtained, the police officer or other person executing the search warrant may proceed in the manner prescribed by section 22 or section 23. (3) Where a person in or about the building or place is reasonably suspected of concealing about his person an article for which search should be made, that person may be searched. (4) If that person is a woman the provisions of section 27 shall be observed.

98. Detention of property seized (1) When anything is so seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.

99. Section 73 of the *Narcotic drugs and psychotropic substances control act* provides as hereunder:

> Power to search; Where information on oath is laid before a magistrate alleging that there is reasonable ground for suspecting that—
>
> (a) an offence under this Act has been, or is being or is planned to be, committed and that evidence of the commission of, or plan to commit the offence is to be found on any premises or other place; or
>
> (b) any document or other material directly or indirectly relating to, or connected with, any transaction or dealing which is, or any intended transaction or dealing which, if carried out, would be— (I) an offence under this Act; or (ii) in the case of a transaction or dealing carried out or intended to be carried out in any place outside Kenya, an offence against any corresponding law in force in that place, is in the possession of or under the control of any person in any premises or other place, the Magistrate may, by warrant under his hand, authorize any police officer named in the warrant, with such assistance as that police officer thinks reasonable, at any time or times within one month from the date of the warrant, to enter and search the premises or other place named in the warrant.
>
> (2) A police officer authorized by any warrant under subsection (1) to search any premises or other place may enter and search such premises or other place (including any receptacle found therein) and every person found therein or who, the police officer has reasonable ground to believe, has recently left those premises or that other place, and for that purpose may use such assistance and such force as may be reasonable and may break open any lock, and may seize any narcotic drug or psychotropic substance, or document or other material referred to in subsection (1), found therein or on any such person, and any other article or thing which he has reasonable ground to believe to be evidence of the commission or intended commission of any offence under this Act.
>
> (3) Where information on oath is laid before a magistrate alleging that there is reasonable ground for suspecting that there is concealed on any person, animal or thing or in any receptacle, premises or other place, any movable property— (a) liable for forfeiture under Part IV; (b) in respect of which a restraint order has been made under section 26; or (c) liable for forfeiture under section 36, the magistrate may, by warrant under his hand, authorize any police officer named in the warrant, with such assistance as that police officer thinks reasonable, at any time or times within one month from the date of the warrant, to enter and search the premises or other place or to search any person, animal, thing or receptacle.
>
> (4) A police officer authorized by any warrant under subsection (3) to search any person, animal, thing, receptacle, premises or other place may search the person, animal, thing or receptacle, or may enter and search any building or other place, and for that purpose may use such assistance and such force as may be reasonable, and may break open any lock, and seize any movable property, referred to in subsection (3) found thereon or therein.

(5) Where any police officer not below such rank as may be specified by regulations is, for reasons to be recorded in writing, satisfied that the delay caused by the time required to apply for and obtain a warrant to enter and search under subsection (1) or (3) would defeat the purpose of the search, he may exercise the powers conferred on him by subsection (2) or (4) in relation to search and seizure without obtaining any warrant for search under subsection (1) or (3).

How was the Search Done?

100. The *Maritime Crime: A Manual for Criminal Justice Practitioner's Guideline* at page 13 states that;

> Human rights obligations at sea: Human rights standards, as well as humane and fair treatment considerations, also apply in the maritime environment. States have a wide range of views regarding which obligations are to be applied in what circumstances, and thus it is not possible to give a concise list of universally applicable human rights to be respected at sea. However, there are examples of human rights and criminal procedure issues that must be considered in all circumstances where the vessel and people are under the control of a maritime law enforcement agency: detention conditions; the right to be promptly brought before a competent judicial authority; and transfer or surrender to another State. The International Tribunal for the Law of the Sea has reaffirmed on many occasions "that the considerations of humanity must apply in the law of the sea as they do in other areas of international law." Accordingly, those conducting maritime law enforcement operations should identify the human rights instruments and domestic laws that apply to them and that they are obliged to implement, and they should understand.

101. The starting point in our case is there was no search warrant and no proper communication on the reasons, process and results of the search. There was also no written reason in writing seeking to exempt the police officers from obtaining a search warrant as is required by section 73(5) of the *Narcotic Drugs and Psychotropic Substances Control Act*.

102. PW1, Hamisi Salim Massa, the Officer in charge of Anti- Narcotics Unit was the lead investigator. In his evidence in chief and under cross examination stated that he first heard about the Amin Darya on 3/7/2014 and that he first knew about a suspicious vessel on 1/7/2014 through intelligence from the Navy. According to him, the Navy then did not specify where the vessel was going or where it was coming from him. He further stated that he deployed his officers among them, Ruth Muinde SSP, CI George Mutiso and Corporal Joseph Wafula to Mombasa on 2/7/2014. He later joined them in Mombasa on 3/7/2014.The officers boarded the ship and carried out a search and recovered registration documents for the crew and the ship as well as 11 mobile phones belonging to the crew.

103. According to PW1, among the documents recovered was a manifest written in Arabic for the vessel called Al Noor registration number 1082 showing the port of loading as Mombasa on 22/5/2014 and also the documents for the vessel Amin Darya showing its registration as IMO 8630784. He also stated that that the vessel Amin Darya had no flag.

The witness interchangeably used the names Amin Darya and Al Noor to refer to one and the same vessel.

104. On recovery of contraband from the subject vessel PW1 stated as follows:

(page 46)

> "On 5/7/2014 the port Authorities gave us equipment we could use to swift through the bags. We used a hopper which allowed as to sift through the 258 jumbo bags. For the other we did it normally as they were smaller. It took several days. We did not recover anything contraband.... on 7.7.2O14 a suspicious package was found in the railing on the lower cargo deck. Joseph Wafula is the one who found it. He brought it to my attention immediately. I was with the captain also said that one member of the crew was sick. We looked. The package was marked Ba/363. It was neatly packed. The captain was concerned with his sick patient than finding out what was in the bag. I have this package. It was marked before we moved it and even photographed...

105. (page 47)

> "On the same 7/7/2014 the shipping agent came in the evening and I told him what had been recovered. I asked the captain how many such parcels he had on the vessel. He said they were over 700 such parcels. I asked him where they were. He said that they were inside the ballast. I went down the vessel with the captain and the engineer. I asked them what was inside the ballast. He said the trunk is usually filled with water but they had put the parcels inside them. I checked inside the ballast trunk inside I saw water. Using a spotlight, I saw floating bags. I identified Sunny bags floating. The vessel was said to have 4 ballast tanks. The fourth ballast tank is the one which had this stuff. The rest of the crew were in the cabin. I immediately looked the bags. They were stuck inside, the engineer opened to go down and bring them. I did not allow him. I planned to cut the deck and recover them. It was already night. It was 10.00 pm".

106. PW25 Police Service No 23XX67 C.I Gerald Mutiso, was among the first investigating officers to board the vessel stated upon cross examination as follows:

(page 299)

> ...The ships bill of landing does not show the vessel was destined to Mombasa. The ships manifest is not part of the inventories prepared. I didn't see the ship's manifest. The ship's route is described in the Alpha book. The book does look like it belonged to a student studying about ships. I didn't call the telephone number in the Alpha book. I don't recall us using sniffer dogs during the inspection. We were looking out for contraband or illicit goods. U.N.O.D.C was involved in the investigations....

107. .... I was not present when Hamisi Massa found the suspicious package. I saw it at and an open place. I can't confirm where it was removed from. Hamisi Massa knows better .....

149 ...the package does not have the name "heroin" written on it.

> ... Accused 6 Passport was issued in 2008. There are no stamps showing he visited any other century. He flew ...the stations Mumbai, India. There was another flight from Mumbai India to Dubai. He trained, Maritime affairs. He undertook various other trainings including welding as per the records were obtained. He has a certificate of compliance in engineering support level. We didn't draw sketch plans of the appearance of the vessel in question. Accused 6 and 8 were engineers in the ship.

108. I except them to move around various places of the ship. There was no suspicious substance in the white cement recovered.

.... The ship's tank was not cut. let was only opened. The water Ballast Tank was cut to access the contents.

...151. . We suspected that the heroin was poured into the diesel tank by the suspects on 6th July 2014 at night. This was an attempt to destroy the exhibits all that time the suspects were alone on the vessel. The Navy officers were only keeping guard outside the ship....

... Not all the accused were present during the recovery of the heroin. On 7/7/2014. Not all also attended the weighing s ampling and analysis of the exhibits. The heroin recovered on 7/7/2014 was weighed on 8/7/2014. The tank recoveries of 12/7/2014 were weighed and sampled on 15/7/2014 on land near the ship.

Anaylis and Determination

109. The starting point is that these investigations were led by some intelligence. We do not know from where. What followed is what was worrying. No one seems to have followed the law as set out above. None of the investigators mentioned any search warrant or attempts to get one or any compliance.

110. Further the evidence of PW1 Hamisi Massa, the chief Investigating Officer and that of members of his team, PW25 CI Gerald Mutiso, PW33 CPL Joseph Wafula, PW34 Ruth Muinde, materially differ on the recovery of the 'initial suspicious package' that according to their evidence set in motion the recovery of the rest of the contraband.

> PW1 testified that "on 7.7.2O14 a suspicious package was found on the railing on the lower cargo deck. Joseph Wafula (this is PW34) is the one who found it. He brought it to my attention immediately. I was with the captain also said that one member of the crew was sick. We looked. The package was marked Ba/363. It was neatly packed. The captain was concerned with his sick patient than finding out what was in the bag. I have this package.
>
> PW25 says
>
> > I was not present when Hamisi Massa (PW1) found the suspicious package. I saw it at an open place. I can't confirm where it was removed from. Hamisi Massa knows better .....
>
> PW33... says
>
> > As we continued searching the ship, we spotted a small package ...I was with Hamisi Massa at the time. The substance was covered with a nylon paper. A piece of clothing was under it. The package was found in the cargo deck of the ship. This is a section of the ship containing its cargo. We discovered the package after removing the gunny bags. The ship's captain was also present when we came upon the package.
>
> Upon cross exam: P33 added On 7/7/2014 we recovered a suspicious package. It was not hidden. Hamisi Massa was the first to spot the package. The captain didn't himself produce the exhibit. It was on the upper deck of the vessel. We prepared a search certificate on 7/7/2014 in respect of the recoveries. Some of the accused couldn't speak well. I can't recall if the ship's captain had recorded a statement by the time the accused were produced in court. C.I Mutiso took down the Captain's statement.

PW34 said...

> On 7/7/2014 at around 2.00 PM. Dr. Massa summoned me to the Cargo deck. I met him in the presence of the Captain. I was shown a package recovered from the ship. We marked the package (identifies "P exhibit 7")

111. From the above, we are also not sure from where the first suspicious bag was recovered because Investigating Officers kept passing the buck. PW1 the lead investigator testified that it said it was PW24. PW24 says PW1 and pw33 and PW1 say it was pw34.

112. We must not forget that this package was recovered several days after the search had started; around the 4th or 5th day. By then we had all sorts of people on board this vessel. There were the captains who directed the ship to the anchorage and the escort team, the search unit, the crane operators, the marine inspector sifting through and repackaging the bulky cement with cranes the investigating officers and then suddenly; voila - the bag appears! There on the cargo deck. Not hidden nor camouflaged. It could be sheer luck, but the contradictions in the recovering officers' evidence, raised a definite red flag in the evidence.

113. After the recovery of this bag, then comes the recovery of the others in the ballast and oil tank. This followed the confession by either the captain or the other crew members.

114. During the cross-examination PW1 says, it is the Captain and the engineer who confessed. Now, we must not forget that PW1 said that when the package was recovered, the captain was on the upper deck, attending to the sick crew member, who eventually passed on that very time of the said recovery.

115. Let's pause a moment; we have a dying and eventually dead crew member, a suspicious recovery and the same time a confession? Can that confession be said to be proper?

116. Confessions are defined in section 25 of our *Evidence Act* as hereunder; A confession comprises words or conduct, or a combination of words and conduct, from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.

117. Section 25A of the *Evidence Act* the clarifies how to deal with confessions. It states ; Confessions generally inadmissible

> (1) A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible and shall not be proved as against such person unless it is made in court before a judge, a magistrate or before a police officer (other than the investigating officer), being an officer not below the rank of Chief Inspector of Police, and a third party of the person's choice. (2) The Attorney-General shall in consultation with the Law Society of Kenya, Kenya National Commission on Human Rights and other suitable bodies make rules governing the making of a confession in all instances where the confession is not made in court. (Act)

118. Section 26... deals with Confessions to police officers and states thus: No confession made to a police officer shall be proved against a person accused of any offence unless such police officer is— (a) of or above the rank of, or a rank equivalent to, sub- inspector; or (b) an administrative officer holding first or second- class magisterial powers and acting in the capacity of a police officer.

PW1 stated that the captain and crew admitted to having THE drugs.

(page 51)

....9/7/2014, I was provided with the staff to cut the deck. The accused were taken to court for plea of the recovered package. When I did the analysis and the weighing for the ln package, the crew were present. They had no advocate but the agent the 12th accused was present. On 9/7/2014 we cut the deck on the afternoon. The accused came back from the court. we showed them the bags inside....

They had admitted concealing them on the deck. There were 7 openings. 6 of them had bags. I retrieved the bags in the presence of the accused..... There were 7 openings. 6 of them had bags. I retrieved the bags in the presence of the accused. I embarked on the exercise. I recovered

At page 51.

The captain and the engineer said they had cut the packets to empty to the ballast water and some had been concealed on the diesel reservoir. I also waited for the analyst to come.

119. On seizure of the ship and contents, and production of the same as exhibit, PW1 stated as follows:

(page 57)

I issued a notice of seizure as the authorized officer. I notified the person who had the ship as the captain. I did this in the presence of his lawyer Mr. Nabwana E. Pascal. This was on 14/7/2014. He did not know the actual owner now but under the law we serve the owner. No person came forward to date. I served a notice to all the nine accused. It is not dated 1B/7/2014. It should. be various dates are indicated. I also issued a notice of seizure for the cargo super planter. This was on 16/7/2014. Nobody had come to claim the car8o. I wish to produce the vessel ai an exhibit. (exhibit 1) in the vessel we had household goods like fridges, deep freezer, Kitchen wares. Safety boat and its engine.

120. Under cross-examination PW1 stated that though he could not tell when or where the drugs were put on the ship and that they did not find any drugs in the personal effects or compartments of the crew, but that nevertheless the crew were responsible as they were in the vessel that had drugs....he also stated that they did not dust for fingerprints and once again restated that that the crew led them to where the drugs were.

(page 89)

121. Chief Inspector Mutiso, Corporal Wafula boarded the vessel at 11.35 to 11.40 55P Muinde was also involved. I entered the vessel at 1430 PM. They searched the ship. They found personal documents of the accused in the ship. They show that the crew was of different nationalities. The vessel had not identification. My officer briefed me. The vessel was self-contained with beds and bathrooms. The accused had personal effects. They were all searched. I did not get any drugs in the personal effects of the compartments where the accused were sleeping. I cannot tell when the drugs were put in the ship. I do not know when any of the accused entered the ship. I cannot tell when exactly the accused entered the ship or when the drugs were placed there. The 9th accused was in the vessel that had drugs. He worked as a crew.....

122. He was not a passenger. He was actually the engineer. He was part of the concealing of the drugs. The 9th accused led me to where he had concealed the drugs....

> In my statement I have not mentioned that the 9th accused led to where the drugs were concealed. The captain looked restless. I never recorded this in my statement. I do not have my note book. We did not document the captain pointing out to us where the drugs were. I do not know where the vessel was before it came to Kenya. The documents show that the destination was Kenya. I can see the port of loading as Mombasa. Destination is Kenya. The vessel is called Al Noor. I got on 3/7/2014. The date of loading is 22/5/2014. On 22/5/2014 the vessel was in Sharjeh in UAE Destination point is in Arabic I cannot read

it" ..... Investigation are still incomplete. The ship is Amin Darya. The documents I have are for Al Noor. I have the serial number of ship Destination is Kenya. The vessel is called Al Noor. I got on 3/7/2014. The date of loading is 22/5/2014. On 22/5/2014 the vessel was in Sharjeh in UAE Destination point is in Arabic I cannot read it" ..... Investigation are still incomplete. The ship is Amin Darya. The documents I have are for Al Noor. I have the serial number of ships. His vessel Al Noor 1082. The owner of the vessel is different. It was 8630784- I have the actual document for Amin Darya. I have not yet produced them. I produce the ones that I have for the purposes of production of the drugs. The documents do not have the description of the goods on board Amina Darya The documents for Al Noor are in Arabic. I do not know what they say. The accused had no Visa to enter Kenya. We did not charge them with being unlawfully present in Kenya. It is a Berth No 8 where we recovered the drugs. We are not in the business of dragging people into the country. The first package with drugs was on a railing. The other substance was conceded. We did not dust for fingerprints..."

123. These confessions were obtained from persons who could not understand the English language. There was also evidence that several were unwell and most worrying their fellow of crew member had passed on. We will also note that these searches were going late into the night and on this fateful 7thAugust 2014, the confession and other recovery was at 10.00 PM. So, on this night again, we combine a death, night search and an illegal confession, where does that leave us? We will consider the effect of this alongside the sampling.

124. On sampling after the appellants had been arrested and arraigned in court, PW1 stated as follows:

(page 50)

.... The sampling was done in the presence of CPL Mutiso and Wafula. It is dated 8/7/2014. The samples were taken from the package and the 2 samples from the ballast.

Upon cross examination PW1 stated that though he could not tell when or where.

(page 89)

125. Chief Inspector Mutiso, Corporal Wafula boarded the vessel at 11.35 to 11.40 SSP Muinde was also involved. I entered the vessel at 14.30 PM. They searched the ship. They found personal documents of the accused in the ship. They show that the crew was of different nationalities. The vessel had not identification. My officer briefed me. The vessel was self-contained with beds and bathrooms. The accused had personal effects. They were all searched. I did not get any drugs in the personal effects of the compartments where the accused were sleeping. I cannot tell when the drugs were put in the ship. I do not know when any of the accused entered the ship. I cannot tell when exactly the accused entered the ship or when the drugs were placed there. The 9th accused was in the vessel that had drugs. He worked as a crew.....

126. He was not a passenger. He was actually the engineer. He was part of the concealing of the drugs. The 9th accused led me to where he had concealed the drugs....

In my statement I have not mentioned that the 9th accused led to where the drugs were concealed. The captain looked restless. I never recorded this in my statement. I do not have my note book. We did not document the captain pointing out to us where the drugs were. I do not know where the vessel was before it came to Kenya. The documents show that the destination was Kenya. I can see the port of 1082. The owner of the vessel is different. It was 8630784 - I have

127. PW2, William Kailo Munyoki, a Government Analyst, analyzed the samples including the diesel which according to him contained heroine at a concentration 0.00 gms /100mls and in his evidence stated as follows:

(Page 58)

I have exhibit memo from dated 28/7/2014. It was received that date..... what was escorted to the Government analyst were 3 containers (exhibit 44)

1. H- 1-A bottle with liquid,
2. 2.l-L a bottle with liquid.
3. 3. M-1-12- 3 bottle with liquid

128. The contents were brownish liquids. The escort was Corporal Wafula. We were to ascertain if the liquid here in contained any narcotics or psychotropic substances? They have our markings as well other markings. I analyzed the contents. ln bottle No 1 there was water which contained heroine at a concentration of 0.19 gm per 100 ml bottle No 2 was water containing heroine at 0.17 gm per 100 ml. Bottle 3- Diesel containing heroine at a concentration of 0.00gm per 100 ml.

129. As we consider this, we must bear in mind that the vessel and its cargo was destroyed.

Below is the Court ruling on 28/8/2014 rejecting DPP application to destroy the ship

(Hon. Gicheru, C.M.)

(page73). short ruling reproduced in its entirety...

> I have today considered the application by the DPP dated 28/8/2014. It was filed today under certificate of urgency. It seeks an order to have the motor vessel Amin Danya which was produced yesterday by Hamisi S. Massa (PW1) destroyed together with all its accessories. The application is made under Article 2O1(d) of the *Constitution* of Kenya 2010. section 74Aand77 of the *Narcotic Drugs and Psychotropic substances court Act*. (Act No 4 of 1994). It is supported by an affidavit sworn by Hamisi 5. Massa the seizure officer in this case. There are several annexures which include a letter dated B/8/2O14 by the General Manager operation Kenya Ports Authority to the Director of Criminal investigation giving a summary of the Marine Services rendered to the vessel" They include pilotage, tug services, part and light dues, security and clearage and name housing. Other annexures are a letter from Kenya Maritime authority dated 23 /7 /2014 amongst others
>
> The grounds for seeking the order of destruction are that no claimant has come forward to claim it and the apparent owner who is the first accused Yussuf Yaqoob was duly served with the Seizure notice after which he has not responded. The state is also incurring huge losses in storage charges and the vessel is a danger to other vessels within the port and a threat to human life I have considered the application in its entirety and I make the followings findings. Firstly, the first accused, the presumed owner of the vessel is represented by counsel who is on record but who unfortunately is unavailable owing to the death of his father. It is very important that the accused and his advocate be present at any proceedings that may result in forfeiture and eventual destruction of the vessel. This case has a hearing date which is 2/9/2014. Secondly, the court has fast tracked the hearing of this case to hasten the destruction the drugs herein and there is such an order already given. Yesterday the court had to sit up to 6.35 PM at a noisy, dusty and dark warehouse at the port of Mombasa to hear four witnesses so that the order for destruction of the drugs could be made. Thirdly, section

77 of the Act does not apply to exhibits that have been produced in court. Once exhibits are produced in court, the general law in Section 177 and 389A of the Criminal Procedure Act would apply. Fourthly witnesses for the prosecution have not even been cross-examined and the case has a hearing date of 2/9/2014 which has been given on a priority basis. For the above reasons I find that it will not be fair, lawful or procedural to all the current application. I direct that the issue of the forfeiture and destruction of the vessel be raised within these proceeding where the defense counsel can be heard before the court makes a decision one way or the other. Owing to the importance of this case to the state, I am prepared to hear it on daily basis until it is concluded.

130. An appeal to the High Court against the trial court's ruling by the DPP was also rejected.

131. On 2/9/2014 the Defence Counsel notified the court of the unlawful destruction of exhibit 1, the ship, despite the court ruling, and registered their objection to the destruction.... (page 79). He stated;

> The court ruled for the vessel not to be destroyed. We now know that the, vessel was destroyed. It was an exhibit of this case..... If we wanted to be shown where the drugs were stashed, can we see them? This now becomes as mistrial. The vessel must have been stolen if it was not released vide a court order, the court now becomes the complainant. The executive has ridden over everybody roughshod. How can we have cross-examined witnesses without the exhibit? The court has not made a determination in the matter. If someone interfering with the court. The application to deploy the vessel was made behind the back of the defense. The application was not allowed. The appeal to the High court was rejected. The state made the application for the destruction of the vessel. It was rejected. I informed the court that I was on record for the ship's owners. How did the 90 days expire? I should have been served with the notice. If the accused were not the owners of the ships, why were they served? We intend to cross examine while looking at the ship...."

132. The court nevertheless while taking judicial notice of the destruction under section 60 of the *Evidence Act* ruled to proceed with the trial...and also noted that destruction of the rest of the drug haul did not comply with the law....

(page 84) it is stated.

..... of course, it goes without saying that the destruction of the vessel is a big blow to the rule of law in Kenya and It was wrong. The court allowed for the destruction of the drugs and hoped that the law set out in Section 79 of the Narcotic Drugs and psychotropic substances (control, seizure and disposal) regulations 2006 would be copied with Rule B (l) (b) provides in the case of narcotic drug or psychotropic substances by incineration or such other method as shall ensure safe and complete physical destruction of such drugs" I was not present at the destruction so I do not know if all the legal procedures were complied with. Be that as it may the vessel was first one of the many exhibits produced in this case. We still have pretty much of the case left and I direct that we proceed from where we left on 27/8/2O14...

(page 153).

133. PW22, Mica Ndhiwa, a welder who cut a hole on the vessel according to his evidence stated as follows:

> " We cut a 3O-4O am long hole in the ship. The officers removed bags of different colours from the hole.... We were not told the content of the retrieved bags. The part we cut had been sealed. There were some other parts which had been cut and welded. I couldn't tell when this happened. The marks appeared old. There was water in a tank where we were

> cutting. I could NOT tell the name of the ship. .... I didn't see the accused persons herein at the place where the ship was berthed. I don't know where the ship is now.... I have 25years experience in my job. I was directed where to cut in the parts of the ship. I can tell the age of welding marks".

134. He continued... Accused 6 "S Passport was issued in 2008. There are no stamps showing he visited any other century. He flew ...the stations Mumbai, India. There was another flight from Mumbai India to Dubai. He trained, Maritime affairs. He undertook various other trainings including welding as per the records were obtained. He has a certificate of compliance in engineering support level. We didn't draw sketch plans of the appearance of the vessel in question. Accused 6 and 8 were engineers in the ship.

135. PW33 Number 4XX70 CPL Joseph Wafula - case investigator at pages 374 and 375 Stated that. Navy officers and the Port Police guarded the vessel during the material period. The Navy officers authorized access to the ship. They were in full time guard of the ship. The Anti-Narcotics Unit had possession of the ship.

> ...As we continued searching the ship, we spotted a small package (PMFI 151 was with Hamisi Massa at the time. The substance was covered with a nylon paper. A piece of clothing was under it. The package was found in the cargo deck of the ship. This is a section of the ship containing its cargo. We discovered the package after removing the gunny bags. The ship's captain was also present when we came upon the package. It was photographed before we marked it. C.I. Mutiso took Possession of the package for safe custody"

136. When the witness was Cross examined by Mr. Ombeta, he admitted that P exhibit 164 does not show the accused were present during the sampling. Chief lnspector Mutiso and Hamisi Massa are shown to have recovered the exhibits. The Memo doesn't show exactly where in the vessels the exhibits were found. I am not shown as one of those who recovered the same. I can't tell if the certificate of the sampling was prepared. I am referred to my statement. I was present when the samples were taken.

137. Pw33 stated that; All the accused were present during the sampling. All the water was extracted from the Ballast Tank and put in several drums. There were 166 drums of water, diesel was extracted and tested as well. Some brownish substances were found in the diesel. They were scooped and storedin12 buckets. We also cut open the Cargo Dock for more search various sucks stashed in the openings were found. One sack contained 90 traces of suspected narcotics.

138. The second sack had 37 packets. Other sacks contained various packages as well each package contained herein. ln total there were 7BB packages. The substances were analyzed by the government chemist and found positive for Heroin. Samples were taken from each of the packages. All the substances and the analysis report, were produced in evidence. 74 packages were analyzed 377.224 kgs changed course for Pamba. "P exhibit 124" is dated 24/5/2014 and stamped "UAE" " P Exhibit 125" is undated it only hears a translation date. Dates of arrival and departure are written in Arabic and Translated. P exhibit 99 gives the valuation of the seized drugs. The charge herein was recommended and preferred.

139. When PW3 was recalled and he stated as hereunder.

> " exhibit 64" shows the samples were submitted to me for analysis. The accused and their advocates were not present when I sampled and analyzed the exhibits. I didn't take phots of the exhibits I have indicated the quantities of the reagents I used in the marquees test The Government chemist receives many samples daily from various parties. Observations of the wavelengths when I used the Ultra Violet Spectroscopy test are not noted in my report.

When Cross examined by Mr. Gichana he said; I have given a concise report of the analysis.

140. PW1 insisted the appellants confessed after the discovery of the suspicious package just at the time and in circumstances when a fellow crew member was found dead and the Captain had been called to the deceased cabin for that purpose.... There was no explanation as to why the law and procedure on confession was not followed. Is that evidence admissible?

141. The rights of an accused are listed under rule 4 of the *Evidence (Out of Court Confessions) Rules 2009* as follows:

> " 4. Where an accused person intimates to the police that he wishes to make a confession, the recording officer shall take charge of the accused person and shall ensure that the accused person–
>
> (a) has stated his preferred language of communication
>
> (b) is provided with an interpreter free of charge where he does not speak either Kiswahili or English;
>
> (c) is not subjected to any form of coercion, duress, threat, torture or any other form of cruel, inhuman or degrading treatment or punishment;
>
> (d) is informed of his right to have legal representation of his own choice;
>
> (e) is not deprived of food, water or sleep;
>
> (f) has his duration, including date and time of arrest and detention in police custody, established and recorded;
>
> (g) has his medical complaint, if any, adequately addressed;
>
> (h) is availed appropriate communication facilities; and
>
> (i) communicates with the third party nominated by him under paragraph
>
> (3) prior to the caution to be recorded under rule 5."

142. An arrested person has the right—

(a) to be informed promptly, in language that the person understands, of--

(i) the reason for the arrest;

(iii) the consequences of not remaining silent;

(ii) the right to remain silent; and

(b) to remain silent;

(d) not to be compelled to make any confession or admission that could be used in evidence against the person;

(e) to communicate with an advocate, and other persons whose assistance is necessary;

143. In our case, The Investigating officer did not inform the appellants of their rights at the time of arrest and charge hence the curious evidence of alleged admission.

We now look at the cumulative effect of all these omissions and lapsed.

144. Admissibility of Illegaly Obtained Evidence

Pre-2010Era

In Kenya, illegally obtained evidence was for a long time admissible in criminal law as long as it was relevant. This position was articulated by the Privy Council in the case of *Kuruma s/o Kaniu v The Queen*, (1955) AC 197 (PC) –an appeal from Colony of Kenya.

145. In this case, a police officer (without a search warrant) searched the appellant and found ammunition, violating local law that required a warrant. The question was whether the bullets could be used as evidence despite the illegal search.

146. The Privy Council held that illegally obtained evidence is admissible if relevant. Lord Goddard stated "the test to be applied... in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained. This affirmed the common-law rule (also echoed in *R v Leatham* (1861)) that even stolen or illegally obtained evidence could be used in court. However, Lord Goddard noted a trial judge retains discretion to exclude evidence if its prejudicial effect outweighs its probative value. This colonial-era precedent (often cited simply as *Kuruma v R*) was followed in Kenya until 2010.

147. Post-2010 Era

However, the *Constitution* of Kenya 2010 shifted the paradigm and Article 50(4) of the *Constitution* and now disallows the admission of such evidence. Article 50 (4) of the *Constitution* provides thus

> " Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice."

148. *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others*, (2017) eKLR – Supreme Court of Kenya

This issue arose in a presidential election petition where the petitioners sought to introduce internal IEBC memoranda as evidence of irregularities. The respondent argued these memos had been obtained unlawfully (leaked without authorization) and should be struck out.

The Supreme Court expunged the memos for being illegally obtained. The Court emphasized that Kenya's 2010 Constitution changed the common law position. Article 50(4) of the *Constitution* provides that "evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice."

The Court noted that information held by public bodies should be accessible "in a manner recognized under the law", and because the petitioners "failed to account for how they accessed the memos", the evidence was obtained in breach of statutory and constitutional provisions on access to information. The import of this decision is that the illegally obtained documents were excluded from the case.

In determining the issue of illegally obtained evidence, the Supreme Court observed as follows:

> " The petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of the 2nd Respondent. Further, it has been alleged that these memos have only been shown in part, and taken out of context to advance the Petitioners' case against the 1st and 2nd Respondents, and to an extent, the 3rd Respondent. No serious answer has been given to that contention. The use of such information before the Court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information. This is the point of divergence between the instant matter, and the case of *Nicholas Randa Owano Ombija v Judges and Magistrates Vetting Board* (supra). In the present instance, there has been a clear violation of laid out procedures of law attributable to access of information, and violation of the rights of privacy and protection of property that the 2nd Respondent is guaranteed under the *Constitution* and Section 27 of the IEBC Act. This is because the limitation imposed by both Article 50(4) and Section 27 aforesaid squarely apply to the matter before us."

149. *United Airlines Limited v Kenya Commercial Bank Limited* (2017) KECA 159 (KLR) – Kenyan Court of Appeal

The Court of Appeal held as follows at paragraph 14 of the judgment:

> " As submitted by learned counsel for the respondent, illegally obtained evidence was for a long time admissible in criminal law as long as it was relevant (see *Kuruma Son of Kaniu v R* (1955) 1 All ER 236. However, the *Constitution* of Kenya 2010 has now shifted the paradigm and Article 50(4) of the *Constitution* now disallows such evidence. For purposes of clarity, the said provision provided as hereunder: -
>
> > " 50 (4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice..."
> >
> > The Kuruma case (supra) is therefore no longer good law. This article nonetheless applies to criminal law and not civil law, as it succinctly refers to "trial" as opposed to suit, and also relate to rights of an accused person."

150. *Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others* (2020) KECA 589 (KLR) – the Kenyan Court of Appeal

This was an appeal from a constitutional petition where some evidence had been obtained irregularly (without following procurement and privacy laws). The issue was whether such evidence should be admissible.

The Court emphasized that the old adage that all relevant evidence is admissible "is no longer reflective of the legal position in Kenya" post-2010. Illegally obtained evidence should be excluded if its admission would prejudice the fairness of the trial or otherwise harm the administration of justice.

The Court of Appeal held as follows at paragraph *80*:

> " The interpretation given by the Court in that case that Article 50(4) of the *Constitution* applies only to criminal law and not civil law is, with respect, doubtful. Article 50 of the *Constitution* deals generally with "fair hearing". In Article 50(1) for instance, reference is made to "every person" as having the right to a fair hearing. This is in contrast to Article 50(2) which is specific "every accused person". In our view, under Article 50(4) if a court determines that admission of evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights would be detrimental to the administration of justice, the court may reject it irrespective of whether it is in connection with a civil or criminal trial. This view accords, we believe, with the Supreme Court decision in *Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others* (2017) eKLR"

151. *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party) International Commission of Jurists Kenya Chapter (Amicus Curiae)* (2019) eKLR – High Court of Kenya Affirmed the position that illegally obtained evidence may only be excluded in a trial in two instances, the High Court in *Philomena Mbete Mwilu v Director of Public Prosecutions & 3 others; Stanley Muluvi Kiima (Interested Party) International Commission of Jurists Kenya Chapter (Amicus Curiae)* (2019) eKLR, referred to the South African case of *Gumede v S* (800/2015) (2016) ZASCA 148, where it was held as follows:

> " Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the subset of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused."

Further, the High Court in the case proceeded to hold as follows:

> " The Kenyan position on the rule that there is no automatic exclusion of illegally obtained evidence is thus shared in other jurisdictions. In our view, the determination of the question whether to exclude illegally obtained evidence on the basis that it will render the trial unfair is a matter within the jurisdiction of the trial court. However, there is the broader question of whether the illegally obtained evidence is otherwise detrimental to the administration of justice, which is an issue that as a court dealing with a petition alleging violation of constitutional rights, we are under an obligation to consider. This is a duty that takes us beyond examining the question of fairness to the Petitioner and to the question whether there could be greater public policy implications arising from the conduct of the DCI."

152. Thus, the above authorities establish that the admission of illegally obtained evidence must be excluded in a trial if it renders the trial unfair or where admission of such evidence is detrimental to the administration of justice. Notably, evidence ought to be obtained in accordance with the provisions of both the *Constitution* and the law. Obtaining evidence without first obtaining appropriate warrants violates Constitutional norms and infringes on the right to property as well as the right to privacy.

When we look outside our borders this is what other courts have held.

153. South Africa

Section 35(5) of the *South African Constitution* provides:

> " Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

This provision is comparable to Article 50(4) of the Kenyan *Constitution*. This provision has been subjected to interpretation in a number of South African cases as illustrated below:

154. *S v Pillay and others*, 2004 (2) SACR 419 (Supreme Court of Appeal)

The case arose from a high-profile armed robbery. During the investigation, police illegally tapped a suspect's telephone line (without a valid warrant) and later, without a search warrant, forced their way into the suspect's home. The suspect (Accused 10) was promised she would not be prosecuted if she cooperated. Relying on this promise, she revealed the location of stolen money hidden in her ceiling, which the police seized. Despite the promise, she was later charged, and the State sought to use the money recovered through the illegal search and inducement as evidence against her.

> " The Supreme Court of Appeal found that the evidence (the hidden money) was obtained through fundamental constitutional violations – an unlawful interception (privacy breach) and an induced confession-like statement (undermining the right to silence). In terms of section 35(5) of the *Constitution*, the court weighed the effect of admitting this derivative evidence. It stressed that admitting evidence obtained by flagrant rights breaches would damage the administration of justice in the long run. The court noted that allowing evidence derived from a "serious breach" of privacy and fair trial rights "might create an incentive for law enforcement agents to disregard accused persons' constitutional rights," a result which "would...do more harm to the administration of justice than enhance it."
>
> The judges highlighted that the police conduct – including presenting false information to obtain the (invalid) phone tap and reneging on the promise – was egregious. Although combatting serious crime is in the public interest, the court held that respect for constitutional rights must take precedence. It concluded that admitting the unconstitutionally obtained money would bring the administration of justice into disrepute. The evidence was therefore excluded under section 35(5) of the South African constitution.
>
> As the Supreme Court of Appeal explained, while excluding the proof might let a culpable person go free, "the objective of seeking co-operation from such a person...is to facilitate a conviction for an even more serious offence...To use the words of s 35(5) ...admission of such evidence would be detrimental to the administration of justice."

155. *S v Mthembu*, 2008 (2) SACR 407 (Supreme Court of Appeal)

This case dealt with evidence obtained by torture – one of the starkest violations of rights to dignity and bodily integrity. The appellant, a former police officer, was convicted of multiple offenses largely on the testimony of an accomplice witness (Ramseroop). Crucially, it emerged that police had brutally tortured this witness (including assault and electric shocks) to make him reveal information and lead them to physical evidence (a stolen vehicle and a metal cash box) some four years before the trial. At

trial, Ramseroop testified against the accused, ostensibly voluntarily, but the origin of his knowledge was the prior torture. The issue was whether the accomplice's testimony and the derivative real evidence discovered as a result of torture could be admitted against the accused.

The SCA unequivocally condemned the use of torture and ruled that any evidence obtained through torture must be excluded to uphold the *Constitution*. The court observed that §35(5) is not limited to violations of an accused's own rights – evidence from a third party obtained by torture (a rights violation of that third party) also falls within its ambit for exclusion. Citing section 12 of the *SA Constitution* and international norms, Judge Cachalia stated that the *Constitution* "speaks unequivocally" on torture: it is absolutely forbidden. Under Article 15 of the Torture Convention and our own values, "any evidence" obtained as a result of torture is inherently inadmissible.

The judgment emphasized that admitting such evidence would irreparably tarnish the justice system. In powerful language, the SCA held that to use torture-tainted evidence would "compromise the integrity of the judicial process (and) dishonor the administration of justice", amounting to the courts' condoning "barbarism". Even if the witness later testified ostensibly of his own free will, the "inextricable link" between the torture and his testimony meant the taint could not be removed. The court concluded that *public interest in justice "demands (the) exclusion" of all evidence obtained by torture, "irrespective of whether such evidence has an impact on the fairness of the trial." Accordingly, the accomplice's testimony (as far as it related to information extracted under torture) and the derivative real evidence were excluded under section 35(5).

156. *S v Tandwa and others*, 2008 (1) SACR 613 (Supreme Court of Appeal)

The case involved a bank robbery prosecution in which police conduct during the investigation violated the suspects' rights. One of the accused (Tandwa) was forcibly taken for interrogation by private security officers and police, during which he was coerced into revealing the whereabouts of stolen money and an AK-47 rifle (evidence used at trial). The methods used by the authorities included kidnapping, assault, and intimidation – effectively amounting to an unlawful deprivation of liberty and dignity to obtain evidence. The trial court admitted the recovered money and firearm as evidence, relying on a distinction (drawn from older Canadian precedent) between real evidence and testimonial evidence. The question on appeal was whether this evidence, obtained by gross rights violations, should have been excluded.

The Supreme Court of Appeal set aside the trial court's admission of the evidence and held it should have been excluded. It rejected the notion that real evidence (physical evidence) obtained via rights violations is automatically admissible. Instead, the court aligned with a principled approach that courts cannot countenance evidence secured through extreme police illegality. It stressed that South Africa's commitment to justice requires both just ends and just means: "What differentiates those committed to the administration of justice from those who would subvert it is the commitment...to moral ends and moral means. We forfeit (moral) authority if we condone coercion and violence...in sustaining order."

The judgment explicitly invoked §35(5), saying it "is designed to protect individuals from police methods that offend basic principles of human rights." Thus, "to admit the evidence of the recovered money and the AK-47 in the circumstances of this case would render that provision nugatory."

In other words, allowing fruits of torture or coercion would gut the constitutional protection. The court concluded that the evidence obtained through these egregious methods had to be excluded to give effect to the Bill of Rights. The conviction was overturned.

157. *Gumede v S*, 2017 (1) SACR 253 (Supreme Court of Appeal)

In Gumede, the appellant was convicted of murder, armed robbery, and firearm offences, but the key evidence against him was obtained in questionable ways. First, police conducted a warrantless search of his home and seized a firearm and ammunition allegedly used in the crime. he searches violated the appellant's privacy because it was done without a valid warrant or statutory justification. Second, after his arrest, the appellant was taken on a "pointing out" expedition where he supposedly pointed out a crime scene and made inculpatory verbal statements. However, officers failed to properly inform him of his right to remain silent and the consequences of pointing out evidence, and there were indications that the pointing out was coerced. The trial court had admitted both the firearm and the pointing-out evidence. The appellant challenged their admissibility on appeal, arguing that his constitutional rights had been violated.

The SCA ruled in Gumede's favor, finding that both the search and the pointing-out procedure violated the *Constitution*, and thus the resulting evidence had to be excluded to ensure a trial that comports with justice. On the firearm seizure: the police admitted they lacked a warrant or exceptional circumstances, so the search violated the right to privacy. On the pointing-out: the court found the appellant had likely been pressured and not fully informed of his rights – effectively a breach of the right to silence and against self-incrimination. In a unanimous judgment by Zondi JA, the SCA applied §35(5) and held that admitting this evidence would undermine the fairness and integrity of the trial. It noted that the police are bound by the *Constitution* and cannot operate as if they are above it: "Public policy requires the police to observe and respect the law in the conduct of their investigation. Police officers are not above the law and must conduct their investigations within the parameters of the law, which includes the *Constitution*."

Given the blatant violations, the court concluded that "the admission of the evidence of the discovery of the firearm and the pointing out evidence, was detrimental to the administration of justice under s 35(5) and it ought to have been excluded." Indeed, without those pieces of evidence, the remaining case was insufficient, and Gumede's convictions were overturned.

158. United States of America

The *Fourth Amendment (Amendment IV) to the US Constitution* provides that:

> " The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Exclusionary Rule is one way the amendment is enforced through American jurisprudence.

159. *Weeks v United States*, 232 U.S. 383 (1914)

Police and federal marshals conducted a warrantless search of Fremont Weeks' home and seized papers implicating him in illegal gambling. Weeks petitioned for return of his belongings, arguing the search violated the Fourth Amendment.

The Supreme Court held that in federal prosecutions, evidence obtained by federal officers in violation of the Fourth Amendment must be excluded. This was the origin of the Exclusionary Rule at the federal level. The Court reasoned that allowing such evidence would deny the Fourth Amendment's protections: "If letters and private documents can thus be seized and held... without requiring any sanction of the law, the protection of the Fourth Amendment... is of no value." As a remedy for

the constitutional violation, the Court created a rule that federal courts cannot admit illegally seized evidence, and it ordered Weeks' papers returned.

160. *Mapp v Ohio*, 367 U.S. 643 (1961)

Cleveland police forced entry into Dollree Mapp's home without a warrant, searching for a bombing suspect. They found obscene books and photos, for which Mapp was convicted under state law. Mapp argued the search was unconstitutional and the evidence should be excluded.

The Supreme Court overturned Mapp's conviction and extended the exclusionary rule to state courts, making it a core part of Fourth Amendment enforcement nationwide. Justice Tom Clark wrote: "We hold that all evidence obtained by searches and seizures in violation of the *Constitution* is... inadmissible in a state court. ... Were it otherwise, then... the assurance against unreasonable searches and seizures would be 'a form of words,' valueless and undeserving of mention."

161. *Silverthorne Lumber Co. v United States*, 251 U.S. 385 (1920)

Federal agents unlawfully seized a lumber company's documents (without a warrant). When the court ordered the return of the originals (recognizing the illegal search), the government tried to use copies it had made of those records to prosecute the Silverthornes.

The Supreme Court held that derivative evidence obtained from an illegal search is also tainted and inadmissible. Justice Holmes analogized that if the government could keep and use copies, it would essentially bypass the Fourth Amendment: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not only evidence so acquired shall be inadmissible, but also all evidence indirectly obtained." This principle later became known as the "fruit of the poisonous tree." It prevents authorities from exploiting illegal conduct by obtaining the same evidence through indirect means.

162. Canada

Section 24(2) of the *Canadian Charter of Rights and Freedoms* provides:

> " Where, ...a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

This provision has been the basis for the Canadian jurisprudence on exclusion of evidence.

163. *R v Collins*, (1987) 1 S.C.R. 265 (SCC)

Undercover officers suspected Ruby Collins of carrying drugs in a pub. An officer grabbed her in a choke-hold to prevent swallowing evidence, wrestled her to the floor, and seized a heroin-filled balloon from her hand. Collins was charged with drug possession. She argued the forceful search was unreasonable (violating Section 8 of the new Canadian Charter of Rights) and sought to exclude the evidence under the Charter's remedy clause (Section 24(2)).

The Supreme Court of Canada agreed the search was unreasonable – a violation of Section 8 – and then considered whether to exclude the evidence. Collins established the first major framework (the "Collins test") for exclusion under the Charter. The Court held evidence "shall be excluded" if, having regard to all circumstances, its admission "would bring the administration of justice into disrepute."

Justice Lamer (as he then was) articulated factors: (1) Was the Charter breach serious or deliberate, or of a merely technical nature? (more serious misconduct favors exclusion); (2) Did the breach impact the accused's Charter-protected interests like bodily integrity or privacy? (greater impact favors exclusion);

and (3) How important is the evidence to the prosecution's case (and to the truth-finding)? The first two factors protect rights and the reputation of justice, the third factor weighs society's interest in adjudicating the case on the merits.

In Collins's case, the Court found the police conduct (grabbing her throat without sure grounds) was a serious Charter breach affecting her bodily integrity, and admitting the heroin would tarnish justice. Thus, the evidence was excluded and Collins's conviction overturned.

164. *R v Stillman*, (1997) 1 S.C.R. 607 (SCC)

A teenaged suspect (Stillman) was arrested for murder. While in custody, investigators forcibly took bodily samples – hair, dental impressions, and buccal swabs – without a warrant or consent. These were used to link him to the crime (bite-mark and DNA evidence). Stillman argued his Section 8 (privacy) and Section 7 (life, liberty, security of person) rights were violated and that the evidence should be excluded under Section 24(2).

The Supreme Court (majority) excluded the bodily evidence and drew a distinction between "conscripted" and "non- conscripted" evidence. The Court viewed the hair, saliva, and dental impressions as conscripted from the accused against his will, in breach of his Charter rights. This kind of evidence (akin to compelled self-incrimination) almost always affects the fairness of the trial if obtained illegally.

The Stillman test (as it came to be known) held that if the accused's body or statements are used against him after a Charter breach, the trial fairness is presumptively impacted, favoring exclusion. By contrast, non-conscripted evidence (like real evidence not from the accused, e.g., seized from a crime scene) might be admitted if it would have been discovered anyway. In Stillman, the methods used to obtain the samples were highly intrusive and without lawful authority, making the Charter breach severe. The Court found admitting this evidence would undermine the integrity of the justice system, so it was excluded.

165. *R v Grant*, 2009 SCC 32, (2009) 2 S.C.R. 353

Grant was stopped by police while walking, questioned, and effectively detained without grounds (a Charter violation for arbitrary detention and search). He ended up incriminating himself and a gun was found. The case reached the Supreme Court to decide if the gun (physical evidence) and statements should be excluded under Section 24(2).

The Supreme Court revised the approach to Section 24(2) with a simplified three-factor balancing test. The court must "assess and balance the effect of admitting the evidence on society's confidence in the justice system", considering:

1. Seriousness of the state conduct: Was the Charter breach a technical slip or deliberate misconduct?

2. Impact on the accused's Charter-protected interests: How did the violation affect the accused's privacy, dignity, or liberty? A home search or bodily intrusion is very impactful; an administrative breach less so.

3. Society's interest in adjudication on the merits: How important is the evidence? Is it reliable and critical to the case? Society has a greater interest in admitting evidence of serious crimes or where the evidence is key and excluding it would gut the case. The handgun in Grant was real, reliable evidence of a serious weapons offense.Grant held that the gun should be admitted (despite the breach) because the police misconduct, while real, was at the lower end (an error in judgment, not blatant), and the evidence was crucial and reliable. However, Grant's

incriminating statements were excluded as they were more directly linked to the arbitrary detention and self-incrimination concerns.

166. *R v Harrison*, 2009 SCC 34, (2009) 2 S.C.R. 494

A police officer stopped Harrison's vehicle without any lawful cause (he actually admitted he just wanted to check the driver's documents). This was a Charter violation (no reasonable suspicion or traffic infraction). The officer then found 35 kg of cocaine in the car trunk.

The Supreme Court excluded the cocaine and entered an acquittal. The Court found the officer's conduct was at the serious end of the spectrum – essentially a willful Charter breach fishing for evidence. The impact on Harrison's rights was also severe: he was arbitrarily detained and subjected to a search of his private vehicle. While society's interest in adjudicating a drug trafficking charge on the merits was high, the first two factors outweighed it in this case.

The majority held that admitting the huge quantity of cocaine would send a message that courts condone blatant police disregard for the Charter, thus bringing justice into disrepute.

167. United Kingdom

Christie v Leachinsky, (1947) AC 573 (UKHL)

Police arrested Mr. Leachinsky on one charge ("unlawful possession" under a local Act) but later sought to justify the arrest on a different basis (suspecting him of a theft offense). He sued for false imprisonment, arguing the arrest was unlawful because he was not told the true reason at the time of arrest.

The House of Lords held the arrest unlawful and upheld the plaintiff's claim for false imprisonment. The Lords affirmed the common law rule that a person arrested without a warrant is entitled to be informed of the true grounds of arrest at the time. Viscount Simon LC stated that ordinarily "an arrest without warrant can be justified only if it is made on a charge made known to the person arrested".

Lord Simonds further declared that it is a fundamental right of every citizen to be free from arrest unless lawful grounds exist, and that one may resist an unlawful arrest. In a famous passage, he wrote: "Putting first things first, it is the right of every citizen to be free from arrest... and it is the corollary of that right that he be entitled to resist arrest unless the arrest is lawful. How can these rights be reconciled with the proposition that he may be arrested without knowing why he is arrested? ... Blind, unquestioning obedience is the law of tyrants and of slaves: it does not yet flourish on English soil."

168. *R v Grant*, (2005) EWCA Crim 1089, (2006) QB 60 (English Court of Appeal)

During a police investigation, officers covertly bugged a conversation between the suspect and his lawyer (placing a listening device in a police station exercise yard). This surveillance of privileged consultations was a flagrant breach of legal privilege and the right to a fair trial. The recordings were not even used as evidence, but the defense argued the very act poisoned the integrity of the proceedings. The trial judge refused to stay the case, and Grant was convicted of conspiracy.

The Court of Appeal quashed the conviction and stayed the proceedings as an abuse of process, due to the gross illegality by police. It held that the deliberate invasion of solicitor-client privilege struck at the heart of a fair trial and "brought the administration of justice into disrepute." The Court found that even if the tainted material was not adduced in evidence, continuing the prosecution would compromise public confidence in justice. This was one of the rare cases where a court took the ultimate step of halting a prosecution to signal that courts will not tolerate egregious police misconduct.

169. Australia

Bunning v Cross, (1978) 141 CLR 54 (High Court of Australia - HCA)

A driver (Cross) was arrested for driving under the influence. A patrolman, suspecting intoxication, took Cross to a police station for a breathalyzer without first administering the required roadside breath test. The breath test showed a high blood alcohol, but because the officer skipped a step mandated by law, the breath test was obtained unlawfully. The magistrate excluded the breath test evidence and acquitted Cross; the prosecution appealed.

The High Court upheld the magistrate's discretion to exclude the illegally obtained evidence, articulating what became known as the Bunning discretion. Unlike the strict English rule at the time, the HCA held that trial judges may refuse to admit evidence if its admission would be more harmful to the integrity of the justice system than its value in proving guilt. The court set out a balancing test: judges must "weigh up the competing public interests" – on one hand, the desirability of convicting the guilty using all reliable evidence; on the other, the importance of courts not appearing to sanction or encourage lawless conduct by authorities.

Relevant factors include: the gravity of the illegality (was it deliberate, or a mere oversight?), the cogency of the evidence, and whether the offense is serious. In Bunning's case, the officer's breach of procedure was relatively unintentional but clear; however, the evidence of intoxication was strong. The magistrate had decided that admitting the evidence would reward the police's neglect of the law, and the High Court found no error in that exercise of discretion.

Ridgeway v The Queen, (1995) 184 CLR 19 (High Court of Australia - HCA)

170. An Australian federal police operation smuggled heroin from Asia into Australia (illegally) to catch Dr. Ridgeway, a suspected drug importer. Undercover officers themselves committed a crime by importing the drug without lawful authorization. They then arrested Ridgeway in a sting when he took possession of the heroin. Ridgeway was convicted of heroin importation.

The High Court quashed Ridgeway's conviction, ordering that the illegally imported heroin could not be admitted as evidence. A majority of the HCA held that the executive's deliberate unlawful conduct (here, literally creating the crime) was so egregious that the courts must distance themselves from it to preserve the rule of law.

The Court reasoned that to allow the conviction would be to approve the government's flouting of the law it enforces. Mason CJ wrote that while exclusion of evidence may let a guilty person go free, the alternative "could be even more damaging to the integrity of the criminal justice system" – it would signal that the end justifies any means. The Court did acknowledge that in less extreme cases of entrapment, a stay of proceedings might be the appropriate remedy rather than evidence exclusion; but here the police conduct (illegally importing narcotics) was particularly egregious.

171. In a judgment delivered Recently the Supreme Court of Appeal of South Africa in Director of Public Prosecutions Appellant ((Gauteng Division) the court rendered itself as hereunder;

> The fundamental question in this appeal is whether the regional court and the high court were correct in disallowing the evidence, on the basis that the search warrant suffered a formal defect. This has been a subject of debate over the years. Much has been said about the United States's law of rigid exclusion of any evidence improperly obtained, as opposed to the position in English law of general inclusion of any evidence that is relevant.8 South Africa has tended towards a Canadian approach, where the decision to admit improperly obtained evidence was left largely to the discretion of the judge, taking into account the individual facts of the case. The interim Constitution contained no express provisions on how to deal with such evidence. However, the *Constitution* has now codified our approach to

unconstitutionally obtained evidence. Section 35(5) of the *Constitution* provides: 'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

International covenants

Where information on oath is laid before a magistrate alleging that there is reasonable ground for suspecting that— (a) an offence under this Act has been, or is being or is planned to be, committed and that evidence of the commission of, or plan to commit the offence is to be found on any premises or other place; or (b) any document or other material directly or indirectly relating to, or connected with, any transaction or dealing which is, or any intended transaction or dealing which, if carried out, would be— (i) an offence under this Act; or (ii) in the case of a transaction or dealing carried out or intended to be carried out in any place outside Kenya, an offence against any corresponding law in force in that place, is in the possession of or under the control of any person in any premises or other place, the Magistrate may, by warrant under his hand, authorize any police officer named in the warrant, with such assistance as that police officer thinks reasonable, at any time or times within one month from the date of the warrant, to enter and search the premises or other place named in the warrant. (2) A police officer authorized by any warrant under subsection (1) to search any premises or other place may enter and search such premises or other place (including any receptacle found therein) and every person found therein or who, the police officer has reasonable ground to believe, has recently left those premises or that other place, and for that purpose may use such assistance and such force as may be reasonable and may break open any lock, and may seize any narcotic drug or psychotropic substance, or document or other material referred to in subsection (1), found therein or on any such person, and any other article or thing which he has reasonable ground to believe to be evidence of the commission or intended commission of any offence under this Act. (3) Where information on oath is laid before a magistrate alleging that there is reasonable ground for suspecting that there is concealed on any person, animal or thing or in any receptacle, premises or other place, any movable property— (a) liable for forfeiture under Part IV; (b) in respect of which a restraint order has been made under section 26; or (c) liable for forfeiture under section 36, the magistrate may, by warrant under his hand, authorize any police officer named in the warrant, with such assistance as that police officer thinks reasonable, at any time or times within one month from the date of the warrant, to enter and search the premises or other place or to search any person, animal, thing or receptacle.

(4) A police officer authorized by any warrant under subsection (3) to search any person, animal, thing, receptacle, premises or other place may search the person, animal, thing or receptacle, or may enter and search any building or other place, and for that purpose may use such assistance and such force as may be reasonable, and may break open any lock, and seize any movable property, referred to in subsection (3) found thereon or therein.

(5) Where any police officer not below such rank as may be specified by regulations is, for reasons to be recorded in writing, satisfied that the delay caused by the time required to apply for and obtain a warrant to enter and search under subsection (1) or (3) would defeat the purpose of the search, he may exercise the powers conferred on him by subsection (2) or (4) in relation to search and seizure without obtaining any warrant for search under subsection (1) or (3)

172. All the 9 core human rights treaties and their protocols, as well as other relevant conventions, apply to States, although some are more relevant than others in the maritime domain. Examples include the following:

• *Convention relating to the Status of Refugees* and the *Protocol relating to the Status of Refugees*

• *International Convention on the Elimination of All Forms of Racial Discrimination*

• *International Covenant on Civil and Political Rights* (ICCPR) • *International Covenant on Economic, Social and Cultural Rights* • *Convention on the Elimination of All Forms of Discrimination against Women* • *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* • *Convention on the Rights of the Child*

• *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* • *International Convention for the Protection of All Persons from Enforced Disappearance*

• *Convention on the Rights of Persons with Disabilities* Many regional human rights treaties are also applicable at sea, for example:

• *American Convention on Human Rights*

• *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) • *African Charter on Human and Peoples'*

173. The *International Covenant on Civil and Political Rights*, The Human Rights Committee has interpreted article 2(1) of *ICCPR* to apply to everyone regardless of their nationality. The Committee has also concluded that States must respect and ensure that the rights enshrined in the Covenant apply "to all persons who may be within their territory and to all persons subject to their jurisdiction" (General Comment No 31).

174. The maritime guidelines state that "'Reading *UNCLOS* and international human rights law instruments together indicates that coastal States have jurisdiction within their internal waters, archipelagic waters and territorial seas, and are obliged to protect the human rights of those aboard vessels located within these waters. However, the jurisdiction of coastal States is limited by the exclusive jurisdiction of flag States that are responsible for enforcing human rights standards on board vessels. Flag States conducting enforcement operations outside the territorial sea must also comply with their human rights obligations when they exercise effective control.

175. The case below explains when law enforcement agents exercise extraterritorial jurisdiction and are obliged to comply with human rights.

J.H.A. v Spain, CAT/C/41/D/323/2007 (21 November 2008), Communication No 323/2007 Relating to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment A complaint was brought by one of the migrants who were rescued by the Spanish rescue tug Luz de Mar off the Canary Islands in response to a distress call following the capsizing of their boat, Marine I. The authorities of Spain engaged in diplomatic negotiations with Mauritania and Senegal regarding the fate of the migrants, who remained on board the vessel off the coast of Mauritania for eight days. The complainant, along with 22 others, refused to be repatriated and remained on board the vessel. He complained, inter alia, of violations of articles 1 and 16 of the Convention against Torture and Other Cruel, I Inhuman or Degrading Treatment or Punishment, owing to the poor conditions of detention on board the vessel.

Determination.

176. We noted above that the prosecution did not prove that the point of interception was within the territorial waters and the nationality of the vessel could not be established.

177. According to the Maritime Crime Manual above cited.

A vessel may be treated as one without nationality when:

(a) The master or person in charge of the vessel fails, on the request of an authorized law enforcement official, to make a valid claim of registry;

(b) The claim of registry made by the master or person in charge is denied by the State whose registry is claimed; or

(c) The master or person in charge of the vessel makes a claim of registry that is not affirmatively or unequivocally confirmed by that State, that is, the claimed flag State is unable to confirm or deny the verbal claim of registry by the master.

178. The right of visit includes the authority to board a vessel in international waters where that vessel is not flying a flag to indicate its claimed nationality. Often, the vessel's nationality may be readily and quickly confirmed by an inspection of vessel documents or by consultation with the claimed flag State. However, this is not always the case. Sometimes a vessel may only be able to produce an expired registration document; this is not sufficient on its own to prove that the vessel is without nationality. Small craft may not carry papersCat all. Thus, the most secure basis for determining that a vessel has no nationality is a refutation of any claimed nationality by the relevant flag State.

179. In this case. The ship had no flag, it had two names painted on it and two sets of documents that were not updated. There was no agent and the owner was not confirmed. Consequently, the interception was lawful.

180. After the interception, we do not know who or how the initial suspicious package was recovered. PWl, PW25, PW33 and PW34 the investigating officers- kept passing the buck. We also established there was no search warrant.\

181. Once the first package was recovered, the subsequent confession was also unprocedural. It was noted that the crew members did not speak nor understand the English language. It is only the captain who spoke a little bit with difficulty. His said confession was also obtained under very stressful conditions when his crew member died under mysterious circumstances and at night.

182. There was also evidence that several other crew members were unwell. Pw7 testified that he observed this when he boarded the ship to pilot it to shore. The health of the accused persons featured prominently in the proceedings court with various orders for treatment.

183. On the procedure as to how the searches are meant to be conducted, again the law was not followed. We find that many people were aboard the vessels and the searches continued ever late into the night.

184. Of great concern also, was the evidence of PW22, the welder who stated that when he cut the hole on the cargo deck, so as to retrieve the other exhibits below, he noted "old cuts and welding" on the floor of the ship. That would go against the prosecutor's evidence that the drugs were thrown into the when the ship was at the anchorage.

185. Unfortunately, the vessel was destroyed before the defence had any chance to cross-examine or point out such issues to the court. This was also done in contravention of the court order.

186. Further on this recovery, we note that the ship's floor was cut and the contents retrieved when the appellants were away. This was on 9/7/2014 when they had been escorted to Mombasa law courts and charged with the initial charges. This issue is tied to the quantity of drugs recovered which we discuss below.

187. According to all the prosecution witnesses, only the first package of 994 grams was at the cargo deck. Yet the charge states that the entire lot was on the cargo deck. The evidence states that the rest of the heroine was in the ballast tanks and diesel tanks.

188. The charge sheet reads as hereunder: On diverse dates between 2nd day of July 2Ol4 and 18th July 2014 at Kilindini Port Mombasa Berth No 8 within Mombasa County, jointly with others not before court were found, trafficking by conveying in the cargo deck of ship Amin Darya also known as Al Noor narcotic drug namely Heroin to wit 377.224 kilograms of creamish granular heroin valued at Kshs 1,131,672,000/-, liquid heroin to wit 33,200 liters valued at Kshs 189,000,000/= and 2,4OO liters of diesel mixed with heroin valued at Kshs 1,440,000/- all with a market value of ksh.1,322,122,000/- (one billion, three hundred and twenty-two million, one hundred and twelve thousand shillings) in contravention of the said Act.

189. The issue of what trafficking and conveying means featured in great detail in the trial court's judgment and also in the submissions in this appeal.

190. Section 2 of the *Narcotic Drugs and Psychotropic Substances Control Act* states that a conveyance of any description used for the carriage of persons or goods and includes any aircraft trial, vehicle or vessel;

191. According to the Oxford Dictionary, to convey means to take, carry or transport something from one place to another.

192. Even without going into the technicalities, a simple question to ask is; what was going on between the 2nd and 18th of August 2014? During this period, the ship had been intercepted and was basically under arrest. Guarded heavily by officers from both the Kenya navy and The maritime police unit. Can the crew be said to have been doing any transportation? Did they take, move or carry anything at all from one place to the other? The answer is No

193. This is also the time that the search and recovery was going on.

Basically, the vessel was a crime scene. Can we logically say the appellants were trafficking drugs at the crime scene? Again No

194. The evidence also shows that the vessel was intercepted on the 1st of August 2014 and PW7 is the one who captained her to the Mtongwe anchorage before it was shifted by PW12 to Berth No 8. So if there was any movement at all , these two would be the culprits not those under arrest. The conveying may have been before the ship docked or before the interception. That is when the right to visit checks in. At the anchorage, we may talk of possession but definitely not transporting.

195. Finally, we also have the issue of the quantity of drugs, especially the amount found in the liquids. The evidence was that the samples of the liquid were tested, and they tested positive for heroin. The percentages were shown in the reports produced by PW2 and PW3. In the initial sample, bottle 1 the water contained heroin at a concentration of 0.19 gm per 100 mls of water and the second bottle contained 0. 17 gm per 100 mls. The diesel contained o.oo gm per 100m ml. This is in the report produced as pext 44 and page 59 of the proceedings.

196. Now, the reports also show the percentage of drugs in the liquid a mere 0.019. Yet the charge show the entire liquid, was in fact liquid heroine. PW1 in her evidence at page 53, stated that they emptied the

water in the ballast into 166 drums each 200 litres totalling to 33,200 litres. At page 53, he states that the diesel was 2400 litres. Now these are the quantities reflected in the charge sheet. Is that correct?

197. A simple example: If I dissolve a solid, say 5gms sugar into a Liter of water, can the entire Liter of water be said to be a Liter of sugar? Definitely not. That exaggeration of the quantity of drugs also affected the value and consequently the sentence that was meted out.

198. Section 134 of the *CPC* deals with specificity of charges and there is a wealth of authorities to that end. A good example is the dicta of Justice Hancox in *Peter Ochieng v Republic* [1985] eKLR in which he stated that carelessness by all concerned in failing to check the charges properly could result in a serious injustice to either or both the parties

199. As regards the hearing, I have noted that there was only one translator despite the various protests. There were several rulings on that and I will not revisit them. What I must emphasize is that the right to a fair hearing is non derogable.

200. The last issue is that the state did not prove that all the crew members acted with one common intention as required under section 20 and 21 of the *Penal Code*.

201. The defence stated that each of them was hired separately, and they found that the ship had already been loaded. The senior investigator should have considered some aspects such as where the owner may have loaded the drugs without the crew's knowledge or involvement. In this case the captain may have been complicit, but it was not proved that all the crew were aware.

202. According to maritime law there are difference mode of concealment

> "Rip-off" modality: A "rip-off " is a concealment methodology whereby a legitimate shipment, usually containerized, is exploited to smuggle contraband (particularly cocaine) from the country of origin, or the trans-shipment port, to the country of destination. In "rip-off " cases, usually neither the shipper nor the consignee is aware that their shipment is being used to smuggle illicit cargo.
>
> "Reefer" modality: A "reefer" is a refrigerated container with an internal refrigeration unit. Reefers are often used to smuggle drugs, particularly cocaine. For this method to be successful, there will always be a local conspiracy in the country of origin or the trans-shipment port as well as the destination country. The difference between "rip offs" and "reefers" is that the reefer mode usually requires the complicity of the legal owner of the cargo. *Maritime Crime: A Manual for Criminal Justice Practitioners* Page 102
>
> In our case we do not know the scenario.

203. As earlier noted, the case started with some intelligence, and it appears that someone out there was calling all the shots. That is the only explanation as to why all our rules of procedure were thrown out of the window. I have noted it was not due to want of experience as we had some of our best officers handling the matter.

204. This culminated in the much-Publicized destruction of the vessel by the executive despite the existing court order.

What is the cumulative effect of all these lapses on the prosecution case?

205. The court is of course aware of the international vice that is drugs and that all parties should pull together to wipe out the menace.

206. In a situation like this I take comfort in the dicta in the Indian case of *D.K Basu v State Of W.B.* (1997) 1 SCC 416 it was opined:

> " We are conscious of the fact that the police in India have to perform a difficult and delicate task, particularly in view of the deteriorating law and order situation, communal riots, political turmoil, student unrest, terrorist activities, and among others the increasing number of underworld and armed gangs and criminals. Many hard-core criminals like extremists, terrorists, drug peddlers, smugglers who have organized gangs, have taken strong roots in this society. It is being said in certain quarters that with more and more liberalization and enforcement of fundamental rights, it would lead to difficulties in the detection of crimes committed by such categories of hardened criminals by soft peddling interrogations.

207. .It is felt in those quarters that if we lay too much of emphasis on protection of their fundamental rights and human rights, such criminals may go scot-free without exposing any element or iota of criminality with the results, the crime will go unpunished and in the ultimate analysis the society would suffer. The concern is genuine and the problem is real. To deal with such a situation, a balanced approach is needed to meet the ends of justice. This is all the more so, in view of the expectation of the society that police must deal with criminals in an efficient and effective manner and bring to books those who are involved in the crime. The cure cannot, however, be worse than the disease itself,"

208. The Court also noted the response of the Supreme Court of the United States of America to such an argument in *Miranda v Arizona* 16 L Ed 2d 694 (1966) wherein that Court had said:

> " The Latin maxim salus populi suprema lex (the safety of the people is the supreme law) and salus republicae suprema lex (safety of the State is the supreme law) coexist and are not only important and relevant but lie at the heart of the doctrine that the welfare of an individual must yield to that of the community. The action of the State, however, must be 'right, just and fair.

209. It was found that on the facts of this particular case, the admission of the impugned evidence would render the trial unfair or otherwise bring the administration of justice into disrepute. The appeal should be upheld.

210. Likewise in this case, the remedy can not be worse than the cure. We cannot rubbish all our procedural laws, say come what may, and damn the consequences. I note that the appellants were elderly foreigners who could barely follow what was going on. As stated above, there was the hand of big brother, the undisclosed informer, but we do not bend all our rules to please someone. I say this because from the proceedings , we can neither blame ignorance nor inexperience. We had very senior and capable officers.

211. . Finally, all the appellants were all foreigners. How should we have treated them? It is said that the true measure of any society, can be found in how it treats its most vulnerable members-including the stranger at its gate... adopted from Mahatma Gandhi. Kofi Annan also stated that "We have to respect and uphold the dignity of all people, regardless of their nationality or status."

212. Closer home , Our Supreme Court in Petition 39 of 2018, *Republic v Ahmad Abolfathi and Sayed Mansour Mousavi*, held that:

> " The fact that the Respondents are foreigners charged with a serious offence, should not impede the Court in upholding equality before the law, or treating them differently under important laws. In judging them, we should interpret our laws for posterity so that similar cases of terror involving citizens of Kenya receive the same treatment. Our evidence law

should be settled, certain and predictable, so that equally serious cases that involve Kenyans are decided in a similar manner."

213. From all this, the court finds that the charge as drawn was defective and the elements thereof not proved. Further, there were too many breaches of the law that the appellants cannot be said to have had a fair trial. They cannot be described as minor breaches which can be ignored. Accordingly, the appeal succeeds.

214. The conviction is quashed and the 7 appellants acquitted of the charge of trafficking in narcotic drugs contrary to Section 4(a) of the *Narcotic Drugs and Psychotropic Substances Control Act* No 4 of 1994. The sentence is set aside and the 7 appellants may be set at liberty.

It is so held.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF MAY 2025.

WENDY KAGENDO

JUDGE

Delivered in the presence of:

Ms. P . Ogega for the State/respondent

The 1st to 6th Appellants – In Person Virtually

Mr. Momanyi Holding Brief For Mr Omondi Ogutu for the 7th Appellant

Bebora Court Assistant

W. K. Micheni J