

CONSTITUTIONAL LAW IN THE EXTRADITION PROCESS:
AN EXAMINATION OF THE APPLICATION OF THE
US-KENYA
EXTRADITION TREATY

A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE BACHELOR OF LAWS DEGREE

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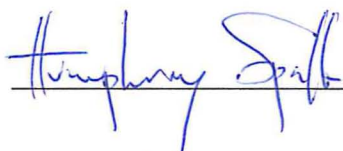
DATE:

09.04.2016


YEAR:

2016

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 11 April 2016

ACKNOWLEDGEMENTS

My sincerest gratitude to all persons who were supportive and made possible the following dissertation to come into fruition.

DECLARATION

I confirm that:

- This dissertation represents my own work;
- This dissertation, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text
- The contribution of any supervisors and others to the research and to the dissertation was consistent with normal supervisory practice.

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Chapter 1

1.1 Statement of Problem

The illimitable rights held within the new Constitution provide fugitives held and requested under extradition that must be taken into consideration in the extradition process in Kenya.

1.2 Background to the study

The old Constitution held severe claw back clauses that undermined the very rights it sought to protect. Under that regime, extradition law lacked integral aspects that led to constriction of the person's right to receive a fair trial.

The bill of rights, under the new Constitution, guarantees all persons fundamental rights and freedoms. Certain classes of rights are deemed inalienable.¹ By virtue of the freedom from discrimination², fair trial³ and equality before the law,⁴ these rights are equally available to fugitives due for arrest and extradition. Therefore, any law that touches on the fundamental rights and freedoms of fugitives must be aligned with, and be in consistent to, the safeguards and rights recognised under the Constitution.

Thus, we shall see, the extradition process' twin principles of meeting bilateral treaty requests and non-interrogation, an extraditable person finds themselves at the mercy of a process that is majorly designed to effect a successful extradition without due regard to constitutional safeguards and hence threatens his civil liberties.

Lastly, this dissertation demystifies the US-Kenya extradition law, examines and defines the nature of such extradition process in Kenya. The examination shall weigh the safeguards availed to an extraditable person by the applicable law, against the safeguards guaranteed under the Constitution.

This study is limited to the context of the 1931 US-Kenya extradition Treaty.

¹ Article 25, Constitution of Kenya, 2010.

² Article 27, Constitution of Kenya, 2010.

³ Article 50, Constitution of Kenya, 2010.

⁴ Article 27, Constitution of Kenya, 2010.

1.3 Research objectives

- a) Outline the legal regime that pertains to extradition in Kenya
- b) Identify and assess the safeguards available to persons sought to be extradited under the US-Kenya extradition regime.
- c) Outline and assess the constitutional safeguards available to above persons
- d) Establish how far the constitutional safeguards are met by the safeguards granted under extradition law.
- e) identify any areas that can be harmonized, or any reform needed to harmonise above.

1.4 Hypothesis

- (a) The safeguards under the regime are encumbered with inefficiencies and hence are not reflective of the constitutional guarantees
- (b) The US-Kenya regime treaty is biased towards effecting a successful extradition and does not honor constitutional protections of the person sought to be extradited.
- (c) There is urgent need to reform the US-Kenya extradition regime to bring it in line with the Constitution.

1.5 Methodology

Methodology employed primarily the analysis of core legal texts, including the Constitution 2010, Constitution 1963, the US-Kenya extradition treaty, the Extradition (Commonwealth Countries) Act and related legislation. Relevant case law, internet sources and scholarly articles were also insightful and informative.

1.6 Chapter breakdown

1.5 (a) Chapter One

Chapter 1 shall consist of my statement of the problem, objectives, literature review, hypothesis and general introduction to the study.

1.5(b) Chapter Two

The second chapter sheds light on the concept of extradition, the practice of extradition in Kenya, The US- Kenya extradition treaty, and discusses the process of extradition in Kenya according to the Extradition (Commonwealth Countries) Act Cap 77.

1.5(c) Chapter Three

Chapter 3 identifies and discusses the presently safeguards under the US-Kenya Treaty. The safeguards discussed are limited to major substantive and procedural safeguards of:-

- a) The extradition exemption for offences of political nature;
- b) The requirements under the doctrine of dual criminality; and
- c) The doctrine of specialty.

The chapter also highlights the weaknesses of the treaty by indicating how such safeguards are not efficient and effective in properly protecting the person sought to be extradited from potential breach of his constitutionally guaranteed rights under the criminal process.

1.5(d) Chapter Four

Chapter 4 provides for the scale to weigh the effectiveness of the US-Kenya extradition treaty in the protection of the rights of the person sought to be extradited. It discusses the safeguards available to such a person as enshrined in the Constitution. The Chapter clearly indicates that the standard of protection required by the Constitution is very high and the US-Kenya extradition law falls far much short of it. The analysis is restricted to the following constitutional safeguards:-

1. habeas corpus
2. fair trial
3. representation
4. right to bond/bail

1.5(e) Chapter Five

Chapter 5 shall give final conclusions and recommendations made.

This dissertation seeks to chart a proposition on the most effective manner to harmonise the above; and suggest whether compromise, non-compromise or amendment shall best serve the interests at hand with respect to extradition treaty objectives of delivering fugitives to justice, and constitutional fidelity in guaranteeing fundamental rights held by persons.

Chapter 2

2.1 Introduction

Chapter 2 defines extradition, and discusses the substantive and procedural law governing extradition in Kenya. This chapter shall give an outline of the US-Kenya extradition Treaty, the Extradition Act, and the various provisions, exceptions and safeguards that exist within.

2.2 Extradition law

Extradition is the legal process of availing suspected criminals or wanted fugitives physically absent from the state to stand trial or serve out penal sentences.⁵ The intention behind passing extradition treaties is to cure any legal obstacles that may exist in between either parties' jurisdiction by minimising technicalities, and harmonising all extradition procedure to one mutually acceptable procedure.⁶

As a sovereign state, Kenya is obligated to honor extradition requests made under extradition treaty concluded with other sovereign states, in honor of the principle of *pacta sunt servanda*.⁷

Legitimate extradition proceedings are an important right, as extra-judicial expulsion or relaying of persons to stand trial or imprisonment without a fair extradition process breaches their natural rights of justice.⁸ As a public process, extradition does activate several rights under fair administrative action that must be observed by the court and the executive that conduct the extradition.⁹

In *Samuel K. Gichuru v Attorney General & 5 Others*¹⁰ the court determined that extradition was, despite the executive elements involved, largely still a criminal process.¹¹ It follows therefore that it is under the Office of Director of Public Prosecution and that all provisions in the relevant law that were made under the Old Constitution and refer to the Attorney General should be read to mean the Director of Public Prosecution to bring them in conformity with the new Constitution 2010.¹²

⁵ *Black's law Dictionary* defines the process to mean "the official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged; the return of a fugitive from justice, regardless of consent, by the authorities where the fugitive is found." International extradition is generally "in response to a demand made by the executive of one nation on the executive of another nation. This procedure is generally regulated by treaties."

⁶ George Ndaile Mbondu, 'A Study of Extradition Law in Namibia in the context of the Constitution', University of Namibia, October 2004.

⁷ *Samuel Kimuchu Gichuru & another v Attorney General & 3 others*, 2015, eKLR, para 73.

⁸ *Zuhura Suleiman –vs- The Commissioner of Police & 2 Others*, Misc. Application No. 441 of 2010, eKLR.

⁹ *Walter Osapiri Barasa v Cabinet Secretary Ministry Of Interior And National Co-Ordination & 6 others*, 2014, eKLR, para 92.

¹⁰ *Samuel K. Gichuru v Attorney General & 5 Others* (2015) eKLR.

¹¹ *Samuel Kimuchu Gichuru & another v Attorney General*, 2015, para 49.

¹² Article 6, Constitution of Kenya 2010, Sixth Schedule.

2.3 The Extradition Treaty Between the US and Kenya, 1931

Kenya concluded an extradition treaty with the United States on December 22, 1931, that came into force on June 24, 1935. It was an agreement between the United States of America and Kenya's colonial master at the time, the United Kingdom of Great Britain.

Independent Kenya agreed to allow the continuation of that treaty on August 19, 1965, by exchanging notes¹³ with US Embassy officials on behalf of the US government towards that effect, without amendment.¹⁴

The question of the existence and enforceability of the above treaty was the subject of parliamentary debate¹⁵ whereupon the Minister of Interior Security, the late Prof. George Saitoti, affirmed the extradition obligations held under that treaty.¹⁶ The Treaty states that accused persons, or persons convicted of extradition crimes¹⁷ under the Treaty ought to be delivered to the Requesting Country.¹⁸ The

2.3.1 Territorial Jurisdiction

To meet the extradition threshold, the treaty stipulates that the accused or convicted person must have committed the crime within the jurisdiction of that state, and be within the territorial jurisdiction of the requested state.¹⁹

¹³ United Nations treaty collection, treaty reference guide, part 1,

An "exchange of notes" is a record of a routine agreement that has many similarities with the private law contract. The agreement consists of the exchange of two documents, each of the parties being in the possession of the one signed by the representative of the other. Under the usual procedure, the accepting State repeats the text of the offering State to record its assent. The signatories of the letters may be government Ministers, diplomats or departmental heads. The technique of exchange of notes is frequently resorted to, either because of its speedy procedure, accessed on the 30 November 2015.

¹⁴ The Kenyan Government, through the Ministry of External Affairs, as it then was, sent an official note on the 14th May 1965, requesting the US Embassy to affirm the status and "...state that in the interest of continuity of treaty relations with the United States of America the Government of Kenya is willing to continue the application of the above Agreement [extradition treaty of December 22 1931] to the territory of the Republic of Kenya beyond the two-year period stipulated in Kenya's Declaration to the United Nations Secretary-General on the devolution of pre-Independence treaty rights and obligations on Kenya (a copy enclosed), pending the negotiation of a new Agreement on this subject directly between the Government of Kenya and the United States.

¹⁵ Kenya National Assembly Official Record (Hansard) 17 Feb 2011, Ministerial statements on the delay of naming honorable members named in drug trafficking, p.23.

¹⁶ Kenya National Assembly Hansard, Minister affirmed to the house the legal obligation Kenya held to extradite drug traffickers whereby drug trafficking was specifically noted as an extradition offence.

¹⁷ Crimes recognised punishable under both nations laws, see Chapter 2.4.2.

¹⁸ Article 1, Extradition Treaty

¹⁹ Article 1, Extradition Treaty; Article 29, Vienna Convention on the Law of Treaties, 1969, identifies the entire territory of the state as applicable to a treaty.

Kenyan courts may therefore assert territorial jurisdiction on any persons found within its territorial land or waters.²⁰ With respect to US jurisdiction, a parallel legal realm holds under the Third Restatement of Laws²¹ which grant the US jurisdiction to offences or omissions conducted by persons on the territory of the US, as well as such offences or omissions that have a subsequent effect on the territory of the US, whether through its material planning or execution. The United States may therefore assert jurisdiction on persons whom conduct any crime outside of the borders of the United States,²² but wherefore that act has an impact on the territory of the United States, they shall be liable to face trial before an American court.²³

2.3.2 Extraditable offences under the Treaty

Extraditable offences are earmarked as commissions or omissions that can be categorised as such under the laws of both party states to the treaty, otherwise identified as the principle of dual criminality.²⁴ total of 27 offences are identified under the Treaty²⁵, and they all fall within the brackets of felonies²⁶, sexual offences²⁷, capital offences²⁸, and transnational crime²⁹.

2.3.3 Transnational Organised Crime

Transnational organised crime are offences committed in one country that have direct or indirect impact in more than one jurisdiction.³⁰ Transnational organised crime offend the good conscience of

²⁰ Interpretation and General Provisions Act, Cap 2, 2012, "the territorial waters" means any part of the open sea within twelve nautical miles of the coast of Kenya measured in accordance with the provisions of the Maritime Zones Act, and includes any inland water of Kenya.

²¹ Extraterritorial Jurisdiction under the Third Restatement of Foreign Relations law of the United States, 1987.

²² Kathleen Hixson, Third Restatement, p 135.

²³ Kathleen Hixson, Third Restatement, p 133 "*The effects doctrine is limited to rare circumstances when conduct is generally recognized as a crime; the effect within the territory is direct, substantial, and foreseeable; and the rule is consistent with the principles of justice in states that have reasonably developed legal systems*".

²⁴ Williams, Sharon A. " *Double Criminality Rule and Extradition: A Comparative Analysis*" Nova Law Review 15.2, 1991, 581-624, p 582, See Chapter 3.3.

²⁵ Article 3, Extradition Treaty.

²⁶ Including Article 3.3 manslaughter, 3.3 abortion, 3.7 kidnapping or false imprisonment

²⁷ Including Article 3.4 Extradition Treaty rape, Article 3.5 *unlawful carnal knowledge, or attempt thereof, Article 3.6 indecent assault*

²⁸ Capital offences carry mandatory death sentences. Under Kenyan law, these include murder, robbery with violence and treason.

²⁹ Including Article 3.10 procuration, defined as the "*...procuring or transporting of a woman or girl under age...with a view...to gratifying the passions of another person...*",

Article 3.19 *Article counterfeiting*, Article 3.27 *slavery*, Article 3.24 *traffic of dangerous drugs*

³⁰ Dr Amandine Scherrer, G8 against Transnational Organized Crime, Amandine Scherrer, Ashgate Publishing, Ltd, 2013, 23.

all nations and are considered abominable internationally,³¹ therefore all states must assist in curbing it in all its forms.

In Kenya, transnational organised crime has been blamed for eroding the integrity of public institutions.³² Transnational organised crime identified under the treaty include the offences of drug trafficking, piracy³³, human trafficking and slavery.³⁴

Under the Treaty, the offences of trafficking are covered under such conduct that include “*crimes or offences [,] or attempted crimes or offences [,] in connection with the traffic in dangerous drugs.*”³⁵ Both the United States and Kenya are signatories to the Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances.³⁶

Under this Convention, conduct that satisfies the threshold of extradition under the Treaty would include, inter alia, the manufacture, sale, conversion, transportation, cultivation or financing that would undermine the object of the convention³⁷.

Parties are also encouraged to formulate law that would facilitate mutual legal assistance between convention parties towards achieving the conventions objective.³⁸

The offence of piracy satisfies the threshold of dual criminality as it exists in our Penal Code³⁹, as well as under American law⁴⁰. Kenya has jurisdiction to try and convict persons found guilty of piracy in the high seas.⁴¹ Citing the Law of the Sea Convention,⁴² the Court of Appeal asserted its *universal jurisdiction* to deal with an offence that is deemed a threat to international peace.⁴³

2.4 Extradition (Commonwealth Countries) Act⁴⁴

The Extradition Act grants provisions for the request⁴⁵, arrest⁴⁶, committal to custody,⁴⁷ and subsequent surrender⁴⁸ of persons accused of committing offences in Commonwealth countries. Under

³¹ See Attorney General Of Israel Vs Eichman, Trial Court Decision, Jerusalem District Court, Jerusalem, International Law Reports 5, p 36.

³² Peter Gastrow, Termites at Work: Transnational Organised Crime and State Erosion in Kenya, September 2011.

³³ Article 26, Extradition Treaty.

³⁴ Article 27, Extradition Treaty.

³⁵ Article 3, Convention against the Illicit Traffic of Narcotic Drugs, United Nations, 1988, Offences and Sanctions.

³⁶ United Nations, 1988.

³⁷ Sub-Article (1), Convention against the Illicit Traffic of Narcotic Drugs, Article 3, Offences and Sanctions.

³⁸ Article 3, Convention against the Illicit Traffic of Narcotic Drugs, Offences and Sanctions, United Nations, 1988.

³⁹ See Section 5, Penal Code, limits of the jurisdiction of Kenyan courts to the territorial land and waters of Kenya.

⁴⁰ U.S. Constitution, Art. I, § 8, cl. 10, provides that Congress has the power “*To define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations.*”

⁴¹ Attorney General v Mohamud Mohammed Hashi & 8 others, [2012] eKLR.

⁴² United Nations Convention on the Law of the Sea, 1982.

⁴³ Attorney General v Mohamud Mohammed Hashi & 8 others, [2012] eKLR.

⁴⁴ No 11, 1983.

those provisions, the Act provides regulations with respect to the treatment of persons accused or convicted of offences in Kenya who are returned to Kenya from other countries.⁴⁹

2.4.1 Offences under the Extradition (Commonwealth Countries) Act

The Extradition Act sets out offences that are subject to extradition.⁵⁰ For an offence to qualify as an extraditable offence, it must:

1. [be] an offence against the law of a requesting country which, however described, falls within any of the descriptions contained in the Schedule and is punishable under the law with imprisonment for a term of twelve months or any greater punishment; and
2. [the] act or omission constituting the offence, or equivalent act or omission, would [have] constitute[d] an offence against the law of Kenya it took place within Kenya or, in the case of extraterritorial offence, in corresponding circumstances outside Kenya.

2.4.2 procedure for extradition [under the act]

A technical procedure elaborates the manner of conducting an extradition under the Extradition Act. Firstly, no extradition can proceed without the express written authorisation from the Attorney General.⁵¹ That authority is only granted upon the receipt of an extradition request to his office from the Requesting Country.⁵² *Samuel K. Gichuru v Attorney General & 5 Others*⁵³ held that this power no longer vests in the Attorney General but the office of the Director of Public prosecutions.⁵⁴

⁴⁵Section 7, Extradition Act, Cap 11, 1983.

⁴⁶Section 8, Extradition Act, Cap 11, 1983.

⁴⁷Section 19, Extradition Act, Cap 11, 1983.

⁴⁸Section 11, Extradition Act, Cap 11, 1983, warrant off surrender.

⁴⁹ Preamble, Extradition Act, Cap 11, 1983.

⁵⁰ Section 4, Extradition Act.

⁵¹ Section 7, Extradition Act.

⁵² request is made to the Attorney General by Requesting Country itself, or through its respective consulate.

⁵³ (2015), eKLR.

⁵⁴ *Samuel Kimuchu Gichuru & another v Attorney General*, 2015, eKLR, para 87.

2.4.3 Arrest

A magistrate has the authority to issue an arrest warrant against the fugitive, subject to the extradition request approved by the Attorney General.⁵⁵ A warrant of arrest is issued by the magistrate in the following circumstances:

- a) Upon receipt of an authority to proceed⁵⁶
- b) If there is no authority to proceed, but information is availed that the fugitive is or is believed to be in or on his way to Kenya, a warrant of arrest may follow.⁵⁷

Before giving the warrant of arrest the magistrate has to consider evidence sufficient to authorise the issue of the warrant for the arrest of a person accused of committing a corresponding offence in Kenya.⁵⁸

Section 9 of the Act requires that a person once arrested under a warrant discussed above must be brought before court as soon as practicable. This provision does not provide strict timelines within which a person should be arraigned in court. If a person is arrested without an authority to proceed, the court will release him if the authority is not given after a reasonable time. Once again, no timelines are stipulated risking the constitutional rights of the accused who may languish in custody for a very long time.

Once the court receives the authority to proceed, it hears the evidence in support of the request for surrender and on behalf of the fugitive and makes the determination as to whether or not to commit him to custody to await his surrender.⁵⁹ In making such a decision the court considers the following:-⁶⁰

- a) Whether the evidence is sufficient to warrant a trial for that offence if it had been committed in Kenya.
- b) If the fugitive is alleged to be unlawfully at large after conviction, that he has been so convicted and appears to be so at large

⁵⁵Sub-Section (1), Section 8, Commonwealth Extradition Act, Cap 11, 1983.

⁵⁶ Sub-section (2) (a), Section 8, Extradition Act, Cap 11, 1983.

⁵⁷Sub-section (2) (b), Section 8, Extradition Act, Cap 11, 1983.

⁵⁸ Sub-section (2), Section 8, Extradition Act, Cap 11, 1983.

⁵⁹ Sub-section (5), Section 9, Extradition Act, Cap 11, 1983.

⁶⁰ Sub-section (5), Section 9, Extradition Act, Cap 11, 1983.

If the above considerations are determined positively the court is under a mandatory obligation to commit the person to custody to await his surrender.⁶¹

The Act also provides for habeas corpus. It imposes obligation the court to inform the person of such right.⁶²

2.5 Surrender

Once the proceedings in the trial court ends with a determination that a person be surrendered, the Attorney General makes an order that the person be surrendered to the requesting country.⁶³The person may however not be surrender if:-

- a) Such surrender is prohibited under any law
- b) The Attorney General decides not to issue the warrant

If the custody to wait for surrender takes two months beginning with the lapse of fifteen days from day on which his committal to custody was made, he may apply to the High Court for his discharge after giving a one week's notice to the Attorney General.⁶⁴ If a warrant of surrender is issued, this application can be made after the lapse of one month from the day the warrant of issued.

2.6 Conclusion

The law governing extradition as discussed above appears comprehensive and orderly. It should be noted however that the person undergoing the process is not well protected by those provisions as required by the Constitution.

The safeguards available in this regime and weaknesses shall be identified and be discussed in the next chapter and weighed against those envisaged by the Constitution in Chapter four of this paper. It shall then be clear that the regime needs reform to be in line with the Constitution.

⁶¹ Sub-section (5), Section 9, Extradition Act, Cap 11, 1983.

⁶² Sub-section (1), Section 9, Extradition Act, Cap 11, 1983.

⁶³ Sub-section (1), Section 11, Extradition Act, Cap 11, 1983.

⁶⁴ Section 12, Extradition Act, Cap 11, 1983.

Chapter 3

US-Kenya Extradition Treaty & the Extradition (Commonwealth Countries) Act

Safeguards granted to a fugitive

3.1 Introduction

The Constitution, as supreme law, provides elaborate guarantee on the right of a person undergoing any criminal process.⁶⁵ Any law providing for a criminal process without due regard or undermines these constitutional safeguards is void and should be rectified to comply with the Constitution.⁶⁶

An appropriate extradition law must provide sufficient safeguards to ensure that fundamental rights of the person subjected to the process are not unlawfully breached.⁶⁷

This chapter identifies and critically assesses the salient safeguards in the US-Kenya extradition regime. Constitutional safeguards are discussed in the next chapter and determine whether the current US-Kenya extradition arrangement is in line with the constitution.

3.2 Procedural safeguards under the Treaty

As mentioned in Chapter 3, the safeguards guaranteed under the treaty include statutory limitation⁶⁸ double jeopardy, ⁶⁹*autre-fois* acquit, *autre-fois* convict,⁷⁰ and the political offences exemption.⁷¹ The above are procedural safeguards exist in national criminal law; they equally bar extradition that fall within the purview of the above limitations.

3.2 (a) *autrefois* convict and acquit

It is a fundamental principle of criminal law to not put a person through criminal proceedings that substantially touch on the same subject matter of an already determined trial conducted by a court of competent jurisdiction. The criminal procedure code guarantees a person the right to not be subjected to trial for a crime they had already been convicted or acquitted from.⁷² However, our criminal code is precise with regard to the manner in which that fact is challenged; the court is obliged to

⁶⁵ Article 49, Constitution of Kenya, 2010.

⁶⁶ Article 2, sub article 4, Constitution of Kenya, 2010.

⁶⁷ Limitable rights are identified under Article 24 of the Constitution.

⁶⁸ Article 5, Extradition Treaty.

⁶⁹ Article 4, Extradition Treaty.

⁷⁰ Article 5, Extradition Treaty.

⁷¹ Article 6, Extradition Treaty.

⁷²Section 279 Criminal Procedure Code, Chapter 75, [2010], Plea of *autrefois* acquit and *autrefois* convict. (1) An accused person against whom an information is filed may plead— (a) that he has been previously convicted or acquitted of the same offence; or (b) that he has obtained the President's pardon for his offence.

try that question to prove the veracity of the claim⁷³. Whereupon the court finds that it is not true, the accused has an opportunity to further prove his claim⁷⁴.

With respect to the Extradition Act, there exist latent challenges to discharging the above safeguard, including challenges of definition, the point at which the defense can be raised and whom may raise it.

Firstly, the Treaty is not clear as to what point in the process this plea may be raised by the accused. Secondly, the challenges of definition would prevent the trial court, in consideration of the doctrine of non-inquiry, to establish whether that person was satisfactorily convicted or acquitted, with respect to the offence in question.

Thirdly, It is not clear whether it is upon the accused to raise this fact before the court, or it would be the onus of the court to conduct its own investigation to prove the above. If legal counsel is provided to the accused (a right not readily provided for under the treaty) the accused may be in a better position to access the above safeguard. As a matter of fact, a conviction or acquittal decree should serve as prima facie proof that the person was indeed acquitted or convicted, and the treaty ought to indicate that fact.

However, this would be dangerously close to breaching the doctrine of non inquiry rule, whereby a Requested State's court takes it upon itself to conduct an investigation on the veracity of a foreign courts judgments and decrees.

⁷³ Sub-section (2), Section 279, Criminal Procedure Code, Cap 75, [2010].

⁷⁴ Sub-section (3), Section 279, Criminal Procedure Code, Cap 75, [2010].

3.2 (b) Safeguards with regard to surrender

Both the Attorney General and the High Court hold powers to prevent the surrender of a fugitive. The High Court's powers lie largely with respect to an order of habeas corpus, whereby the accused ought not to be surrendered prior to its full determination. The character of *awrit of habeas corpus* application ought to restrict the courts analysis to the legality of the arrest and confinement.⁷⁵ Despite this, the Act envisages the court making pronouncements on the content and subject of the extradition request itself.⁷⁶ It is noteworthy that such an interrogation would largely be for on its face-value (as the court would be limited with regard to relevant material to conduct a conclusive investigation)⁷⁷ and, as determined in the Barasa case,⁷⁸ it is not the place of the requested court to interrogate the veracity of the claim against the accused, provided that it is legitimate, *prima facie*. However, the Barasa decision saw a court hesitant to nullifying a provision of an act⁷⁹ and not the conduct of an investigation, as was seen in Republic v Wilfred Onyango Nganyi.⁸⁰ In that decision, the court did not hesitate to determine the authority of a Tanzanian investigating officer in Kenya, in pursuance of a fugitive in Kenya.

3.3 Substantive safeguards

Safeguards held by the fugitive can be classified as either substantive or procedural safeguards. With respect to the former, the attorney general is obligated to refuse extradition where the extradition request rests on grounds considered non-extraditable.

On procedural safeguards, the extradition proceedings cannot be commenced without the express authorisation of the Attorney General.

⁷⁵ https://www.law.cornell.edu/wex/habeas_corpus, accessed on 16 Jan 2016.

⁷⁶ Walter Osapiri Barasa v Cabinet Secretary Ministry Of Interior And National Co-Ordination & 6 others, 2014, eKLR.

⁷⁷ Sub-section Section (4), Section 10, Criminal Procedure Code, Cap 75, [2010], the court holds, however, the power to request for additional evidence to complete its mandate under of the Act.

⁷⁸ Walter Osapiri Barasa v Cabinet Secretary Ministry Of Interior And National Co-Ordination & 6 others, 2014, eKLR.

⁷⁹ International Crimes Act, 2008.

⁸⁰ Republic v Wilfred Onyango Nganyi & another [2008] eKLR

3.3 (a) Political nature exemption

The political undertones of the extradition process poses prejudicial threats to extraditable persons, as it constructively presumes guilt on the person sought to be extradited and seek, as a matter of first priority, to maintain positive foreign diplomatic relations with the requesting state by honoring requests for extradition.

Nevertheless, such rights that the individual holds have come to occupy international human right status, and are exemplified in leading international human rights treaties and accords⁸¹.

An exemption exists with regard to extradition for offences deemed political in their nature. The UN Model Treaty on Extradition cites political exemption as a mandatory obligation⁸². The discretion to define what amounts to political offence is left to the interpretation of the Requested State⁸³, and in Kenya's case, the Attorney General.⁸⁴

There is a misplaced power granted to the attorney general to define and subsequently exempt extradition on what, to his satisfaction, amounts to a politically motivated extradition request. This power is judicial in nature. The Attorney General is not in a proper position to make fair and objective decisions with due regard to the fugitive's interests. A court of law, preferably the High Court, would be better placed to ascertain the justification for the grounds of the extradition request.

The high court holds original jurisdiction on all matters: including the above; whereas the attorney general holds no such power within his constitutional mandate; equally, the court is an independent, objective and sober adjudicator of such a question as it would not be subject to influences and considerations that an attorney general would.

3.3 (b) principle of dual criminality

Dual criminality may be considered the crux of extradition law, as it is the fundamental grounding of the mutual understanding on the question of the criminality of the conduct in question, and the subsequent agreement by both states to ensure the bringing to justice of persons who commit that offence, whenever such persons are found within the other countries jurisdiction.

Dual criminality often precedes extradition treaties, however some offences are proscribed under concluded multilateral treaties, under which both parties to an extradition treaty are signatories to.

⁸¹ Article 14, International Civil and Political Rights, 1976.

⁸² Sub-article (1), Article 3, Model Treaty on Extradition, 1990, "*If the offence for which extradition is requested is regarded by the requested State as an offence of a political nature.*"

⁸³ Sub-section (1) (a), Section 6, Extradition Act, Cap 11, 1983, the Attorney General holds this interpretational power: "*...if in his opinion, the offence is of a political nature*"

⁸⁴ Section 6 (a), Extradition Act, Cap 77.

Though dual criminality is yet to reach customary law status, it has been argued to be a “creature” of rule and statute⁸⁵ that serves the purposes of expediency and policy goals.⁸⁶

Under the Manual on Extradition Treaties⁸⁷, States ought to implement effective extradition legislation within their national legal frameworks that expedites and promotes the objectives of the extradition treaty.⁸⁸

American law observes the importance of dual criminality⁸⁹ and the Commonwealth Extradition Act equally reflects the same position.⁹⁰

The offence must be recognised to be extraditable by both states under reciprocity or specific reference within the treaty. Thus it is traditionally the case that extradition treaty either:

- 1) list the offences to which the treaty applies (thus the designation ‘list treaty’) or
- 2) create a formula by which the States indicate those offences that are extraditable, i.e., all offences which implicate a term of incarceration of a specified period and/or a fine of a specified amount.⁹¹

The specifics of dual criminality limitations express an individual due for extradition ought to have committed a crime that is criminal and punishable in both countries. A preliminary challenge to this barrier is the reality that the substance of the offence would not ordinarily be exactly similar between two countries. Despite this, the dual criminality principle demands that though there may be a discrepancy in the substance of the offence, the general elements and substance of the offence ought to be the same.⁹²

⁸⁵ Williams, Sharon A. "Double Criminality Rule and Extradition: A Comparative Analysis" *Nova Law Review* 15.2, 1991, 581-624, p 582.

⁸⁶ O'Higgins, "British and Irish Extradition Law and Practice, 1961, (un-published Ph.D. thesis).

⁸⁷ Revised Manual on the Model Treaty on Extradition, (1995).

⁸⁸ Article 2, Revised Manual on the Model Treaty on Extradition, (1995), extraditable offences, p. 10.

⁸⁹ *US v. Saccoccia*, 18 F. 3d 795, 1994, Justice Hall stated: "Dual criminality requires that an accused be extradited only if the alleged criminal conduct is considered criminal under the laws of both the surrendering and requesting nations."

⁹⁰ Sub-section (1), Section 4, Commonwealth Extradition Act, "For the purposes of this Act, an offence is an extradition offence... (b) the act or omission constituting the offence... would constitute an offence against the law of Kenya if it took place in Kenya"

⁹¹ note 1, M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 29, 54(4th ed, Oceana Publications Inc., (2001), p 473.

⁹² *Man-Seok Choe v. Torres*, 525 F.3d 733, (9th Cir. 2008), Justice Alex Kozinski noted the terms of the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Korea dated June 9, 1998, writing, "In determining whether Korea has satisfied the dual criminality requirement, we consider the totality of the conduct alleged."

With respect to the conduct alleged, it ought to be within the entire transaction of the offence in its totality that the offending conduct was captured. The interrogating court shall not limit itself in examining an individual event, act or actor, but the chain of events in their entirety.

3.3. (d) Specialty

The doctrine of specialty states that a person ought only be tried or prosecuted only for the charges leveled against him, and any new offences the prosecution wishes to charge a person ought to be charged afresh.

Article 7 of the extradition treaty aptly provides:-

“A person surrendered can in no case be kept in custody or be brought to trial in the territories of the High Contracting Party to whom the surrender has been made for any other crime or offence, or on account of any other matters, than those for which the extradition shall have taken place, until he has been restored, or has had an opportunity of returning, to the territories of the High Contracting Party by whom he has been surrendered”

This stipulation does not apply to crimes or offences committed after the extradition. The treaty states that persons ought only to be tried or convicted for the offence requested for. There appears to be latent flaw in the above safeguard. Firstly, the treaty does not envision enforcement mechanisms to compel the requesting state to live up to the requirements of Article 7. Article 7 also envisions all associated costs that pertain to the extradition to be borne by the requesting state.

The requested state would not be in a position to enforce this provision, rather it would solely rely on a bona fide interpretation of the rule and good will on its application. Thirdly, there lies an absurdity with regard to the treaty requirement to return a fugitive prior to to be subjected to any other judicial process beyond the subject matter of the original extradition request. This would be subject to several legal obstacles raised by prosecution interests.

3.4 Threshold

It is of importance to establish the threshold used by the court in making a decision to accept an extradition request on the evidence presented. Article 9 of the Extradition Treaty states that extradition ought only take place where “...the evidence be found sufficient, according to the laws of the

3.4 Threshold

It is of importance to establish the threshold used by the court in making a decision to accept an extradition request on the evidence presented. Article 9 of the Extradition Treaty states that extradition ought only take place where "...the evidence be found sufficient, according to the laws of the High Contracting Party applied to..." sufficiency must be determined in line with the doctrine of non inquiry, yet in preservation of the accused's right to the guarantee of a fair trial. Non-inquiry compels a court to desist from any extensive investigation or questioning of the veracity of any foreign courts workings. As customary international law, this doctrine precludes a court from interrogating:

1. the processes by which a requested state secures evidence of probable cause to request extradition
2. whether the fugitive will receive a fair trial in the requested state
3. the fairness of the procedures under which a requested state secured a criminal conviction
4. the potential treatment or punishment a government may impose on the fugitive if returned to that country

The last requirement stands in blatant conflict to the principle of non-refoulment, and runs contrary to other international obligations held by the requested state to not send persons whom they reasonably believe would be exposed to inhumane treatment.

The extradition treaty does allow one peculiar exception to the requirement of non-inquiry. States have the right to refuse to extradite persons to the other Party on grounds of non-permissible extradition grounds.⁹⁴

The Act allows refusal for extradition where the Requested state perceives that the fugitive would be "prejudiced at his trial" Though Lenaola J refuted the any misconception that Kenya's courts would hold any power to question any aspect of a foreign court⁹⁵ the act does envisage instances where Kenya, as the requested state, may challenge and refuse to honor such a request, where it holds a diverging opinion on the legality of the extradition offence in question.⁹⁶

In *Walter Osapiri Barasa v Cabinet Secretary Ministry Of Interior And National Coordination*,⁹⁷ The petitioner was to appear before the ICC on grounds of witness tampering. The sta

⁹⁴ political offences, capital punishment, extradition on grounds of political opinion, race, gender or ethnicity.

⁹⁵ *Walter Barasa v Min of Interior*, 2014, para 74 "As a matter of fact, I dare say that it does not fall within the jurisdiction of a municipal Court to question and put to trial the legal system of another sovereign State."

⁹⁶ *Walter Barasa v Min of Interior*, 2014, para 74.

⁹⁷ *Walter Osapiri Barasa v Cabinet Secretary Ministry Of Interior*, 2014.

tute that the Cabinet Secretary relied on to request the only authority capable of issuing an arrest warrant, the High Court, was impugned by the petitioner, Mr. Barasa, as unconstitutional. Mr. Barasa faulted the constitutionality of the extradition proceedings in the Act for foregoing his right to be informed of the accusations laid against him under Article 47 of the Constitution.

The court held that it was in the state's best interest to observe its international obligations, and to apply ratified international law as domestic law.⁹⁸ In the same vein, the court held that it could only determine a breach of the Constitution where the object and purposes of the Act did not conform to the Constitution.⁹⁹ Any extension beyond this would usurp executive or legislative powers it did not have.¹⁰⁰ The court held that the petitioner failed to prove the unconstitutionality of the provision and, furthermore, it found that the Cabinet Secretary had no obligation to furnish him information pertaining to his pending arrest prior to that arrest.¹⁰¹ The judge held that the rights under Article 49, including the right to be issued with the information pertaining to the case against the accused, only "kick in" upon arrest.¹⁰²

3.5 Torture

Torture is defined under Article 1 on the United Nations Convention against torture¹⁰³, to include the unlawful use of psychological or physical techniques to intentionally inflict severe pain and suffering on another, when such pain or suffering is inflicted by or with the consent of public officials. The freedom from torture is intimately linked to the right to live and be treated with respect and in identification of the persons inherent human dignity, a right readily recognised constitutionally in Kenya.¹⁰⁴ Freedom from torture, in Kenya, is a freedom exercised without any recognised limit.¹⁰⁵

No one can be exposed to torture, which includes being subjected to cruel inhuman or degrading mental or physical treatment.¹⁰⁶ In a recent UK decision, A Basildon councilor of Kenyan origin won an extradition case against him lodged by Kenya in the UK, where the trial court, citing a US

⁹⁸ Walter Barasa v CS Min of Interior, 2014, para 45.

⁹⁹ Walter Barasa v CS Min of Interior, 2014, para 48.

¹⁰⁰ Walter Barasa v CS Min of Interior, 2014, para 62.

¹⁰¹ Walter Barasa v CS Min of Interior, 2014, para 103.

¹⁰² Walter Barasa v CS Min of Interior, 2014, para 103.

¹⁰³ Convention against Torture, and other Cruel, Inhuman and Degrading Treatment or Punishment, 1984.

¹⁰⁴ Article 28, Constitution of Kenya, 2010.

¹⁰⁵ Article 25 (b), Constitution of Kenya, 2010.

¹⁰⁶ Article 29, Constitution of Kenya, 2010.

Department of Justice Report, agreed with his proposition that the prison conditions in Kenya would expose the individual to inhumane living conditions that was tantamount to torture.

In the reverse, Kenya has notoriously disregarded the threat on the life and health of the persons it extradites. According to an Amnesty international report,¹⁰⁷ Kenya has, on the pretext of counter-terrorism, illegally rendered persons back to state's that they knowingly, or had reason to believe, would be subjected to torture. Kenya has been found liable of consistently falling foul of the international customary law doctrine of non-refoulement.

The report clearly shows the defeat of extradition safeguards through the 'widely known' practice of 'extraordinary renditions' made in Kenya to the US in clear violation of international law.¹⁰⁸ Extra-legal rendition is a human rights violation as it transgresses on the person's freedom of movement, right to fair trial and often exposes the persons to torture, inhuman and degrading treatment, arbitrary detention and abuse.¹⁰⁹ extraordinary renditions are illegal, and violate articles 7 and 9 of ICCPR and 6 of the African Charter on Human and Peoples Rights, which Kenya has ratified. The law must actively stamp out this alternative regime of availing persons to other countries outside the extradition regime, as it renders the latter nugatory and wholly undermines the legitimacy of the process.

3.6 Conclusion

The safeguards above were enacted during the reign of the old constitution. In fact the treaty was made during the colonial era. Needless to say, the main focus of contracting states then was to come up with a quick procedure to extradite fugitives without regard to technicalities.

The safeguards do not specifically refer to adherence to any constitutional safeguard. They look good on face value but their effectiveness has been clearly questioned as above. The US-Kenya extradition regime therefore falls short of providing sufficient safeguards as required by the Constitution. The next Chapter discusses the key safeguards enshrined in the Constitution.

¹⁰⁷ Amnesty International Report, AFR 32/010/2008

¹⁰⁸ Amnesty International Report, AI Index: AFR 32/010/2008

¹⁰⁹ Ole Mapelu Zakayo, Rendition and Extradition in Kenya, March 2011, <http://evolutionafrica.com/rendition-and-extradition-in-kenya/>, accessed on 21 February 2016.

CHAPTER 4

Constitutional safeguards

4.1 Introduction

As discussed in the previous chapters, the emphasis of the extradition proceedings, including extradition proceedings under Kenyan law *vis a vis* the US-Kenya Extradition Treaty, there appears a practical emphasis toward a desire to have a person extradited without due regard to his constitutional rights.

Kenyan legislation providing for the surrender of person sought by other countries is almost similar old with a commencement date of 30th December 1968.¹¹¹ These laws were made during the reign of the previous Constitution of Kenya which has been challenged by critics and scholars for not having comprehensive provisions on fundamental rights and menaced by unnecessary claw back clauses.¹¹²

It is not a surprise, therefore, that the safeguards under the Treaty and the applicable law have proved not proved sufficient in protecting the person undergoing extradition, a reality that has far-reaching adverse effects to his fundamental rights. This chapter identifies the rights that the person is entitled to under the Constitution, and argues that the same should be incorporated and adhered to in the extradition process.

4.2 Protections from the police

Arrest

It is of sad note that unlawful arrest, detention and rendition are the norm rather than exception in Kenya. In *Zuhura Suleiman –vs- The Commissioner of Police*,¹¹³ The court noted that the evidence pointed to an unlawful arrest and irregular extradition, where the accused's apprehension and presentation in Uganda less than 24hrs apart could not have possibly allowed for him to seek the ordinary protections of law guaranteed to all persons without exception.¹¹⁴

Article 29 of the Constitution provides that every person shall have the right to freedom and security and shall not be deprived of freedom arbitrarily and without just cause.¹¹⁵ This right to not have

¹¹¹ Extradition Act

¹¹² History of Constitution Making in Kenya, Media Development Association & Konrad Adenauer Foundation, 2012, p 5.

¹¹³ *Zuhura Suleiman –vs- The Commissioner of Police & 2 Others* High Court Misc. Application No. 441 of 2010, eKLR.

¹¹⁴ *Zuhura Suleiman –vs- The Commissioner of Police*, 2010, para 82.

¹¹⁵ Article 29 (a), Constitution of Kenya, 2010.

one's freedom curtailed without a justifiable case ensures that the person sought to be extradited is not subjected to an unlawful arrest or detention without a justifiable cause.¹¹⁶

Any attempted arrest on the person sought to be extradited has to be lawful pursuant to a valid arrest warrant.¹¹⁷ Such an arrest warrant must conform to the standards set out under sections 103 to 109 of the Criminal Procedure Code.¹¹⁸

The person sought to be extradited cannot be subjected to an arrest without a warrant if such an arrest is not allowed on the grounds listed in the Criminal Procedure Code and the Extradition (Commonwealth Countries Act) Act.¹¹⁹ How does the Extradition Act relate to other criminal law? all law rank equal, therefore a test must be conducted to prove which ought to be taken into consideration over the other.

There exist criteria under Kenyan criminal law that dictate the circumstances within which a police officer or a magistrate may make an arrest.¹²⁰ No use of violence is legal in effecting an arrest,¹²¹ save for an amount of restraint necessary to avoid escape.¹²² This means that a person sought to be extradited can impugn an arrest which is contrary to the law or if the arrest is effected by the arrest is conducted by use of unjustifiable force.

The Extradition Act¹²³ grants the magistrate the right to issue an arrest warrant either on receipt of authority to proceed by the Attorney general or upon information that the person sought is or is believed to be in or on his way to Kenya.¹²⁴

Right to bail

Constitutionally, the person sought to be extradited, once arrested, is entitled to be released on bond or bail on reasonable conditions pending a charge or trial.¹²⁵ Despite the right to be granted bail being the subject of judicial discretion, the right to apply for bail is trite law.¹²⁶ The right to bail is

¹¹⁶ Article 29 (b), Constitution of Kenya, 2010.

¹¹⁷ Section 8 (1), Extradition Act, Cap 11, 1983.

¹¹⁸ Cap 75, 2010.

¹¹⁹ Extradition Act, Cap 11, 1983.

¹²⁰ Section 29, Criminal Procedure Code, Cap 75, 2010.

¹²¹ Article 29 (c), Constitution of Kenya, 2010.

¹²² section 24, Criminal Procedure Code, Cap 75, 2010.

¹²³ Extradition Act, Cap 11, 1983.

¹²⁴ Section 8, Extradition Act, Cap 11, 1983.

¹²⁵ Sub-Article (1)(h), Article 49, Constitution of Kenya, 2010.

¹²⁶ David Njoroge Macharia v Republic, [2011], eKLR.

equally recognised under the Act.¹²⁷ Even persons suspected of offences as grievous as terrorism must be accorded the right to apply for bail and, where “compelling circumstances” do not warrant its denial, be granted bail at reasonable standards.¹²⁸

It is worth noting that the right to bail also means that a person should not be subjected to excessive bail.¹²⁹ Reasonable bail is granted in appreciation of the accused’s personal circumstances and the nature and circumstances of his case.¹³⁰ The prevailing consideration by the court ought to be preserving the accused’s right to be presumed innocent yet serving public interest of delivering justice to victims.¹³¹ In *Republic versus Baktash Akasha & 3 others*,¹³² despite the court ruling against the application of American reservations against bail in extradition proceedings in Kenya,¹³³ it did agree with the jurisprudence that bail conditions must be higher for extradition than for other trials.¹³⁴

Bail ought to be granted against the basic principle of ensuring that the accused will attend court and be available at trial.¹³⁵

The court’s must restrict itself to the sober interrogation of the fugitive’s application for bail on the criteria set out in law, *sine* any prevailing factors that may surround his extradition.¹³⁶ Therefore,

¹²⁷ Section 14 (3), Extradition (Commonwealth Countries) Act

¹²⁸ Republic Vs Ahmad Abolfathi Mohammad Sayed Mansour Mousavi Nairobi High Court Criminal Revision No. 373 of 2012 (unreported), Principal Magistrate Paul Biwott observed: “*I have found that the two are not capital offenders and even if they were, the constitution allows them bail,*”

¹²⁹ Section 123, Criminal Procedure Code, Cap 75, [2010].

Where bail is excessive, the person sought to be extradited can make an application for reduction of the bail amount. He can also make an application to be released on his own recognisance. This is however difficult and the person will have to present all the evidence that portrays him in best possible light. In Kenya, cases are yet to be reported where a person sought has been released on their own recognisance in extradition proceedings. It is noteworthy, however, that under the High Court has discretionary power to reduce bail granted by a subordinate court or the police.

¹³⁰ Republic v Taiko Kitende Muinya [2010] eKLR.

¹³¹ Bail and Bond Policy Guidelines, National Council on the Administration of Justice, March 2015, para 1.9, p 6.

¹³² (2015), eKLR.

¹³³ United States vs. Messina, 36 F.2d, 699, (2d Cir. 1929), the Court held that in extradition proceedings the presumption is against bail because of the interest in successfully producing extradited persons. The court therefore observed that bail will only be granted under special circumstances. Similarly in Wright versus Henkel Ltd the Court stated that bail cannot ordinarily be granted in extradition cases. The court however went ahead to state that it is not held that the circuit courts may not in any case and whatever the special circumstances extend the relief.

¹³⁴ Republic versus Baktash Akasha & 3 others, (2015), eKLR.

¹³⁵ Republic v versus Danson Mgunya & Another [2010], eKLR.

¹³⁶ Bail and Bond Policy Guidelines, National Council on the Administration of Justice, March 2015, para 4.26, p 26. Factors that ought to be considered during a bail application include:

- a. that the accused person is likely to fail to attend court proceedings; or
- b. that the accused person is likely to commit, or abet the commission of, a serious offence; or
- c. that the exception to the right to bail stipulated under Section 123a of the criminal Procedure code is applicable in the circumstances; or
- d. that the accused person is likely to endanger the safety of victims, individuals or the public; or
- e. that the accused person is likely to interfere with witnesses or evidence; or
- f. that the accused person is likely to endanger national security; or
- g. that it is in the public interest to detain the accused person in

the court must take care that it does not fall foul of the Constitution through discriminatorily raising the standards for bail, by virtue of the nature of the offence in question.¹³⁷

American jurisprudential commentators had challenged the presumption against bail in extradition proceedings.¹³⁸ and a new jurisprudence in American courts is developing in the courts that is more tolerant and favorable to the grant of bail in extradition proceedings.¹³⁹

With respect to Kenya, Dr. Scholastica Omondi observed that a court, when faced with a bail application, ought to consider the very purpose of the Constitution.¹⁴⁰ According to Omondi, the purpose of the Constitution, derived from the preamble, is the nurturing of the wellbeing of an individual, his family, the community and the country.¹⁴¹ The scholar argues that a court facing such circumstances has to consider the effect of the court's in its constitutional context of fostering the accused person's familial and community interests.¹⁴²

The scholar asserts that, where compelling circumstances warrant the limitation of this right, the prosecution must satisfactorily convince the court of their existence.¹⁴³ In such a scenario, the court needs to conduct a full trial on the single question of bail.¹⁴⁴ In the above investigation, the accused must be granted ample opportunity to answer to the prosecution's case.¹⁴⁵ Only upon the conclusion of such a process could the court make an informed decision on the issue, based on how it has been canvassed by all parties before it.¹⁴⁶

custody.

¹³⁷ Bail and Bond Policy Guidelines, National Council on the Administration of Justice, March 2015, para 2.2, p 7.

¹³⁸ Kelly C. Quinn And Mellisa A. Weinberger, International Extradition And Constitutional Rights: Time For Change, Aba White Collar Crime Committee Newsletter, 2007, Traditional Bail Practices are out of sync with technological advancement (which include (GPS) tracking capabilities, electronic monitoring) and better ability to verify documents such as property deed and passports, that provide more sophisticated means to ensure that individuals cannot flee.

¹³⁹ Kelly C. Quinn & Melissa A. Weinberger, International Extradition and Constitutional Rights, ABA White Collar Newsletter, 2007.

¹⁴⁰ See Dr Scholastic Omondi "Balancing the Constitutional Right to bail and State Security in the Context of Terrorism Threats and Attacks in Kenya", Quest Journals, Journal of Research in Humanities and Social Science Volume 3 ~ Issue 2, (2015), p 23-44.

¹⁴¹ Omondi, Balancing the Constitutional right to Bail, Quest Journals, Journal of Research in Humanities and Social Science, p 37.

¹⁴² Omondi, Balancing the Constitutional right to Bail, Quest Journals, Journal of Research in Humanities and Social Science, p 40.

¹⁴³ Omondi, Balancing the Constitutional right to Bail, Quest Journals, Journal of Research in Humanities and Social Science, p 10.

¹⁴⁴ Omondi, Balancing the Constitutional right to Bail, Quest Journals, Journal of Research in Humanities and Social Science, p 15.

¹⁴⁵ Omondi, Balancing the Constitutional right to Bail, Quest Journals, Journal of Research in Humanities and Social Science, p 13, p 16.

¹⁴⁶ Omondi, Balancing the Constitutional right to Bail, Quest Journals, Journal of Research in Humanities and Social Science, 37.

4.3 Protections during detention

A person who is detained, held in custody or lawfully imprisoned retains all the rights and fundamental freedoms except to the extent that any particular freedom is clearly incompatible with the fact that the person is detained, held in custody or imprisoned.¹⁴⁷

The person sought has a right to freedom from prolonged pre-trial detention.

The mechanisms in place to ensure that the person sought is not subjected to unlawful pre-trial incarceration include:

1. The availability of bail;
2. The requirement that the person sought is released promptly, if he is not taken through the extradition proceedings within the time prescribed under the law.

As discussed above, persons sought hold the right to legal representation during their detention.

The person sought is entitled to the unlimited right to apply for an order of *habeas corpus*.¹⁴⁸ The procedure for the application and grant of this order is set out in section 389 of the Criminal Procedure Code and the accompanying Rules.

Through *habeas corpus*, the High Court may, in the exercise of its supervisory powers¹⁴⁹, order any person illegally or improperly detained in public or private custody be set at liberty.¹⁵⁰ *Paul Mburu Kamau & Another versus Provincial Criminal Investigation Officer, Coast province*¹⁵¹ held that for a *habeas corpus* order to issue, the applicant must show cause and demonstrate that, with respect to his case, any other ordinary remedies are either inapplicable or inadequate.¹⁵²

4.4 Conclusion

The Constitution is sufficient of itself in granting comprehensive safeguards to protect a person subject of extradition proceedings. Some of these safeguards, such as the right to fair trial and the right to *habeas corpus*, are not subject to any limitation.¹⁵³ Considering the safeguards between those provided within the US-Kenya Extradition Treaty and the applicable law in that respect, there exists a clear discrepancy with respect to the protections granted under the Constitution as discussed

¹⁴⁷ Article 51, Constitution of Kenya, 2010.

¹⁴⁸ Article 25, as read together with sub-article (2), Article 51, Constitution of Kenya, 2010.

¹⁴⁹ Sub-Article (6), Article 165, Constitution of Kenya, 2010.

¹⁵⁰ Section 10, Extradition (Commonwealth Countries) Act, Cap 11, 1983.

¹⁵¹ (2006), eKLR.

¹⁵² *Paul Mburu Kamau & Another versus Provincial Criminal Investigation Officer, Coast province*, (2006), eKLR.

¹⁵³ See Article 25, Constitution of Kenya 2010.

above. Such a gap lingers dangerously against the interests and fundamental rights of persons subject to an extradition process. The safeguards within the US-Kenya extradition regime fall short of the constitutional requirements and necessitate urgent and unavoidable reform.

Chapter 5

5.1 Conclusion

The US-Kenya extradition arrangement is archaic and does not reflect the elaborate protections available to the fugitive under the Constitution of Kenya 2010.¹⁵⁴ The above research has highlighted a process created purposefully created towards the sole interest of facilitating the expeditions procurement of fugitives to either face trial or serve sentences, with minimal, if any, interest in the rights of the fugitive. Kenya itself was under a constitutional regime that was wanting in terms of fundamental rights and freedoms. It is for this reason that the safeguards identified in both the Treaty and the Act are incomplete and below observed constitutional standards.

Several countries have amended or repealed their extradition regimes to reflect principles embraced in their new constitutional orders. It is high time that Kenya follows the same path.

Constitutional supremacy isn't an accident of history, rather a conscientious decision by the people of Kenya to limit government's powers with regard to the people, who bequeath that power to the state, and are its beneficiaries.¹⁵⁵ This is exemplified in the court decisions that quash actions that do not meet constitutional standards.¹⁵⁶

5.2 Recommendations

Based on the foregoing the following recommendations are necessary:-

1. Section 12 of the Extradition (Commonwealth Countries) Act should be amended and read that a person should be discharged after the lapse of two months if they are not surrendered as ordered by the court. The onus of requiring an application from the fugitive and notice to the Attorney General should be done away with. This onus is susceptible to manipulation leading to the fugitive being kept in custody for a very long time.
2. Section 9 of the Act should be amended to read that a person once arrested should be arraigned in Court within twenty four hours as stipulated in the Constitution.
3. The extradition process in the Extradition (Commonwealth Countries) Act and the Treaty should have appropriate human rights safeguards and provide appropriate Judicial Review, having regard to Kenyan's obligation under international human rights conventions, in particular, International Covenant for Civil and Political Rights (ICCPR), the Convention

¹⁵⁴History of Constitution Making in Kenya, Media Development Association & Konrad Adenauer Foundation, 2012, p 5.

¹⁵⁵ Paul Muite, 'New law is about the supremacy of the Constitution, not National Assembly', 16 FEBRUARY 2014, <http://www.nation.co.ke/oped/Opinion/New-law-is-about-the-supremacy-of-the-Constitution/-/440808/2208930/-/3u3rhtz/-/index.html>, accessed on 10 November 2015.

¹⁵⁶ Centre for Rights Education and Awareness (CREW) and 7 others V. Attorney General, (2011), eKLR.

Against Torture and Other Cruel or Degrading Treatment, The Convention on the Rights of the Child and the principle of non-refoulement.

4. Kenya should be able to receive extradition requests subject to provisions of sufficient human rights safeguards enshrined in statutory frameworks.
5. Our extradition regime should embrace an appropriate evidentiary standard in relation to extradition requests.
6. All administrative decisions in the extradition process should be reviewable under the fair Administrative Action Act.¹⁵⁷
7. The Extradition (Commonwealth Countries) Act should include a prima facie right to bail.

¹⁵⁷No 4, 2015.

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APPENDICES

Appendix 1

Extradition Law binding on Kenya

- 1. Extradition Treaty between the United States of America and Kenya*
- 2. Agreement between Canada and Kenya Extradition Treaty between Rwanda and Kenya*

Regional instruments.

1. Instruments adopted by the African Union

- 1. African Charter on Human and Peoples' Rights*
- 2. Organization of African Unity Convention on the Prevention and Combating of Terrorism*
- 3. African Union Convention on Preventing and Combating Corruption*
- 4. Protocol to the Organization of African Unity Convention on the Prevention and Combating of Terrorism*

Instruments adopted by the Commonwealth Secretariat

- 1. The London Scheme for Extradition within the Commonwealth*
- 2. Scheme relating to Mutual Assistance in Criminal Matters within the Commonwealth*
- 3. Commonwealth Scheme for the Transfer of Offenders*

International instruments.

1. Universal instruments against terrorism

- 1. Convention on Offences and Certain Other Acts Committed on Board Aircraft*
- 2. Convention for the Suppression of Unlawful Seizure of Aircraft*
- 3. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*
- 4. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents*

5. International Convention against the Taking of Hostages

Convention on the Physical Protection of Nuclear Material

7. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation

8. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation

9. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf

10. Convention on the Marking of Plastic Explosives for the Purpose of Detection

11. International Convention for the Suppression of Terrorist Bombings

12. International Convention for the Suppression of the Financing of Terrorism

13. International Convention for the Suppression of Acts of Nuclear Terrorism

14. Amendment to the Convention on the Physical Protection of Nuclear Material

15. Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

16. Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf

II. Instruments against transnational organized crime, corruption and drugs

1. Single Convention on Narcotic Drugs

2. Convention on Psychotropic Substances

3. United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

4. United Nations Convention against Transnational Organized Crime

5. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

6. Protocol against the Smuggling of Migrants by Land, Sea and Air

7. Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition

8. *United Nations Convention against Corruption*

III. Instruments related to human rights

1. *Convention relating to the Status of Refugees*

2. *International Covenant on Civil and Political Rights*

3. *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*

Appendix 2:

Kenya (Commonwealth Countries) Act, 11 of 1983.

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjnn6Hy-sfKAhWK1hQKHdpyBlSQFggcMAA&url=https%3A%2F%2Fwww.issafrica.org%2Fcdct%2Fmainpages%2Fpdf%2FTerrorism%2FLegislation%2FKenya%2FKenya%2520Extradition%2520Commonwealth%2520Countries%2520Act%2520.pdf&usg=AFQjCNHj4ig6YAdeL83zTLlsRNThST7X3A&sig2=cPwummN4sgE3HMByoU1atw&bvm=bv.112454388.d.ZWU>

Appendix 3: US Kenya Extradition Treaty 1931

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjTzKWj-8fKAhVLtROKHVbrCZkQFggcMAA&url=https%3A%2F%2Finternationalextraditionblog.files.wordpress.com%2F2011%2F03%2Fkenya.pdf&usg=AFQjCNGGQ4DhqFDhyCWbYLhaK0YI9QuGLg&sig2=v1-G82IdQ63EufBqkZL3jQ>

Appendix 4

ANNEXTURE 2

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT
AT NAIROBI
MISCELLANEOUS CRIMINAL APPLICATION



NUMBER 4 OF 2010

REPUBLIC APPLICANT

ANASTACIA OLUOCH RESPONDENT

ORDER

(Pursuant to the provisions of section 5 (1) of the Extradition (contiguous and foreign countries) Act Cap.76 Laws of Kenya).

TO : The Chief Magistrate
 Nairobi Law Courts
 High Court Building
 P. O. Box 30041— 00100
 NAIROBI

WHEREAS a request has been duly made to me Amos Wako Attorney-General of the Republic of Kenya, on behalf of the United States of America for the surrender of Anastacia Oluoch who is accused of the extraditable offences of :-

1. Assault in the second degree
2. Reckless endangerment
3. Abuse or neglect of a vulnerable adult in the second degree and

ANNEXTURE # 5^{1/2}



AUTHENTICATION CERTIFICATE

SAMOS WAKO, ATTORNEY GENERAL of the Republic of Kenya,
do hereby certify that the signature on the warrant of arrest is
that of MRS. G.L. NZIOKA, SENIOR PRINCIPAL MAGISTRATE,
NAIROBI, KENYA and that all documents attested and signed
by her receive full faith and credence in Kenya.

GIVEN under my hand Seal of the Attorney General at NAIROBI
7th day of JULY 2010

SAMOS WAKO, EGH, FCI, Arb., SC, MP
ATTORNEY GENERAL

ANNEXTURE "6"



REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT

AT NAIROBI

MISC. APPLICATION NUMBER 4 OF 2009

REPUBLIC APPLICANT

VERSUS

GUNTER GROCHOWSKI..... RESPONDENT

WARRANT OF SURRENDER AND EXTRADITION

(Pursuant to the provision of section 9 of the Extradition (contiguous and foreign countries) Act Cap.76 Laws of Kenya).

- | | |
|-------------------------------|--------------------------------|
| TO: 1. The Officer In Charge | 2. The Director of Immigration |
| Industrial Area Remand Prison | Ministry of State and |
| P.O. BOX 18364 | Registration of Persons |
| NAIROBI | P.O. Box 30190 - |
| | NAIROBI |

WHEREAS MR. GUNTER GROCHOWSKI Formerly residing in Diani, Ukunda Estate, Kwale District, Coast Province, Kenya is alleged to have committed offences related to the importation of, trading in and possession of narcotic substances and taking part in a criminal organization which offences are punishable under Belgium Laws was delivered into your custody by a warrant dated 19th June 2009 pursuant to the Extradition (contiguous and Foreign Countries) Act Charter 76, Laws of Kenya;

AND WHEREAS the said MR. GUNTER GROCHOWSKI has not been discharged by order of the court and I am satisfied that there is not other provision of the said Act prohibiting his extradition.

AG/CR/2014/5333

16th March, 2010

THE COMPETENT AUTHORITY OF THE
UNITED ARAB EMIRATES

THRO'

UNITED ARAB EMIRATES
DEPARTMENT OF JUSTICE
UNITED EMIRATES EMBASSY
NAIROBI, KENYA

RE: REQUEST FOR ASSISTANCE IN CRIMINAL CASE NUMBER 2486 OF 2009
ACCUSED: JOHN LUBEGA
COMPLAINANT: OLALY CHARLES LWANGA NYAMBUORO
OFFENCE: OBTAINING MONEY BY FALSE PRETENCES
CONTRARY TO SECTION 313 OF THE PENAL CODE.

I present my compliments to the Competent Judicial Authority of the United Arab Emirates and have the honour to request your assistance in obtaining evidence for the purpose of criminal investigation and trial currently underway.

AUTHORITY INITIATING THE REQUEST.

The investigating authority in this case is the Criminal Investigations Department, of the Republic of Kenya which is vested by the Constitution of Kenya with powers to maintain Law and Order, investigate all Criminal matters and arrest criminal offenders.

This request is being submitted by the Attorney-General of Kenya who is the designated by the Constitution as the prosecuting Authority of Kenya. Accordingly the Attorney-General is vested with powers to institute and undertake criminal proceedings before any court of law in Kenya. The Attorney-General is also the Competent Authority for purposes of International Cooperation in criminal matters. He is also the Principal Legal Advisor to the Government of the Republic of Kenya and has powers under section 26 of the Constitution to give, to such an extent as he considers appropriate, advice to the police force in all matters relating to

criminal offences. He is also mandated to request the appropriate authority of any state for assistance in criminal matters. He may seek assistance of the appropriate authority of a foreign country to arrange for evidence to be taken in the foreign country or documents or other articles in the foreign country to be produced for the purposes of criminal proceedings in Kenya.

The Attorney-General has delegated the powers to prosecute to the Director of Public Prosecutions. The office of the Director of Public Prosecutions is seeking assistance touching on a matter that was investigated by the Criminal Investigations Department and is pending before a Court of Kenya and which evidence indicated has connections in the United Arab Emirates.

THE NEED FOR ASSISTANCE

This request for assistance is made in the interests of justice. It will not be used for political, military or fiscal purposes in Kenya.

A BRIEF SYNOPSIS OF THE CASE

On 22nd January, 2010, some fraudsters successfully executed fraudulent transfers of US \$ 800,700 FROM Account number 140082977301 held at CFC Stanbic Bank in Nairobi Kenya in the name of Sinohydro Corporation. Sinohydro Corporation. Sinohydro Corporation is an International Company currently undertaking road construction in Kenya. The beneficiary account of the fraudulent transfer was account number 01-4908279 -01 held at Standard Chartered Bank, Main Branch in Bur Dur, United Arab Emirates (U.A.E) in the name of Ahmednur Mohd Trading.

On the same day, the same fraudsters attempted to make another fraudulent transfer of US \$ 480,000.

The intended beneficiary of this second attempt was H.C.G. Middle East holder account number 4342020001 held at Abu Dhabi Commercial Bank (ADCB), Sharjah branch in the United Arab Emirates (U.A.E.) The latter transaction was however stopped by the C.F.C. Stanbic Bank Management here in Kenya after citing some irregularities in the cash transfer instruction.

The Standard Chartered Bank account in Bur Dubai into which the funds in the first transaction were transferred has since been frozen through the intervention of Interpol but the funds are yet to be returned to the Kenyan bank from where they were withdrawn/transferred.

THE NATURE OF CASE

The actions of the fraudsters of issuing instructions to CFC Stanbic Bank transfer monies from an account not held by them amount to criminal offence to wit:

- i. Fraud
- ii. Forgery
- iii. Stealing

Section 345 of the Penal Code Cap.63 of the Laws of Kenya defines forgery in the following terms.

"Forgery is the making of a false document with intent to defraud or deceive."

Section 347 criminalizes forgery. The said section reads as follows:-
Any person makes a false document who -

- (a) Makes a document purporting to be what in fact it is not; or
- (b) Alters document without authority in such a manner that if the alteration had been authorized it would have altered the effect of the document; or
- (c) Introduces into a document without authority whilst it is being drawn up matter which if it had been authorized would have altered the effect of the document, or

Stealing is defined in section 268 (1) of the Kenyan Penal Code as follows:-

- (i) A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property.

Section 275 which criminalizes theft reads as follows:

"Any person who steals anything capable of being stolen is guilty of the felony termed theft and is liable, unless owing to the circumstances of the theft or the nature of the thing stolen some other punishment is provided, to imprisonment for three years.

ASSITANCE REQUESTED

To enable the criminal investigations and prefer charges as appropriate it is requested that the funds in the sum of US\$ 800,700 which were

fraudulently transferred from CFC Stanbic Bank in Nairobi to standard Chartered Bank Main Branch in Dubai, United Arab Emirates (U. A.E) be returned in the former bank.

BASIS OF THE REQUEST

In the absence of a Mutual Legal Assistance Treaty between Kenya and the United Arab Emirates this request is made in the framework of the United Nations Convention against Transnational Organised Crime.

Article 2 (a) of the said convention defines organized crime as: "Organised Criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;

Article 2 (b) defines "Serious Crime" as shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or more serious penalty;

Article 2 (f) defines "freezing" or seizure as shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority;

Article 2 (g) defines confiscation as Article 13 of the said Convention makes extensive provisions for identification tracing, freezing, seizure and confiscation of proceeds of crime as is the case herein.

DOCUMENTS IN SUPPORT OF THE REQUEST

We enclose the following documents in support of the request, Viz.

1. Letter dated 29th January, 2010 lodging the complaint with the criminal Investigations Department.
2. Letter dated 21st January 2010 forged by the fraudsters addressed to CFC Stanbic Bank for the transfer of US \$ 800,700 to Standard Chartered Bank Main branch in Bur Dubai, U.A.E.
3. Confirmation of the transfer of US\$ 800,700.

4. Letter dated 21st January, 2010 forged by the fraudsters for the transfer of US\$480,000 FROM CFC Stanbic Bank in Kenya to ADCB Bank in the UAE.

THE CRIMINAL CASE

This is a criminal matter namely Criminal Case No. 2489 of 2009 presently before the Chief Magistrate Court, Kibera, Nairobi. The accused person John Lubega has been charged with the offence of obtaining money by false pretences contrary to section 313, of the Laws of Kenya, the same is related to the forged tickets that were in the possession of Olaiy Charles Lwanga Nyambuoro when he was detained in Dubai, U.A.E.

ASSISTANCE REQUIRED

To enable the criminal investigations and the criminal case to be concluded the repatriation of Olaiy Charles Lwanga Nyambuoro to Kenya would be crucial.

RECIPROCITY BETWEEN KENYA AND THE UNITED ARAB EMIRATES

The office of the Attorney-General and the Kenya police will assist the United Arab Emirates in the investigation of any crime by persons within jurisdiction of the Republic of Kenya in the spirit of Mutual Legal Assistance in the suppression of crime.

The Attorney-General of the Republic of Kenya will be grateful for any assistance that the Competent Judicial and Administrative Authorities, of the United Arab Emirates can offer in response to this request as the criminal activity is adverse to the interests of justice in Kenya

UNDERTAKING

We hereby undertake to abide by the terms and conditions of the Governing Legislation in the United Arab Emirates and the Republic of Kenya.

I attach hereto copies of correspondence and other relevant documents pertaining to this matter for your information and reference.

KERIAKO TOBIKO
DIRECTOR OF PUBLIC PROSECUTIONS
FOR: ATTORNEY-GENERAL