THE PRESUMPTION OF INNOCENCE IN CRIMINAL CASES IN KENYA - A MYTH OR REALITY ?

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C O N T E N T S

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I N T R O D U C T I O N

The concept of liberty (or freedom as it is commonly called) is very important anywhere. In Kenya, it is more important if viewed in a historical context. In the colonial days, the indigenous people of Kenya were denied freedom in their own country by their colonial masters who the former viewed as aliens-ond aliens indeed they were, having come from their own mother country (Britain) and set up an appressive regime here. Chiefly as a result of denial of freedom by the said colonial masters and other reasons incidental thereto, the Africans fought to acquire their independence with a view to reinstating their long-lost freedom. It was hoped that with the coming of independence, the concept of liberty or freedom would be upheld.

"Freedom" or "liberty" can best be defined as the right to do what one wills to do. But it would be incorrect to talk of one's freedom to do what one wills except in relation to other people's freedom to do what they will because one's freedom will definitely affect another's or other's freedom. If peoples' actions were completely unchecked by an external authority, a world in which peace prevails would not obtain, for respect for others' freedom or rights is not a natural impulse among most people: the rich would appress the poor, the strong would oppress the weak and so forth. It is with

constitution of Kenya.[1]

Section 3 of the constitution provides that any law that is inconsistent with the constitution is, to the extent of the inconsistency, void. That the concept of Freedom, enshrined in the Bill of Rights, has been given a place in the constitution gives credence to its importance. One of the set of guarantees enshrined in the constitution is the presumption of innocence provided in section 77(2) of the constitution. This provides that when a person is charged with a criminal offence, he shall be presumed to be innocent till proved, or has pleaded guilty. It is a grand design aimed at safeguarding the freedom of the subject against the strong powers of the Government. However, setting out a law and ensuring it observance are two different things. The aim of this paper is to examine whether this presumption is adhered to by those arms of the Government charged with its adherence when carrying out official duties, namely the judiciary and the police force. It will be shown, hopefully with a large measure of clarity, that this presumption is grossly fronted by the police force and the judiciary.

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1 Act No. 3 of 1969 - Kenya Gazette Supplement number 27.

a view to ehecking such infringment of peoples' freedom by others that the institution of Government has been set up. However, the Government itself, with its astronomical powers, can interfere with peoples rights, while purporting to protect them. In effect , this means that even Governmental powers have themselves to be checked so that they are not exercised to the prejudice of the citizen: the question is not whether to do away with Government but how to limit its power so that such power is not exercised to the prejudice of the citizen while still retaining enough power to control the actions of the citizen. In other words, the Government is a necessary evil since it has the potential to interfere, and grossly too, with the citizens' rights - But at the same time its existence is necessary to check peoples' actions so that they do not prejudice others. To strike a balance, some machinery or devices have to be set up to control the Government. Different countries have different devices for the said purpose.

In many commonwealth countries, the protection of the subject from infringement of his rights by the Government is effected through the bill of Rights. The Bill of Rights is a set of guarantees passed to prevent infringement of the citizens' rights by the Government and thus acts as a limiting force of Governmental power. It is enshrined in the constitution, which is the fundamental law of the country In Kenya, the Bill of Rights is enshrined in Chapter 5 of the

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In the first chapter, some light will be thrown on the development of the Bill of Rights and the presumption of innocence. The second chapter will consist of an analysis of the law relating to the presumption and the third chapter will examine cases where it (the presumption) is seriously flouted, and recommendations for improvement will also be attempted.

CHAPTER I

The Bill of Rights and its concomitant Provisions, including the Presumption of innocence, has had a lengthy and eventful history. The rights that are enshrined therein were fought for over a long period of time, sometimes in conditions that militated strongly against the success of securing them. In most of the countries that constituted the battle field for these rights, Human rights were not known at all except for those members of society who comprised the ruling class. The Subject enjoyed rights at the pleasure of the ruler and the dominant philosophy was that the former existed to be used and abused by the latter. In feudal countries for example, the serf was under the complete control of the feudal Lords and had few rights he could call his own. A good example of this absolutism is afforded by the infamous system of lettres-de-catchet in France by which a Feudal Lord could order the imprisonment of a serf without trial through the issue of a lettre-de-catchet (a letter which authorised such practice). Elsewhere, the system was just as cruel, if not more cruel, and most rights that were to be enjoyed by anybody other than the ruler were the exclusive domain of the landed gentry.

In slave-owner societies, the situation was the same and perhaps even worse. Human rights were the exclusive domain of the slave owners and slaves had no rights they could call their own.

A discussion of the History of the Bill of Rights starts with a discussion of human rights (or fundamental rights as they are known is some quarters) for it is in the latter that the former is rooted. Human or fundamental rights is the modern name for what have been traditionally known as natural rights, and these may be defined as moral rights which every human being, everywhere, at all times, ought to have. Simply because of the fact that, in contradistinction with other beings, he is rational and moral. No man may be deprived of these rights without grave affront to Justice.

In the development of the concept of human rights, the theory of natural law played a dominant part. But it is remarkable that before the formulation of the theory of natural law by the Stoic Philosophers, Greek citizens had enjoyed some of the rights which are claimed as fundamental; isogoria or equal freedom of speech, isonomia or equality before the law and isotomia or equal respect for all.

The concept of natural law was first systematically formulated by the stoics after the breakdown of the Greek

city states. To them natural law was universal in that it applied not only to citizens of certain states but rather to everybody in the cosmopolis. It was superior to any positive law and embodied the elementary Principles of Justice which were "apparent to the eye of reason". The natural rights conferred by it were not particular privileges of citizens of certain states but something every human being everywhere was entitled to in virtue of the simple fact that he was human and ration. Man, they argued, could comprehend and obey this law of nature because of common possession of reason, and capacity to develop and attain virtue.

"It is of universal application, unchanging and everylasting .... it is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people. ..... and there will not be laws at Rome and at Athens or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times."[1]

Similarly, during the middle ages there was even greater stress laid by Political Philosophers, especially saint Thomas Aquinas, on the concept of natural law as a law higher than all positive laws, and one which all ruler must obey.

After a temporary setback resulting from the teachings of Machiavelli (Machiavelli taught the Princes and monarchs of that day how to retain their sovereignty which in those days was absolute Monarchism) and the absolutism of the national state in the 16th century, the idea of natural rights was revitalised by 2 factors. First, the reformation and the resultant religious struggles brought about a widespread outcry for the natural rights of freedom of conscience and religious belief. Secondly, this was the period when the Bourgeois class was on the uprise, and was struggling to oust the Feudal class who controlled the machinery and wealth of the State. This struggle was prompted by the Bourgoisies desire to change the mode of production so as to suit the exchange of commodities which was the basis of capitalistic mode of production. For this purpose, the bourgoisie invoked the notion of natural law and rights which they coloured with the idea of the social contract. The doctrine (of the social contract) made its appearance in the 16th and 17th centuries, when bourgeois political theorists turned to the notion of contract to interpret the relationship between the individual and the state. Initially, it claimed that royal authority devired from a contract of Government whereby people had collectively undertaken to obey the ruler, so long as the governed in the general interest

and kept within the terms of the contract. In the seventeenth century, however, as the bourgeois struggle intensified, the idea of the social contract came to be construed as an act of separate individuals emerging from a state of nature into civil society, where for their common advantage, they undertook with one another to set up a government to which they would give active support and submission, while reserving the right to remove it in the event of its failure to govern in the general interest. The association thus formed would proceed, usually by majority decision, to appoint governors whom it empowered either by a contract of government or deed of trust or by an act of delegation to govern on its behalf, usually subject to the condition that it acted in the general interest and respected natural rights. Failure in this respect might justify disobedience and even rebellion.[2] Thses ideas led to the English bourgeois revolution of 1688 which in turn led to the enactment of the first Bill of Rights passed in England in 1689 and which embodied, inter alia, the presumption of innocence in its provisions as one of the rights of mankind protected by the law.

During the American revolution, the colonists backed up their claims with the concepts of natural law and natural rights and made use of John Locke's ideas (the most notable English bourgeois revolutionary) to justify their rebellion. They saw the Mayflower contract

of 1620 as the original contract between King and people which had been designed to protect their natural rights. George III and his governors, by levying taxes without their consent, had violated those rights and had thus forfeited all claims to authority over them.

The same idea had been immortalised in the Declaration of independence which was the final act showing the determination of the colonists to overthrow the authority of the imperial Government:

"We hold these truths to be self-evident; that all men are created equal; that they are endowed by their creator with certain unalienable rights; that among these rights are life, liberty and the pursuit of happiness. That to secure these governments are instituted among men deriving their just powers from the consent of the governed; that whenever the Government becomes destructive of these ends, it is the right of the people to alter and abolish it and to institute new Government".[3]

Although the founding fathers thus based their case against their mother country on the rights of man, when they came to draft a constitution no attempt was made to enshrine these in a Bill of Rights. It was only in 1791 that ten amendments to the constitution were passed by congress which came to be known as the Bill

of Rights and to be regarded as forming the constitution. These provide that the congress shall make no law respecting an establishment of a religion or prohibiting the free exercise thereof, or obridging the freedom of speech or the press or the right of the people to peaceably assemble, and to petition the Government. The right of the people to keep and bear arms shall not be infringed, and no soldier shall in times of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner prescribed by law. The right against unreasonable searchers and seizures shall not be violated and subject to certain stated exceptions, no person shall be held to answer for a capital or otherwise infamous crime unless on a presentiment or indictment of a Grand Jury, nor shall any person be subjected to double jeopardy with respect to the same offence. No person shall be forced in any criminal case to be a witness, nor shall he be deprived of life, liberty or property without due process of law and his property shall not be compulsorily acquired without just compensation.

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial July, shall be informed of the nature and cause of his accusation and will have compulsory process for obtaining witnesses on his behalf, and to have the assistance of counsel for his defence. Excessive bail shall not be required nor shall excessive fines be imposed. Similarly,

unsual punishment shall not be inflicted.

During the second half of the 18th century, the economic and social injustices of the French ancien regime had become unbearable and in consequence provoked a stream of brilliant satirical and destructive criticism from the philosophers. These writers, in whose arguments the influence of Jean Jacques Rosseau was discernible, believed that mankind was on the threshold of a new age in which right reason would triumph, and in which all citizens would enjoy their natural and imprescriptible right to life, liberty and the pursuit of hapiness. It was the duty of the Government to preserve these rights because men everywhere had certain spiritual and material needs, and the rights necessary to meet these needs were natural and inalienable. A Government which failed to safeguard them could not justify its existence.

The criticism of the philosophers did not produce the desired reform; rather all the abuses associated with the regime continued unabated. Matters came to a head on 17th June 1789 when the third estate, defying Louis XVI and the first estate, proclaimed itself the National Assembly and on 20th June took the famous Tennis court oath asserting that they would not separate till they had given France a constitution. Consequently, the Deputies prepared a list of the inalienable rights of free citizens known as the Declaration of the Rights of Man. The formular chosen for the rights of man and the citizens were suggested in part by English and American models and

were permeated by the philosophy of Rosseau. Men were declared to be born free and equal in respect of rights. The purpose of civil Government was the preservation of the natural and unprescriptive rights of man, and these were liberty, property and resistance to oppression.

Furthermore, everyman was entitled not to be accused, arrested or imprisoned except in accordance with the law; and to be counted innocent till proved guilty.

The English, American and French examples started off a new trend in the constitutional recognition of individual fundamental rights. Consequently, bills of rights have become parts of the constitutions of practically the majority of countries. In Kenya on attainment of Independence it was realized that the human rights which the indigenous colonized people had been denied by their colonial masters were now achieved (or hopefully so). It was therefore decided to enshrine them in a Bill of Rights in a consitution which was moddelled on British one from which its main ideas sprang, having been drafted in Britain. No wonder the Kenyan independence constitution was popularly called the Westminster model constitution.

The history of the presumption of innocence is closely related to that of the Bill of Rights. The presumption of innocence developed as one of the rights

that were striven for by the masterminds of the Bill of Rights. This is because in the early feudal days, the trial of accused persons was such as to lead one to the assumption that the accused person was presumed guilty and that it was upon him to prove himself innocent. For example, during the feudal era, there existed in England a form of trial known as trial by ordeal. According to this form of trial, the accused person was subjected to one of several forms of ordeal and if he survived it, he was declared innocent. One of such ordeals was one according to which the accused was thrown into a pool of water; if he sank he was guilty and if he floated, he was innocent. There were several other forms of ordeal and the common feature in most of them was their tortorous nature.

However, as time went on, there was increasing agitation for the rights of accused persons which culminated in the inclusion of the presumption of innocence in the first Bill of Rights which was enacted in England in 1689. This example was copied in other countries and today, the presumption of innocence is embodied in the Bills of Rights of most countries in the world, with a notable exception of France, where one is presumed guilty till proved innocent. The converse is the position in Kenya; and the law is that the court must during the trial of an accused person, proceed from the premise that such peron is uinnocent till proved or pleads guilty.[4]

FOOTNOTES TO CHAPTER I

1. De Republica, III, 33, quoted in d'Entreves, Natural Law (1960), pp 20 -21.

2. See e.g., John Locke, civil Government, Book II (Everyman's Edition). The social contract and Discourses, Book II, p. 71.

3. See Friedrich and McCloskey, From the Declaration of Independence to the Constitution (1954), p. 3

4. Supra, in the introduction.

The discussion on Chapter I was mainly derived from PROTECTION OF HUMAN RIGHTS UNDER THE LAW - by Gius Efijoyo (Published by London Butterworths) and, as regards the presumption of innocence, PROTECTION FROM POWER - by John Clarice McDermott (London Stevens, 1957, 196 p. The Hamlyn Lectures, 9 series).

CHAPTER TWO

In discussing the source(s) of any law in Kenya regard must be had to the Judicature Act [1] Section 3 (1) and (2). Section 3(1) of the said Act enumerates the sources of law in Kenya as follows:

1) The Constitution;

2) Subject thereto, all written laws, including the acts of the British Parliament;

3) The substance of the common law, doctrines of equity and statutes of general application in force in England on 22nd August 1897.

Section 3 (1) goes on to state that the said substance of the common law, doctrines of equity and statutes of general application shall apply only in so far as the circumstances and inhabitants of Kenya permit.

The enumeration set out here above shows that the constitution of Kenya is the paramount law of the land. Indeed, Section 3 of the said constitution provides :

> " This constitution is the constitution of the Republic of Kenya and shall have the force of law throughout Kenya and, subject to Section 47 of this constitution, if any law is inconsistent with this constitution, this constitution shall prevail and the other law shall, to the extent of the inconsistency, be void".

The fact of any law being set out in the Constitution therefore gives credence to its importance. The pre-

sumption of innocence is clearly set out in the Constitution as we shall presently see. Its (the presumptions) importance cannot therefore be underrated without affront to justice.

The law relating to the presumption of innocence is expressly set out in section 77(2) (a) of the Constitution which section provides that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty. This is the only section in the bulk of our law where the presumption of innocence is expressly provided for. However, there are other sections of the law that tacitly provide for the presumption. This is the case in respect of laws which either expressly or by necessary implication forbid the maltreatment of suspected offenders before conviction. In them, an allusion to the presumption is discernible.

Section 77 (1) provides that if any person is charged with a criminal offence, then, unless the charge is withdrawn , the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. The requirement as to a fair hearing within a reasonable time by an independent and impartial court established by law is an allusion to the presumption of innocence in that the requirement that the hearing be held with a reasonable time is

definitely intended to prevent the maltreatment and suffering (either psychological or physical) of accused persons for a long time before the case is heard during which time their guilt is not yet a foregone conclusion; i.e. they are still presumed innocent. As for the requirement of a fair hearing by an independent and impartial court established by law, this is directly consonant with the presumption, for if the accused were to be tried by a dispassionate tribunal, the presumption would be negated and it can in fact be said not to exist in the first place.

Section 77(2)(b) of the Constitution provides that every person who is charged with a criminal offence shall be informed as soon as is reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged. Here, an allusion to the presumption is discernible. The inference that can be drawn from this Section is that the person(s) arresting should not go with the irrevocable assumption that the person they are arresting has committed the offence charged. There could be a mistake as to identification of the person who is being arrested; and the aim of this section is presumably to allow the arrestee to disabuse the person(s) making the arrest of their mistake as to identification or kindred issues. This Section is therefore in keeping with the presumption of innocence.

Section 77(2)(c) of the Constitution provides that when a person is charged with a criminal offence, he shall be given adequate time and facilities for the preparation of his defence. This most certainly arrived at giving the accused to defend himself till he is proved or declared innocent.

Section 77(2) (d) of the Constitution provides that when any person is charged with a criminal offence, he shall be permitted to defend himself before the court in person or by a legal representative of his choice. This section is intended to give the accused person, who is presumed innocent, a chance to prove or at least indicate, however slightly, his innocence and is consonant with the presumption of innocence.

Section 77(2) (e) of the court provides that every person who is charged with a criminal offence shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution. This Section envisages a situation where none of the two sides to a litigation has yet proved their case. It shows that at the outset of a case the balance is supposed to be level and not tilting in favour of either of the two sides. As the trial proceeds and more and more

witnesses are called, the balance tilts on one side, i.e. either of the accused or the prosecution.

Section 77(2) (f) of the constitution provides that every person accused of a criminal offence shall be permitted to have without payment the assistance of an interpreter of he cannot understand the language used at the trial of his charge. This is intended to ensure that the accused person follows every stage of the proceedings so that he can controvert evidence given by the prosecution and also present his own side of the story, to enable the final judgement to reflect the positions of both the accused and the prosecution. It is obvious therefore, that during the continuance of the trial the accused is an innocent man in the mind of the court.

Section 77 (2) (7) of the Constitution provides that no person who is tried for a criminal offence shall be compelled to give evidence at the trial. This is because compelling such person to give evidence to at his trial would amount to assuming that the accused is already a guilty man and all that is required is evidence, including his own, which will confirm this assumption.

The foregoing are the sectioning in the Kenya Constitution which provide for the presumption of innocence. However, there are instances, provided by the constitution itself in which the presumption does not apply. Section 83 (1) of the Constitution provides that " nothing contained

in or done under the authority of an act of Parliament shall be held to be inconsistent with or in contravention of Section 72, Section 76,Section 79, Section 80 and Section 81, or Section 82 of this Constitution when Kenya is at war, and nothing contained in or done under the authority of any Provision of Part III of the Preservation of Public Security Act [3] shall be held to be inconsistent with or in contravention of those sections of this Constitution when and in so far as the provision is in operation by virtue of an order made under Section 85 of this Constitution. " The effect of this, inter alia, is to allow for the detention of persons who have not been proved guilty of any offence and is therefore a departure from the presumption of innocence. This is done under the Preservation of Public Security Act.

Section 85(1) of the constitution provides that the President may at any time, by order published in the Gazette, bring into operation, generally or in any part of Kenya,Part III of the Preservation of Public Security Act or any of the Provisions of that Act. The order remains in force for twenty eight days before it is necessary to have the approval of the National Assembly and the period when Parliament is dissolved does not count towards the twenty eight days. No special majority is specified for the approval

so a simple majority of those present and voting suffices. Unless the President revokes the order earlier it stays in force indefinitely, although the Naiton National Assembly may bring it to an end at any time, but to do so, it must master up the support of the majority of all the members of the assembly. It can therefore be seen that it is easier to make an order made under the Act to stay than it is to revoke it. Under the Preservation of Public Security Act, the President may bring the Act into operation when he is of the view that there is a danger to public security. Public security is not defined, and the Act has been used to silence political foes. Politicians like Odinga Oginga,Martin Shikuku and Wesonga Siyeyo were detained under this Act and no offence had been proved against them before they were detained. President Moi's assertion when he acceded to power in 1978 "Detention will be the last resort" shows that detention is here to stay. Detention of people who have not been tried by a competent court of law is a serious abrogation of the presumption of innocence and is currently used by those in power for selfish reasons.

Apart from the constitution there are other statutes that provide indirectly for the presumption of innocence. One of these is the Kenya Evidence Act.[4] The said Act is a procedural one and guides the court in the determination of evidence that is relevant and evidence, that is not relevant. Section 5 of the

Act provides that " subject to the provisions of this Act and of any other law, no evidence shall be given in any suit or proceeding except evidence of a fact in issue and of any fact declared by any provision of this Act to be relevant". This generally sums up the purposes of the Evidence Act. From this we can see that The Kenya Evidence Act is a procedural one.

The Evidence Act does not state the presumption of innocence expressly anywhere, but an allusion to the said presumption is made in several sections of the Act. One of such several sections is section 15 which provides against the admissibility of similar fact evidence. This section provides that when there is question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant . The basic principles underlying section 15 were set forth in MAKIN'S CASE [5] as reiterated by Sir Kenneth O'Conner, P. in R v. JOHN MAKINDI[6]. He said, " The principles which govern the admissibility of evidence of similar offences are well-known. The leading authority is Makin-.V-Attorney-General of New South Wales . . . where Lord Herschell at p.65 enunciated two propositions. The first one is : ' It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the

accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried ". This is because the accused is always presumed innocent till proved or has pleaded guilty. The Lord Chancellor in Makin's case went on to enunciate a second proposition:

> ' On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused'.

These are the only instances where similar fact evidence is admissible, otherwise, the general rule is that similar fact evidence is not admissible, for one is presumed innocent till proved or has pleaded guilty.

Section 127 (2) K.E.A.* provides that in criminal proceedings every person charged with an offence ..... shall be a competent witness for the defence at every stage of the proceedings, whether such person is charged alone or jointly with any other person.

* K.E.A. - Kenya Evidence Act.

Provided that:-

i) The person charged shall not be called as a witness except upon his own application;

ii) Failure of the person charged . . . to give evidence shall not be made the subject of any comment by the prosecution.

This section restates section 77(2)(7) K.E.A.[6] that provides that no person who is tried for a criminal offence shall be compelled to give evidence against himself, for such a person is presumed innocent till proved guilty. Compelling the accused to give evidence against himself would amount to a breach of the presumption of innocence.

It is probably true to say that the presumption of innocence is alluded to in the law in respect of confessions. Section 25 Kenya Evidence Act defines a confession as comprising of 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.

Section 26 Kenya Evidence Act provides that a confession or any admission of a fact tending to the guilt of an accused person is not admissible if it appears to the court to have been caused by any inducement,

threat or promise having reference to the charge against the accused person,proceeding from a person in authority and sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain an advantage or avoid any evil of a temporal nature in reference to the proceedings against him. This section would seem to imply that since an accused person is presumed innocent till proved or pleads guilty, he should give any self inculpatory statement on his own volition and should not be forced to do so by either threats, inducements or promises. If threat, inducement or promise is used to procure a confession from the accused this would negate the presumption of innocence as it would presuppose a working presumption of guilt in the mind of the person making the threat or holding out the promise or inducement with respect to the accused.

Section 57(1) Kenya Evidence Act provides against the admissibility of character evidence. This is because one is presumed to be innocent with respect to the case at hand till proved or has pleaded guilty. The said section provides that in criminal proceedings the fact that the accused person has committed or been convicted of/or been charged with any offence other than that with which he is charged, or is of bad character, is inadmissible unless:

a) The proof that he has committed or been convicted of such other offence is admissible under section 14 or 15[7] of this Act to show that he is guilty of the offence with which he is charged; or

b) he has personally or by his advocate asked questions of a witness for the prosecution with a view of establishing his own good character; or

c) the nature or conduct of the defence is such as to involve imputations on the character of the complainant or of a witness for the prosecution;or

d) he has given evidence against any other person charged with the same offence.

Except for these limited examples evidence of a person's previous bad character is not admissible in criminal proceedings, for the accused is always presumed innocent with respect to the case at hand till proved or has pleaded guilty.

Another statute that tacitly talks about the presumption of innocence is the criminal procedure code.[8] Section 36 provides that when any person has been taken into custody without warrant for an offence other than murder or treason, the officer-in-charge of the police station to which such person has been brought may in any case and shall, if it does not appear practicable to bring such person before

before an appropriate subordinate court within 24 hours after he has been taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature , release the person on his executing abond with or without surieties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where any person is retained in custody he shall be brought before a subordinate court as soon as is practicable. The presumption underlying this section is the presumption of innocence, for, by providing against the remanding of custody of persons for a long time, the section is saying nothing more than that such persons should not be punished before they are declared guilty by a court of law. This section is supported by section 33 which provides that when a police officer making an arrest withou warrant shall,without unnecessary delay and subject to the provisions of this code as to bail, take or send the person before a Magistrate having jurisdiction in the case or before an officer in charge of a police station. This is probably to prevent the persecution of such persons at the hands of such officer and to restrain the liberty of such persons for longer than is necessary and is therefor consonant with the presumption of innocence.

Section 123 of the C.P.C.* provide that when any person ,other than a person accused of murder or treason is arrested or detained without warrant by an officer in

* C.P.C. - Criminal Procedure Code

charge of a police station, or appears or is brought before a court and is prepared at anytime while in that custody of such officer or at any stage of the proceedings before such court to give bail, such person may be admitted to bail. The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive. This section, as can be seen, is intended to prevent hardship accruing to the accused person before he is declared guilty by a court and is therefore consonant with the presumption of innocence.

Section 24 C.P.C. provides that persons arrested shall not be subjected to more restraint than necessary. This implies that nobody who is accused of a crime should be imprisoned longer than necessary since such person is presumed to be innocent, till proved or has pleaded guilty. This section is supported by sections 123 and 33 (supra).

Section 21(2) provides that if the person sought to be arrested forcibly resists the endeavor to arrest him or attempts to evade the arrest, the police officer or other person may use all necessary means to effect the arrest - subsection (3) provides that nothing contained in this section shall be deemed to justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.

This section provides against the use of unreasonable force against a person who has not as yet been guilty or found guilty of an offence. It is therefore consonant with the presumption of innocence.

From the foregoing, one can see that the presumption of innocence is given adequate coverage, both in the form of an express constitutional guarantee and implicit statutory safeguards in respect of the accused person. However, in practice this safeguard is flagrantly i flouted in many of the instances where it should be upheld.

The aim of the following chapter is to show some of these instances and perhaps show a great many incentives for charge as regards the presumption and many other statutory safeguards available to accused persons.

FOOTNOTES FOR CHAPTER TWO

1 The Judicature Act, Cap 8 LAWS OF KENYA.

2 Kenya Gazette Supplement No.27 (ACT NO.3) of 18th April,1969.

3. Cap 57 LAWS OF KENYA

4. Cap 80 LAWS OF KENYA

5. (1894) A.C. 57

6. (1961) E.A. 327

7. Supra.

8. Cap.75 LAWS OF KENYA.

CHAPTER 3

The first and second chapters have discussed, inter alia, the history of the Presumption of innocence and the Kenyan law relating to the same respectively. This exercise has been undertaken not only to throw some light on the History of the said Presumption and the Bill of Rights in which it is embodied, but also to show some of the incentives which prompted the evolution of the Bill of Rights and its concomitant Provisions, including the Presumption of innocence.

This chapter is devoted to the Practice relating to the Presumption of innocence in Kenya. In looking at the said practice, we shall see great incentives for improvement of this Practice, for the Presumption of innocence is in many instances flouted by the agents of the government charged with its observance when Performing officia duties in connection with the administration of Justice. The fact that one is to be Presumed innocent till proved or pleads guilty calls for the Proper treatment of an accused Person from the moment he is arrested and right through his trial to the moment of conviction or acquittal by the court. This means that the institutions of the Police force (charged with the duty of arresting offenders and bringing them before a court of law) and the law courts (which adjudicate on all Points in issue as regards the trial of accused Persons and decide on the guilt or innocence of the latter) should proceed on the Premise that the accused has committed no

offence before he is found guilty of one and is therefore entitled to be treated with respect and accorded the dignity that is enjoyed by all free citizens. The two institutions have astronomical power over accused Persons which, if misused, could have serious and adverse effects on the liberty of the accused Person. The observance of the Presumption of innocence by these two institutions cannot therefore be overemphasised.

The fact of one being Presumed innocent till proved or pleads guilty Precludes Police brutality: It means that the exercise of brutality on accused Persons by the police either at the time of arrest of the former or when they are in Police custody pending trial is incosistent with the Presumption. However, Police brutality is so widespread in Kenya that it is almost an institution in itself. Many citizens do not as a result of the much talked about brutality know that the Police should protect their rights. Indeed, Police brutality was once the issue in Parliament.[1] Mr. Mwatsama, a member, asked the minister if he could tell the house why Messrs Peter Gituto and Thomas Otam, both East African External communications trainees in Mombasa, were arrested in their lodging room and seriously beaten up by Police constables,* in the Makupa presence of a Police Inspector, on 8th November, 1965, at about 2.a.m. Mr. Mwatsama seemed to have echoed a Public outcry when he said[2] ".....since there have been so many complaints with regard to the behaviour of the Police,

* The said Police constables were attached to the

what is the ministry doing to try and improve the position?" Mr. Mwatsama's words were spoken by him in 1965, but today, 16 years later, the situation remains virtually the same; the brutality of the Police is still a Public complaint.

Speaking on the same issue, Mr. Joseph Gatuguta, then member for Kikuyu said[3] "Mr. Speaker Sir, this incident involves a very seriously breach of discipline on the Part of the Police, because this sort of thing seems to be happening almost everywhere in the country"(emphasis mine). Despite this complaint by the member for Kikuyu, the then Practice is still prevalent almost everywhere in the country. In reply to Mr. Gatuguta and Mr. Mwatsama, the Assistant Minister for Home Affairs, Mr. Wamuthenya, said[4] "Mr. Speaker Sir, it is agreed that this is taking place everywhere in the country" (emphasis mine). As a result of this complaint, the Assembly set up a select committee to inquire into the incidents and report to it . The committee found the allegations of Police brutality justified. Today, sixteen years after this discovery, the question to be asked is what the Government has done to alleviate or even eradicate Police brutality on accused Persons. The answer to that question would seem to be, that nothing has been done as current practice shows.

Police brutality is still practised today. Citizens complain about this but nothing seems to be done. The writer recalls a horrifying experience which occurred when he was doing his end of Second Year fourth-term court Programme. A man was brought before a District Magistrate Grade II at Nakuru law courts, Mr. Bomet, charged with theft contrary to section 268 of the Penal Code.[5] The facts were that the accused broke into the house of the complainant and stole some goods and cash. During the trial of the accused, the accused told the court that he had been tortured by the Police while in Police custody. He alleged that his genitals had been pierced with a sharp object and the wound so inflicted was becoming gangerous. The magistrate ordered that the Police who arested the accused be brought to court to answer why he so treated the accused.[6] Instances of Police brutality are many, and the two discussed above are but a drop in the ocean.

Section 36 of the Criminal Procedure Code[7] Provides that when any Person has been taken into custody for an offence other than murder or treason, the Police Officer in charge of the Police Station to which such Person is brought may in any case and shall if it does not appear practicable to bring such Person before an appropriate subordinate court within 24 hours after he has been taken into custody, inquire into the case, and, unless the offence appears to the officer to be a serious nature, release the Person upon his of

executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where any person is retained in custody he shall be brought before a subordinate court as soon as is reasonably practicable. This section provides, inter alia, against the detention of persons in police custody for longer than necessary and is therefore consonant with the presumption of innocence. This is because restraining the accused for longer than necessary in Police custody would amount to punishing the accused for an offence for which he has not yet been proved or pleaded guilty before a competent court. This section is supported by section 24 of the criminal Procedure code[8] which provides that a person arrested shall not be subjected to more restraint than is necessary. However, in Practice, the Police do detain people in Police custody for long periods of time without having any justification. A recent narrative in the weekly Review underscores this assertion.[9] On July 8 this year, the narrative says, Mr. Stephen Waweru Njuguna was allegedly arrested by the police. Njuguna had up to the time of going to Press (August 28th 1981) never been taken to court to answer any charges, and his family claimed never to have seen him since. The High court consequently issued summons to the Minister for Constitutional and Home Affairs, Mr. Charles Njonjo, and the Commissioner of Police, Mr. Ben Geth to appear in court following an application for a writ of habaes corpus by Njuguna's wife, Mary Wangui, who claims her

husband was improperly detained by the State.

According to a Plaint filed through Nairobi lawyers, Kanyi Kogi and Company Advocates, on the night of July 7 and 8, Wangui learnt that ther husband, Njuguna, had been admitted to Gatundu hospital with injuries suffered from a road accident. The Plaint says Wangui and Wanjiru Njuguna, the mother of Njuguna, went to see Njuguna at the hospital but were informed that he had been taken to the operating theatre. The next day, the Plaint stated, Wangui went to see her bhusband, but he could not talk. On July 9, Wangui was allegedly informed by her brother-in-law, Mr. Stanley Ng'an that Njuguna had been arrested by the Police and guards posted at his hospital bed. The Plaint then stated that Njuguna was discharged from the hospital on July 28, and taken to Gatundu Police Station and that since then Wangui has never seen her husband. It is further claimed that a lawyer from Kanyi, Kogi and advocates went to Kamukunji Police Company Station on August 1, and was told that Njuguna had been taken to the criminal Investigation Department (CID) headquarters. The lawyer, the Plaint said, then went to the CID headquarters on August 4, in a bid to see Waweru but the lawyer was told to go back the following day. On further inquiries, the Plaint states the lawyer was informed that Waweru was being held at Pumwani Police Station as on August 12 and had "not been charged with any offence." Said Wangui Njuguna, wife of Njuguna, "he has been in custody for about seven weeks without being charged with any offence

in contravention of Section 72 (2) and (5) of the constitution". This action of the Police was clearly in contravention of Section 36 of the Criminal Procedure code and, as Wangui said, section 72 (2) and (5) of the constitution of Kenya.[10] It amounts to restraining the liberty of an individual who has not been proved guilty of any crime and is a most serious violation of the Presumption of innocence.

All the above-mentioned activities of the Police with respect to accused Persons would lead one to assume that the accused, while in Police custody, is processed towards a plea of guilty. As a matter of fact, one would be perfectly justified for arriving at such a conclusion, for the Police are over-zealous in arriving at conviction. This partly explains brutality on their part. Police brutality is usually exercised on Persons in Police custody with a view to extracting confessions from such persons. Such confessions are subsequently held out in court as having been made voluntarily. The accused person is warned before appearing in court to maintain that such a confession was made voluntarily, with a threat of harmful consequences to be him if he decries the voluntariness of such a confession. The law provides against the non-admission of confessions exhorted by means of threats, intimidation or inducement.[11] However, the accused, who is usually ignorant of the law, will hardly know that he can avail himself of this safeguard.

The only hope for him is for him to be represented by an advocate. But in a country where poverty is so widespread, very few people will afford to engage the services of lawyers, and the impecunious accused person might find the balance of the case tilting in his disfavour by reason of his ignorance of legal technicalities such as the one in respect of confessions mentioned hereabove. The sum total of all these is to erode the presumption of innocence to an extent where it is only the magistrate who can assist the accused. However, very few Magistrates do this, owing to pressure of work and other reasons.

A psychological explanation of Police brutality can be sought in the method and objectives of their training. The police are trained to stamp out crime. Moreover, most policemen are of a very low educational status. As a result of these two factors, most policemen do not see the importance of balancing properly betweeen their duty (that of stamping out crime)and respect for the statutory safeguards for accused persons, such as the Presumption of innocence. They do not even know that police brutality is inconsistent with the Presumption of innocence. They instead emphasise the duty of stamping out crime more, even at the expense of innocent citizens. Also, the number of convictions a Policeman is able to secure is very determining as far as consideration for promotion is ~~considered~~ concerned. This explains why Policemen exercise a lot of brutality on people in Police custody when compelling them to make confessions and no

to subsequently retract them. This is of course designed to make it easier for the court to arrive at conviction. Another factor that prompts Police brutality is the fact that Policemen are very poorly paid. This makes them Not any more exercise brutality on Persons who fall into their hands with a view to extracting bribes from them. Policemen should be recruited from people of a reasonable educational status which would enable them to grasp the importance of balancing between their duty and respect for the safeguards for available to accused persons. This would undoubtedly lead to less violations of the Presumption of innocence and more respect for the freedom of the individual. Further, the Police should be paid better salaries, for this would go a long way in reducing instances of Police brutality aimed at extracting bribes from innocent people.

Even without direct persecution by the police, conditions in Police cells are such as to suggest that a Person is presumed guilty and that a subsequent declaration of guilt by the court only confirms a Pre-existing Presumption of guilt. Before these conditions are discussed, let us see how a person finds himself in such conditions. Section 123 of the criminal procedure code provides that when any person, other than a person accused of murder or treason, is arrested or detained without warrant by an officer in charge of a Police Station, or appears or is brought before a court and is prepared at any time while in the custody of such officer or at any stage

of the proceedings before such court to give bail, such person may be admitted to bail. Sub-section 2 of the same section proceeds to state that the amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive. Section 36 of the same code provides for the award of bond.[13] It provides that when any person has been taken into custody for an offence other than murder or treason, the officer in charge of the police station to which such person has been brought may in any case and shall, if it does not appear practicable to bring such person before an appropriate subordinate court within 24 hours after he has been taken into custody, inquire into the case, and unless the offence appears to the officer or be of a serious nature, release the person unpon his executing a bond, with or without sureties, for a reasonable amount to appear before a subordinate court at a time and place to be named in the bond, but where any person is retained in custody he shall be brought before a subordinate court as soon as is reasonably practicable. The sum total of all these provision's is to dictate that bail or bond be available to accussed persons as a rule rather than as an exception. However, the practice is different. The usual practice when a person is taken to a Police Station and charged with a specific offence is to remand him in police custody for a long time pending trial. In Police custody, conditions are such as to make the presumption of innocence a big sham. The cells are usually, indeed

almost invariably, very small and overcrowded. The accused persons are usually under lock and key for most hours of the day in cells that hardly allow in some light. At night, the prisoners sleep on hard cold and bare cement floor and cover themselves with blankets that are usually infested with lice and bed bugs. A pail placed at a corner of the cell serves as a toilet and the prisoners have to live with the stench emanating therefrom.[14] It is no wonder then, that when a person eventually appears before the court, his rough appearance may sometimes create a bias in the magistrate's mind in the accused's disfavour which may sometimes result in the conviction of accused persons on purely emotional grounds.

The pre-trial imbalance that is a characteristic of remanding people in police custody is worth mentioning. The impecunious accused person who can't afford to engage the services of a lawyer and who is remanded in custody pending trial is at a disadvantage Vis-a-vis the prosecution as far as collecting evidence and calling witnesses is concerned. The prosectution, have astronomical investigatory powers due to the fact that they are unrestrained unlike the accused who is remanded in custody and further, they also have the means to carry out investigations and call witnesses. Moreover, the police are experts at grilling witnesses so as to make them give a story, even one in support of a fabricated charge. The result of all this is that when the accused is eventually brought before

the court, the balance of the trial will tilt in his disfavour, and any protection afforded by the presumption of innocence and also by other safeguards, will usually be watered down.

Strictly speaking, nowhere in Kenya law are the police empowered to shoot suspects on sight except for the criminal procedure code section 21[15] which provides that a policeman may use reasonable force to effect an arrest. But the same section goes ahead to say in subsection (2) that such a policeman shall not use more force than is necessary to effect an arrest. However, the police have used the gun and killed people, some of whom could well have been innocent, in the streets. A common justification sought is that the deceased was "a most wanted criminal" or that he was trying to resist arrest by escaping. Several incidents of this nature (i.e. of shooting on sight) have recently been highlighted in the local newspapers. The Weekly Review[16] recently carried an article highlighting this practice. A former football ace, Mr. Daniel Nickodemus Odhiambo, popularly known as Arudhi, reportedly surrendered himself to the police but was later shot dead. According to an assistant Minister in the Office of the President, Mr. Isaac Salat, Odhiambo was shot while he was trying to escape. He told parliament that the deceased was wanted by the police who had been looking for him for the last 3 years, in connection with a number of murders in Nairobi. However,

an advocate for the family of the late Odhiambo, challenged the Assistant Minister's statement on the circumstances surrounding the case. According to the lawyer, Mr. Colin Omondi of C. N. Omondi and Company, the police could not have been looking for three years for a man who during all that period was doing open business and living in Nairobi and whose whereabouts the police were well aware of. Omondi said that the fact that the police went to Odhiambo's house expecting to find him there disproves the Minister's assertion, "if they had been looking for him for 3 years," Omondi said, "they must have known him, yet, the police officer who took his body to the city mortuary directed that it be marked "unknown male adult." Needless to say, the shooting of suspects on sight, whatever the justification except in cases where the policeman is defending himself from a murderous attack by the suspect himself, cannot be consonant with the presumption of innocence at all. It suggests that the policeman shooting the suspect has already declared a verdict of guilt and is subsequently procceding to prescribe and implement a punishment. Such an attitude should be condemned in the strongest terms possible not only because it violates the presumption of innocence but also because it sometimes results in the death of persons other than the one intended to be shot.

A recent episode reported in the Weekly Review[17] underscores this latter point. Six people died at Dandora estate after they were shot down by the police. One of the people killed was a boy of 17 years of age named Paul Kihugu Mathenge. According to the boy's sister, Wangari, she was escorting a visitor and saw people running away, apparently from the police who were trying to arrest certain people. After twenty minutes she saw people surrounding some dead bodies and when she went nearer she saw that among the dead was her brother Paul. The Weekly Review's sister publication, the Nairobi Times was later told by Paul's brother, James Mwangi Mathenge who had gone to the Central Police Station, Nairobi, to inquire what the Police were doing about his brother that six people died as a result of the police shoot-out on June, 21 1981. This carnage needs to be condemned in the strongest terms possible, for it involved the death of innocent people who happened to be in the policemen's line of fire. The use of the gun by the police can only be justified where the policeman is defending himself from a murderous assailant, for self-defence is allowed by our law.[18] But even in self-defence, my submission is that the policeman should proceed on the basis that the cardinal aim is to effect an arrest, not to kill. In pursuance of this objective, policemen should endeavour to aim at less fatal areas of the body of the

assailant.

When the case eventually comes up before the court, the latter is supposed to adjudicate on all points in issue with regard to the case between the prosecution and the defence and on the basis of the evidence available, strike a balance between the two sides while remaining impartial throughout the case, for justice must not only be done but should manifestly be seen to be done. In connection with this, there are two principles developed in administrative law regarding adjudication of cases by tribunals and courts and which can be extended by analogy to the administration of justice in criminal cases. The first of these principles states that "no man shall be condemned unheard," i.e. no person shall be made to bear a punishment prescribed by the law without putting his defence to the court. The second principle states that "no man shall be judged in his own course.". This, plainly put, means that no party with an interest in a given case shall be allowed to adjudicate on it. These two principles of law underscore the importance of the impartiality of the adjudicator in a court of law with respect to the trial of accused persons. It is in this context that the presumption of innocence and all other safeguards available to the accused during his trial should be seen.[19]

There is a case to be made for the criticism of the accused's dock in criminal cases. By placing the accused in a Dock separately from all other people in court and

where the latter can all see him, a very strong ~~presumption~~ implication is made that the accused is part of the way towards being a guilty man. Throughout the trial, the accused is made to feel that it was his fault that he ever got there. Even if the ultimate finding is one of innocence on the part of the accused, the accused is left with the stigma of a man who has been lucky to get away with it. Instead of not being guilty from the outset of the case, he is merely proved not guilty, a clear antithesis of the presumption of innocence.

One assertion in favour of the accused Dock is that it facilitates the identification of accused persons. By putting the accused separately in the accused's dock, witnesses can easily identify him, since all they need to do is point at him because he is already, so to speak, identified for them. But might not the court, by putting the accused in the dock, not in some cases aid a witnesses in making a mistake? It is submitted that the dock is a degrading symbol which sometimes results in the identification of the wrong people and unjust consequential punishment.

Section 123 of the criminal procedure code[20] provides, inter alia, that when a person other than a person accused of murder or treason is prepared at anytime during his trial to give bail, such person may be admitted to bail. This section tacitly dictates that the award of bail by the court should be the rule rather than the exception. However, this is usually not the case in subordinate courts;

and it is not unusual to get a situation where a person is remanded in custody for as much as 6 months or more, notwithstanding that the offence he committed was so minor as not to disentitle him to bail. Further, due to the large number of cases to be handled by magistrates in limited time, the latter have developed certain attitudes which suggest that the accused is processed towards giving a guilty pleal. Such attitudes, to name a few are such as the practice of magistrates interrupting the unrepresented accused when the latter is attempting to explain something to raise a defence and snapping at him to say whether he is guilty or not rather than waste the court's time. This usually happens when the accused is told to plead guilty and he chooses to explain what really happened instead of stating in a nutshell what really happened. This is owing to the accused's inability to understand that the time of pleading is not the time of explaining or putting a defence. Moreover, the accused is greatly handicapped by the technicalities of procedure and the magistrate rarely comes to his aid. Jerome H. Skolnick[20] who correctly describes this as a system of justice without trial observes ".....the negation of the presumption of innocence permeates the entire system of justice without trial. The system of justice without trial operates according to a working presumption of guilt. As accused

after accused is processed through the system, participants are prone to develop a routinized callousness, akin to the absence of emotional involvement characterizing physicians' attitude towards illness and disease.[21] This quotation best illustrates why magistrates adopt attitudes akin to the procession of accused persons towards a plea of guilty and needs no elaboration.

It can thus be seen that the trial of the unrepresented accused person is usually a one-sided affair, with the prosecution having the upper hand and resulting in protection afforded by the presumption of innocence a fallacy. Moreover, the accused, as aforementioned, is usually greatly handicapped by the court's procedure while, on the other hand, even a prosecutor of the lowest rank is familiar with procedure in the court. This tilts the balance of the trial more in the accused's disfavour, and greatly waters down the presumption of innocence.

From the foregoing discussion, one can see that the presumption of innocence is floured to the extent that only persons who are legally represented can avail themselves of it. Short of this, a person needs to be conversant with his legal rights to get at least a semblance of respect for the presumption of innocence by the court and the police with regard to him. But in a country where poverty is widespread and ignorance of the law rampant, the majority remain oppressed by the harsh attitudes of the police and the courts The question therefore remains; who will watch the watchers? That is to say, who will ensure that those invested with the duty of ensuring that justice is dispensed will themselves dispense justice?

FOOTNOTES TO CHAPTER 3

. The National Assembly, House of Representatives Official Reports - VOL IX, Part I, Col 183.

. At column 183

. At column 186

. At column 186

. CAP 63, LAWS OF KENYA

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CAP 75, LAWS OF KENYA

CAP 75, LAWS OF KENYA

Weekly Review, August 28, 1981 at p.8.

Kenya Gazette Supplement No. 27 (Acts No. 3) April 18th 1969. Section 72 (2) Provides that any Person who is arrested shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention. Subsection (5) provides that if any person arrested or detained is not tried within a reasonable time, then, he shall be released either unconditionally or upon reasonable conditions, including in Particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings

Preliminary to trial.

11. See THE KENYA EVIDENCE ACT, CAP 80 LAWS OF KENYA, at Section 26.

12. CAP 75, LAWS OF KENYA

13. CAP 75, LAWS OF KENYA

14. The writer himself experienced all these when he was locked up at the Makupa Police Station, Mombasa, following one of the infamous police swoops that are carried out at night arbitrarily on people whose only offence is that they were found walking at night, regardless of whether the circumstances were such as to show an evil intention o not.

15. CAP 75 LAWS OF KENYA

16. The weekly review, July 17 1981 at pg. 17.

17. CAP 63, LAWS OF KENYA at Section 17.

18. These two principles are tacitly embodied in the sections of our law that provide for the accused's safeguards during trial already considered in chapter 2.

19. Criminal Procedure code, CAP 75 LAWS OF KENYA.

20. Jerome H. Skolnick; Justice without Trial. Law enforcement in a Democratic Society, New York 1966 at p. 241

CONCLUSION

It has been shown how the Presumption of innocence is violated by those charged with its observance. The presumption of innocence, as aforementioned, is one of the human rights protected or purported to be protected by the law through inclusion in the Bill of Rights. There is quite a number of other rights enshrined in the Bill of Rights which are supposed to be protected by the State. However, the ultimate prerogative whether to respect the legal protections for its subjects lies with the state, and the latter can, and does, choose to violate such protections. The individual who is adversely affected by such violations has no alternative except to appeal to municipal courts, and the latter being themselves part of the state can decide not to offer him any redress. In the final analysis, the individual may have no redress at all for the violation of his rights. He can appeal to International tribunals but since the individual is, subject to a few specified exceptions such as refugees and stateless persons, not a subject of international law, he cannot raise a claim on the international plane. In the final analysis, the rights enjoyed by the individual on the municipal plane are very much so enjoyed at the will of the ruler, i.e. the state as in mediæval and early times. Human rights in the Municipal context therefore have been and continue to be violated with impurity, and the presumption of innocence is but a drop in the ocean of such violations.