

Strathmore University

Law School

PROMOTING FAIR TRIAL RIGHTS: THE VITAL SIGNIFICANCE OF THE SUBSTANTIAL INJUSTICE TEST IN GUARANTEEING EQUITABLE LEGAL ACCESS IN KENYA

Submitted in partial fulfilment of the prerequisites for the Bachelor of Laws Degree,
Strathmore University Law School

By:

Kerama Natasha Nyamoita Marita

134015

Prepared under the supervision of

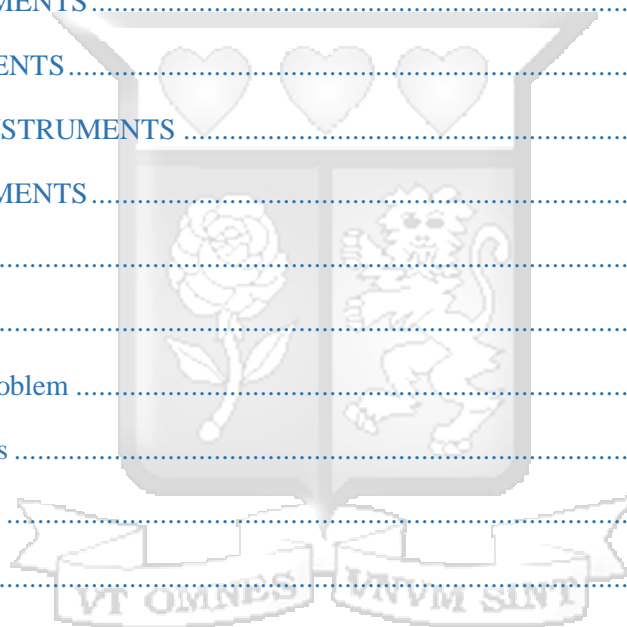
Dr Lynette Osiemo

May 2024

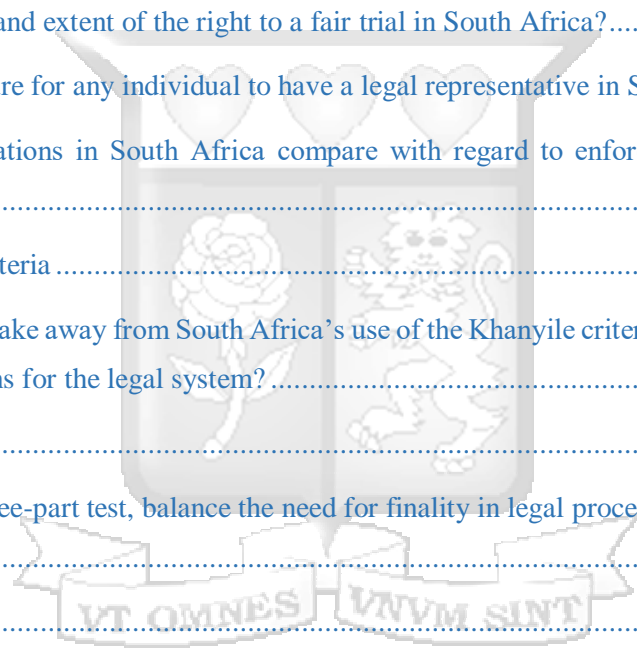
Word Count: 9,969

TABLE OF CONTENTS

ACKNOWLEDGEMENTS	v
DECLARATION	vi
ABSTRACT	vii
LIST OF ABBREVIATIONS.....	viii
LIST OF CASES	ix
DOMESTIC CASES.....	ix
FOREIGN CASES.....	ix
LIST OF LEGAL INSTRUMENTS	x
DOMESTIC INSTRUMENTS	x
FOREIGN INSTRUMENTS	x
INTERNATIONAL INSTRUMENTS	x
REGIONAL INSTRUMENTS	x
CHAPTER ONE.....	1
1.0 INTRODUCTION.....	1
1.1 Statement of Problem	2
1.2 Research Objectives	2
1.3 Research Questions	3
1.4 Hypothesis	3
1.5 Justification.....	3
1.6 Literature Review	4
1.6.1 Providing Effective Legal Representation for Children	4
1.6.2 Theoretical Framework.....	5
A Theory of Justice by John Rawls	5
1.6.2.1 Criticisms	6
Ownership and entitlements	6
Identity and Impartiality.....	7
Ideal justice?.....	7
1.6.2.2 Conclusion	8



1.7 Contribution.....	8
1.8 Methodology.....	8
1.9 Limitations of this study.....	9
1.10 Chapter Breakdown.....	9
CHAPTER 2.....	11
2.1 Unpacking the Legal Character of ‘Substantial Injustice’	11
2.1.1 What then is substantial injustice?	13
2.2 Does the three-part test established address the protection of the right to a fair trial?.....	14
CHAPTER 3.....	15
3.1 What is the nature and extent of the right to a fair trial in South Africa?.....	15
3.1.1 The Legal structure for any individual to have a legal representative in South Africa	15
3.2 How do the regulations in South Africa compare with regard to enforceability of the ‘substantial injustice’ test?.....	20
3.2.1 The Khanyile Criteria	20
3.3 How might Kenya take away from South Africa’s use of the Khanyile criterion (the substantial injustice test) and its implications for the legal system?.....	20
CHAPTER 4.....	22
4.1 How should the three-part test, balance the need for finality in legal proceedings with the preservation of justice?	22
4.1.1 Rule of Law	22
4.1.2 Fairness.....	22
4.2 How might we anticipate the intervention of the State to provide relief for legislators?	23
4.2.1 Legislative Action	23
4.2.2 Collaboration with Legal Advocacy Groups.....	23
CHAPTER 5.....	25
CONCLUSION AND RECOMMENDATIONS.....	25
5.1 FINDINGS OF DISSERTATION	25
5.1.1 What would be the best approach to reconcile the difficulties in enforcement of the ‘substantial injustice’ test?.....	25
5.2 RECOMMENDATIONS.....	26



According to the analysis provided, we can suggest several measures to tackle the complexities and hurdles in guaranteeing access to legal aid based on the concept of substantial injustice:..... 26

5.2.1 Collaborative Approach..... 26

5.2.2 Refinement of Criteria 26

5.2.3 Regular Review and Evaluation 26

5.2.4 Addressing Systemic Issues 26

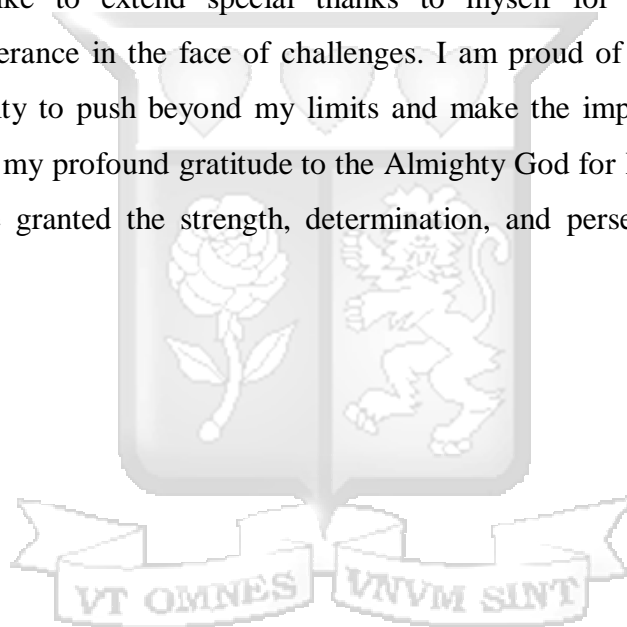
BIBLIOGRAPHY 27



ACKNOWLEDGEMENTS

I am deeply grateful to express my appreciation to a multitude of individuals who have played pivotal roles in my academic journey and the completion of this dissertation. First and foremost, my family; their belief in my abilities has provided me with the strength to navigate through the challenges and setbacks encountered during the research process. To my parents, sibling and extended family members, I am indebted for their constant encouragement and understanding. I am profoundly thankful to my mentors and friends for their insightful feedback. A heartfelt acknowledgement is due to my esteemed supervisor, Dr Lynette Osiemo, whose invaluable mentorship, support and expertise have been instrumental in guiding me through the intricacies of the research process.

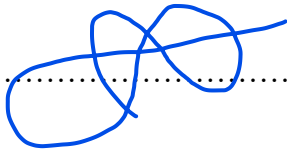
Furthermore, I would like to extend special thanks to myself for demonstrating resilience, determination and perseverance in the face of challenges. I am proud of my accomplishments and grateful for the opportunity to push beyond my limits and make the impossible possible. Last but certainly not least, I offer my profound gratitude to the Almighty God for His divine providence and boundless love that have granted the strength, determination, and perseverance to complete this dissertation.



DECLARATION

I, Kerama Natasha Nyamoita Marita, declare that this research is solely my own work. To the best of my knowledge, it has not been presented, either in full or in part, to any other university for academic recognition. Any external references utilized in this study have been appropriately credited.

Signed:



Date: 30/05/2024

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

Signed:



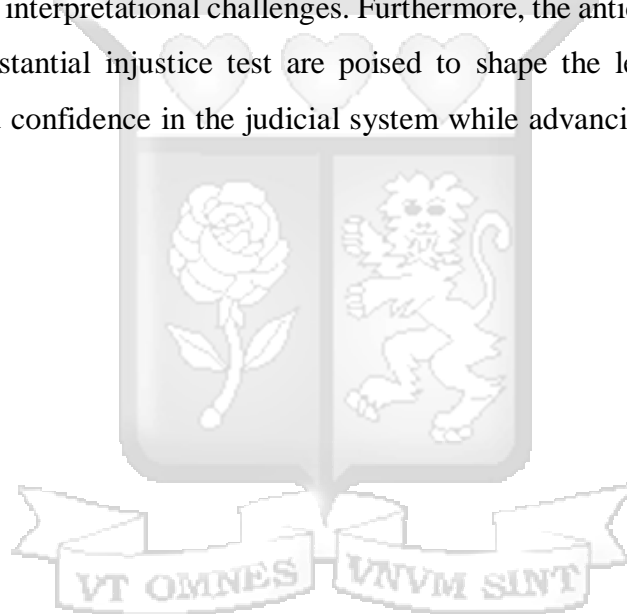
29 May 2024

Dr Lynette Osiemo



ABSTRACT

As societal dynamics evolve, there is a widening interpretation of laws to cater to people's needs. The right to a fair trial is fundamental in modern day legal systems, ensuring fairness, the rule of law, equality and justice. This dissertation explores various aspects of this crucial right, particularly focusing on the concept of "substantial injustice" and its interpretational challenges. This dissertation advocates for a renewed dedication to protect and improve the entitlement to a fair trial by instituting a thorough examination of substantial injustice, with the goal of guaranteeing that justice remains within reach and inclusive for all segments of society. Additionally, this dissertation anticipates the positive impacts of this new substantial injustice test in shaping the legal landscape. This dissertation underscores the importance of the right to a fair trial in contemporary legal systems and highlights the significance of addressing interpretational challenges. Furthermore, the anticipated positive impacts of implementing a new substantial injustice test are poised to shape the legal landscape positively, fostering greater trust and confidence in the judicial system while advancing the cause of justice for generations to come.



LIST OF ABBREVIATIONS

ACHPR__ - African Charter on Human and Peoples' Rights

AfCHPR__ - African Court on Human and Peoples' Rights

CRC__ - Convention on the Rights of the Child

EcmHR__ - European Commission on Human Rights

EctHR__ - European Court on Human Rights

ICCPR__ - International Covenant on Civil and Political Rights

KITUO__ - Kituo Cha Sheria-Legal Advice Centre

KLRC__ - Kenya Law Reform Commission

KNHRC__ - Kenya National Human Rights Commission

UN__ - United Nations

OHCHR__ - United Nations Human Rights Committee



LIST OF CASES

DOMESTIC CASES

David Njoroge Macharia v Republic (2011) eKLR
Dominic Kamau Macharia v Republic (2014) eKLR
Joseph Kiema Philip vs. Republic (2019) eKLR
Joseph Ndungu Kagiri v Republic (2016) eKLR
Moses Gitonga Kimani v Republic (2013) eKLR
Republic v Karisa Chengo & 2 others (2017) eKLR
Thomas Alugha Ndegwa v Republic (2016) eKLR

FOREIGN CASES

Legal Aid Board v Msila and others (1997) (2) BCLR 229 (E)
Mgcina v Regional Magistrate (1997) (2) SACR 711 (W)
Msila v Government of South Africa (1997)
O.F. v Norway (1983) Communication No. 158/1983; UN Doc. CCPR/C/23/D/158/1983
Pett v Greyhound Racing Association (1968) 2 W.L.R. 1471
R v Criminal Cases Review Commission, ex parte Pearson (1999) 3 All ER 498. 23
S v Baloyi and Others (CCT29/99) [1999] ZACC 19; 2000 (1) BCLR 86; 2000 (2) SA 425 (CC)
S v Khanyile and Another 1988 (3) SA 795 (N)
S v Manale (2000) (2) SASV 666 (NK)
S v Mbambo (1999) (2) SA 843 (A)
S v Mbonani (1988) (1) SA 191 (T)
S v Mthwana (1992) 1 SA 343(A))
S v N (1997) 1 SA 242 (SE)
S v Radebe (1988) 1 SA 191 (T)
S v Rudman and Another (1992) SA 294 (A)
S v Vermaas (1995) ZACC 5

LIST OF LEGAL INSTRUMENTS

DOMESTIC INSTRUMENTS

Children's Act, 2022 of Kenya
Constitution of the Republic of Kenya (2010)
Legal Aid Act of Kenya, 2016
Persons with Disabilities Act, 2003 of Kenya

FOREIGN INSTRUMENTS

Act 30 of South Africa Constitution Amendment Act (1977)
Constitution of the Republic of South Africa Act 200 of 1993 (repealed)
Constitution of the Republic of South Africa (1996)
Criminal Procedure Code Act 51 of 1977, South Africa
Fifth Amendment of the United States Constitution (1791)
Fourteenth Amendment of the United States Constitution (1868)
Legal Aid Act of South Africa, 2014
Sixth Amendment of the United States Constitution, It was ratified in 1791 as part of the United States Bill of Rights

INTERNATIONAL INSTRUMENTS

Convention on the Rights of the Child (CRC) (1989)
European Convention on Human Rights (ECHR) (1950)
International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171
United Nations Basic Principles on the Role of Lawyers on the Prevention of Crime and the Treatment of Offenders, 1990

REGIONAL INSTRUMENTS

African Charter on Human and Peoples' Rights (ACHPR)

CHAPTER ONE

1.0 INTRODUCTION

The Constitution of Kenya (2010), is widely recognized as an exemplary framework for democratic governance in Africa.¹ One of the Constitution's key aspects that consistently falls under judicial oversight is its extensive chapter dedicated to the Bill of Rights.² It recognizes and endeavours to safeguard the right to fair trial, including the provision of legal representation.³

Lord Denning in the case of *Pett v Greyhound Racing Association*⁴,

*“It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man: ‘you can ask any questions you like;’ whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?”*⁵

The concept of ‘substantial injustice’ first came up for interpretation in *David Njoroge Macharia v Republic*,⁶ where the court highlighted that the concept of substantial injustice as used in Article 50 (2) (h)⁷ is undefined in the Constitution. In *Dominic Kamau Macharia v R*,⁸ the court explained the criteria for the "substantial injustice" test. Which is: firstly, the case complexity. Secondly, the nature of the

¹ Ghai J C and Ghai Y P, ‘Kenya’s Constitution: An Instrument for Change’, Katiba Institute, 2011.

² Chapter 4, Constitution of Kenya (2010).

³ Article 14, International Covenant on Civil and Political Rights (ICCPR), 24 March 1976, 998 UNTS 3.

⁴ *Pett v Greyhound Racing Association (1968)*, *The Supreme Court of England*.

⁵ *Thomas Alugha Ndegwa v Republic (2016)* eKLR.

⁶ *David Njoroge Macharia v Republic (2011)* eKLR.

While returning home from a pub, David Nguyo, the plaintiff in this case, was accosted and robbed by four individuals. Acting on an anonymous tip, David Njoroge Macharia, the appellant, was apprehended and led authorities to a first where stolen goods belonging to Nguyo were recovered. Subsequently, the appellant was charged with violent robbery, a capital offence. He was convicted and sentenced to death by the Chief Magistrate's Court in Kibera after trial. He then appealed to the High Court and, subsequently, to the Nairobi Court of Appeal. During the appeal, the appellant's advocate argued that the state should have covered the appellant's legal representation costs during the trial. The Court acknowledged that under the new Constitution, the appellant would have been entitled to such a right; however, his trial occurred under the repealed Constitution, which explicitly denied such a right. Therefore, the appellant was not granted any relief.

⁷ Article 50(2) (h), Constitution of Kenya (2010).

⁸ *Dominic Kamau Macharia v Republic (2014)* eKLR.

alleged offence. Lastly, is the accused's capacity to manage his or her own defence. Substantial injustice refers to a significant and serious unfairness that affects an individual's right to a fair legal process. In the context of legal representation, it implies situations where the absence of legal representation would severely prejudice the outcome of a case, particularly for those who lack the means to hire a lawyer.

1.1 Statement of Problem

Substantial injustice violates the principle of equality of arms, which in legal proceedings is a fundamental aspect of the right to a fair trial.⁹ The vast majority are unfairly burdened because they cannot afford legal representation and struggle to demonstrate the complexity and gravity of their case. Article 50 (2) (h) of the Constitution of Kenya,¹⁰ therefore, limits the entitlement to the right to a fair trial by establishing unclear requirements based on the concept of "substantial injustice" as the basis for the state to provide legal representation to its citizens. Similarly, sections 36, 43 and 43 (1A)¹¹ of the Legal Aid Act of Kenya, reiterate the concept of "substantial injustice" and does not attempt to define it. The issues that are going to be tackled in this dissertation are on the manifestation of the right to a fair trial with regard to the concept of substantial injustice and its inconsistency in the law.

1.2 Research Objectives

1. To identify and analyse the effectiveness of the concept of “substantial injustice” in qualifying for the right to a fair trial.
2. To conduct a comparative analysis of the laws governing the enforceability of “substantial injustice” in terms of the right to a fair trial in South Africa with a focus of identifying similarities, differences and emerging trends.
3. To propose recommendations for a comprehensive test on what “substantial injustice” should be taken to mean.

⁹ Fedorova M, ‘The Principle of Equality of Arms in International Criminal Proceedings’, Intersentia, 2012.

¹⁰ Article 50(2) (h), Constitution of Kenya (2010).

¹¹ Section 36(4), Legal Aid Act (2016), Notwithstanding subsections (1), (2) and (3a0, legal aid services will only be provided by the Service if it determines that denying such aid would lead to substantial injustice for the applicant.

Section 43, Legal Aid Act (2016), When an accused person appears before a court without representation, the court shall ensure that substantial injustice is not likely to occur.

Section 43 (1A), Legal Aid Act (2016), When assessing the likelihood of substantial injustice as mentioned in paragraph (1) (b), the court shall consider factors including the seriousness of the charge and the potential sentence, the complexity of the case and the accused's ability to defend themselves.

1.3 Research Questions

1. How does the concept of “substantial injustice” contribute to qualifying for the right to a fair trial and what factors determine its effectiveness in ensuring justice?
2. What are the similarities, differences and emerging trends in the laws governing the enforceability of “substantial injustice” in South Africa concerning the right to a fair trial?
3. What criteria and standards should a comprehensive test employ to determine the meaning of “substantial injustice”?

1.4 Hypothesis

This dissertation hypothesizes that the undefined concept of 'substantial injustice' in Article 50 (2) (h) of the Constitution of Kenya and sections 36,43 and 43 (1A) of the Legal Aid Act undermines the right to a fair trial by creating inconsistency in legal representation entitlements and disproportionately affecting those unable to afford legal counsel.

1.5 Justification

This dissertation aims to address the disparity created by the substantial injustice test. Unlike existing scholarly critiques, this dissertation will delve into why the right is constrained by the substantial injustice test. This dissertation intends to develop a new substantial injustice test that redefines what substantial injustice entails. This revised test for determining eligibility for legal representation will expand beyond conventional considerations such as case complexity, seriousness and the accused's capacity to defend themselves as highlighted earlier. Instead, it will incorporate additional relevant factors, which will be thoroughly explored in this dissertation. The findings of this study will be valuable to decision makers across various capacities, including judges, arbitrators, magistrates, members of the cabinet, government ministries, departments, agencies, citizens, institutions and stakeholder groups such as governmental organizations and non-governmental organizations involved in funding legal aid schemes.

1.6 Literature Review

1.6.1 Providing Effective Legal Representation for Children

Noel Zaal¹² and Ann Skelton¹³ argue that the criteria for substantial injustice should be taken to apply to the rights of children as vulnerable persons in the society.¹⁴ The Constitution of South Africa provides for a clearer protection mechanism. Section 28 (1) (h) of the Constitution of South Africa.¹⁵ establishes the right for a child to have a legal representative appointed by the state and at the state's cost in civil proceedings involving the child. Similarly, Section 35(3) (g)¹⁶ allows for all accused persons, including children, to have a legal representative appointed for them by the state and at the state's expense in criminal cases. In contrast, the right to a fair trial as outlined in the Kenyan Constitution is comparatively limited in its scope and hinges on a somewhat ambiguous criterion, the 'substantial injustice' test which may pose challenges in practical application.

Madalyn Wasilczuk explores why Kenyan children are entitled to legal representation. She underscores the significance of viewing children as a minority group requiring the right to a fair trial through state-funded legal representation. She discusses the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC), which recognise children as individuals entitled to the same rights as adults, including the right to a fair trial.¹⁷ Furthermore, the ICCPR specifies that the right to a fair trial encompasses legal representation provided at no cost to the accused.¹⁸ Given that children generally have apprehension of the legal system compared to adults, the importance of legal assistance for them cannot be overstated.¹⁹ In their book, Marsha Levick and Neha Desafi²⁰ discuss the importance of juveniles receiving legal counsel to navigate legal complexities, conduct thorough investigations into facts, ensure the proceedings'

¹² Biography: Professor Frederick Noel Zaal has a special interest in the role that courts play in protecting children, as well as child care and protection legislation.

¹³ Skeleton A and Zaal N, 'Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children's Courts. South African Journal on Human Rights', 1998, 539-559.

¹⁴ Section 222(2), Children's Act of Kenya (2022).

¹⁵ Section 28 (1) (h), South Africa Constitution (1996).

¹⁶ Section 35 (3) (g), South Africa Constitution (1996).

¹⁷ Article 37, 40 of the Convention on the Rights of the Child (CRC) adopted on 20 November 1989 and entered into force in September 1990.

¹⁸ International Covenant on Civil and Political Rights was adopted and made available for signature, ratification and accession through General Assembly resolution 2200A (XXI) on 16 December 1966, entry into force 23 March 1976. <<https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/ccpr.pdf>>.

¹⁹ Berkheiser M, 'The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts', 2002, 65.

²⁰ Neha Desai oversees the National Centre for Youth Law's work on behalf of undocumented children, including federal litigation and policy, in her capacity as Senior Director of Immigration. Neha's group strives to provide immigrant children the tools and chances they require to recover and flourish, enabling them to live in communities as opposed to being detained by the government.

regularity and determine if they have a defence prepared.²¹ Article 7 of the UN Basic Principles on the Role of Lawyers on the Prevention of Crime and the Treatment of Offenders mandates that governments guarantee prompt access to a lawyer for all individuals arrested or detained, regardless of criminal charges, within 48 hours of arrest or detention.²²

Despite these assurances, children often navigate the court system without legal representation due to the limited funds of legal aid programs. Legal representation should not be perceived as charity, where non-governmental organizations, law firms, and other entities band together to assist the less fortunate in accessing justice. Instead, legal representation should be responsibility of the state.²³

1.6.2 Theoretical Framework

The theoretical framework of this dissertation demonstrates how the Rawlsian theory shapes this study and highlights the significance of the idea of a fair trial.

A Theory of Justice by John Rawls

In John Rawls' book, 'A Theory of Justice',²⁴ he describes a fair society as one that organises its institutions, norms and laws so as to achieve the greatest good for the greatest number of people.²⁵ Rawls intuitively recognized that societies fail to become fairer because the individuals who benefit from existing injustices are not compelled to consider what it would have been like to be born into different circumstances. To address this, he devised one of the greatest thought experiments in political philosophy, which he called the 'veil of ignorance'. John Rawls described the veil of ignorance as a hypothetical scenario where individuals making decisions about societal arrangements are unaware of their own characteristics. Rawls suggested that behind this veil, people would select principles that maximize the well-being of the least advantaged, promoting a more equitable society.

According to Rawls, the debate within the veil of ignorance should yield two principles. The first principle asserts that each individual has an alienable right to a complete set of equal fundamental liberties, which must be compatible with the same rights for others. The second principle, known as

²¹Desai M and Levick N, Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel At all Stages of the Juvenile Court Process, 2007, 175.

²² Article 7, United Nations Basic Principles on the Role of Lawyers on the Prevention of Crime and the Treatment of Offenders.

²³ Legal representation being a state's responsibility ensures equitable access to justice and safeguards individuals' rights within the legal system.

²⁴ Rawls J, A Theory of Justice, Original Edition, India, Harvard University Press, 1971, 116.

²⁵ Daniels N, Reading Rawls: Critical studies on Rawls' 'A theory of justice', Vol. 229, Stanford University Press, 1989, 57.

the Difference Principle addresses social and economic inequalities. These disparities should be tied to positions and roles open to everyone under conditions of fair equality of opportunity, or they should benefit the least advantaged members of society the most.²⁶

Because Rawls believes it is crucial for people to view one another as equals in society, he includes equality of basic liberty in the first principle. Higher compensation, for instance, may attract the most diligent individuals to certain positions, increasing economic benefits for everyone. The difference principle further restrains inequalities by requiring that any inequality must benefit the most disadvantaged people, even if it does not directly affect equality of opportunity. For example, allowing inequality might encourage people to work harder. The difference principle permits such inequalities if they help the most disadvantaged members of society.²⁷

1.6.2.1 Criticisms

Like any significant philosopher, John Rawls has generated a great deal of debate and criticism.

Ownership and entitlements

Rawls makes several explicit assumptions that influence the nature of the discussion behind the veil of ignorance and the likely outcomes. However, these assumptions can be contested regarding their fairness. One of the most notable challenges to Rawls' assumptions comes from Robert Nozick.²⁸ Nozick observes that, in actuality, most products are already owned.²⁹ Rawls' theory creates a reasonable pattern, nevertheless, Nozick contends that how certain assets came to be possessed must be considered. In certain circumstances, it may be discovered that the individual who owns the products worked for them. In other circumstances, the individual inherited the items from an ancestor who worked for them. In both circumstances, these items cannot be redistributed to match our pattern as individuals.³⁰

Nozick believes that once ownership rights have been acquired, the owner can do nearly anything they want with them, as long as they do not infringe on anyone else's rights. According to Nozick, you own

²⁶ Davies B, 'John Rawls and the Veil of Ignorance', 2022.

²⁷ Rawls J, A Theory of Justice, Original Edition, India, Harvard University Press, 1971.

²⁸ Nozick R, Anarchy, State and Utopia, New York: Basic Books, 1974, 91.

²⁹ Dr Pandey N and Dr Jaiswal M, 'A Comparative Study of Theory of Justice: In Reference To Rawls and Nozick', Journal of Positive School Psychology, Vol. 6, 2022, 8-12 < <http://journalppw.com> >.

³⁰ Dr Pandey N and Dr Jaiswal M, 'A Comparative Study of Theory of Justice: In Reference To Rawls and Nozick', Journal of Positive School Psychology, Vol. 6, 2022, 8-12 < <http://journalppw.com> >.

anything you produce or earn. However, a flaw in this reasoning is that one's capacity to work and hence acquire property) depends on various factors, including education, health (often guaranteed by a public health system), and a stable society that provides employment opportunities. It is not true that an individual generates everything on their own.

Identity and Impartiality

This criticism addresses the issue behind the veil of ignorance whereby various facts are hidden from individuals. Instead of focusing on the substantive conclusions Rawls reaches, as Nozick does, this criticism questions the very coherence of reasoned discussion behind the veil of ignorance.³¹ People behind the veil of ignorance are supposed to come up with a view of how society should be structured while knowing almost nothing about themselves and their lives.³² Communitarians³³ also suggest that Rawls' conception of the individuals behind the veil of ignorance is problematic because they have very few defining features. Communitarians critique Rawls' theory for neglecting the importance of community and tradition in shaping individuals' identities and conceptions of justice. They argue that justice cannot be separated from the communal context and that Rawls' focus on individual rights and fairness neglects the essential communal bonds and obligations necessary for a thriving society. Instead, communitarians advocate for a more holistic approach to justice that incorporates the values, traditions and shared goals of communities, rather than relying on abstract principles from a hypothetical scenario.

Ideal justice?

Rawls sought to delineate a theory of "ideal" justice, envisioning what a perfectly fair society would resemble. This deliberate focus sidesteps the numerous injustices. Critics contend that this approach yield, at best, an incomplete theory, lacking guidance on rectifying existing injustices referred to as "non-ideal" justice, a matter Rawls acknowledges as pressing and urgent.³⁴

³¹ Dr Pandey N and Dr Jaiswal M, 'A Comparative Study of Theory of Justice: In Reference To Rawls and Nozick', Journal of Positive School Psychology, Vol. 6, 2022, 8-12 < <http://journalppw.com> >.

³² Rawls J, A Theory of Justice, Original Edition, India, Harvard University Press, 1971, 120.

³³ Communitarians are political theorists that believe that community values and traditions have a significant impact on society They contend that people are intimately immersed in their communities and that these surroundings impact their identities, values and opportunities

³⁴ Dr Pandey N and Dr Jaiswal M, 'A Comparative Study of Theory of Justice: In Reference To Rawls and Nozick', Journal of Positive School Psychology, Vol. 6, 2022, 8-12 < <http://journalppw.com> >.

1.6.2.2 Conclusion

The Rawlsian Theory of Justice, grounded in principles of fairness and equality, provides a valuable lens through which to examine the right to a fair trial. According to John Rawls, justice entails the fair treatment of individuals within society, ensuring that they have an equal opportunity to access basic liberties and that inequalities exist only if they benefit the least advantaged. When applied to the right to a fair trial, the Rawlsian framework emphasizes the importance of impartiality. While the concept of substantial injustice aims to capture instances where fundamental rights are violated or where legal proceedings are grossly unfair, its subjective nature presents limitations. Therefore, while the Rawlsian theory provides a robust framework for understanding justice, addressing the limitations of concepts like substantial injustice remains essential for guaranteeing the efficient entitlement of the right to a fair trial.

1.7 Contribution

This dissertation will be unique in so far as creating a new substantial injustice test that will ensure that justice is accessible to the vast majority. This test will broaden the spectrum of age, capacity and legal knowledge forming an umbrella for all who will require legal representation.

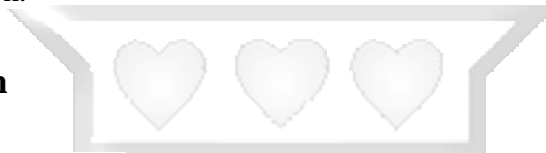
1.8 Methodology

Doctrinal research is the basis of this study. The research will utilise data from secondary and primary sources. Legislation, case law, policy papers and studies from several reputable organizations that have investigated the right to a fair trial and "substantial injustice" and the "substantial injustice" test, are the primary sources of information. This dissertation will also rely on a comparative analysis between South Africa and Kenya. The conclusions drawn from each section of the analysis will help in drawing lessons that Kenya can learn and that will help more people access justice through the substantial injustice test. Doctrinal research forms the foundation for legal arguments, helping to support or challenge legal positions based on established legal principles. However, doctrinal research focuses solely on legal texts and fail to consider broader social, economic and cultural contexts that influence legal outcomes. Moreover, comparative analysis between South Africa and Kenya. Comparing South Africa and Kenya constitutionally highlights the contrast between South Africa's progressive and inclusive post-apartheid constitution and Kenya's more recent constitution aimed at addressing ethnic tensions and promoting devolution of power.

1.9 Limitations of this study

Firstly, it took a lot of time and resources to carry out doctrinal research, especially because it entails in-depth textual analysis. This made it more difficult to perform extensive research. Secondly, subjectivity; because this interpretive paper depends on my interpretation of the concept of substantial injustice. Diverse researchers may get varying conclusions due to personal prejudices, experiences and viewpoints. However, interpretative papers, in spite of these drawbacks, may offer insightful analysis of intricate events and advance our knowledge of society, culture and behaviour in people. To enhance the validity and dependability of the findings, openness and honesty were maintained regarding the limitations of the interpretation.

1.10 Chapter Breakdown



This dissertation has six main chapters:

Chapter One, presents the subject of the research and the details of the study. It gives an overview of the topic, the research questions and objectives and sets the foundation of the subsequent chapters. It also presents the theoretical framework of this dissertation. The Rawlsian Theory of Justice, developed by John Rawls, posits that justice is best understood through principles of fairness and equality.

Chapter Two, critically examines the applicable laws governing the right to a fair trial, more so, those that have used the concept substantial injustice and interest of justice which will be explained. This chapter focuses on the international view through international statutes, conventions and treaties that Kenya has ratified, with the aim of decrypting the meaning of the substantial injustice.

Chapter Three, studies the situational analysis of Kenya and South Africa. It examines the substance, interpretation and enforceability of substantial injustice and the substantial injustice test in South Africa. This chapter concludes by picking up lessons that Kenya can learn from the application of the substantial injustice test in South Africa.

Chapter Four, analyses the role the concept of substantial injustice, plays in creating a road map for people to access justice. Moreover, how the state can come in to assist in coming up with improvements to relieve the legislators from issues pertaining to the vagueness of the concept of substantial injustice, and the substantial injustice test. In addition to that, how the lacuna that the concept of substantial

injustice creates, can be filled and to establish distinctively what circumstances do natural persons or legal persons qualify for legal representation.

Chapter Five, recaps the general findings of this study and proposes the way forward to address the issues that have been highlighted throughout the study.



CHAPTER 2

2.1 Unpacking the Legal Character of ‘Substantial Injustice’

This chapter will tackle what substantial injustice has been taken to mean. In the case of *O.F. v Norway*,³⁵ the correspondence detailed a situation in which O.F, a citizen of Norway, alleged that Norway violated Article 14, paragraphs 3(a), (b), (d) and (e) of the ICCPR.³⁶ O.F. claimed that during court processes pertaining to a traffic infraction and a failure to provide information regarding a business entity, his right to obtain and interrogate witnesses, be aided by legal counsel and effectively prepare his case were not honoured. The court held that in a case where the accused is charged with a minor offence whose punishment is a fine, the accused does not require state funded legal representation. In the Guidelines on Fair Trial and Legal Assistance, the African Commission on Human and Peoples’ Rights delineates several pivotal factors to be weighed in determining “interest of justice”. Among these considerations are the seriousness of the offence, the severity of the sentence and whether or not the offence is a capital offence.³⁷

The Constitution of Kenya (2010) has explicitly guarantees the right to a fair trial, which includes the provision that if substantial injustice would occur, the accused is entitled to have an advocate appointed by the state at the state’s expense. Additionally, the accused must be informed promptly of this right.³⁸ This provision is therefore in accordance with the state’s obligation under Article 14(3) (d) of ICCPR³⁹ and Article 7(1) (c) of the ACHPR,⁴⁰ and its execution will bring the State in compliance with its international and regional obligations. The international statutes that Kenya is a signatory to,⁴¹ employs the term ‘interest of justice’ while the Constitution of Kenya (2010) refers to it as ‘substantial injustice,’ which remains undefined. Interest of justice is defined by the Kenya Law Reform Commission.⁴²

³⁵ *O.F. v Norway (1983)*.

³⁶ In the adjudication of any criminal accusation against an individual, everyone shall have the following fundamental guarantees, on an equal basis: To have sufficient time and resources for preparing their defence and to communicate with legal counsel of their own section.

³⁷ Union A, ‘Principles and guidelines on the right to a fair trial and legal assistance in Africa’, 2019.

³⁸ Article 50 (2) (h), Constitution of Kenya (2010).

³⁹ Article 14 (d), International Covenant on Civil and Political Rights (1972).

⁴⁰ Article 7(1) (c), African Charter on Human and Peoples’ Rights (1981).

⁴¹ Article 2(6), Constitution of Kenya (2010).

Kenya is a signatory to several international treaty bodies across various domains.

⁴² The Kenya Law Reform Commission defines the interests of justice as safeguarding the investigation and prosecution process from potential obstruction by those who are charged. This definition is found in Article 3. Therefore, it is critical that law enforcement and judges understand that the public is interested in seeing that crimes are effectively prosecuted.

In *David Njoroge Macharia v Republic*,⁴³ the Court held that in specific circumstances, state-funded representation is a right. In *Moses Gitonga Kimani v Republic*,⁴⁴ the court acknowledged that the Constitution mandates Parliament to enact legislation within four years of its promulgation to ensure the accused's right to a fair trial as stipulated in, the Constitution.⁴⁵ The Legal Aid Act was enacted in 2016⁴⁶ but it did not shed light on the vague concept of substantial injustice. The Legal Aid Act also reiterated the concept of substantial injustice without defining it, in sections 36 (4) (k), 43 (1) (b) and in 43 (1A).⁴⁷

Section 43 (1A) of the Legal Aid Act states that, in determining whether substantial injustice is likely to occur, the court shall take into consideration, the severity of the charge and sentence, the complexity of the case and the capacity of the accused to defend themselves. Similarly, in the case of *Dominic Kamau v Republic*⁴⁸, the judge set out the same criteria. Both the Act and the case did not go in depth into what the concept means, the levels and the severity factor. This raises important questions which need to be answered for the criteria to be clear. For instance, which cases are severe? What elements make a case complex? Who should investigate whether or not the accused qualifies for the substantial injustice test? It may be hard for the judge to prove the test in its entirety for all the accused persons that come to court because of time constraints. The Legal Aid Act establishes other requirements for substantial injustice, they include: the case needs to be sufficiently important, have a realistic probability of success and there must be enough funds available in National Legal Aid Scheme to facilitate it. This expands the three-part test to a six-part test. When deciding whether to offer legal representation, consideration should be given to whether the case is of wide public interest or if it would be particularly challenging for the applicant to handle without legal representation.⁴⁹

The substantial injustice criteria established by the Legal Aid Act that forms a six-part test as highlighted above and the three-part test discussed in this dissertation in *Dominic Kamau v Republic*, are excessive, considering denial of legal aid will inevitably lead to “substantial injustice” for the applicant. Why are two tests running concurrently to establish whether or not the accused is eligible to get a legal representative? Who needs to prove this test, is it the magistrate, judge or the legal

⁴³ *David Njoroge Macharia v Republic* (2011) eKLR.

⁴⁴ *Moses Gitonga Kimani v Republic* (2013) eKLR.

⁴⁵ Article 50, Constitution of Kenya (2010).

⁴⁶ Legal Aid Act (2016).

⁴⁷ Section 36 (4) (k), 43 (1) (b) and 43 (1A), Legal Aid Act (2016).

⁴⁸ *Dominic Kamau Macharia v Republic* (2014) eKLR.

⁴⁹ Section 36 (4), Legal Aid Act (2016).

practitioners in the facilities that offer legal representation to indigent persons?⁵⁰ Does substantial injustice apply to companies, trusts and associations? This is not to say that institutions for example Kenya Power do not require legal aid; but what about community- based organizations or Chamas?⁵¹ Large organizations like Kenya Power are frequently able to manage legal concerns internally because they have in-house legal teams or access to a wealth of legal resources. Furthermore, they might have some protection from legal risks and responsibilities due to their size and resources.

However, community-based organizations frequently lack the funding and legal knowledge necessary to successfully handle complicated legal matters. They might have legal difficulties with contracts, governance, compliance and conflicts, but they don't have the internal resources to deal with them effectively. As a result, they often rely on external legal representation to ensure their interests are protected and to navigate legal proceedings with expertise and diligence.

2.1.1 What then is substantial injustice?

It can be taken to mean an act which is 'considerably' unjust. Considerably, because a lot of thought must go into it to establish the unjust nature of the offence. The substantiality of the injustice depends on the weight of the offence for instance, in *David Njoroge Macharia v Republic*⁵², the learned judge concluded that because of the severity of the death sentence, the accused fulfilled the criteria for the substantial injustice test.⁵³

Section 38 of the Persons with Disabilities Act No. 14 of 2003,⁵⁴ highlights the entitlement of individuals with disabilities to receive complimentary legal assistance concerning issues related to the infringement of their rights, deprivation of property, cases involving capital punishment and other matters as determined by regulations set forth by the Attorney General. However, in Kenya, the criminal justice system operates differently for those with mental illnesses than for those without. When the accused has a mental disorder, the rules are not enforced in the same way.⁵⁵ Individuals are typically compelled to represent themselves because they cannot afford legal representation. At that point, their weakness becomes more apparent and their position more difficult.

⁵⁰ Section 5 of the Legal Aid Act 2016 institutes the National Legal Aid Service, tasked with the aim of furnishing legal aid services to financially disadvantaged, marginalized and vulnerable individuals.

⁵¹ A 'Chama' is a small-scale saving association where groups of Kenyans use to collectively gather funds. "Chama," in specific ethnic communities like the Gikuyu, translates to group or body in Kiswahili. Odhiambo F, 'How Chama's in Kenya Fight Poverty', 2021.

⁵² *David Njoroge Macharia v Republic (2011) eKLR*.

⁵³ *David Njoroge Macharia v Republic (2011) eKLR, para 50*.

⁵⁴ Section 38, Persons with Disabilities Act (2003).

⁵⁵ Juma P, 'Right to self-representation for people with mental disabilities in Kenya's courts', African Disability Rights Yearbook, 2019, 81-95.

2.2 Does the three-part test established address the protection of the right to a fair trial?

In addition to the right to a fair trial afforded to the accused by Article 50(2) (h) of the Constitution,⁵⁶ there is now in operation an elaborate legal aid scheme.⁵⁷ In considering the aforementioned principles, the principle of due process and fair trial in the Rawlsian theory, it is evident that courts should take into account a number of relevant additional factors when assessing whether or not substantial injustice will occur.⁵⁸ It is not clear how the three-part test is supposed to be interpreted. Are these factors determined conjunctively or separately? If the accused fulfils one criteria, do they qualify for legal representation? The three-part test which was elevated to the six-part test by the Legal Aid Act of Kenya.⁵⁹ This creates more confusion and a dilemma. There needs to be a clear criteria for who qualifies for this right because the terms used, for example, seriousness, severity and complexity have been used in a vague manner.

In conclusion, Kenya's legal framework, as outlined in the Constitution of Kenya (2010) and further elaborated in judicial decisions and legislation such as the Legal Aid Act, underscores the nation's commitment to uphold the right to a fair trial. However, the interpretation and application of the concept of substantial injustice remains ambiguous, raising concerns about its consistent application and its effectiveness in safeguarding the right to a fair trial.

Moving forward, there is a pressing need for clarity and guidance on key aspects of the substantial injustice test, including defining severity in legal charges, determining the complexity of cases and establishing a criteria for assessing the accused's capacity to defend themselves. Without clear parameters, there is a risk of inconsistent application and potential injustices within the legal system. Therefore, addressing these issues is paramount to ensuring the effective realization of the right to a fair trial, thereby fostering trust, equity and fairness within the justice system.

⁵⁶ Article 50(2) (h), Constitution of Kenya (2010).

⁵⁷ Section 5 of the Legal Aid Act, 2016 establishes the National Legal Aid Service that implements the National Legal Aid Scheme.

⁵⁸ *Republic v Karisa Chengo & 2 others (2017) eKLR*. Additionally, Lord Kerr of the United Kingdom Supreme Court eloquently put it, the only type of justice that litigants are entitled to is justice according to law rather than utopian concept of justice. The Constitution is not focused on all forms of injustice. Rather, it is only concerned about substantial injustice.

⁵⁹ Section 36 (4), Legal Aid Act (2016).

CHAPTER 3

3.1 What is the nature and extent of the right to a fair trial in South Africa?

This chapter will compare and contrast the legislation in South Africa and Kenya that govern the application of the notion of significant injustice, emphasizing the parallels, discrepancies, and new developments. In this endeavour, South Africa faces obstacles like an incredibly high crime rate, racial tensions, and inequality brought about by years of apartheid, in addition to restricted funding and a shortage of legal counsel.⁶⁰

South Africa was chosen because, firstly, both countries share certain historical legacies, such as colonialism and struggles for independence, yet they took distinct political, social and economic trajectories. Secondly, the Constitutional provision on the right to a fair trial in South Africa is similar to Kenya's, whereby the clause under the right to a fair trial also includes the concept of 'substantial injustice'.⁶¹ For that reason, it would be interesting to see how South Africa has interpreted it. Finally, it would be educationally beneficial to explore how the legal structure governing the entitlement of the right to a fair trial, its efficacy and potential lessons for Kenya to enhance and address legal deficiencies.

3.1.1 The Legal structure for any individual to have a legal representative in South Africa

The legal foundation for publicly funded criminal defence representation in South Africa has been affirmed through statutory law, scholarly discourse and the pronouncements of select jurists, grounded in fundamental rights and societal values.⁶² The legal foundation rests primarily on two established legal principles: the principle of equality under the law⁶³ and the right to a fair trial.⁶⁴ The Constitution Amendment Act of South Africa (1977)⁶⁵ provided that an accused is entitled to legal representation during criminal proceedings, provided such representation is not prohibited by law from appearing at the relevant proceedings.

⁶⁰ Ogletree C J, 'The Challenge of Providing "Legal Representation" in the United States, South Africa and China', 2001, 47.

⁶¹ Section 35 (3) (g), South Africa Constitution (1996).

⁶² Chapter 2, Constitution of South Africa (1996).

⁶³ Section 9, Constitution of South Africa (1996). The principle of equality ensures that individuals are treated impartially and fairly before the law.

⁶⁴ Section 35 (3), Constitution of South Africa (1996).

⁶⁵ Act 30 of Constitution Amendment Act of South Africa (1977).

The case of *S v Baloyi*⁶⁶ effectively demonstrates the prevailing notion that judicial officers lack the authority to hinder the exercise of the right to a fair trial and are instead obligated to ensure its facilitation. The accused sought additional time to secure legal representation, which the lower court approved. However, upon the lower court's refusal of this request, the judge evaluated whether there were any grounds to reverse the sentence. According to the reviewing judge, there is no basis for overturning a sentence in cases when the accused does not want legal representation and there is no court order preventing them from doing so. The accused's access to a legal representative is contingent upon two conditions: Firstly, the accused must be aware that they have the right to ask for legal assistance. Secondly, the accused must be able to pay for it.

A number of rulings over the ten years preceding the 1997 South African provisional Constitution's adoption revealed a trend toward the inclusion of affirmative aspects in the right to a fair trial. This suggests that, rather than just taking a passive approach, there was an increasing tendency among court decisions to actively support and defend the values and procedures guaranteeing a fair trial.⁶⁷ In 1988, in *S v Radebe*⁶⁸ and *S v Mbonani*,⁶⁹ the verdicts and sentencing of two defendants who were found guilty without being advised of their right to get legal counsel was overturned by the Transvaal Provincial Division. The defendant, Radebe, a first-time offender aged nineteen, was convicted of car theft and sentenced to four years imprisonment. He was not informed of his right to a fair trial. At the conclusion of presenting his case and evidence, the magistrate asked if he had any further remarks. It was then that the defendant requested, citing its belated nature and the defendant's prior opportunity to secure representation during the proceedings.⁷⁰

The appellate court judge recognized the second defendant, Mbonani, as a member of the group of young people (his exact age was not disclosed) who were accused of hurling stones at cars and pedestrians.⁷¹ The magistrate asked him if he planned to retain legal representation at the start of his trial. Mbonani couldn't understand the question. Nevertheless, the magistrate inquired of the defendant if he wanted to handle his own defence without making an effort to explain the question. Mbonani gave a favourable response. After being found guilty of public violence, he received a 10-year prison

⁶⁶ *S v Baloyi and Others* (1999).

⁶⁷ South African Constitution Act 200 of 1993 (repealed).

⁶⁸ *S v Radebe* (1988).

⁶⁹ *S v Mbonani* (1988).

⁷⁰ *S v Radebe* (1988).

⁷¹ *S v Mbonani* (1988).

sentence.⁷² In his opinion, Judge Goldstone praised the magistrate in Mbonani's case for raising the issue of legal aid. However, he criticised him for being overly confident that the defendant was willing to proceed without it, despite the defendant's evident confusion.⁷³

Judge Goldstone went on to explain that an accused person should be advised that they might be eligible for legal aid from the Legal Aid Board,⁷⁴ given enough time to engage legal counsel, and encouraged to exercise their right to counsel. The court ultimately came to the conclusion that, given the specifics of each case, the judicial officer's failure to take these steps could lead to an unfair trial and a total miscarriage of justice.⁷⁵ Judge Goldstone highlighted that the accusations in the two instances before him were severe and that there were some pretty significant evidential issues that the defendants had not provided complete or effective defences. The judge found that there had been a catastrophic breach of justice in each case and hence the sentences were thrown aside.

The Natal Provincial Division's landmark ruling in 1988, *S v Khanyile and Another*⁷⁶ was the most extensive court decision, interpreting the right to fair trial through legal aid. This case included the joint appeal of two defendants who had been convicted of breaking into residences with the intent to steal, each received a one-year sentence. Both defendants filed not guilty pleas. Throughout the trial, two police officers who gathered the prints and an expert who performed the comparisons testified that the sole evidence utilised against the defendants was a match between their fingerprints and fingerprint impressions found at the crime scene. The defendants did not cross-examine the two police officers because their last cross-examination of a fingerprint expert was characterised as perfunctory, superficial and aimless.⁷⁷

The defendants' only line of defence were their alibis. The fingerprint evidence was the prosecution's only way of indirectly challenging these alibis. In his verdict for the Natal Provincial Division, Judge Didcott highlighted that the trial's magistrate failure to advise the defendants of their right to fair

⁷² *S v Mbonani* (1988), para.196.

⁷³ *S v Mbonani* (1988), para.196.

⁷⁴ Depending on the complexity of the charge, the associated legal regulations and its severity, it is not sufficient for the accused to merely be informed of their right to legal representation, they should be actively encouraged to exercise this right. They should be provided with a reasonable timeframe to arrange for legal representation and, in suitable cases, informed of their entitlement to seek assistance from the Legal Aid Board. Failure by a judicial officer to fulfil these duties, considering the specifics of a case, could lead to an unjust trial and substantial injustice would take place.

⁷⁵ *S v Mbonani* (1988), para.198.

⁷⁶ *S v Khanyile and Another* (1991).

⁷⁷ *S v Khanyile and Another* (1991), p 810.

trial.⁷⁸ However, the judge continued, noting that the two defendants were unlikely to have been impacted had the information not been provided.⁷⁹

One way to interpret the court's decision is that, firstly, despite their strong desire to obtain legal aid, the defendants would not have been able to do so. They did not have the resources to hire an advocate on their own and no legal aid was available. The two were accused of conducting a burglary that happened seven years prior to the trial, therefore, the defendants' use of alibis was a bad tactical choice. Few people can likely recall where they were on a specific day seven years ago, additionally, none of the defendants made an effort to identify the pivotal day but only stated in vague terms that they had spent the entire year prior to the burglary in different parts of the nation.

The first line argument in *Khanyile* case involved comparing South Africa's right to legal counsel with the evolution of this right in the United States. The judge highlighted the similarity in language between the Sixth Amendment of the U.S. Constitution⁸⁰ and section 73 (2) of South Africa's Criminal Procedure Act of 1977.⁸¹ He noted that both were initially interpreted as providing a negative right, ensuring legal counsel only to those who could afford it.

The Due Process Clause in the United States Constitution was interpreted to naturally include the provision of legal representation for all impoverished individuals facing incarceration. Noting the various functions of the Due Process Clause in American jurisprudence, the judge concluded that, in the realm of criminal justice, the Due Process Clause is equivalent to the South African common law right to a fair trial.⁸² The Sixth Amendment's wording was influenced by due process principles, upheld the right of an American accused person who is impoverished to legal counsel. Section 73(2) of the Criminal Procedure Code of South Africa also shapes the right to fair trial and upholds the right of indigent accused individuals in South Africa to legal counsel. South African indigent accused's the right to the same.⁸³

The second line of reasoning was cogent: the established access to fair trial through legal aid was deemed to ensure fair trial. Denying this right, especially to a defendant who actively sought to exercise

⁷⁸ *S v Khanyile and Another* (1991), p 815-816.

⁷⁹ *S v Khanyile and Another* (1991).

⁸⁰ The Sixth Amendment guarantees the rights of criminal defendants, including the right to a public trial without unnecessary delay, the right to a lawyer, the right to an impartial jury and the right to know who your accusers are and the nature of the charges and evidence against you.

⁸¹ Section 73(2), Criminal Procedure Code, South Africa (Act 51, 1977).

⁸² The Fifth Amendment: The Due Process Clause, states that individuals are not to be deprived of their life, liberty, or property without first receiving due process. Due process is the usual term used to describe fair processes.

⁸³ Section 73(2), Criminal Procedure Code, South Africa (Act 51, 1977).

it, would unquestionably render the conviction unjustifiable and susceptible to being overturned on appeal or review. Judge Didcott contended that if having legal representation is deemed essential for ensuring a fair trial of someone who has the means to engage an advocate, why should it be regarded as unnecessary for an individual who lacks the financial resources to obtain such representation.⁸⁴ This statement encapsulates the core principles of equality before the law. It highlights the inherent injustice of denying legal counsel to individuals solely based on their financial circumstances.

Judge Didcott delineated three criteria to identify cases where the absence of legal representation would lead to the most severe outcome: the complexity of both legal and factual aspects of case, the defendant's capability to mount a defence, and the case, the defendant's capability to mount a defence, and the seriousness of the charge and its potential ramifications. The presiding judge ought to collect extensive information to assess these factors and ascertain whether their combined impact would unjustly disadvantage the individual, rendering the trial markedly and blatantly unfair if conducted without defence counsel.⁸⁵ Judge Didcott proposed that if the presence of legal representation is deemed necessary for ensuring a fair trial for someone who has the means to engage an advocate, then it should similarly be considered essential for an individual who lacks the financial resources to afford such representation. This would occur if the trial proceeded without legal representation, resulting in defendant's guilty verdict. While the court recognized the limitations of this approach, it concluded that a more comprehensive solution was unfeasible due to South Africa's resource constraints at the time. Despite the case's relatively conservative holding, the Appellate Division of the Supreme Court overruled *Khanyile* four years later in *S v Rudman and Another*⁸⁶ and *S v Mthwana*.⁸⁷

The United States Supreme Court determined that every time an impoverished accused person faced a possible jail sentence without being assigned legal aid, substantial injustice would ensue albeit in somewhat different words. The Constitution of South Africa and the United States Constitution share many similarities.⁸⁸ It is possible that the more circumspect wording was chosen to provide South African judges the ability to assess the practicality of the issues, at least temporarily.

⁸⁴ *S v Khanyile and Another* (1991), p 196.

⁸⁵ *S v Khanyile and Another* (1988).

⁸⁶ *S v Rudman and Another* (1992), *S v Mthwana* (1992).

⁸⁷ *S v Mthwana* (1992).

⁸⁸ The Constitution of South Africa and the United States Constitution share several similarities, notably in their emphasis on basic rights and liberties.

3.2 How do the regulations in South Africa compare with regard to enforceability of the ‘substantial injustice’ test?

3.2.1 The Khanyile Criteria

Section 35(3)⁸⁹ of the Constitution of the Republic of South Africa, affords an accused the right to a fair trial. This right includes no less than fifteen rights addressing the procedure and process of a trial. Before the commencement of the new constitutional order, the right to fair a trial was somewhat limited as articulated in the infamous dictum.⁹⁰ In *S v Vermaas*⁹¹, the Constitutional Court indicated in an obiter dictum⁹² that the criteria set out in *S v Khanyile*⁹³ had to be considered to determine whether 'substantial injustice' would result from a refusal to provide legal aid to an accused person.

The Khanyile criteria is well known. It focuses on *the legal and factual complexity of the case, the accused's ability to defend himself and the gravity of the charge and its consequences*. One of the many things to take into account when determining whether or not there would be considerable unfairness in a trial conducted without legal counsel is the possibility of jail in the case of a conviction. 'Where substantial injustice might otherwise follow' is a phrase that has evidently been carefully chosen to express a fairly nebulous and fluid idea, to which the courts will need to provide more exact substance in light of the cases that come before them.⁹⁴

3.3 How might Kenya take away from South Africa’s use of the Khanyile criterion (the substantial injustice test) and its implications for the legal system?

In South Africa, the Khanyile criteria is widely recognised in courts. It focuses on the *legal and factual complexity of the case, the accused's ability to defend himself and the gravity of the charge and its consequences*. The factual and legal complexity of the case is more explicit on what the court should look into. It is specific to the legal and factual aspects of the case which narrows the scope of the

⁸⁹The provision stipulates that accused, imprisoned, and arrested individuals.-(i) Anyone detained for allegedly committing a crime has the following rights: (a) to be informed promptly of the reason for detention; (b) to select and consult with a legal practitioner and to be informed of this right promptly; (c) to have a legal practitioner assigned to the detained person by the state and all associated state expenses, if substantial injustice would otherwise result.

⁹⁰ Steytler N, 'Constitutional criminal procedure: A commentary on the Constitution of the Republic of South Africa 1996', 214.

⁹¹ *S v Vermaas* (1995).

⁹² Debayan S, 'Difference between obiter dicta and ratio decidendi', Pen Acclaim Journal, 2021, 15.

Obiter dictum offers insights into the circumstances that influenced the court's decision and can aid in comprehension.

⁹³ Together, Payise Khanyile and Mkezi Mkwanyana were put on trial on the charges of stealing and breaking into a property with the purpose to steal. All entered not guilty pleas. Nevertheless, they were found guilty and given a year's jail.

⁹⁴ *Mgcina v Regional Magistrate* (1997).

criteria. Legal complexity highlights the procedural complexity for instance, the stage of the legal proceedings (pre-trial, post-trial or appeal stage), jurisdictional complexity and public interest, evaluate the potential impact of the case on public policy and social norms. Factual complexity looks into the factual issues that arise which include understanding the events, considering expert opinions on technical discrepancies and determining the reliability and credibility of evidence and witnesses.

In conclusion, the evolution of legal standards regarding the right to a fair trial, as exemplified by the substantial injustice test in Kenya and the Khanyile criteria in South Africa, underscores the ongoing pursuit of justice within the legal systems. While both frameworks aim to ensure equitable access to legal aid and fair trial procedures, they demonstrate nuanced approaches tailored to their respective legal landscapes.

Although the transition from a three-part test to a more comprehensive six-part criteria framework reflects an effort to tackle the multifaceted nature of legal proceedings and the diverse needs of defendants, there is much more that can be done to cement the meaning of the concept of substantial injustice and the substantial injustice test by having one comprehensive test aside from the two tests that are running concurrently. South Africa's recognition of the Khanyile criteria in court proceedings reflects a commitment to safeguarding the rights of the accused and upholding principles of fairness. By focusing on legal and factual complexities, as well as the defendant's ability to defend themselves, this framework provides a structured approach to assessing the adequacy of legal aid and ensuring a just outcome.

Ultimately, the aim of the substantial injustice test is to prevent substantial injustice and upholding the fundamental right to a fair trial. It is imperative to maintain a balance between accessibility and efficacy, ensuring that the criteria remains practical and comprehensible to all stakeholders while upholding the integrity of the justice system. Through ongoing refinement and adaptation, these standards can continue to serve as pillars of justice, fostering trust and confidence in legal institutions.

CHAPTER 4

4.1 How should the three-part test, balance the need for finality in legal proceedings with the preservation of justice?

The delicate task between guaranteeing fairness and justice and ensuring that legal issues are settled quickly and effectively is known as “balancing the need for finality in legal proceedings.”⁹⁵ In legal procedures, finality is essential because it gives the parties involved closure and clarity, enabling them to go on with their lives or companies. The substantial injustice test, should provide a legal framework for striking a balance between the necessity for justice to be upheld and the requirement that rulings be final. In summary, striking a balance between finality and fairness necessitates a sophisticated strategy that considers the concerns of all parties and the main objective of preserving justice.

Below are some legal principles that the substantial injustice test should maintain to reconcile the need for finality in legal proceedings:

4.1.1 Rule of Law

The substantial injustice test should look at whether the legal proceedings that resulted in a decision are transparent, equitable and are carried out with the principles of the rule of law.⁹⁶ For a majority of Kenyans, justice is still unattainable. The 2010 Constitution requires, among other things, the use of conventional conflict settlement procedures, which would improve access to justice.

4.1.2 Fairness

It is never appropriate to pursue finality at the expense of justice or due process. Decisions should be made on the basis of facts and legal precepts and parties should be given a sufficient chance to state their case. Self-representation may impact the outcome of a case. The court in *Joseph Ndungu Kagiri v Republic*,⁹⁷ observed that in criminal trials, whether or not an accused individual is represented

⁹⁵ Balancing the need for finality in legal proceedings means maintaining a balance for conclusiveness in legal proceedings.

⁹⁶ A foundational principle of government is the rule of law, which states that all people, even the state, are subject to laws that are passed by the people, consistently enforced, and determined by impartial tribunals.

Secretary-General Report: ‘Transitional Justice and the Rule of Law in Conflict and Post-Conflict Societies’, 2004.

⁹⁷ *Joseph Ndungu Kagiri v Republic (2016) eKLR*.

matters a great deal.⁹⁸ This is due to the intricacies of the adversarial system,⁹⁹ which an accused individual lacking the necessary legal expertise may find hard to understand.

4.2 How might we anticipate the intervention of the State to provide relief for legislators?

Anticipating the country's role involves considering the social, political and economic context, along with historical precedents, when determining the criteria for substantial injustice. This includes assessing how the concept of substantial injustice can be adapted to enable state intervention when needed. Understanding the substantial injustice test will allow for the identification of potential ways the state can support lawmakers in guaranteeing the preservation of the right to a fair trial.

4.2.1 Legislative Action

The State through the National Assembly can codify the substantial injustice test in *Dominic Kamau v Republic (2014)*,¹⁰⁰ the Legal Aid Act¹⁰¹ and the National Legal Aid Scheme to systematically organise and consolidate the substantial injustice criteria into a single, comprehensive test. This procedure will aid in clarifying and streamlining legal regulations and processes, thereby enhancing accessibility and comprehension of the right to a fair trial for both legal practitioners and the general public. Legislative action involves creating budget allocations to prioritise the funding for legal aid. Limited financial resources may impede efforts to prioritize funding for legal aid, thus hindering the realization of the entitlement to a just trial.

4.2.2 Collaboration with Legal Advocacy Groups

The state should monitor the activities of the various legal advocacy institutions and their interactions with state officials, to provide insight into potential state interventions. These groups lobby for policy changes, initiate lawsuits to enforce the entitlement to a just trial and collaborate with lawmakers to draft legislation. The Young Offenders Legal Aid and Reform Advocacy is a non-governmental group based in Kenya, focuses on safeguarding children entangled in legal conflicts.¹⁰² Kituo Cha Sheria-Legal Advice Centre (KITUO)¹⁰³ is a nationwide non-governmental organization that is committed to

⁹⁸ *Joseph Ndungu Kagiri v Republic (2016) eKLR, para 23.*

⁹⁹ An adversarial criminal justice system is one in which a third person (a magistrate or judge) hears arguments from both the accuser and the accused before making a decision.

¹⁰⁰ *Dominic Kamau v Republic (2014) eKLR.*

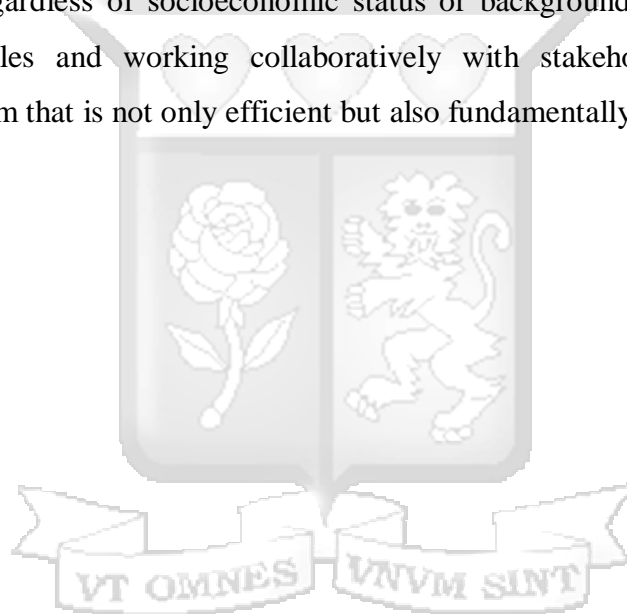
¹⁰¹ Legal Aid Act, 2016.

¹⁰² <https://grassrootsjusticenetwork.org/connect/organization/young-offenders-legal-aid-and-reform-advocacy/>.

¹⁰³ Kituo Cha Sheria, a legal and human rights organization.

empowering the underprivileged and marginalized, advocating for fairness and equitable access to justice for all. With its 50 years of expertise and knowledge of the justice issues that Kenya's underprivileged communities face, KITUO hopes to fulfil its mission of creating a society of equity and justice for all.¹⁰⁴

In summary, striking a delicate equilibrium between conclusiveness in legal proceedings and the safeguarding of justice demands a nuanced strategy that considers the concerns of all stakeholders, the integrity of legal procedure and the overarching objective of maintaining justice. The substantial injustice test, with its focus on transparency, fairness and accessibility, serves as a critical framework for reconciling these competing imperatives. Legislative action, partnership with legal advocacy groups, and a dedication to tackling systemic issues are key roles the state can play in guaranteeing that every individual, regardless of socioeconomic status or background, receives a fair trial. By embracing these principles and working collaboratively with stakeholders, policymakers can contribute to a legal system that is not only efficient but also fundamentally just and equitable.



¹⁰⁴ <https://kituochasheria.or.ke/about-us/>.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 FINDINGS OF DISSERTATION

5.1.1 What would be the best approach to reconcile the difficulties in enforcement of the 'substantial injustice' test?

In the rigorous analysis done above, it is important to take into account practical considerations. The comprehensive test suggested above is along the lines of the Khanyile criteria. This criteria is practical because it does not give people the lee-way to engage in criminal activities and have a lawyer assigned to them. It is fair because the substantial injustice test established in Kenya leans towards indigent persons who have committed murder. Does this mean that the legal system favours murderers?

Like in South Africa, the complexity of the legal case should be divided into two categories: the legal complexity referring to the intricacies and nuances of the applicable law governing the case. Factual complexity entails gathering evidence, calling witnesses to give their testimony. Factually complex cases should also be considered for legal aid. Factual and legal complexity should be used conjunctively. With the analysis given above, the accused qualifies for the right if this test is satisfied. The defendant's ability to represent him or herself is the next test that can only be proved by the legal aid service of that court. If he or she is unable to defend him/herself and their case fits within the complexity as analysed above then they qualify for the right automatically. The seriousness of the accusation and its ramifications, if the charge is severe and it holds weight enough to get life imprisonment and the case fulfils the complex requirement and the accused person is unable to represent himself or herself, then they qualify for the right automatically. Finally, the seriousness of the case to the extent that it may attract public interest. Seriousness and complexity may be confused to mean the same but here seriousness is in relation to the welfare of the public.

The most effective method proposed, other than employing the comprehensive test, is to foster collaboration between legal aid services and other agencies offering legal assistance. When an accused person is brought to court, a legal aid officer should be summoned to question the accused on whether or not he or she is able to carry out their own defence. If the answer is in the affirmative, the legal proceeding will continue, if not the Legal Aid Service will alert the advocacy organizations depending on their specialization.

5.2 RECOMMENDATIONS

According to the analysis provided, we can suggest several measures to tackle the complexities and hurdles in guaranteeing access to legal aid based on the concept of substantial injustice:

5.2.1 Collaborative Approach

Encouraging collaboration between the Legal Aid Service and other agencies providing legal counsel, such as advocacy organizations specializing in various areas, can enhance the effectiveness of legal aid provision. By leveraging the expertise and resources of these organizations, individuals can access tailored legal aid that addresses their specific circumstances and needs. By implementing these recommendations, legal systems can better address the substantial injustice concept and the substantial injustice test and uphold the right to a fair trial for all individuals.

5.2.2 Refinement of Criteria

Refine the criteria for substantial injustice to qualify for legal aid to ensure that it appropriately balances the rights of the accused with practical considerations.

5.2.3 Regular Review and Evaluation

Implement regular views and evaluations of the legal aid system to assess its effectiveness in meeting the needs of defendants. This can help identify areas for improvement and ensure that the system remains fair and equitable.

5.2.4 Addressing Systemic Issues

Address systemic issues that may contribute to disparities in access to legal aid, such as socioeconomic barriers. This can be addressed by implementing policies to address poverty, improve access to education and employment opportunities which will in turn reduce systemic discrimination within the legal system.

BIBLIOGRAPHY

BOOK CHAPTERS

Daniels N, Reading Rawls: Critical studies on Rawls' 'A theory of justice', Vol. 229, Stanford University Press, 1989, 57.

Desai M and Levick N, Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel At all Stages of the Juvenile Court Process, 2007, 175.

Nozick R, Anarchy, State and Utopia, New York: Basic Books, 1974, 91.

Rawls J, A Theory of Justice, Original Edition, India, Harvard University Press, 1971, 116.

JOURNAL ARTICLES

Berkheiser M, 'The Fiction of Juvenile Right to Counsel: Waiver in the Juvenile Courts', 2002, 65.

Davies B, 'John Rawls and the Veil of Ignorance', 2022.

Debayan S, 'Difference between obiter dicta and ratio decidendi', Pen Acclaim Journal, 2021, 15.

Dr Pandey N and Dr Jaiswal M, 'A Comparative Study of Theory of Justice: In Reference To Rawls and Nozick', Journal of Positive School Psychology, Vol. 6, 2022, 8-12 < <http://journalppw.com> >.

Fedorova M, 'The Principle of Equality of Arms in International Criminal Proceedings', Intersentia, 2012.

Ghai J C and Ghai Y P, 'Kenya's Constitution: An Instrument for Change', Katiba Institute, 2011.

Juma P, 'Right to self-representation for people with mental disabilities in Kenya's courts', African Disability Rights Yearbook, 2019, 81-95 < <http://doi.org/10.29053/2413-7138/2019/v7a4> >.

Muli K, 'The Draft Constitution of Kenya (Bomas Draft): Reflections and Commentary on Issues of Content and Process', Institute for Education in Democracy, 2005.

Odhiambo F, 'How Chama's in Kenya Fight Poverty', 2021.

Ogletree C J, 'The Challenge of Providing "Legal Representation" in the United States, South Africa and China', 2001, 47.

Skelton A & Zaal N, 'Providing Effective Representation for Children in a New Constitutional Era: Lawyers in the Criminal and Children's Courts. South African Journal on Human Rights', 1998, 539-559.

Steytler N, 'Constitutional criminal procedure: A commentary on the Constitution of the Republic of South Africa 1996', 214.

Union A, 'Principles and guidelines on the right to a fair trial and legal assistance in Africa', 2019.

UN DOCUMENTS

Convention on the Rights of the Child (CRC); which was adopted by the UN General Assembly on 20 November 1989 and entered into force in September 1990.

< <https://www.coe.int/en/web/compass/convention-on-the-rights-of-the-child> >.

International Covenant on Civil and Political Rights (ICCPR); Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976

< <https://www.ohchr.org/sites/default/files/Documents/ProfessionalInterest/ccpr.pdf> >.

United Nations Basic Principles on the Role of Lawyers on the Prevention of Crime and the Treatment of Offenders; Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

< <https://digitallibrary.un.org/record/166213?ln=en> >.

ONLINE SOURCES

On the occasion of Mandela's inauguration as President of South Africa on 10 May, 1994. Reported in the International Herald Tribune, 11May 1994 "Forget the Past, President Mandela Tells South Africa"; p. I at p. 5 column 4.

RESEARCH PAPERS AND REPORTS

Secretary-General Report: 'Transitional Justice and the Rule of Law in Conflict and Post-Conflict Societies', 2004.

