THE APPROPRIATE REMEDY FOR THE BREACH OF THE 24-HOUR RULE

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By

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DECLARATION

I, ROGERS SSEKUBWA GITHINJI, 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.

Signed: ……………………………………………………….

Date: ………………………………………………………….

This dissertation has been submitted for examination with my approval as University Supervisor

Signed: ………………………………………………………Mr. Humphrey Sipalla

LIST OF CASES

Albanus Mwasia Mutua v Republic, Criminal Appeal No. 120 of 2004 (unreported).

Republic v David Geoffrey Gitonga, Criminal Case No. 79 of 2006 Meru (unreported).

Julius Kamau Mbugua v Republic (2010) eKLR.

Assanidze v Georgia ECtHR Judgement of 8 April 2004.

Michael Rotich v Republic (2016) eKLR.

Julius Kamau Mbugua v Republic (2010) eKLR.

Betty Jemutai Kimeiywa v Republic (2018) eKLR

Broniowski v Poland, ECtHR Judgement of 22 June 2004.

Republic v David Muchiri Mwangi [2018] eKLR.

Salim Kofia Chivui v Resident Magistrate Butali law courts & another (2012) eKLR.

LIST OF LEGAL INSTRUMENTS

KENYA

Constitution of Kenya, (2010).

Constitution of Kenya (1963).

Penal Code Cap 63.

The National Police Service Act.

LIST OF ABBREVIATIONS

ECtHR -European Court on Human Rights.

IACtHR -Inter-American Court on Human Rights.

ABSTRACT

This dissertation is an introduction into a research concerning the suitable remedy for the breach of the 24-hour rule. The philosophical basis of this dissertation is hinged on Pheroze Nowrojee and Issa Shivji's political theories on the connection of politics and justice. The theory shows the need for political support in the formulation of both victim and systemic remedies for breach of the 24-hour rule. The dissertation also assesses whether the compensation awarded by courts in isolation of other remedial principles has resulted in a recurrent violation of the 24-hour rule. Kenya's remedial approach will be benchmarked against the pilot judgement scheme used by the European Court of Human Rights. The methods used in carrying out this research will be to investigate the current remedial practice in Kenya, the various opinions of scholars on remedies and the standard approach on remedies.

Moreover, for the right to personal liberty to be respected there is a need to put in place remedial strategies that are not only monetary but have a corrective and preventative effect.

CHAPTER ONE: INTRODUCTION

Article 49 (1) (f) of the Constitution of Kenya, 2010 guarantees that a person has a right to be arraigned as soon as reasonably possible but not later than 24 hours. The question arises as to what happens in the event that the 24-hour rule is infringed. Article 23 (3) of the Constitution outlines the remedies put in place for breach of constitutional rights in the form of a declaration of rights, an injunction, and order for compensation among others. Prior to the promulgation of the Constitution of Kenya 2010, judges took different positions in addressing cases falling under the realm of infringement of the 24-hour rule by arriving at different judgments for cases with the same facts. However, post 2010, courts have settled for compensation as the appropriate remedy for breach of the 24-hour rule.

This research focuses on the 24-hour rule as an element of the right to a fair trial and proposes an appropriate remedy for breach of the 24-hour rule. The study is limited to examining how courts have addressed the issue of pre-trial detention post 2010. I would also like to clarify that there are two distinct aspects of pre-trial detention. Pre-trial detention before arraignment and pre-trial detention after arraignment but before trial. The two are related but the focus of this research is on pre-trial detention before arraignment.

1.1 Background

The right to personal liberty requires that no person is detained arbitrarily. Police officers have a duty to arraign arrested persons before court within the constitutionally specified 24 hours of arrest.[1]They are also required to carry out their administrative work in accordance to the rule of law, justice and accountability. The judiciary is also mandated to observe the law to the letter and take action against any police officer who curtails the right to personal liberty.[2]

Post-colonial governments were characterised by political use of criminal prosecutions. Many people were held in pretrial detention without charges against them.[3] Amendments were made to the Constitution of Kenya, 1963 to legalise detention without trial by incorporating provisions of the Preservation of Public Security Act into the Constitution whose Article 85(1) gave the president full discretionary powers to apply the act to curtail the right to personal liberty by

[1] Article 49(1) (f), *Constitution of Kenya,* (2010).

[2] UNGA, *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, UN A/RES/60/147 (21 March 2006).

[3] Pheroze Nowrojee , 'The legal profession 1963-2013: All this can happen again soon' in Yash Pal Ghai and Jill Cottrell Ghai (eds) *The legal profession and the new constitutional order In Kenya,* Strathmore University Press, Nairobi,2014, 35.

imposing curfews and detention.[4] The detention laws emulated in the Preservation of Public Security Act were modelled on the Emergency Regulations of British colonies.[5] The provisions of this Act were unchallengeable.[6] During the Moi regime the Preservation of Public Security Act continued being in force and it was used to conduct unprocedural operation of detention.[7]

The then Constitution provided that an arrested person was to be arraigned within 24 hours of his arrest or 14 days in the event that his arrest was based on suspicion that he had committed or was about to commit a crime punishable by death. The rationale for the 14 days pretrial detention in the latter instance was that the arrested person was to be given a written statement setting the grounds for his arrest within 5 days.[8] The rationale for the 14 days was to allow time for a notice to be issued in the Kenya Gazette stating that a person is in custody and outlining provisions of the law that authorised the detention.[9] The arrested person's case would then be reviewed within a month and afterwards at intervals of 6 months by a tribunal that was appointed by the president.[10] The three instances discussed above demonstrate the legality of pre-trial detention according to the then Constitution.

The 2010 Constitution has explicitly protected the right to personal liberty by placing a duty on the police to arraign arrested persons within 24 hours of their arrest or if the 24 hours end outside the ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.[11]

Later than 24 hours, the court lacks temporal jurisdiction to hear and determine any criminal matter presented by the prosecution. As noted above, in the event of a breach of the 24-hour rule, Article 23(3) of the Constitution sets out remedies that may be awarded to the aggrieved party.

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[4] Section 85(1*), Constitution of Kenya*, (1963).

[5] Nowrojee P, 'The legal profession 1963-2013: All this can happen again soon' in Yash Pal Ghai and Jill Cottrell Ghai (eds) *The legal profession and the new constitutional order In Kenya,* Strathmore University Press, Nairobi, 2014, 34.

[6] Nowrojee P, 'The legal profession 1963-2013: All this can happen again soon', 34.

[7] Nowrojee P, 'The legal profession 1963-2013: All this can happen again soon', 35.

[8] Section 83(2) (a) *Constitution of Kenya* (1963).

[9] Section 83(2) (b) *Constitution of Kenya* (1963).

[10] Section 83(2)(c) *Constitution of Kenya* (1963).

[11] Article 49(1)(f), *Constitution of Kenya*, (2010).

1.2 Statement of Problem

Article 23(3) of the Constitution provides for remedies that courts may award to persons whose right to personal liberty has been infringed on. What then is the appropriate remedy that would strike a balance between protecting the right to personal liberty and ensuring criminal cases are heard without delay.

1.3 Hypothesis

The appropriate remedy for violation of the 24-hour rule is dismissal of the case if the prosecution fails to arraign an arrested person within 24 hours of his arrest or if the 24 hours end outside the ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day.[12]

1.4 Statement of Objective(s)

The specific objectives of this study are:

I. To explain the meaning of pre-trial detention.
II. To trace the theory of remedies and how it affects rights.
III. To propose the appropriate remedy for breach of the 24-hour rule.

1.5 Research Questions

I. What is pre-trial detention?
II. How effective are the remedies under Article 23(3) of the Constitution in addressing arbitrary pre-trial detention?
III. What is the appropriate remedy for pre-trial detention?

1.6. Justification

There is a need to use remedies that both prevent the violation of the 24-hour rule and at the same time compensate aggrieved parties. It may therefore be appropriate to begin thinking of remedies from a dual track approach that focuses on both the individual and the system.

[12] Article 49(1)(f), *Constitution of Kenya*, (2010).

1.7 Theoretical Framework

The study is rooted on the nexus between politics and justice. Issa Shivji states that "The ruling class in Africa may rule through the instrument of law but the law rarely rules."[13] In a strict positivist approach, it is the citizens who are the holders of rights guaranteed to them respectively by laws, notwithstanding that these laws ultimately reflect the will of the ruling class.[14] This goes to show that much as Article 49 (1) (f) of the Constitution of Kenya, 2010 makes provision for the right of an arrested person to be arraigned within 24 hours, this same right is not enjoyed by all Kenyans.

Shivji further submits that the primary and significant violator of rights in Africa generally is the state itself by engaging in extra-legal coercion.[15] Extra-legal coercion refers to the application of coercion which strictly speaking, is illegal, but is sanctioned by the highest organs or officials of the state and carried out by immediate perpetrators as if it was in obedience of 'lawful' orders.[16]

Nowrojee also, agrees that politics impacts the attainment of human rights and that the remedies used to enforce human rights depend on the political goodwill of the executive.[17] In congruence with Nowrojee's assertion, Shivji further asserts that magistrates tend to avoid the conflict of powers between the executive and judiciary.[18]

1.8 Literature Review

Kent Roach defines remedies as corrective action taken in response to violation of a right. He says that remedies are responsive to a violation that occurred in the past and also serve to avoid such violations from occurring in the future.[19] He says that remedies influence rights and to some extent they discourage the very recognition of rights.[20] He relies on *Brown v Board of Education* and the subsequent *Brown II and Brown III*, cases on segregation of black children in public schools, in

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[13]Issa G Shivji I, '*State coercion and freedom in Tanzania,* Human & Peoples' rights monograph series No 8, Institute of Southern National University of Lesotho, Lesotho, 1990, 3.
[14] Issa G Shivji, *The concept of human rights in Africa*, Codesria Book Series, London, 1989, 23.
[15]Shivji, *'State coercion and freedom in Tanzania*,' 5.
[16]Shivji, '*State coercion and freedom in Tanzania*,'13.
[17]Nowrojee, the legal profession1963-2013: All this will happen again-soon, 33-58.
[18]Shivji, '*State coercion and freedom in Tanzania,*'59.
[19] Roach K, 'Remedies in transformative Constitutions' International conference on interpreting and shaping of transformative constitutions, conference organized by Katiba Institute, the British institute for Eastern Africa, Kenya Human Rights Commission and Judicial training Institute, Nairobi, 9 June 2014,52.
[20]Roach K, 'Remedies in transformative constitutions,' 51.

which the US Supreme Court recognised the rights of black children to attend public schools without racial discrimination but the remedial strategy used by the Court left public schools effectively segregated to this day.[21]

Theo Van Boven is a Dutch jurist who says that violation of human rights has legal consequences in terms of remedies that should combat impunity.[22] He set out the five types of remedies for implementation of victim remedies. These remedies include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[23] These principles have propelled the development of robust judicial remedies for rights violations.[24] Boven teaches us to adopt both the victim and systemic remedial approach when addressing the violation of human rights.[25]

Sonja Starr explains the aims of remedies which include serving a purpose of corrective justice, prevention of repetition, expressive in that they attach stigma to wrongful conduct and creating deterrence.[26] She teaches us that it is not just about giving a remedy to a victim but also preventing the same violation from happening again.

Dinah Shelton says that compensation rarely serves a deterrence purpose.[27]In a Kenyan context we learn that this seemingly popular remedy given in courts has failed to deter the police from violating the 24-hour rule as evidenced by the increased number of unlawful pre-trial detentions in Kenya.[28] As Sonja Starr puts it, the use of compensation in isolation of other remedial principles also allows perpetrators to buy impunity.[29]

[21]Roach K, 'Remedies in transformative Constitutions,' 51.

[22]Theo Van Boven, 'Categories of rights' in Moeckli D, Shah S and Sivakumaran S (eds) *International human rights law*, 1ed, Oxford University Press, 2014,151.

[23] UNGA, *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violation of international human rights law and serious violations of international humanitarian law*,7.

[24] UNGA, *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violation of international human rights law and serious violations of international humanitarian law*,7.

[25] UNGA, *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violation of international human rights law and serious violations of international humanitarian law*,7.

[26] Sonjar B Starr, 'The right to an effective remedy: Balancing Realism and Aspiration, in M A Baderin and M Ssenyonjo (eds) *International Human Rights Law: issues, Six Decades after the UDHR and beyond*, Ashagate, UK, 2010,486.

[27] Denah Shelton, *The Oxford handbook of international human rights law,* Oxford University Press, New York, 2013,1.

[28]National Council on the Administration of Justice, *Criminal Justice System in Kenya,* 25th May 2015,62

[29]Sonja Starr, 'The right to an effective remedy, '489.

Ed Bates, an associate professor of law says that pretrial detention violates the principle of fair trial: presumption of innocence until proven guilty.[30] Bates teaches us that the 24-hour rule is an element of the right to fair trial.[31]

Fair trial is premised on three principles: not charging a person for a crime that was not provided for by the law at the time of its commission, not charging a person twice for the same crime and when in doubt favour the accused.

Thomas M Antkowiak says that remedial strategies that focus on compensation and declarative relief are insufficient, inadequate and inefficient.[32] He further says that courts should adopt an all-round remedial approach instead of focusing on compensation.[33] He stresses the significance of non-monetary remedies by acknowledging that remedies ordering specific conduct: restitution of personal liberty and negative injunctions, terminate ongoing violations and eschew the perpetuator from buying off impunity through payment of damages.[34] He says that the money paid to victims should not be seen as a substitute for suffering. To better ensure adequacy, he suggest that victims should be allowed to propose an amount to be given to them as compensation instead of leaving this role entirely to the court.[35] He advocates for a participative remedial model by saying that courts should issue merits decisions and obligate parties to a case to negotiate remedial solutions.[36] His suggestions are based on the *Barrios Altos and Durand* cases where victims who were given a merits decision in their favour negotiated remedies that were satisfactory and once consensus was reached between them and the state, the Inter-American Court of Human Rights enforced the resulting agreement.[37] We learn from Thomas Antkowiak that compensation alone is not the appropriate remedy for breach of the 24-hour rule. It must be accompanied by non-pecuniary measures such as guarantees of non-repetition.[38]

[30] Bates Ed, 'Categories of rights' in Moeckli D, Shah S and Sivakumaran S (eds) *International human rights law*, 1ed, Oxford University Press, 2014, 151.

[31] Bates Ed, 'Categories of rights'151.

[32] Antkowiak T, 'Remedial approaches to human rights violations: The Inter-American Court of Human Rights and Beyond' Columbia Journal of Transitional Law, 2008,355 >http://ssrn.com/abstract=1329848< on 22 February 2019.

[33] Antkowiak T, 'Remedial approaches to human rights violations, 359, 355

[34] Antkowiak T, 'Remedial approaches to human rights violations, 387

[35] Antkowiak T, 'Remedial approaches to human rights violations, 401

[36] Antkowiak T, 'Remedial approaches to human rights violations, 401

[37] Antkowiak T, 'Remedial approaches to human rights violations, 401.

[38] Antkowiak T, 'Remedial approaches to human rights violations, 401.

Guarantee of non-repetition is a systemic remedy designed to prevent the perpetrator from ever committing future violations of human rights.

Albanus Mwasia Mutua v Republic is a foundational case on the 24-hour rule in Kenya which established that, a prosecution after constitutional and fundamental rights have been violated is null and void. This case establishes the principles that underlie a fair trial: double jeopardy, no punishment for a crime which the law did not previously provide and when in doubt favour the accused. The case established that failure to arraign an arrested person within 24 hours would result in an automatic dismissal of the case.[39]

Later than 24 hours, the court should release the arrested person because it lacks temporal jurisdiction.

The approach that was taken in the above case changed in the *Republic v David Geoffrey Gitonga.* This case established that breach of the 24-hour rule does not render a trial a nullity but entitles an accused person to compensation. Justice Emukule failed to recognise that the failure to arraign an arrested person within 24 hours in itself makes a court lack temporal jurisdiction to entertain a case before it.[40]

Post 2010 case law shows that judges have adopted compensation as the only fit remedy for breach of the 24-hour rule as discussed in Julius *Kamau Mbugua v Republic*. This case has established that the only remedy for breach of the 24-hour rule is compensation.[41] In principle, all the other remedies provided by Article 23 (3) of the Constitution would qualify to remedy aggrieved parties but nevertheless courts have not offered them in addition to compensation. This case shows that the scope of the remedial approach taken by Kenyan courts is so limited amidst the very many existing remedies as already discussed above. The compensation given is only intended to remedy the victim for the harm suffered. The court gives compensation based on its own discretion and based on the assumption that it is adequate. Based on what we have learnt from the scholars

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[39] *Albanus Mwasia Mutua v Republic*, Criminal Appeal No. 120 of 2004 (unreported)
[40] *Republic v David Geoffrey Gitonga*, Criminal Case No. 79 of 2006 Meru (unreported).
[41] *Julius Kamau Mbugua v Republic* Criminal Appeal 50 of 2008 (2010) eKLR.

discussed above, compensation accompanied by non-monetary measures such as guarantee of non-repetition and just satisfaction serves a much better remedial purpose.

Judges should at least emulate from the Inter American Court on Human Rights (IACtHR) and the European Court of Human Rights on their approach to remedies. Both the IACtHR and ECHR have handled cases of arbitrary pre-trial detention with caution and provided remedies over and above compensation.[42]

Having analysed the remedial approach taken by Kenyan courts, I have noted the following challenges: divergence of opinion still persists thereby leaving the law on remedies unsettled, remedies set out in article 23(3) of the Constitution are patterned from common law and judges have limited themselves to compensation as the only fit remedy for breach of the 24-hour rule.

1.9 Research Methodology

1.9.1 Methodology

The main sources of information shall be:

a) Primary sources i.e. legislation, international instruments, Kenyan and foreign case law and UN documents on the topic of remedies which shall include the current legal framework on remedies.
b) Secondary sources i.e. as books, conference papers, journals and articles on the topic of remedies
c) Case studies which will mainly look at how international courts have dealt with the issue of remedies when redressing pre-trial.

1.9.2 Assumption(s)

The assumption of this research is that there are other remedies available to redress the breach of the 24-hour rule.

1.9.3 Limitations

I did not have sufficient funds to buy particular textbooks that would have enriched my research. The school library also had limited books that suited the theoretical framework for this dissertation.

[42] *Assanidze v Georgia* ECtHR Judgement of 8 April 2004, para 198-202.

To overcome my financial limitation, I borrowed books from my friends, used google scholar articles and read case law.

1.9.4 Chapter Breakdown

This dissertation is divided into five chapters:

I. Chapter one looks into the topic being studied, the background of this topic, the legal question at hand, the theoretical framework and the literature review on the topic of study.

II. Chapter two forms the theoretical framework

III. Chapter three discusses pre-trial detention

IV. Chapter four traces the theory of remedies and how it affects rights

V. The last chapter suggests the appropriate remedy for breach of the 24-hour rule shall

1.9.5 Duration

Assuming the absence of significant impediments, the research is expected to be conducted from 30th March and be completed on 30 November 2019.

CHAPTER TWO: UNIVERSAL APPLICABILITY BUT NOT UNIVERSALLY APPLIED

2.1 Introduction

In this chapter I intend to discuss three key issues namely: The history of Kenya's judiciary, the nexus between politics and justice as a basis for my theoretical framework and unjustified pre-trial detention as a violation of the fundamental right to personal liberty. Under issue one, I will explore the judicial protection system that has existed in Kenya and show how it has been undermined. The second issue will elaborate the nexus between politics and justice in fulfillment of the right to personal liberty. Lastly, the third issue gives a brief overview on pre-trial detention.

2.2 The history of Kenya's judiciary

To address the above issues and explore the nexus between politics and justice in Kenya's judiciary we have to look back to the 1960s. As most black African countries marched into independence, they were given the Westminster constitutional and political order in the former British colonies, while constitutions in French-speaking Africa were based on analogies taken from France or Belgium.[43] In both cases, in their human rights provisions, the models departed from those found in the mother countries.[44] Britain of course does not have a written constitution and follows the principle of sovereignty of parliament.[45] There the protection of human rights, it is said, is based on constitutional conventions and traditions.[46] Nonetheless all former British colonies were handed a written constitution that protected fundamental rights as part of the independence package.[47] The French independence constitutions paid homage to human rights usually modelled on the international and European conventions, although following the French practice, these were not reviewable by independent institutions such as courts.[48]

Shivji asserts that:

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[43]Shivji I, '*State coercion and freedom in Tanzania,* 18.
[44]Shivji, *The concept of human rights in Africa*, 18.
[45]Shivji, *The concept of human rights in Africa*, 18.
[46]Shivji, *The concept of human rights in Africa*, 19.
[47]Shivji, *The concept of human rights in Africa*, 19.
[48]Shivji, *The concept of human rights in Africa*, 19.

"There is a minority strand of argument that the reason for enshrining fundamental rights as part of the independence constitutions was to safeguard the property interests of the settler population with investment in the former colonial economies. The British were little concerned with separation of powers and independence of the Judiciary during their rule in the colonies.[49]"

2.3 The undermining of judicial independence

The Kenyan Constitution has protected the judiciary since independence except for the constitutional amendment that briefly removed the security of tenure of judges from the Constitution.[50] The judiciary was intended to be free from the pressures of both the executive and the legislature.[51]

Franceschi and Lumumba cherish Ghai and McAuslan's argument, that the main reason for undermining the independence of the judiciary was the general control of public policy by the executive in addition to the attitudes of those in authority in the legal field in the immediate period following independence.[52]

Sharing similar sentiments, M Kiwinda Mbondenyi and J Osogo Ambani states that since the early 1960s the judiciary has faced the difficult task of maintaining the intricate balance between political transformation and just interpretation of the law.[53]

When called upon to determine matters of a political nature, the judiciary was in most occasions seen to be inclining towards the executive to the detriment of other litigants or the public.[54] Mbondenyi and Ambani states that:

> "Judicial independence was largely a byword because the legal system was plagued with a number of handicaps including: inadequate legislative and institutional frameworks for the *appointment* of

[49]Shivji, *The concept of human rights in Africa*, 19.
[50] Luis Franceschi and Patrick Lumumba, *The Constitution of Kenya: A commentary,* 2ed, Strathmore University Press, Nairobi, 2019, 517.
[51]Franceschi and Lumumba, *The Constitution of Kenya,* 517.
[52]Franceschi and Lumumba, *The Constitution of Kenya,* 517.
[53]The New Constitutional Law of Kenya, 132.
[54] Mbondenyi and Ambani, *The New Constitutional Law of Kenya*, 132.

> competent judicial officers; apparent appointment of judicial officers on the basis of personal loyalties; and political interference."[55]

The repealed Constitution did not adequately guarantee judicial independence because it vested upon the President enormous powers and overwhelming influence over the executive, judicial and legislative functions of government.[56] For instance, it mandated the President to appoint the Attorney General, Chief Justice and other judges.[57] The question of determining the removal of these judicial officers was also vested in the President who by law was required to appoint a tribunal in this regard.[58]

Franceschi and Lumumba agree that post-independence, Kenyans lost their confidence in the judiciary.[59] It was accused of the failure to defend the rights and aiding the violation of fundamental human rights itself.[60] Kenyans viewed the Judiciary as a secretive and unaccountable institution in addition to its inclination to serve the interests of the executive.[61]

Nowrojee contextualises Lumumba and Franceschi's views by giving an example of what used to happen in the Detainees' Review Tribunal. He asserts that a Detainees Review Tribunal was established.[62] The Tribunal was headed by a High Court judge, appointed by the President. The Tribunal convened once in a while to assess cases of the detainees.[63] In practice, the Tribunal neither assessed the facts and reasons surrounding the detention of each inmate nor the need for continued detention.[64] It would merely meet the detainees to talk about trivial issues that were never related to the detention cases at hand.[65] The Tribunal instead of being neutral body, a defender of the rights of the detainees was run as the political overseer of the interests of the executive itself.[66]

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[55]Kiwinda and Ambani, *The New Constitutional Law of Kenya*, 132.
[56]Kiwinda and Ambani, *The New Constitutional Law of Kenya*, 133.
[57]Kiwinda and Ambani, *The New Constitutional Law of Kenya*, 133.
[58]Kiwinda and Ambani,*The New Constitutional Law of Kenya*, 133.
[59]Franceschi and Lumumba,*The Constitution of Kenya,* 509.
[60]Franceschi and Lumumba,*The Constitution of Kenya,* 509.
[61]Franceschi and Lumumba, *The Constitution of Kenya,* 509.
[62]Pheroze Nowrojee, 'The legal profession 1963-2013: All this will can happen again soon,' in Yash Pal Ghai and Jill Cottrell Ghai (eds), *The legal profession and the new constitutional order in Kenya*, Strathmore University Press, Nairobi, 2014, 34.
[63]Nowrojee, 'The legal profession 1963-2013, 34.
[64]Nowrojee, 'The legal profession 1963-2013, 34.
[65]Nowrojee, 'The legal profession 1963-2013, 34.
[66]Nowrojee, 'The legal profession 1963-2013, 35.

The 'fair' trial process envisioned in Kenya's justice system was always circumvented by the State having first ensured a predetermined conclusion and conviction by ensuring that such cases were only placed before compliant magistrates and judges.[67] At the same time it was impossible to challenge any arbitrary detentions in courts to check whether the facts alleged against a detainee were true or whether the minister concerned had exercised his discretion in accordance with law.[68]

In agreement with the minority strand of argument discussed by Shivji, I am of the opinion that Kenya fits the description of an African country whose colonial masters least cared about the separation of powers and independence of the Judiciary. Post-independence, I am convinced that there was an intention to have an independent Judiciary as envisioned by the Independence Constitution much as this dream was watered down by the Kenyan leadership that took over power from the British.

2.4 The nexus between politics and justice

Nowrojee demonstrates how politics affects justice and how the political structures undermine the judiciary.[69] Interrogation into Kenyatta I and Moi's political system reveals the political use of criminal prosecution that occurred during the two different regimes.[70] As Kenya strives to chart out and define its own history, there are lessons to be learnt and experiences to be adopted and adapted from the governments of Kenyatta I and Moi.

The theory this study is anchored on is the nexus between politics and justice. Issa Shivji states that "The ruling class in Africa may rule through the instrument of law but the law rarely rules."[71] In a strict positivist approach, it is the citizens who are the holders of rights guaranteed to them respectively by laws, notwithstanding that these laws ultimately reflect the will of the ruling class.[72] This goes to show that much as Article 49 (1) (f) of the Constitution of Kenya, 2010 provides for the right of an arrested person to be arraigned before court within 24 hours, this same right is not enjoyed by all Kenyans.

[67]Nowrojee, 'The legal profession 1963-2013, 35.
[68]Nowrojee, 'The legal profession 1963-2013, 34.
[69]Nowrojee, 'The legal profession 1963-2013,' 37.
[70]Nowrojee, 'The legal profession 1963-2013,' 35.
[71]Shivji, *State coercion and freedom in Tanzania,* 3.
[72]Shivji, *The concept of human rights in Africa,* 23.

Shivji further submits that the primary and significant violator of rights in Africa generally is the state itself by engaging in extra-legal coercion.[73] Extra-legal coercion refers to the application of coercion which strictly speaking, is illegal, but is sanctioned by the highest organs or officials of the state and carried out by immediate perpetrators as if it was in obedience of 'lawful' orders.[74]

Nowrojee also, agrees that politics impacts the attainment of human rights and that the remedies used to enforce human rights depend on the political goodwill of the executive.[75] In congruence with Nowrojee assertion, Shivji further asserts that magistrates tend to avoid the conflict of powers between the executive and judiciary [76] and that for justice to be attained, Mfalila J avers that the Judiciary is supposed to act only in accordance with the law despite pressures from the executive.[77] He then opines that:

> "So long as the executive is manned by ordinary human beings who are bound to exercise excesses in their enthusiasm to serve the Republic, the judiciary should expect such conflicts and pressures, and its duty is not to succumb, but to stand firm in defence not only of the people brought to court, but also the Constitution."[78]

After taking an accused person to court, the only rules that are applicable are those that further the administration of justice. In the application of these rules, the court concerned should not be under any influence or pressure.[79] This is the meaning behind the concept of the independence of the judiciary.

2.5 Pre-trial detention

Pre-trial detention means holding an accused person in custody before a hearing in court has taken place.[80] Pre-trial detention is excessive and unlawful when detention does not follow due process or is prolonged beyond what constitutes a reasonable period. Pre-trial detention assumes guilt before trial and violates the right to personal liberty. However, under exceptional circumstances, a reasonable time frame of pre-trial detention can be justified for example arresting an accused on

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[73] Shivji, *'State coercion and freedom in Tanzania*,' 5.
[74] Shivji, '*State coercion and freedom in Tanzania*,' 13.
[75] Nowrojee, The legal profession 1963-2013, 33-58.
[76] Shivji, '*State coercion and freedom in Tanzania,*' 59.
[77] Shivji, *'State coercion and freedom in Tanzania*,' 59.
[78] Shivji, *'State coercion and freedom in Tanzania,*' 60.
[79] Shivji, '*State coercion and freedom in Tanzania*,' 60.
[80] Pilar Domingo and Lisa Denney, 'The political economy of pre-trial detention,' Open Society Justice Initiative, 2013, 2.

a weekend when the court is on an official break. Pre-trial detention should be lawful reasonable and necessary in all the circumstances.[81] Pilar Domingo and Lisa Denney explain that:

> 'the criminal justice system has many interconnected stages creating a network with many loopholes, capacity gaps and opportunities that can be exploited by the police and high profile politicians who may wish to use excessive pre-trial detention to serve their personal interests.'[82]

In the Kenyan context, the right to personal liberty has been trampled on to serve a political purpose. As was discussed in Chapter One, history has shown that pre-trial detention has been used for political purposes, to establish political dominance and to do away with political opponents.[83]

Political uses of pre-trial detention are also evident in Comoros following the arrest and pre-trial detention of two journalists for over a month. According to the Committee to Protect Journalist (CPJ), the detention aimed at controlling the criticism of President Azali Assoumani by the two journalists who made a call for his resignation. This is yet another example to show the political use of pre-trial detention to silence critical voices.[84]

Moreover, in my opinion pre-trial detention has also been used by the police under unjustifiable circumstances to extort money from arrested persons. Corrupt police officers arrest people and ask for money from them as a way of securing their release. Those who are who are unwilling to pay the requested bribe are detained inside the police vehicles hours before being taken to court. Since few Kenyans can afford to pay a bribe, many languish in pre-trial detention until their relatives or friends are able to pay a bribe.[85]

2.6 Conclusion

Issa Shivji asserts that the concept of human rights has been referred to at various times in history, but it has not been applicable to all humans.[86] He posits that the human rights discourse is not ideologically innocent. On the contrary, it is:

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[81] Domingo and Denney, The political economy of pre-trial detention, 2.
[82] Domingo and Denney, The political economy of pre-trial detention, 3.
[83] Nowrojee, 'The Legal Profession 1963-2013,' 34.
[84] Committee to Protect journalists, 26 March, 2019 https://cpj.org/2019/03/two-journalists-held-in-pre-trial-detention-since-.php Accessed on 21 November 2019.
[85] *Anthony Njenga Mbuti & 5 others v Attorney General & 3 others* (2015) eKLR.
[86] Shivji, '*The concept of human rights in Africa*,'3.

> "an ideology of dominion and part of the imperialist world outlook. The dominant human right ideology claims and proclaims universality, immortality and immutability while propagating in practice class-parochialism, national oppression and 'patronizing' authoritarianism. Shivji adds that in an Africa neo-colonialist formation, law is an instrument for the application of state coercion and plays a subordinate role, if any at all, in legitimizing the rule of the dominating class."[87]

Using this theory, it is evident that the right provided under Article 49(1) (f) of the Constitution of Kenya, 2010 has universal validity and applicability.[88] But it is not universally applied to all Kenyans as a result of political influence.

[87] Shivji, '*State coercion and freedom in Tanzania*,' 104.
[88] Shivji, '*The concept of human rights in Africa*,' 11.

CHAPTER THREE: WHEN THE WHEELS OF JUSTICE TURN SLOWLY

3.1 Introduction

Having discussed the meaning of pre-trial detention under Chapter Three, I would like to clarify that there are two distinct aspects of pre-trial detention. Pre-trial detention before arraignment and pre-trial detention after arraignment but before trial. The two are related but the focus of our discussion is on pre-trial detention before arraignment.

With that in mind, under this chapter I intend to discuss 3 key issues, namely: The Kenyan approach to pre-trial detention, the powers of the police to make arrest and the parameters of pre-trial detention. Issue two will discuss the reality of pre-trial detention in Kenya followed by the reasons for prevalent pre-trial detention in Kenya.

3.2 Pre-trial detention: the Kenyan approach

Pursuant to Article 2(5) of the Constitution of Kenya, 2010 the general rules of international law regarding pre-trial detention form part of the law of Kenya. Kenya is subject to the human rights standards contained in the International Covenant on Civil and Political Rights (ICCPR), the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, among others.[89]

At the national level, the applicable law includes the Constitution of the Republic of Kenya 2010, the Penal Code Cap 63, and the National Police Service Act. These prescribe rules for treatment of detainees. Article 49 (1) (f) of the Constitution speaks to the right to personal liberty and outlines the rights of arrested persons.

3.2.1. Power to arrest without a warrant

The police have the constitutional and statutory power under Articles 243-245 of the Constitution and Section 58 of the National Police Service Act to arrest a person reasonably suspected of having committed a crime.

The powers of arrest are expressly made subject to Article 49 of the Constitution regarding the rights of an arrested person and, therefore, upon arrest, the person may be dealt with in line with

[89] Claiming human rights: Guide to international procedures available in cases of human rights violations in Africa http://www.claiminghumanrights.org/kenya.html on 1 October 2019

Article 49 (1) (g) and (h) by charging, detention, release and release on bond. Ultimately, the test for validity of arrest is reasonable grounds for suspicion; not "prima facie" evidence test of judicial inquiry.[90]

3.2.2 Parameters of pre-trial detention

A reasonable period of pre-trial detention includes taking into account whether such a period is lawful from the time of arrest to the time the detainee is arraigned.[91] According to Article 49(1) (f) of the Constitution of Kenya, 2010, the words, "but not later than" set the parameters of the period within which a person can be held in police custody before being arraigned.[92] Sub Article (f) (i) provides for a period within 24 hours in any case and (f)(ii) the end of the next court date where the 24 hours end outside the ordinary hours or on a day that is not an ordinary court date. Sub articles (f) (i) and (ii) set the time limit of what is allowed for pre-trial detention.[93] Should the detention period exceed the time limits of this provision a violation of personal liberty is said to have occurred.[94]

Any detention beyond 24 hours must be lawful as provided by Article 49(1) (g) of the Constitution. Once a person has been arraigned within 24 hours, the court may order the immediate release of a person or may release the person pending charge or trial on bail or bond unless there are compelling reasons not to be released.[95]

In practice, the recurrence of pre-trial detention is linked to the poor management of the interconnected chain of the criminal justice system from the moment of arrest to arraigning the arrested person.[96] Crime-related policy trends and political attitudes towards the criminal justice system and detainees shape pre-trial detention.[97]

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[90] *Betty Jemutai Kimeiywa v Republic* (2018) eKLR.
[91] Domingo and Denney, 'The political economy of pre-trial detention, 2.
[92] *Salim Kofia Chivui v Resident Magistrate Butali law courts & another* (2012) eKLR
[93] *Salim Kofia Chivui v Resident Magistrate Butali law courts & another* (2012) eKLR
[94] *Salim Kofia Chivui v Resident Magistrate Butali law courts & another* (2012) eKLR
[95] *Salim Kofia Chivui v Resident Magistrate Butali law courts & another* (2012) eKLR
[96] Domingo and Denney, 'The political economy of pre-trial detention,ii.
[97] Domingo and Denney, 'The political economy of pre-trial detention,ii.

3.3 The reality of pre-trial detention in Kenya

In developing countries, the greater majority of all detainees are pre-trial detainees and they are forced to remain in custody for years.[98] This is a clear indication of an inefficient and overwhelmed criminal justice system that does not respect the rule of law.[99] Contextualising the aforesaid statement, Kenya fits in that category. Rachel Strohm asserts that:

> "A percentage of fifty two detainees in Kenyan prisons are in pre-trial detention.[100] On average, a Kenyan spends one year in pre-trial detention is one.[101] Some inmates have been in custody close to eight years without a hearing.[102] 90% of the inmates are stuck in pre-trial detention owing to the fact that they cannot afford to pay the bail that was set.[103] Several people in pre-trial detention have had their cases mentioned a number times in court, but the court reached no decisions were because the complainants or witnesses did not show up, and they were then returned to jail to await a new court date."[104]

In Kenya it is very normal for some magistrates and judges to allow pre-trial detention of accused persons for as many as 30 days before they can formally plead to a charge, presumably to allow investigators to conduct further investigations.[105] This is buttressed by the decision of the magistrate's court that ordered the detention of an applicant for 28 days while awaiting investigations to be completed by the police.[106] Based on the facts presented. I am of the opinion that the figures stated above do not adequately reflect the real extent of pre-trial detention in Kenya.

3.4 Reasons for pre-trial detention

Corruption, police corruption is a major cause of arbitrary arrest and detention, a challenge mainly affecting the economically disadvantaged.[107]

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[98] National Council on the Administration of Justice, *Criminal justice system in Kenya: An audit*, 19 January 2017, 22.*Salim Kofia Chivui v Resident Magistrate Butali law courts & another* (2012) eKLR

[99] National Council on the Administration of Justice, *Criminal justice system in Kenya: An audit*, 19 January 2017, 22.

[100] Rachel Strohm, Statistics on pre-trial detention in Kenya, 2018 https://rachelstrohm.com/2018/09/20/statistics-on-pre-trial-detention-in-kenya/ Accessed on 23 October 2019.

[101] Strohm, Statistics on pre-trial detention in Kenya, 2018.

[102] Strohm, Statistics on pre-trial detention in Kenya, 2018.

[103] Strohm, Statistics on pre-trial detention in Kenya, 2018.

[104] Strohm, Statistics on pre-trial detention in Kenya, 2018.

[105] Edward Kahuthia, 'Judiciary at fault to issue long pre-trial detention orders' *The Standard* Newspaper, 27 February 2019.

[106] *Michael Rotich v Republic* (2016) eKLR

[107] Louise Edwards , Perspectives on pre-trial justice in Africa: The use of arrest, 2015, 9.

3.5 Conclusion

The 24-hour rule demands an arrested person to be presented before court within a limited period beyond which the court lacks temporal jurisdiction. 24 hour later such cases should be dismissed unless there are compelling lawful reasons to support the continued detention.[108] The arresting police officers should give a comprehensive justification for subjecting arrested to pre-trial detention and the failure to do so should attract sanctions.

[108] *Salim Kofia Chivui v Resident Magistrate Butali law courts & another* (2012) eKLR

CHAPTER FOUR: TRACING THE THEORY OF REMEDIES AND HOW IT AFFECTS RIGHTS

4.1 Introduction

The aim of the 24-hour rule has been misinterpreted and constrained to the point of "regularising punishment before conviction"[109] thus violating the presumption of innocence. The only way to reinforce the right to personal liberty is by revisiting the remedies provided and strictly following the law as it is i.e. 24 hours later, the court lacks temporal jurisdiction. In this chapter, I therefore intend to trace the theory of remedies and how it affects the right to personal liberty

4.2 The theory of remedies

In the common law tradition, both Blackstone and Dicey celebrated the importance of remedies but in the limited fashion of the common law. Canadian Chief Justice McLachlin has commented on the essence of formulating constitutional remedies that are free of common law and equitable limits.[110] Remedies allow us to heal our wounds and carry on as individuals and as a society.[111]

Much as anything less than a victim centered system of justice demeans the very notion of individual rights.[112] It is very important to strike a balance between victim remedies and systemic remedies. While victim remedies focus on the individual, systemic remedies focus on unclogging systemic issues that result in consistent violations the 24-hour rule. For a decline in pre-trial detention to be realised, breach of the 24-hour rule requires both victim and systemic remedies. Compensation awarded to a person whose 24 hour-rule has been violated does not guarantee non-repetition of the same violation.

[109] Humphrey Sipalla, 'The presumption of innocence and its corollaries in international law: Considering and *ipso facto* violation standard' Unpublished MAThesis, University for Peace, San Jose, 2015,11.
[110] Beverley McLachlin 'Rights and Remedies Remarks' in RJ Sharpe and K Roach, *Taking Remedies Seriously*, Canadian Institute for the Administration of justice, Ottawa, 2010, 27.
[111] Beverley McLachlin 'Rights and Remedies- Remarks,' 30.
[112] Thomas Antkowiak, Truth as right and remedy in international human rights experience, 23 Michigan Journal of International Law 977 (2002). http://digitalcommons.law.seattleu.edu/faculty/421 1010

4.2.1 How remedies affect rights

Kent Roach defines remedies as corrective action taken in response to violation of a right. Remedies actualise constitutional guarantees.[113] They are responsive to a violation that occurred in the past and also serve to avoid such violations from occurring in the future.[114] They influence rights and to some extent they discourage the very recognition of rights.[115]

4.2.2 Van Boven's framework

According to a report adopted by the General Assembly, the following remedies constitute a standard framework for full and effective remedies for victims of human rights violations. They include: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[116] Out of the five types of remedies, remedies that apply to pre-trial detention are; compensation, satisfaction and guarantee of non-repetition. Each of these remedies will be explained as follows

Taking into consideration the circumstances of each case, compensation should be appropriate and proportional to the magnitude of the suffering by a pre-trial detainee. When assessing compensation, the following factors must be considered; physical or mental harm suffered, missed opportunities, including employment, material damages and loss of earnings.[117]

Satisfaction encompasses having effective measures aimed at stopping of recurring violations; a public apology, including acknowledgement of the facts and acceptance of responsibility; judicial and administrative sanctions against persons liable for the violations. Just satisfaction is not just to pay the aggrieved party but also to select the appropriate measures to be adopted in a legal system as a way to end to the violation found by the court.[118]

Guarantees of non-repetition are aimed at the avoidance of recurring violations. It encompasses measures such as: reforming statutes and regulations to ensure stricter adherence to the law, strengthening the independence of the judiciary, creating awareness of human

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[113]Roach K, 'Remedies in transformative constitutions' International conference on interpreting and shaping of transformative Constitutions, conference organised by Katiba Institute, the British Institute for Eastern Africa, Kenya Human Rights Commission and Judicial Training Institute, Nairobi, 9 June 2014,50.

[114] Roach K, 'Remedies in transformative constitutions' International conference on interpreting and shaping of transformative constitutions, conference organized by Katiba Institute, the British institute for Eastern Africa, Kenya Human Rights Commission and Judicial Training Institute, Nairobi, 9 June 2014,52.

[115]Roach K, 'Remedies in transformative constitutions,' 51.

[116]UNGA, *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violation of international human rights law and serious violations of international humanitarian law*,7.

[117]UNGA, *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violation of international human rights law and serious violations of international humanitarian law*,7.

[118]*Broniowski v Poland,* ECtHR Judgement of 22 June 2004, para 192.

rights by educating each and every member of society, training law enforcement officials and advocating for the strict adherence to codes of conduct and by public servants.

Out of the five types of remedies listed above, the applicable remedies for pre-trial detention are; compensation, satisfaction and guarantee of non-repletion. These three remedies ought to be used simultaneously to form a robust remedial strategy for victims of pre-trial detention and streamlining the criminal justice system.

Restitution is not a proper remedy for pre-trial detention cases because it is practically impossible to restore the personal liberty of a previous detainee back to the original status he was in before his detention. It is impossible to restore to the victim the intangible rights taken from him, along with the pain and suffering, humiliation, and embarrassment caused to him.

4.3 Conclusion

At the bare minimum, remedies should match the purpose of the right being enforced.[119] In addition to being fit for purpose, remedies should also be effective, meaningful, and responsive to the violation in the past or the future. Unfortunately, the remedial approach set forth by Van Boven is sadly lacking in the Kenyan justice system.

[119] Roach K, 'Remedies in transformative constitutions' International conference on interpreting and shaping of transformative Constitutions, conference organized by Katiba Institute, the British Institute for Eastern Africa , Kenya Human Rights Commission and Judicial Training Institute, Nairobi, 9 June 2014,52.

CHAPTER FIVE: THE APPROPRIATE REMEDY FOR BREACH OF THE 24-HOUR RULE

5.1 Introduction

In this chapter, I intend to evaluate the effectiveness of compensation as the fit remedy for breach of the 24-hour rule. I will then explain the pilot judgement procedure by ECHR and set out lessons that may be adopted and adapted by Kenya's judiciary from the pilot judgement procedure. Lastly, I will set out recommendations on the remedial approach Kenya can take in a bid to end unlawful pre-trial detention.

5.2 Evaluation of compensation

Out of the seven remedies set out under article 23(3) of the Constitution, courts have settled for compensation as the fit remedy for breach of the 24-hour rule. Compensation is a victim centered remedy that ignores the root cause of the violation. It is important to acknowledge that the kind of remedies awarded by a court whenever a human right is violated may discourage the very recognition of human rights guaranteed by the Constitution.[120] Compensation is a soft ineffective remedy as far as deterrence of violation of the 24-hour rule is concerned.[121]

Post 2010 case law shows that judges have adopted compensation as the only fit remedy for breach of the 24-hour rule as discussed in Julius *Kamau Mbugua v Republic*. This case shows that monetary compensation has been regarded as the ordinary remedy for breach of the 24-hour rule.[122] However systemic changes and guarantee of non-repetition would mean that people who are repeatedly arrested can directly and tangibly benefit from the new remedies that will hold police officers accountable. Monetary compensation is a completely inadequate remedial approach that fails to address the systemic causes of pre-trial detention.

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[120] Roach K, 'Remedies in transformative Constitutions',51.
[121] Roach K, 'Remedies in transformative Constitutions' 51.
[122] *Julius Kamau Mbugua v Republic* (2010) eKLR.

5.3 How the ECHR has dealt with systemic problems

The ECHR uses the pilot judgement procedure. The pilot judgement procedure is a technique used to pinpoint the structural problems underlying repetitive cases brought against a particular country and imposing obligations on that country to address those problems.[123]

When the ECHR receives cases that have the same root cause, it picks out one case for priority treatment under the pilot procedure. In a pilot judgement, a decision is made as to whether there is a violation of ECHR in chosen case and also identifies the underlying systemic problem. The court then goes further to provide guidance to governments regarding the types of remedies they can use to address the violation at hand.[124]

Under the pilot procedure, related cases can be adjourned for a period of time so that the government can take the necessary steps to adopt the national measures required to satisfy the verdict. In the interest of justice, the ECHR can opt to resume examining adjourned cases.[125]

The goal of the pilot judgement procedure is to assist in solving systemic problems at a state level, offer a possibility of quicker remedies to the aggrieved parties and assist courts to manage the backlog of cases efficiently and diligently by reducing the number of similar cases that have to be scrutinised.

5.3.1 Lessons from the pilot judgement procedure by ECHR

To address the issue of pre-trial detention, the judiciary should shift its focus from entirely awarding victim remedies to aggrieved parties while ignoring systemic remedies that address the root cause of the violation. Many pre-trial detention cases pending before Kenyan courts are of a repetitive kind, which spring from a common dysfunction of the criminal justice system.

[123] Factsheet-Pilot Judgements 1.
[124] Factsheet-Pilot Judgements 1.
[125] Factsheet-Pilot Judgements 1.

5.4 Recommendations

The breach of the 24-hour rule cases makes known the existence, within the Kenyan legal system, of a structural deficiency which denies Kenyans the enjoyment of their right to personal liberty. For any change to occur there is a need to strike a balance between victim and systemic remedies.

There is a deficiency in the remedies stipulated under article 23(3). The remedies are structurally ineffective. There is a need to secure in the Kenyan legal order a remedial approach infusing a fair balance between victim remedies and structural remedies, in accordance with the 24-hour rule. Article 23(3) should include preventive and compensatory remedies in respect to allegation of breach of the 24hour rule. There exists a compensatory remedy that sometimes operates well, but when examining the repetitiveness of pre-trial detention, Kenyan courts should consider systemic remedies as well.

5.5 Conclusion

There is need for combination of effective remedies in respect of breach of 24-hour rule that have both preventive and compensatory effects. It may therefore be appropriate to begin thinking of remedies from a dual track approach that focuses on both the individual and the system. Courts are traditionally good at redressing violations and irreparable harm to individuals.[126]

[126] Roach K, 'Remedies in transformative Constitutions', 51.

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