

**EVALUATING THE ADEQUACY OF THE LAW ON SEARCHES WITHOUT
WARRANTS IN KENYA: A COMPARATIVE STUDY**

**Submitted in partial fulfillment of the requirements for the Bachelor of Laws Degree,
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DECLARATION

I, ABOT PHOEBE GAI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.



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Date:

ABSTRACT

This study examines Kenya's legislative framework on warrantless searches concentrating on the vague "substantial prejudice" standard set forth in Section 60 of the National Police Service Act. Against the backdrop of recent police abuses during public protests, the paper evaluates how the lack of clear norms governing police discretion could result in widespread violations of the constitutional right to privacy under Article 31. Using a doctrinal and comparative legal methodology, the study examines judicial interpretations of warrantless searches in Kenya and compares them to the Canadian jurisdiction's structured application of the reasonableness and proportionality tests under Section 8 of the Canadian Charter of Rights and Freedoms.

The results highlight a worrying trend of Kenyan courts interpreting warrantless searches inconsistently, frequently emphasizing evidential weight over evidence gathering method. This undercuts both the rule of law and procedural fairness, aggravating police discretion. It is brought out that the ambiguous "substantial prejudice" criteria permits law enforcement to exploit legal ambiguity, resulting in arbitrary intrusions into private life and a loss of public trust in the judicial system.

To address these shortcomings, the dissertation suggests establishing objective guidelines for determining "substantial prejudice," enacting exclusionary rules to deter illegal searches, providing judicial training on constitutional interpretation, and implementing institutional reforms that improve police accountability. These policies seek to match Kenya's legal processes with democratic ideals and international human rights obligations, protecting individual liberty from government overreach.

LIST OF ABBREVIATIONS

COK *Constitution of Kenya*

CPC *Criminal Procedure Code*

CDSA *Controlled Drugs and Substances Act*

UDHR *The Universal Declaration of Human Rights*

ICCPR *The International Covenant on Civil and Political Rights*

ACHPR *The African Charter on Human and Peoples' Rights*

LIST OF CASES

Heiwua Auto Kenya Ltd v Central Police Kenya [2010] eKLR.

Stephen V. Mangira & Anor v The Senior Principal Magistrate [2019] eKLR.

Samura Engineering Ltd & Another v Kenya Revenue Authority Nairobi [2011] eKLR.

Samson Mumo Mutinda v Inspector General National Police Service & 4 Others [2014] eKLR.

Standard Newspaper Ltd & Another v Attorney General & 4 Others [2013] eKLR.

Joseph Ngunguru Wanjohi V Republic [2014] eKLR.

R. v. Pike, 2024

R v Pawar, 2023

R. v. Campbell, 2024

R. v. Guerrier, 2024

R. v. Neill, 2002

R. v. Fearon, 2014

R. v. Nolet, 2010

LIST OF LEGAL INSTRUMENTS

Constitution of Kenya (2010)

Criminal Procedure Code (cap. 75)

National Police Service Act (2011)

Data Protection Act (2019)

The Canadian Charter of Rights and Freedoms (1982)

Controlled Drugs and Substances Act (CDSA)

The Prevention of Terrorism Act (2012)

The Universal Declaration of Human Rights (UDHR)

The International Covenant on Civil and Political Rights (ICCPR)

The African Charter on Human and Peoples' Rights (ACHPR)

CHAPTER ONE

INTRODUCTION TO THE STUDY

Background

After the August 2022 elections, Kenyans in support of the Azimio party went on the streets to protest the election results. In response to a letter from Amnesty International, Kenya and Human Rights Watch seeking comment on October 29, the Independent Policing Oversight over Police Conduct (IPOA) reported 67 investigated cases of people killed during the protests between March and July 2023.¹ Furthermore, police were reported to have used unnecessary physical force as well as having conducted illegal home searches, and unlawfully using tear gas against peaceful protesters, bystanders, children and individuals in their homes, businesses and on the streets.² A four-month-old baby by the name of Precious succumbed to death when a tear gas canister was thrown on the roof of her house and the gas made its way into the house. Similarly, the 2024 *Maandamano* against the proposed financial bill of 2024 left a trail of terror by the police. Valentine Wairimu, 2 months old, became unconscious when a tear gas canister was thrown on the roof of her house. She died at Brother Andre Hospital while receiving first aid.³

These events show the alarming extent of police disregard for human rights. Police power, even when under regulation, can devolve into illegal and forceful actions. Police discretion has proved to be a slippery slope to fundamental human rights violations thus far. Therefore, it must be precisely checked. There is always a potential for abuse inherent in unchecked authority, and because of this, it is vital that all powers granted to law enforcement be explicitly and narrowly defined.

Unless a limitation is justified by law, Article 31 of the Constitution of Kenya guarantees the right to privacy.⁴ It provides, *Every person has the right to privacy, which includes the right not to have– (a) their person, home or property searched; (b) their possessions seized; (c) information*

¹ Human Rights Watch, Amnesty International, *Unchecked Justice*, 25 November, 2024, 2

² Human Rights Watch *et al*, *Unchecked Justice*, 24.

³ Mathare Social Justice Centre (MSCJ), *The untold terror of police violence during maandamano*, August 2, 2023, 5.

⁴ Article 31, *Constitution of Kenya* (2010).

*relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed.*⁵

The Criminal procedure code, under section 118, implements this constitutional provision by granting law enforcement the right to search the premises and objects of suspects after attaining a search warrant from a court or magistrate⁶ Section 118 comprehensively stipulates that, *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.*⁷

Despite the legal requirement for a search warrant under the criminal procedure code, the National Police Service Act, in special circumstances, distinctively gives power to police officers to conduct a search without a warrant.

Article 60 provides that, *When a police officer in charge of a police station, or a police officer investigating an alleged offence, has reasonable grounds to believe that something was used in the commission of a crime, is likely to be found in any place and that the delay occasioned by obtaining a search warrant under section 118 of the Criminal Procedure Code(Cap. 75) will in his opinion substantially prejudice such investigation, he may, after recording in writing the grounds of his belief and such description as is available to him of the thing for which search is to be made, without such warrant, enter any premises in or on which he or she suspects the thing to be and search or cause search to be made for, and take possession of such thing.*

⁵ Article 31, *Constitution of Kenya* (2010).

⁶ Section 118, *Criminal Procedure Code* (Act No. 11 of 1930).

⁷ Section 118, *Criminal Procedure Code* (Act No. 11 of 1930).

Multiple other legislations, such as the *Narcotic Drugs and Psychotropic Substances Control Act* under section 73(5)⁸ and section 37 of the *Firearms Act*, permit searches without warrants in the particular spaces they govern.⁹

Article 24 of Kenya's constitution dictates that a right or fundamental freedom in the Bill of Rights shall not face limitation except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society.¹⁰ A search without a warrant is a limitation of the right to privacy under Article 24. It must therefore meet the requirement of the proportionality test, which means that courts will only uphold the measure in a way that maintains proportionality.

In order to preserve the rule of law and protect individual rights and freedoms, such exceptions must be upheld appropriately. The judiciary must interpret cases and legislation with as much specificity as they deserve so as to prevent ambiguity in execution.

Statement of the problem

Neither the act nor other police service instruments provide guidelines that guide the opinion of police officers on what constitutes substantial prejudice. This in turn creates a situation where police use unregulated discretion to determine whether to conduct a warrantless search. Since there is no defined threshold, everything goes, and consequently, court decisions are inconsistent and unpredictable. Focus in precedence has been on delay of investigation, neglecting the need for a precise interpretation of what amounts to substantial prejudice.

Police officers are required to write down the grounds under which they conducted the search, and presumably those grounds should determine whether the threshold for substantial prejudice has been reached. The problem here is that the grounds may not be strong enough to reach the threshold, since the threshold is not defined. Thus giving the police a lot of discretion or that the court interprets the standard of substantial prejudice too lightly in a way that makes it very easy for police to conduct unreasonable searches without warrants.

⁸ Section 73(5), *Narcotic Drugs and Psychotropic Substances Control Act* (Act No. 4 of 1944).

⁹ Section 37, *Firearms Act* (Act No. 40 of 1953).

¹⁰ Article 24, *Constitution of Kenya* (2010).

Research Questions

1. What is the legal framework on searches without warrants, and how have courts interpreted the term “substantial prejudice” in the context of searches without warrants?
2. How does the absence of clear guidelines on “substantial prejudice” affect the protection of the fundamental right to privacy as protected by the Constitution?
3. What are the best practices and guidelines regarding police discretion that can be borrowed from the Canadian jurisdiction to guide police opinion when determining “substantial prejudice”?
4. What recommendations can be given to guide police discretion?

Research Objectives

1. To examine the legal framework surrounding searches without warrants and the manner in which Kenyan courts have interpreted substantial prejudice.
2. To highlight how the absence of clear guidelines on “substantial prejudice” affects the protection of the Right to privacy
3. To investigate best practices based on the Canadian jurisdiction to guide police opinion when determining “substantial prejudice.”
4. To recommend reforms to guide police discretion.

Hypothesis

The lack of clear guidelines regarding what constitutes ‘substantial prejudice’ exacerbates police violations of fundamental human rights. i.e., the right to privacy. By recommending the implementation of the reasonableness and probable grounds tests to section 60 of the *National Police Service Act*, a broader framework is created to guide police opinion. This way, abuse of discretionary power in determining ‘substantial prejudice’ will be curbed.

Justification of the Study

This research aims to shed light on a loophole in the law governing searches without warrants. Courts have inadequately interpreted section 60 of the National Police Service Act when determining the legality of searches without warrants, neglecting to inform a fundamental discretion granted to police officers. Consequently, the right to privacy guaranteed by the Constitution and treaties has continuously been violated by the police. Further, this study will

provide insight to courts and legislators about necessary reforms that will enhance police accountability and protect citizens from arbitrary violations of their rights.

Theoretical Framework

1. Rule of law

The World Justice Project defines the rule of law as a durable system of laws, institutions, norms, and community commitment that provide and reinforce four universal principles.¹¹ These are accountability, just law, open government and accessible and impartial justice.¹²

The principle of rule of law emphasizes that laws should be applied consistently and fairly, without arbitrary enforcement. In evaluating police conduct, the rule of law is a crucial principle that ensures that any actions taken by individuals, state officials and institutions are legally justified.¹³

The World Justice Program breaks down the four elements of the rule of law as follows :¹⁴

a) *Accountability*

Government as well as all private actors are accountable under the law.

b) *Just Law*

laws must be clear, published, stable and applied evenly, ensuring human rights as well as property, contract and procedural rights.

c) *Open Government*

Processes by which the law is adopted, administered, adjudicated, and enforced have to be accessible, fair and efficient.

d) *Accessible and Impartial Justice*

¹¹World Justice Project, ‘What is the rule of law?’ — <https://worldjusticeproject.org/about-us/overview/what-rule-law#> — on 11 April 2025.

¹² World Justice Project, ‘What is the rule of law?’ — <https://worldjusticeproject.org/about-us/overview/what-rule-law#> — on 11 April 2025.

¹³ World Justice Project, ‘What is the rule of law?’ — <https://worldjusticeproject.org/about-us/overview/what-rule-law#> — on 11 April 2025.

¹⁴ World Justice Project, ‘What is the rule of law?’ — <https://worldjusticeproject.org/about-us/overview/what-rule-law#> — on 11 April 2025.

Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.¹⁵

Theory of Justice

John Rawls, in his theory of justice, argues that progress in political philosophy comes about not from any great new insight about the components of justice, but from devising fair procedure.¹⁶ He proposes creating a fair procedure for identifying or picking principles of justice for the distribution of benefits and burdens of social cooperation and then letting the substantive chips of justice fall, more or less where they may.¹⁷ This theory is also enshrined within the various laws of Kenya such as the Constitution under Article 48 on access to justice, Article 50 on fair hearing, Article 159(2) on judicial authority (principles guiding the court), and Civil Procedure Act 1A (overriding objective).

Procedural fairness

Procedural fairness is founded on the principles that recognize power imbalance that may exist between an administrative decision maker such as a delegate of a government agency and an individual citizen.¹⁸ It involves two requirements: the fair hearing rule and the rule against bias.¹⁹ The fair hearing rule requires decision makers to inform a person of the case against them and

¹⁵ World Justice Project, 'What is the rule of law?' — <https://worldjusticeproject.org/about-us/overview/what-rule-law#> — on 11 April 2025.

¹⁶ Dutta S, 'Rawls theory of justice: An analysis' 22 *IOSR Journal Of Humanities and Social Science* 4, 2017, 40-43.

¹⁷ Dutta S, 'Rawls theory of justice: An analysis' 22 *IOSR Journal Of Humanities and Social Science* 4, 2017, 40-43.

¹⁸ Australian Law Reform Commission, 'A common law duty' <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-ip-46/14-procedural-fairness/a-common-law-duty> — 8 Dec 2014.

¹⁹ Australian Law Reform Commission, 'A common law duty' <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-ip-46/14-procedural-fairness/a-common-law-duty> — 8 Dec 2014.

provide them with an opportunity to be heard.²⁰ The relevant statutory laws dictate the extent of the obligation on what is fair in all circumstances on the decision maker²¹

The bias rule makes the requirement that a decision maker must neither be actually nor ostensibly biased.

Protection for procedural fairness is provided by the principle of legality. Courts will presume that parliament did not intend to limit procedural fairness unless this intention was made unambiguously clear when interpreting a statute.²² In special circumstances, ‘urgent action’ to prevent greater harm may be said to justify limits on procedural fairness. These limits, as provided by bill of rights, must be reasonable, prescribed by law, and demonstrably justified in a free and democratic society²³

Procedural fairness promotes public confidence in official decision making and this is how it supports the rule of law. It is a principle of constitutionalism and is instrumental in aiding good decision making.²⁴ The manner in which disputes are handled, with an emphasis on fairness, transparency, and respect, has a rudimentary impact on individuals' evaluations of their experiences within the legal system and their overall trust in the justice system.

Literature Review

A search and seizure is conduct in a situation involving a reasonable expectation of privacy. Privacy, on the other hand, means that a person keeps personal information and his affairs secret and out of the public domain.²⁵ Intrusions to a person’s body are highest at that level. Next in the

²⁰ Australian Law Reform Commission, ‘A common law duty’ <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-ip-46/14-procedural-fairness/a-common-law-duty> — 8 Dec 2014.

²¹ Australian Law Reform Commission, ‘A common law duty’ <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-ip-46/14-procedural-fairness/a-common-law-duty> — 8 Dec 2014.

²² Australian Law Reform Commission, ‘A common law duty’ <https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-by-commonwealth-laws-ip-46/14-procedural-fairness/a-common-law-duty> — 8 Dec 2014.

²³ Article 24, *Constitution of Kenya* (2010).

²⁴ Holloway I, ‘Natural justice and the high court of Australia’, Published PHD Thesis, The Australian National University, Australia 1999,

²⁵ Prefontaine D, ‘Implementing international standards in search and seizure: striking the balance between enforcing the law and respecting the rights of the individual’ Sino-canadian international conference on the ratification and

category are homes; and in the lowest categories are offices and businesses, automobiles and other similar types of places. Essentially, where there is an expectation of privacy, then such a search and seizure must be controlled. Expectation is lower on the scale where licenses or a regulated area is involved.²⁶ Searches also include interception of communications (wiretapping), video surveillance, and installation of tracking devices on vehicles.²⁷ The Supreme Court of Canada defined a seizure as “*the taking of a thing from a person by a public authority without that person’s consent.*” It also includes the act of compelling a person to give up things or objects that he owns or has in his possession.²⁸

Article 50(4) of the constitution provides “*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.*”²⁹ This departs from the common law position as it provides exceptions to the rule that all evidence relevant to a case, is admissible.

There has not been sufficient scholarly work on police discretion and its guiding principles. Current academic literature revolves around the mere legality or illegality of searches without warrants. Focusing on the strength of evidence obtained during the search so as to determine whether such evidence is constitutional or otherwise. Authors are, however, in consensus that privacy rights are a fundamental human right that must be protected.

H.W.S. argues that conducting searches without warrants effectively forces people to incriminate themselves. When the very objective of a search and seizure is to force a person to be a witness against themselves, such as through the seizure of private papers, then it is an unreasonable search and seizure, violating constitutional safeguards. He emphasizes that a person's home is their sanctuary, therefore any search conducted without a warrant, whether for contraband or private documents, is fundamentally unreasonable.³⁰

implementation of human rights covenants by the The International Centre for Criminal Reform and Criminal Justice Policy, Beijing, October 2001, 5.

²⁶ Prefontaine D, ‘Implementing International Standards in Search and Seizure’ 6.

²⁷ Prefontaine D, ‘Implementing International Standards in Search and Seizure’ 7.

²⁸ Section 8, *The Canadian Charter of Rights and Freedoms*, (1982).

²⁹ Article 50, *Constitution of Kenya* (2010).

³⁰ HWS, ‘Search and seizure without a warrant’ 98 *University of Pennsylvania Law Review* 4, 1950, 415.

Courts in Kenya, in regard to evidence obtained from a search without a warrant, have maintained their focus on the admissibility of evidence that has been presented, neglecting the manner in which the evidence was acquired.³¹ Each case has been treated differently based on the facts rather than on an objective, narrow standard. The trend has been that courts consider the weight of the illegally obtained evidence, and if such evidence presents a probability that the accused was at fault, then the police officer's illegal actions are sustained. This presents a gap in the discussion as the law is narrowly presented and interpreted.

The Canadian jurisdiction has an exclusionary rule under section 24 of its Charter, which provides that anyone whose rights or freedoms have been infringed or denied may apply to a court so as to obtain a remedy that is just and appropriate.³² If it is proven that, in light of all the circumstances, admitting the evidence into the proceeding would have the effect of bringing the administration of justice into disrepute, the court may use the remedy of excluding the evidence gathered during a constitutional right violation.³³ This is known as the Canadian Exclusionary Rule.³⁴

American literature has a special focus on reasonableness in determining the legality of a search without a warrant. The determination of reasonableness is based on the specific context and circumstances surrounding the search.³⁵ This may seem to suggest that their practice is similar to that of the Kenyan courts; however, the distinction is that there is an objective test for reasonableness. This objective test guides both the opinion of the police when conducting such a search without a warrant and the courts when determining whether evidence obtained from an illegal search is admissible due to the special circumstances of the facts. Atkinson critiques the double standard that may arise when evidence obtained through unreasonable searches is admitted while excluding self-incriminating testimonies.³⁶ This asserts H.W.S's sentiment in his paper for

³¹ Prefontaine D, 'Implementing International Standards in Search and Seizure' 6.

³² Section 24, *Canadian Charter of Rights and Freedoms*, (1982).

³³ Prefontaine D, 'Implementing international standards in search and seizure' 8.

³⁴ Prefontaine D, 'Implementing international standards in search and seizure' 8.

³⁵ Atkinson T, 'Admissibility of evidence obtained through unreasonable searches and seizures' 25 *Columbia Law Review* 1, 1925, 8.

³⁶ Atkinson T, 'Admissibility of evidence obtained through unreasonable searches and seizures' 8.

the University of Pennsylvania Law Review that conducting a search without a warrant is equitable to forcing a man to incriminate himself, which contradicts the principle of procedural fairness.³⁷

The absence of academic literature focused on the contentious section 60 of the *National Police Service Act* makes it a grey area that has been left unexplored. This is in turn problematic to the administration of justice and police accountability in Kenya. Corruption in law enforcement is an undisputable reality. In a 2022 report by the U.S Department of State on Human Rights practices in Kenya, the national police service was reported to have committed *Significant human rights issues included credible reports of unlawful or arbitrary killings, including extrajudicial killings; forced disappearances; torture and cases of cruel, inhuman, or degrading treatment or punishment by the government; harsh and life-threatening prison conditions; arbitrary arrest and detention; arbitrary interference with privacy.*³⁸

This dissertation highlights serious concerns about the use of ambiguous statutory language. Kenya's absence of precise legislative standards creates a legal vacuum that encourages police excess and impairs constitutional rights. This paper observes that judicial control is impaired when courts are left to interpret terms without statutory or jurisprudential direction, which effectively allows law enforcement authorities to determine their own criteria.

Methodology

This research will be comparative and desk-based, relying on online resources and databases. It relies on primary sources such as the constitution of Kenya, the criminal procedure code, the national police service act and treaties ratified by Kenya. It will also analyze judicial precedents by Kenyan and American courts. Moreover, it will rely on secondary materials such as reports, dissertations and journal articles. These materials will document and highlight trends in decisions that judges have made and compare them to best practices from Canada.

³⁷ H.W.S, 'Search and seizure without a warrant' 73 *University of Pennsylvania Law Review* 4, 1925, 415.

³⁸ U.S Department of State, *Country reports on human rights practices: Kenya*, 2022, 3.

Chapter Breakdown

Chapter 1 :An introduction to the background and foundation of the research. It provides the background, problem statement, research questions, research objectives, and finally the hypothesis and preliminary literature review.

Chapter 2 : An Analysis of the Legal Framework for Searches Without Warrants in Kenya. Moreover, an assessment of interpretations of the legal framework by the Kenyan courts together with their rationale.

Chapter 3 : An examination of how the absence of clear guidelines on “substantial prejudice” affects the protection of the right to privacy as protected by the constitution.

Chapter 4 : An analysis of the practices in the Canadian jurisdiction in the context of searches without warrant.

Chapter 5 : Conclusions, findings, and recommendations. This will be the final chapter of the research paper and will propose recommendations on best practices that can be adopted in order to improve section 60 of the National Police Service Act.

CHAPTER TWO

LEGAL FRAMEWORK ON SEARCHES WITHOUT WARRANTS IN KENYA.

Introduction

This chapter will examine the legal framework governing execution of searches without warrants in Kenya. It gives a brief common law historical overview and will look into the relevant constitutional provisions, statutory laws, and judicial interpretations of the law in question . It will also consider international and regional human rights instruments that have influenced Kenya's legal landscape and in this manner, the gaps in the current framework shall be highlighted.

Common law historical overview

Protection against invasion of a person's home in England goes back 400 years ago.³⁹ The maxim " Every man's home is his castle" is enshrined in Semayne's Case in 1603 and was a highly respected principle and the right of the homeowner to protect his home from unauthorized intrusion by the King's agents was upheld by the English Court.⁴⁰ Authority to break and enter when properly notified by appropriate officers was also acknowledged.⁴¹

In the British colonies, there soon after arose urgency to protect against unreasonable searches and seizures as English efforts to enforce the revenue laws against smuggling heightened in order to guard against arbitrary search and seizures.⁴²As a general search warrant, Writs of assistance by the King's agents were used, enabling access into houses or other places to search and confiscate

³⁹ Prefontaine D, 'Implementing international standards in search and seizure' 4

⁴⁰ Prefontaine D, 'Implementing international standards in search and seizure' 4

⁴¹ Prefontaine D, 'Implementing international standards in search and seizure' 4

⁴² Prefontaine D, 'Implementing international standards in search and seizure' 4

prohibited and uncustomed goods.⁴³ The American Revolution was one of the outcomes of these arbitrary powers as American colonies proclaimed their independence as the United States of America.⁴⁴ This materialization of the strong emotions against the intrusion of an individual's privacy.

From this a monumental principle was established to the effect that state officials must possess legal permission to conduct searches and seizures. Second, the courts' preference has been created mandating that warrants be issued by an impartial authority, typically a body established by the judiciary, like a judge or magistrate. Thirdly, it must be shown that the police had a legitimate purpose for conducting the search and seizure.⁴⁵

International and Regional Standards

The Constitution explicitly amalgamates international law in Articles 2(5) and 2(6). Article 2(5) indicates that "general rules of international law" will form part of Kenyan law.⁴⁶ This phrase is usually considered to refer to customary international law, which encompasses internationally recognized norms such as state sovereignty, non-aggression, and core human rights protections. Furthermore, Article 2(6) states that treaties and conventions approved by Kenya directly become part of Kenyan law without any further legislative action.⁴⁷ These clauses create a monist framework in which both customary international law and ratified treaties have direct application inside Kenya's legal system.

UN Human Rights Committee's General Comment No. 16

As outlined in the *International Covenant on Civil and Political Rights (ICCPR)*, searches without a warrant must strictly adhere to principles of necessity and proportionality.⁴⁸ Such searches must serve a crucial public purpose, such as averting impending harm, and must only be conducted when no less invasive options remain. In order to ensure that interference is neither excessive nor

⁴³ Prefontaine D, 'Implementing international standards in search and seizure' 4

⁴⁴ Prefontaine D, 'Implementing international standards in search and seizure' 4

⁴⁵ Prefontaine D, 'Implementing international standards in search and seizure' 5.

⁴⁶ Articles 2(5), *Constitution of Kenya* (2010).

⁴⁷ Article 2 (6), *Constitution of Kenya* (2010).

⁴⁸ CCPR, *General Comment No 16, The right to respect of privacy, family, home and correspondence, and protection of honour and reputation*, 8 April 1988, 2

arbitrary, proportionality requires that the extent of invasion of an individual's privacy be weighed against the justifiable goal being sought.⁴⁹ These guidelines are intended to protect the public from the unbridled use of state power, particularly in situations when there are insufficient or no legal protections.

1. The Universal Declaration of Human Rights (UDHR)

Article 12 of the UDHR prohibits arbitrary interference with one's privacy, family, home, or correspondence.⁵⁰ By defining interference as "arbitrary," the UDHR implies that law enforcement must act under established legal frameworks and with justification.

Although non-binding, the UDHR influences the creation of binding treaties, national laws, and constitutions, including Kenya's 2010 Constitution, particularly Article 31 which guarantees the right to privacy.⁵¹

Arbitrary interference under Article 12 extends beyond mere legal authorization and requires proportionality, necessity, and safeguards against abuse.⁵² This, as in Nowak's interpretation, is particularly relevant when addressing warrantless searches, emphasizing the need for judicial oversight to prevent excessive interference by state authorities.

2. The International Covenant on Civil and Political Rights (ICCPR)

The ICCPR requires any interference with privacy be lawful and non-arbitrary.⁵³ Article 17 mirrors UDHR's protections but imposes binding obligations on State Parties. It mandates that any interference with privacy must be both lawful and non-arbitrary.⁵⁴

"Lawful" interference must adhere to pre-existing legal frameworks, while "non-arbitrary" entails compliance with principles of necessity and proportionality.⁵⁵

⁴⁹ CCPR *General Comment* 16, 2.

⁵⁰ UNGA, *Universal declaration of human rights*, UNA/RES/217(III) (10 December, 1948).

⁵¹ Nowak M, *UN covenant on civil and political rights: CCPR commentary*, 2 ed, Kehl am Rhein, Engels, 2005, 383.

⁵² Nowak M, *UN covenant on civil and political rights: CCPR commentary*, 388.

⁵³ Article 17, *International covenant on civil and political rights*, 16 December 1966, 999 UNTS 171.

⁵⁴ Article 17, *International covenant on civil and political rights*, 16 December 1966, 999 UNTS 171.

⁵⁵ CCPR *General Comment* 16, 2.

3. The African Charter on Human and Peoples' Rights (ACHPR)

Article 4 guarantees the right to dignity, which encompasses protection against unlawful searches.⁵⁶ While the ACHPR does not explicitly protect the right to privacy, Article 4 guarantees the right to dignity and life which is interpreted by the African Commission on Human and Peoples' Rights to include freedom from arbitrary or unlawful searches.

The Right to Privacy and Warrantless Searches Under Kenyan Law

1. Constitutional Provisions

The right to privacy is established as a fundamental human right under Article 31 of the constitution. As the constitution is the supreme law of the land,⁵⁷ this article serves as the cornerstone for evaluating the legality of searches without warrants. The provision states:

*"Every person has the right to privacy, which includes the right not to have — (a) their person, home, or property searched; (b) their possessions seized; (c) information relating to their family or private affairs unnecessarily required or revealed; or (d) the privacy of their communications infringed"*⁵⁸

Liberal conception of rights, which emphasizes the protection of individual liberty and autonomy against state overreach, is consistent with the constitution's guarantee of privacy.⁵⁹ The proportionality principle, requiring that any limitation on privacy rights be justified as necessary and proportionate to a legitimate aim, also forms the center of this framework.

2. Statutory laws

Several statutory provisions such as the National Police Service Act, permit searches without warrants. The public interest theory posits that state intervention is justified when it serves public

⁵⁶ Article 4, *African charter on human and peoples' rights*, 27 June 1981, 1520 UNTS 217.

⁵⁷ Article 2, *Constitution of Kenya* (2010).

⁵⁸ Article 31, *Constitution of Kenya* (2010).

⁵⁹ Dworkin R, *Taking Rights Seriously*, Harvard University Press, Massachusetts, 1978,

welfare.⁶⁰ Kenyan Statutory law aligns with this theory, Nevertheless, undefined and unchecked discretion in the application of such statutes raises concern under critical legal studies, such as this paper, which highlights the potential for abuse of power by state actors in their ‘pursuit for the common good.’⁶¹

The criminal Procedure Code (CPC)

Section 118 of the Criminal Procedure Code (Cap. 75) authorizes a court or magistrate to grant a search warrant if there is evidence on oath that an item related to a crime is likely to be found in a certain location.⁶² The warrant must specify the location and object of the search, and any items discovered must be brought before the court.⁶³ This provision ensures that searches are conducted with reasonable suspicion and judicial scrutiny hence enhancing the fundamental right to privacy under Article 31.

The National Police Service Act (2011)

Section 60 of the *National Police Service Act* authorizes police officers to conduct warrantless searches in cases when obtaining a warrant would create significant delays and prejudice.⁶⁴ It gives officers broad discretion but requires them to defend their decisions in writing and report to a higher authority within a specified time frame.⁶⁵

The Prevention of Terrorism Act (2012)

Section 35(1) of the *Prevention of Terrorism Act of 2012* authorizes police officers to conduct warrantless searches in urgent situations involving suspected terrorist operations if getting prior judicial approval would jeopardize investigations or public safety.⁶⁶

⁶⁰Michael H, *The Public Interest Theory of Regulation: Non-existence or Misinterpretation?*, European Journal of Law and Economics, Netherlands, 2003, 1.

⁶¹ Kennedy D, ‘The role of law in economic thought: essays on the fetishism of commodities’ 34 *American University Law Review* 1, 1982, 939-100

⁶² Section 118, *Criminal Procedure Code* (Act No. 11 of 1930).

⁶³ Section 118, *Criminal Procedure Code* (Act No. 11 of 1930).

⁶⁴ Section 60, *National Police Service Act* (No. 11 of 2011).

⁶⁵ Section 60, *National Police Service Act* (No. 11 of 2011).

⁶⁶ Section 35, *Prevention of Terrorism Act* (No. 30 of 2012).

Judicial Interpretation of Warrantless Searches

Case law has reflected inconsistencies, particularly regarding the admissibility of evidence obtained through warrantless searches, which has been the main focus of the courts, and there has been no criticism of the law permitting such evidence from being acquired in the first instance. The words ‘substantial prejudice’ have not been interpreted by the courts or in the least challenged by parties seeking claims. A problem hidden in plain sight. What’s obvious to the judges is that the evidence has been illegally acquired, which is illegal and unconstitutional, which is why such evidence is in contention. There is a clear and unrepeatable exception here, that the acquiring of such evidence is legal when it is in the interest of the public.

Kenyan Jurisprudence

1. Heiwua Auto Kenya Ltd v Central Police Kenya

In his judgment, the judge took the position that, “*except with his own consent no person shall be subjected to the search of his person or property or the entry by others on his premises.*”⁶⁷ In spite of this, the judge said in his statement “*neither the constitution nor the criminal procedure nor the evidence act provides that evidence obtained without a search warrant cannot be used in a criminal case in a court of law.*”⁶⁸ He was of the opinion that the petitioner simply wanted to prevent the criminal process which the court found no basis for so doing. This case highlights the manner in which the court treated evidence obtained during a search without a warrant.⁶⁹ This demonstrates a procedural orientation, in which courts prioritize the integrity of criminal proceedings over challenges to evidence acquisition methods.

2. Stephen V. Mangira & Anor v The Senior Principal Magistrate

The claimants invoked the right to a fair hearing and the court posited that evidence obtained in a manner violating any right or fundamental freedom in the Bill of Rights shall be excluded if its admission would render the trial unfair or would otherwise stand to be detrimental to

⁶⁷ *Heiwua Auto Kenya Ltd v Central Police Kenya* (2010) eKLR, 5.

⁶⁸ *Heiwua Auto Kenya Ltd v Central Police Kenya* (2010) e KLR, 6.

⁶⁹ *Heiwua Auto Kenya Ltd v Central Police Kenya* (2010) eKLR, 6.

administration of justice.⁷⁰ The decision here aligned with constitutional safeguards against unlawful searches as provided under Article 31.

3. Joseph Ngunguru Wanjohi V Republic

Here, the court took the position that suspicion, however strong, can never be the basis for inferring guilt on a person, which must be proved by evidence.⁷¹ This aligns with the idea that conducting a search without a warrant has an underlying presumption of guilt, that is, the suspect probably has the illegal items or articles in their possession.

Conclusion

There is no judicial interpretation of the threshold ‘substantial prejudice’ leaving police discretion unchecked. Officers merely need to document their belief that a delay might jeopardize investigations as mandated by section 60, but courts rarely review these records for reasonableness. Moreover, Kenyan jurisprudence has shown inconsistent exclusionary standards; some courts use *Stephen v. Mangira* to reject tainted evidence, but others, like *Heiwua*, admit it unless explicitly prohibited by statute. This discrepancy undermines the constitutional protections against arbitrary searches.

A coherent doctrine for warrantless searches is yet to be established that oscillates between deference to police authority and constitutional rights enforcement. There is a need for legislative reforms to define the contents of section 60 of the National Police Service Act and harmonization of evidence exclusionary rules. The risk of arbitrary searches and inconsistent rulings will persist until then.

⁷⁰ *Stephen V. Mangira & Anor v The Senior Principal Magistrate* (2019) eKLR.

⁷¹ *Joseph Ngunguru Wanjohi V Republic* (2014) eKLR, 2.

CHAPTER 3

EXAMINING HOW THE ABSENCE OF CLEAR GUIDELINES ON “SUBSTANTIAL PREJUDICE” AFFECTS PROTECTION OF THE RIGHT TO PRIVACY AS PROTECTED BY THE CONSTITUTION

1. Introduction

The right to privacy encapsulates the presumption that individuals must have space for independent development, association and liberty.⁷² A “private sphere” with or without social interaction is free from arbitrary state intervention and of excessive unsolicited interference by other uninvited individuals.⁷³

⁷² Privacy International & National Coalition of Human Rights Defenders-Kenya, *The Right to Privacy in Kenya: Universal Periodic Review Stakeholder Report: 21st Session*, 2014, 1.

⁷³ Privacy International & National Coalition of Human Rights Defenders-Kenya, *The Right to Privacy in Kenya: Universal Periodic Review Stakeholder Report: 21st Session*, 2014, 1.

The right to privacy is enshrined in *Article 31 of the Constitution of Kenya*.⁷⁴ It guarantees all people non-interference of their person, home or property through search, their possessions seized or their communications infringed upon.⁷⁵ It is subject to limitations as set forth in Article 24 on the limitations of fundamental rights and freedoms.⁷⁶ The limitation in the context of this study occurs after it has been determined that delay caused by obtaining a court warrant would cause ‘substantial prejudice’ to the investigation.⁷⁷ Article 24 of the Constitution mirrors the proportionality test although not conclusively, by requiring any limitation of a fundamental right be reasonable, justifiable in an open and democratic society, and based on the principles of human dignity, equality, and freedom, with a special emphasis on the need for less restrictive means.⁷⁸ In theory, this provision provides a strong constitutional safeguard against arbitrary restrictions on rights, especially the right to privacy. However, in practice Article 24 has been ineffective in avoiding abuses especially when supporting legislation such as the National Police Service Act and fails to establish clear criteria for enforcing its requirements. The absence of clear guidelines guiding what constitutes ‘substantial prejudice’ creates legal uncertainty, which leads to erosion of the right to privacy. This chapter examines how this legal ambiguity affects the protection of privacy rights in Kenya.

2. The right to privacy in Kenya

It guarantees every person the right to not have their person, home or property searched, their possessions seized or their communications infringed upon.⁷⁹ Article 31 of the Constitution safeguards this right which includes protection against unwarranted searches of one's person, home, or property.⁸⁰ However, it is subject to limitation under Article 24 if the restriction is reasonable and justifiable in an open and democratic society.⁸¹ With the enactment of the data protection act

⁷⁴ Article 31, *Constitution of Kenya* (2010).

⁷⁵ Article 31, *Constitution of Kenya* (2010).

⁷⁶ Article 24, *Constitution of Kenya* (2010).

⁷⁷ Article 60, *National Police Service Act* (No. 11 of 2011).

⁷⁸ Article 24(1), *Constitution of Kenya* (2010).

⁷⁹ Article 31, *Constitution of Kenya* (2010).

⁸⁰ Article 31, *Constitution of Kenya* (2010).

⁸¹ Article 24, *Constitution of Kenya* (2010).

the right to privacy continues to develop as one of the objects of the act is to protect the privacy of individuals as set out in its preamble.⁸²

Privacy breaches manifest in various ways, including but not limited to unlawful searches such as warrantless raids on homes or digital devices. Compelling individuals to disclose sensitive personal data without necessity and the surveillance of communications, including the interception of messages.⁸³ Kenyan law lacks clear guidelines on what amounts to substantial prejudice yet it plays a crucial role in determining the admissibility of evidence obtained in warrantless searches. This right is particularly threatened when police officers conduct warrantless searches.

In *Samura Engineering Ltd & Another v Kenya Revenue Authority*, the court, in emphasizing the right to privacy, stated that

“The right to privacy enshrined in our constitution includes the right to one’s person or home searched, one’s property searched or possession seized. Since searches infringe the right to privacy, they must be conducted in terms of legislation which must comply with the provisions of Article 24. It has been said that the existence of safeguards to regulate the way in which state officials enter the private domains or ordinary citizens is one of the features that distinguish a democracy from a police state...”⁸⁴

In *Samson Mumo Mutinda v Inspector General National Police Service* the court held that

“the right to privacy protects a person’s autonomy. The breach of the right of privacy either involves violation of the law that permits infringement of the right consistent with the limitation provided under Article 24 or failure to obtain consent of the person. Thus the right to privacy may be waived by a person consenting to the search of his person or premises in certain circumstances. Such consent must be voluntary and freely given.”⁸⁵

In *Standard Newspaper Ltd & Another v Attorney General & 4 Others* the court held that

⁸² Preamble, *Data Protection Act* (No. 24 of 2019).

⁸³ Privacy International *et al*, *Universal Periodic Review, Stakeholder Report*, 5.

⁸⁴ *Samura Engineering Ltd & Another v Kenya Revenue Authority Nairobi* (2012) eKLR, para. 66.

⁸⁵ *Samson Mumo Mutinda v Inspector General National Police Service & 4 Others* (2014) eKLR, para. 23.

“While it is true that police officers have a duty to prevent commission of crimes, they must, just like everyone else, abide by the law, and there must be due process in everything that they do in exercise of their mandate to prevent the commission of crime. To hold otherwise would be to say that the rules and dictates of democracy are too tedious to observe and an unnecessary inconvenience; and this would result in anarchy and negate the very core principles of our constitution.”⁸⁶

Similarly, the notion of public interest and national security are in my view multi-faceted and capable of varied interpretations. For example, while it is in the public interest that citizens are not subjected to arbitrary searches and seizures that in essence act to violate other fundamental rights and freedoms and make mockery of the constitutional protection to privacy....”⁸⁷

The opinions of the courts in these cases support a principled and rights-conscious interpretation of Kenya's right to privacy. The judiciary understands that privacy is a fundamental constitutional value that protects personal autonomy, dignity, and democratic integrity. Through these decisions the courts have emphasized that any limitation on the right to privacy must be consistent with Article 24, based on clear law, and exercised with due process. While the courts make significant normative commitments to privacy, the success of this protection is ultimately dependent on continuous enforcement and alignment of judicial language and corrective action.

3. Understanding ‘Substantial Prejudice’ and the right to privacy

Substantial prejudice is defined as a significant or material harm that poses a significant risk to the fairness or integrity of legal processes.⁸⁸ It is not only incidental harm but a significant hindrance to justice, requiring concrete evidence of harm to legal rights or trial fairness.⁸⁹ The term "substantial prejudice" refers to demonstrating a major impact on legal rights or trial outcomes.

⁸⁶ *Standard Newspaper Ltd & Another v Attorney General & 4 Others* (2013) eKLR, para. 45.

⁸⁷ *Standard Newspaper Ltd & Another v Attorney General & 4 Others* (2013) eKLR, para. 46.

⁸⁸ Petruska J, ‘The difference between some prejudice and substantial prejudice’ 27 July 2023 <https://www.rogerspartners.com/the-difference-between-some-prejudice-and-substantial-prejudice/> on 20 February 2025.

⁸⁹ Petruska J, ‘The difference between some prejudice and substantial prejudice’ 27 July 2023 <https://www.rogerspartners.com/the-difference-between-some-prejudice-and-substantial-prejudice/> on 20 February 2025.

For example, a delay causing witnesses to forget facts may represent "some prejudice," but only delays leading to irretrievable evidence loss rise to "substantial prejudice."⁹⁰

The harm in determining substantial prejudice must be greater than speculative or minor.⁹¹ For example, in civil delay lawsuits, courts need evidence that missing evidence or witness absence directly damages the defendant's capacity to establish a defense. Moreover, prejudice claims must be backed by facts and specifics, such as documents lost as a result of a delay or inadequate witness testimony. Finally, courts then balance justice against procedural efficiency.⁹²

Right to privacy is a first-generation right and is therefore a negative right.⁹³ Negative rights require states to refrain from interference.⁹⁴ Searches done without warrants in the course of investigations are inherently unconstitutional. Section 31 in its ambiguity is a bedrock for justification of searches without warrants, undermining the state's responsibility to protect the right to privacy. The term substantial prejudice lacks objective criteria for its application, consequently being interpreted loosely to the detriment of the right holder. This perpetuates institutional violence whereby police officers abuse the powers conferred to them with impunity. The state bears a responsibility to protect its citizens rights by taking necessary action to prevent institutional violence. Courts in Kenya have tended to defer to procedural compliance rather than looking into the necessity of such privacy intrusions.

4. Impact on the right to privacy

The vagueness surrounding substantial prejudice adversely affects privacy protection in more ways than one. Firstly, it creates legal uncertainty because courts and law enforcement authorities apply

⁹⁰ Petruska J, 'The difference between some prejudice and substantial prejudice' 27 July 2023 <https://www.rogerspartners.com/the-difference-between-some-prejudice-and-substantial-prejudice/> on 20 February 2025.

⁹¹ Petruska J, 'The difference between some prejudice and substantial prejudice' 27 July 2023 <https://www.rogerspartners.com/the-difference-between-some-prejudice-and-substantial-prejudice/> on 20 February 2025.

⁹² Petruska J, 'The difference between some prejudice and substantial prejudice' 27 July 2023 <https://www.rogerspartners.com/the-difference-between-some-prejudice-and-substantial-prejudice/> on 20 February 2025.

⁹³ Vasak K, 'Human rights: A thirty-year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights' 30 *UNESCO Courier* 11, 1977, 29.

⁹⁴ Vasak K, 'Human rights: A thirty-year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights' 30 *UNESCO Courier* 11, 1977, 29.

inconsistent standards, which leads to unpredictable outcomes regarding the admissibility of evidence.⁹⁵ It also creates the potential for abuse because without clear guidelines, authorities may conduct intrusive searches without demonstrating actual prejudice because they can claim that delay would have caused “substantial prejudice” to the investigation.⁹⁶ It also has a characteristic of erosion of due diligence, as individuals may face unlawful intrusions into their personal lives without proper legal recourse.⁹⁷ Selective enforcement, in the absence of objective criteria, has the effect of law enforcement agencies disproportionately targeting certain individuals or groups.⁹⁸

Effects of the Kenyan threshold ‘substantial Prejudice’ ambiguity

The permission for warrantless searches is granted by the National Police Service Act if police officers deem that a delay would cause ‘substantial prejudice’ to investigations. However, there is a lack of explicit criteria for assessing this threshold, and without guidelines, judicial oversight is undermined because police officers subjectively interpret it to justify intrusive actions. Furthermore, the legislation prioritizes expediency over proportionality. Courts then focus on the delay of investigations rather than the necessity of privacy intrusions. Thus, without examining whether the risk was actually “substantial,” courts may rely on police claims that a warrantless search avoided the destruction of evidence; this risks normalizing invasions of privacy that are arbitrary. A cycle of abuse is perpetrated when police officers rely on vague defenses that come about due to the existence of vague laws. It is not far-fetched to believe that police officers may weaponize such vagueness to wield power.

⁹⁵ *Geoffrey Andare v Attorney General & 2 others* (2016) eKLR.

In this case, the court held that laws which are too vague and confer unfettered discretion violate the principle of legal certainty and are likely to be applied arbitrarily.

⁹⁶ Nowak M, *UN covenant on civil and political rights: CCPR commentary*, 388. Nowak notes that without clear limits and judicial oversight, “lawful” interference with privacy under Article 17 of the ICCPR can become arbitrary, especially when vague legal terms are exploited.

⁹⁷ *Coalition for Reform and Democracy (CORD) & 2 others v. Republic of Kenya & 10 others* (2015) eKLR. The court condemned the lack of procedural safeguards in mass surveillance and warrantless search regimes, emphasizing that unchecked discretion undermines due process.

⁹⁸ Cannataci J, UN Human Rights Council report of the special rapporteur on the right to privacy, UN Doc A/HRC/46/37, 19 February 2021, para. 34.

The report warns that vague legal standards in digital surveillance regimes have led to discriminatory enforcement and profiling, especially in contexts where judicial review is weak.

1. Vagueness Undermines the First Limb of the Proportionality Test (Legality)

Proportionality begins with legality, meaning that interference must be based on a law that is accessible and specific enough to allow individuals to anticipate its consequences. In *Geoffrey Andare v Attorney General & 2 Others* the High Court overturned portions of the *Information and Communications Act* on the basis of ambiguity, emphasizing that legislation must not be so wide as to allow arbitrary execution. Vagueness encourages abuse and violates the first criterion of the proportionality test, legality.⁹⁹ Similarly, the ambiguous term "substantial prejudice" provides no useful advice to law enforcement or the judges, making it practically difficult for citizens to govern their behavior or anticipate when their privacy would be infringed.

2. Lack of Threshold Renders Minimal Impairment Meaningless

The second limb of the proportionality test, minimal impairment, requires states to impair rights as little as possible while achieving their goals. In the absence of standards on "substantial prejudice," officers may disregard warrants based simply on subjective belief rather than objective need. In *Okiya Omtatah Okiiti v. Communication Authority of Kenya & 8 others* the High Court warned against ambiguous reasons for state monitoring, finding that it must be carried out rigorously within pre-established legal frameworks.¹⁰⁰

In contrast, Canadian courts implementing Section 8 of the Charter need reasonable and probable grounds before authorizing a warrantless search. In *R v Collins*, the Supreme Court of Canada ruled all warrantless searches to be presumptively unreasonable and the state must demonstrate that the search was authorized by law, the law is reasonable, and done reasonably.¹⁰¹

3. Balancing Test Breaks Down Without Defined Interests

The third limb of proportionality necessitates a balancing test. A state's interest must outweigh the gravity of the privacy invasion. Lack of precise standards for "substantial prejudice," arbitrates and skews the balancing process in favor of governmental interests.

⁹⁹ *Geoffrey Andare v. Attorney General & 2 others* (2016) eKLR, para 63-66.

¹⁰⁰ *Okiya Omtatah Okiiti v. Communication Authority of Kenya & 8 others* (2020) eKLR, para 134-137.

¹⁰¹ *R v Oakes* (1986) 1 SCR 103, Supreme Court of Canada, para. 70.

In *Coalition for Reform and Democracy (CORD) & 2 others v. Republic of Kenya & 10 others*, it was determined that state monitoring powers under Section 36 of the Kenya Information and Communication Act lacked adequate protections against abuse, rendering the provisions unconstitutional. This exemplifies the judiciary's view that uncontrolled discretion tips the scales in favor of state convenience over individual rights.¹⁰²

In comparison to Canadian *R v Oakes* standard, which considers proportionality to encompass pressing and substantial objectives, rational relationship, minimal detriment, and overall balance.¹⁰³ Each limb is based on precise legal principles, not ambiguous limits such as "substantial prejudice."

4. Enabling Discretion Encourages Abuse and Erodes Accountability

Courts have warned that ambiguous statutes allow for governmental misuse. In *Media Rights Agenda v Nigeria, the African Commission on Human and Peoples' Rights* ruled that legislation granting state authorities unlimited discretion violates Article 9 of the ACHPR, which is inclusive of the freedom to receive and impart information.¹⁰⁴ In Kenyan law, there is no requirement for contemporaneous recording, no deadline for post-factum judicial approval, and no definition of exigency, all of which should exist for clearer legal action.

Conclusion

Conclusively, the right to privacy as guaranteed by Article 31 of the Constitution of Kenya is jeopardized by the ambiguous legal standard governing warrantless searches. The lack of precise rules for defining "substantial prejudice" under the *National Police Service Act* and the *Criminal Procedure Code* provides a loophole that can undermine constitutional safeguards. Kenyan case law illustrates that this ambiguity allows for disproportionate intrusions into people's private lives, with some courts deferring to police discretion rather than strictly adopting the proportionality and reasonable and probable grounds standards. This not only creates legal uncertainty and potential abuse, but it also undermines due process. To maintain the foundations of a democratic society,

¹⁰² *Coalition for Reform and Democracy (CORD) & 2 others v. Republic of Kenya & 10 others* (2015) eKLR.

¹⁰³ *R v Oakes* (1986) 1 SCR 103, Supreme Court of Canada, para. 70.

¹⁰⁴ *Media Rights Agenda v. Nigeria*, ACmHPR Comm. 224/98, 14th Activity Report (2001), para. 67.

Kenya's legal structure must be amended to establish precise standards for judging "substantial prejudice" and to ensure that any limitations on private rights are strictly required, minimally invasive, and commensurate with legitimate governmental goals. Without such improvements the right to privacy is subject to arbitrary infringement, jeopardizing the entire foundation of constitutional protection.

CHAPTER 4

AN ANALYSIS OF SEARCHES WITHOUT WARRANTS IN THE CANADIAN JURISDICTION

Introduction

Interference of the right to privacy through unreasonable searches without warrants is guaranteed protection by Canada's section 8 of the Charter of rights and freedoms.¹⁰⁵ Section 8 emphasizes privacy rights rooted in dignity, integrity and autonomy.¹⁰⁶ Canada's jurisprudence has an evidentiary threshold of reasonable and probable grounds, unlike Kenya's vague substantial prejudice threshold. Searches done without warrants are treated as prima facie unreasonable.¹⁰⁷

Courts use a two-part test in assessing whether a search or seizure violates Section 8. The first test is usually whether there is a search or a seizure.¹⁰⁸ A "search" happens when state action violates a legitimate expectation of privacy, for example, accessing electronic data, recording private conversations, or scrutinizing regulated commercial paperwork. A "seizure," on the other hand, is the taking of property or information without consent, such as compelled production of documents or record copies.¹⁰⁹

The second test would be whether the search and seizure was reasonable. A search or seizure is only justified if authorized by law and if such law is reasonable, meaning that it is in proportion to the state's objectives.¹¹⁰

Exceptions to warrantless searches are in the instances of consent through the voluntary permission of the subject, exigent circumstances and searches incident to arrest. This is the three-part reasonableness test. Reasonable expectation of privacy is determined by the totality of

¹⁰⁵ Section 8, *Canadian Charter of Rights and Freedoms* (1982).

¹⁰⁶ Section 8, *Canadian Charter of Rights and Freedoms* (1982).

¹⁰⁷ Simon's megalomaniacal legal resources, 'Criminal - warrantless searches' <<http://isthatlegal.ca/index.php?name=criminal.warrantless-search>> on 5 March 2025.

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¹⁰⁹ Section 8, The Canadian Charter of Rights and Freedoms, Search and Seizure <<https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art8.html>> on 5 March 2025.

¹¹⁰ Charterpedia, Section 8, Search and seizure <<https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art8.html>> on 6 March 2025.

circumstances by assessing one, the subject matter, that is, the nature of the information or place searched, such as a home vs. a public space. Second, direct interest, which is the claimant's connection to the subject matter. Third, subjective expectation, an individual's belief in privacy, and lastly, objective reasonableness, which is whether society recognizes this expectation as reasonable.¹¹¹

The proportionality test then follows. Courts apply the test by first checking legal authorization as the law authorizing the search must strike a balance between state objectives such as public safety and individual privacy rights.¹¹² Secondly, minimal impairment, to achieve its aim, the legislation should trespass on privacy as little as feasible.¹¹³ For example, while police may search electronic devices in connection with an arrest, the scope of the search must be limited to arrest-related evidence. Finally, for the balancing test, which is last, the state's interest in law enforcement must outweigh the gravity of the privacy violation. In *R. v. Pike*, Ontario Court of Appeal decided that border officers' unlimited access to personal devices was disproportionate to the objective of intercepting contraband.¹¹⁴

Case Law

The Canadian jurisdiction further outlines in its case law a series of principles and criteria to determine the appropriateness of a search done without a warrant.

Exigent circumstances

Canadian courts make considerations for when warrantless searches may be justified for "exigent circumstances" under various acts such as the *Controlled Drugs and Substances Act* (CDSA).

¹¹¹ *R v Caslake* (1998), Supreme Court of Canada, para. 18.

¹¹² Dentons, 'Ontario Court of Appeal finds warrantless searches of electronic devices unconstitutional' 21 August 2024 <<https://www.dentons.com/en/insights/articles/2024/august/21/ontario-court-of-appeal-finds-warrantless-searches-of-electronic-devices-unconstitutional> > on 6 March 2025.

¹¹³ Fric A, 'Reasonableness as proportionality: Towards a better constructive interpretation of the law on searching computers in Canada, 21 *Appeal: Review of Current Law and Law Reform* 59. 79-81.

¹¹⁴ *R. v Pike*, 2024, *Ontario Court of Appeal* (Canada).

a) Legal Principles under (i) Section 11(7) of the CDSA

Section 11(1) of the CDSA permits a justice to issue a warrant for the search and seizure of a controlled substance.¹¹⁵ Exceptionally, section 11(7) allows a police officer to search the location without a warrant if the conditions for a warrant apply but "exigent circumstances" render obtaining one "impracticable."¹¹⁶ Section 11(1) and (7) states:

A justice who, on ex parte application, is satisfied by information on oath that there are reasonable grounds to believe that:

- (a) a controlled substance or precursor in respect of which this Act has been contravened,*
- (b) any thing in which a controlled substance or precursor referred to in paragraph (a) is contained or concealed,*
- (c) offence-related property, or*
- (d) anything that will afford evidence in respect of an offence under this Act or an offence, in whole or in part in relation to a contravention of this Act, under section 354 or 462.31 of the Criminal Code*
- (e) is in a place may, at any time, issue a warrant authorizing a peace officer, at any time, to search the place for any such controlled substance, precursor, property or thing and to seize it.*

A peace officer may exercise any of the powers described in subsection (1), (5) or (6) without a warrant if the conditions for obtaining a warrant exist but by reason of exigent circumstances, it would be impracticable to obtain one.¹¹⁷

b) Two Requirements Under Section 11(7)

Section 11(7) was interpreted as having two requirements in Peterson, Brown J. First, it must be shown that there were "exigent circumstances," which "denote not merely convenience,

¹¹⁵ Section 11(7), *Controlled Drugs and Substances Act* (Canada).

¹¹⁶ Section 11(7), *Controlled Drugs and Substances Act* (Canada).

¹¹⁷ Section 11(7), *Controlled Drugs and Substances Act* (Canada).

propitiousness or economy, but rather urgency, arising from circumstances calling for immediate police action to preserve evidence, officer safety or public safety.”¹¹⁸

Second, the requirements for getting a warrant must be demonstrated to have been met, but that exigent circumstances "made it 'impracticable' to obtain a warrant," which means that it was "impossible in practice or unmanageable to obtain a warrant." Therefore, "it must be demonstrated that the exigent circumstances lead to impracticability."¹¹⁹

Justice Brown summed up the two conditions of s. 11(7) as follows: the Crown must demonstrate that the entrance was forced by urgency, requiring prompt police action to protect evidence, officer safety, or public safety and secondly, it must also be demonstrated that this urgency was so great that delaying obtaining a warrant would have seriously jeopardized those imperatives.

The Evidentiary Threshold: Reasonable and Probable Grounds

The police must have reasonable and probable grounds, rather than merely reasonable suspicion, for the claimed exigency under section 11(7). The higher standard of reasonable and probable reasons helps guarantee that police are not relieved too easily of the duty to seek a warrant, considering the privacy and liberty concerns at stake when weighed against the needs of law enforcement.

The standard requires the Crown to establish the reasonable probability of the claimed exigency, based on the police's experience and expertise and the relevant facts before them; it does not require the Crown to establish the exigency on the balance of probabilities; rather, the Crown must show that the officers' reasonable belief in the exigency was "objectively grounded in the circumstances of the case." The police's subjective views must have been objectively reasonable. A vague, hypothetical, or general worry that prolonging a search to obtain a warrant might risk the loss of evidence does not meet the exigency criteria.¹²⁰

¹¹⁸ Section 11(7), *Controlled Drugs and Substances Act* (Canada).

¹¹⁹ Section 11(7), *Controlled Drugs and Substances Act* (Canada).

¹²⁰ *R v Pawar*, 2020, para. 72.

The Standard of Appellate Review

A trial judge's evaluation of the evidence and conclusions of fact in applying section 11(7) receives "substantial deference" on appeal.¹²¹ However, whether the trial judge's findings meet the legal criteria for exigency under section 11(7) is a point of law that can be reviewed for correctness.¹²² This court underlined that reasonable concerns regarding safety or evidence destruction should not be viewed through the "lens of hindsight." Courts should not second-guess reasonable operational judgments made by police.

Finally, the court recognized that the police cannot construct an investigation technique to establish an emergency in order to proceed without a warrant. If the police strategy creates the supposed urgency, the circumstances are not 'exigent', but are anticipated, if not planned for, by the police.¹²³ In this case, however, the police "were faced with an active, unfolding crime." As a result, they responded to an emergency situation rather than creating one.

R. v. Campbell

In this case the Supreme Court of Canada dismissed a criminal appeal from an Ontario Court of Appeal and that from a trial judge's finding that convicted the defendant of trafficking and possession offences under the CDSA and sentenced him to a term of imprisonment.¹²⁴ Here the court considered warrantless search law.¹²⁵

The court determined that a warrantless search is presumptively unreasonable, transferring the burden of persuasion to the Crown to prove on a balance of probabilities that the search was justified.¹²⁶ Section 8 defines a reasonable search as one that is authorized by reasonable legislation and carried out in a reasonable way.¹²⁷

¹²¹ R v Cornell, 2010 SCC 31.

¹²² Simon's Megalomaniacal Legal Resources, 'Criminal - Warrantless Searches' <<http://isthatlegal.ca/index.php?name=criminal.warrantless-search>> on 12 March 2025

¹²³ Simon's Megalomaniacal Legal Resources, 'Criminal - Warrantless Searches' <<http://isthatlegal.ca/index.php?name=criminal.warrantless-search>> on 12 March, 2025.

¹²⁴ R.v. Campbell (2024), *Supreme Court of Canada*.

¹²⁵ R.v. Campbell (2024), *Supreme Court of Canada*.

¹²⁶ R.v. Campbell (2024), *Supreme Court of Canada*.

¹²⁷ R. v. Fearon (2014,) P. 278

R. v. Guerrier

The Ontario Court of Appeal discussed warrantless searches where the police had performed a warrantless search of the appellant's vehicle. The court relied on *R. v. Nolet* where it was held that a warrantless search is prima facie unreasonable so the Crown must prove on a balance of probabilities that:¹²⁸

1. *The search was authorized by law,*
2. *the law authorizing the search is reasonable,*
3. *the manner in which the search was conducted was reasonable.*¹²⁹

R. v. Neill

The Court of Appeal in this case reviewed the application of exigent circumstances to justify a warrantless seizure of a BlackBerry under section 487.11 of the Canadian Criminal Code. The appellant argued that the police improperly created exigent circumstances, citing the precedent in *R. v Phoummasak*. However, the court disagreed with this contention and upheld the application judge's findings.¹³⁰

The application judge determined that exigent circumstances existed, relying on factual evidence that supported the imminent risk of evidence destruction. The court emphasized that this was not a case where police had grounds to obtain a warrant but chose alternative investigative methods to create exigent circumstances artificially. Instead, the urgency to act justified the warrantless seizure.

In arriving at its decision the court referred to the legal test for exigent circumstances established in *R. v Kelsy*. It also noted that substantial deference must be given to trial judges' findings regarding imminent risks of evidence destruction, as previously recognized in *R v Hobeika*, at paragraph 45. Based on the record before the application judge the court found no error in concluding that exigent circumstances justified the seizure of the BlackBerry without a warrant.¹³¹

¹²⁸ *R.v. Guerrier (2024), Ontario Court of Appeal.*

¹²⁹ *R. v. Nolet (2010) para. 21.*

¹³⁰ *R v Neill (2023), Ontario Court of Appeal, Canada.*

¹³¹ *R v Neill (2023), Ontario Court of Appeal, Canada.*

Findings and Conclusion

In contrast to Kenya, the Canadian legal framework provides a strong model for regulating warrantless searches, with various characteristics that Kenya may use to strengthen privacy protections. Section 8 of Canada's Charter of Rights and Freedoms explicitly prohibits searches and seizures that are unreasonable, which the judiciary has interpreted using well established criteria to determine the legality of warrantless searches. Notably in *R. v. Collins* and *R. v. Grant* the Supreme Court of Canada established standards for rejecting unlawfully obtained evidence, emphasizing the gravity of such violation, impact on the accused, and society's interest in a fair trial. This contrasts with Kenya's imprecise and inconsistent "substantial prejudice" threshold.

Furthermore, Canadian jurisprudence reveals heightened sensitivity to digital privacy, as evidenced in *R. v. Spencer* and *R. v. Fearon*, where courts imposed higher access criteria for digital devices, suggesting a realization of the changing nature of privacy in the digital era. In contrast to Kenya's larger, less controlled legislative provisions, it preserves tightly designed statutory exclusions for warrantless searches in exigent circumstances, which are typically accompanied by protections and post-search accountability measures. Furthermore, Canadian law enforcement officers receive extensive constitutional rights training, promoting a culture of legal compliance, which Kenya may benefit from through curriculum revisions within the National Police Service. Overall, Kenya may learn useful lessons from Canada by adopting a more structured judicial approach, improving statutory clarity, strengthening digital privacy laws, and instituting rights-based training in law enforcement.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSIONS

Policy recommendations

Kenya must establish objective criteria for determining "substantial prejudice" in accordance with international norms such as the proportionality test and the reasonable and probable grounds standards used in Canadian law. This will ensure that warrantless searches are only justified in limited circumstances, such as impending evidence destruction or public safety hazards.

Secondly, Kenya should establish a uniform definition of "reasonable grounds," akin to the Canadian approach, to ensure that any action conducted by law enforcement is justified and subject to judicial review.

Thirdly, exclusionary rules need to be implemented, and legislation that allows evidence obtained through illegal or unreasonable searches to be excluded must be passed. This would serve as a deterrent to police misconduct and enhance the integrity of the criminal justice system.

Recommendations to the Judiciary

Courts should closely analyze claims of "substantial prejudice" and require police to demonstrate specific concerns before circumventing warrants. Evidence gathered through unconstitutional means should be excluded from proceedings so as to preserve privacy rights. Judicial independence and accountability can be improved by training judges on issues such as inappropriate searches and the ethical ramifications of judicial biases.

Institutional recommendations

Strengthening oversight bodies such as *Kenya's Independent Policing Oversight Authority* (IPOA) with more authority and resources to monitor police behavior and investigate complaints about illegal searches and conduct.

Accountability systems must be in place to prevent police from exploiting legal ambiguity. This involves punishing police who conduct arbitrary searches and maintaining openness in law enforcement actions.

Public Awareness Campaigns

Educating citizens about their rights in the face of unwelcome searches, as well as offering accessible grievance procedures and empowering them to use such procedures, is vital to developing a society that is aware of its rights and capable of confronting abuses.

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