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I hereby declare that I have read and understood the regulations governing the submission of Masters of Laws dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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TABLE OF CONTENTS

LIST OF CASES

1. *Aneriko v Uganda* (1972) E.A 193.
2. *Anyangu v R* [1968] EA 239.
3. *Bassam and Wathioba v R* (1961) E.A 84.
4. *Boyd v United States* 116 US 616 (1866).
5. *Callis v Gunn* [1964] 1 Q.B 495.
6. *Commissioner of Customs and Excise v Harz and Power* [1967] 1 A.C 760.
7. *Deokinan v R* (1969) 1 A.C 20 (PC).
8. *DPP v Pin Ling* [1975] 3 All ER 175 (H.L).
9. *Ekai v Republic* Crim Appeal No 115 of 1981.
10. *Elkins v United States* 364 US 206 (1960).
11. *Harris v New York* 401 US 222 (1971).
12. *Ibrahim v The King* [1914] A.C 599.
13. *Janis v United States* 428 US 443 (1966).
14. *Key v Attorney General, Cape Provincial Division and Another* 1996 (2) SACR 113 (CC).
15. *Kuruma s/o Kaniu v Regina* [1955] AC 197.
16. *Mapp v Ohio* 367 US 643 (1961).
17. *Mills v R* [1986] 1 S.C.R 863.
18. *Miranda v Arizona* 348 US 436 (1966).
19. *Mohamed Ali and Anor v R* (1956) 29 K.L.R 166.
20. *Muriuki v R* [1975] EA 223.
21. *Murray v United States* 487 US 533 (1988).
22. *Mutagwaya v R* (1950) U.L.R 233.

23. *Nayinda s/o Batugwa v R* (1959) E.A 688.

24. *New York v Quarles* 467 US 649 (1984).

25. *Nix v William* 104 Sct 2505 (1984).

26. *Njuguna s/o Kimani and Ors v R* (1954) 21 EACA 311.

27. *Olmestead v United States* 277 US 438 (1928).

28. *Oregon v Hass* 420 US 714 (1975).

29. *Pakala Naraya Swami v King Emperor* (1939) All ER 397.

30. *People v Defoe* 150 NE 585 (1926).

31. *R v Agricola Kanyerihe* [1936] 6 ULR 10.

32. *R v Carrrire* (1983) 32 C.R. (3d) 117.

33. *R v Collins* [1987] 1 S.C.R 265, 56 C.R (3d) 193.

34. *R v Cooley* (1868) 10 Cox CC 536.

35. *R v Court* [1962] Crim LR 697 CCA.

36. *R v Croydon* (1846) 2 Cox 67.

37. *R v Davies* [1979] Crim LR 167.

38. *R v Debot* [1989] 2 S.C.R 1140.

39. *R v Doherty* (1874) 13 Cox CC 23.

40. *R v Drew* (1837) 8 C&P 140.

41. *R v Eriya Kasule & Anor* (1948) 15 EACA 148.

42. *R v Fallon* [1975] Crim LR 341.

43. *R v Fennel* (1881) 7 Q.B.D 147.

44. *R v Gillis* (1866) 11 Cox 69.

45. *R v Grewal* (1975) Crim. LR 159.

46. *R v Ikojot &Agella* (1917) 2 U.L.R 26

47. *R v Isequilla* [1975] 1 All ER 77.

48. *R v Jarvis* (1867) LR 1 CCR 96.

49. *R v Jenkins* (1822) Russ & Ry 492.

50. *R v Leatham* 1861 Cox CC 489.

51. *R v Payne* [1963] 1 WLR 367 CCA.

52. *R v Reeves and Hancock* (1872) LR 1 CCR 362.

53. *R v Richards* (1967) 51 Cr. App R 266.

54. *R v Rowbobotham* (1984) 13 WCB 104.

55. *R v Sang* [1979] 3 WLR 263 HL.

56. *R v Shepherd* (1836) 7 C&P 579.

57. *R v Simpson* (1834) 1 Mood 410.

58. *R v Smith* (1959) 2 Q.B 35.

59. *R v Taylor* (1939) 8 C& P 733.

60. *R v Thompson* (1783) 1 Leach 291.

61. *R v Thompson* [1893] 2 Q.B.D 12.

62. *R v Upchurch* (1836) 1 Mood 465.

63. *R v Warmingham* (1852) 2 Den 447 n.

64. *R v Warwick* (1783) 1 Leach 263.

65. *Rakas v Illinois* 439 US 128 (1978).

66. *S v Dzukuda* 2000 2 SACR 443 (CC).

67. *S v Lottering* 1999 12 BCLR 1478 (N).

68. *S v Madiba* 1998 1 BCLR 38.

69. *S v Mark* 2001 1 SACR 572 at 578i.

70. *S v Mkhize* 1999 2 SACR 632 (W) 417.

71. *S v Mphala* 1998 1 SACR 654.

72. *S v R* 2000 (1) SACR 33.

73. *S v Soci* 1998 2 SACR 275.

74. *S v Strachan* (1988) 67 C.R (3d) (S.C.C).

75. *Saunders v United Kingdom* 1996 EHRR 313.

76. *Tuwamoi v Uganda* [1967] EA 84.

77. *United States v Leon* 104 Sct 3405 (1984).

78. *Week's v United States* 232 US 383 (1914).

79. *Wolf v Colorado* 388 US 25 (1945).

TABLE OF STATUTES

1. The Evidence Act Cap 80 Laws of Kenya

2. Criminal Procedure Code Cap 75 laws of Kenya

3. The Constitution of Republic of Kenya

4. The Draft Constitution of Kenya 2004

5. The Constitution of Republic of South Africa Act 108 of 1996

6. The Canadian Charter of Rights and Freedoms

ABSTRACT

The rules governing admissibility of improperly obtained evidence vary from one country to another. However, we can categorise the approaches in to two broad groups,

i) Exclusionary approach and

ii) Inclusionary approach

The exclusionary approach in its rigid form could be traced to the United States of America Supreme Court.[1] The American exclusionary rule is to the effect that any illegally obtained evidence is not admissible. In *Weeks v United States*[2] the court gave the rationale for the exclusionary rule as meant to protect the rights of citizens as provided in the Constitution and specifically the Bill of Rights. Day J noted,

> 'If letters and private documents can thus be seized and held and used on evidence against a citizen accused of an offence, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the constitution.'

The American exclusionary approach has been adopted in other jurisdiction but in a modified form. The approach has had influence in continental jurisdictions,[3] supra-national regional jurisdictions[4] and the evidential systems of international criminal tribunals[5].

The inclusionary approach on the other hand is mainly practiced in countries that adopted the Anglo-American system law of evidence and procedures. To them, so long as evidence is relevant it is admissible. This rule was developed under the

[1] P.J Schwikkard & S E Van Der Merwe *Principles of Evidence* 2ed (2002) 169.
[2] 232 US 383,393 (1914).
[3] C M Bradley 'The Emerging International Consensus as To Criminal Procedural Rules' (1993) 14 *Michigan Journal of International Law* 171,219.
[4] Section 6 European Convention on Human Rights.
[5] Article 74 of the Rome Statute of the International Court.

English common law in the famous case *R v Leatham*[6] where Crompton J summarised the rule by saying,

> 'It matters not how you get it; if you steal it even,
> it would be admissible'

The rule has however undergone various modifications and its rigid approach relaxed. This can mainly be attributed to the influence of international law instruments relating to human rights and the growing awareness of the need to protect fundamental human rights and the need to promote legality.

The source of Kenyan law of evidence is contained in the Constitution,[7] the Evidence Act[8] and the English Common law[9]. The Evidence Act is greatly influenced by the English common law of evidence. This can be explained by the fact the Act was closely modelled in the Indian Evidence Act. The Indian Evidence Act was the work of Sir James Fitzjames Stephen who drafted the Act with a view of codifying the English common law on the subject.[10] In interpreting the Evidence Act, the courts have also relied on the interpretation by the English courts. The decisions of the courts in commonwealth countries have a persuasive authority in Kenya.

The Kenyan approach on improperly obtained evidence is largely on inclusionary one. Section 27 of the Evidence Act[11] provide that,

> 'If confession made by an accused person is otherwise admissible it does not cease to be so merely because it was made under a promise of secrecy, or in consequence of deception practiced on him for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, because he was not warned that he was bound to make such confession and that evidence of it might be given.'

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[6] 1861 Cox CC 489,501.
[7] Section 77.
[8] Chapter 80 Laws of Kenya.
[9] The Judicature Act (Cap 8) s 3 provide that the sources of law in Kenya includes *inter alia*
(a) The Constitution (b) The Statutes of Kenya parliament
(c) The substance of common law and doctrines of equity in force in England on 12th etc
[10] H F Morris, *Evidence In East Africa* (1968) 1.
[11] Chapter 80 Laws of Kenya.

Further s 31 of the Act[12] provides,

> 'Notwithstanding the provisions of ss 26,28 and 29 of this Act, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.'

The courts have cited and approved the case of *Kuruma s/o Kaniu v R*[13] as an authority on improperly obtained evidence. In the case Lord Goddard observed,

> ' In their lordships opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to matters in issue'

The Kenyan Constitution provides the rights of an accused person but does not expressly provide for improperly obtained evidence. Thus from the Act and case law the Kenyan position as far as improperly obtained evidence is that it is admissible subject to it being relevant.

Kenya is currently undergoing constitution making and it has a draft Constitution. The draft constitution was adopted by the National Constitutional Conference on 15th March, 2004 and now awaits parliament approval.

The purpose of this dissertation is to critically examine the current position of the law on improperly obtained evidence and analyse the provision of the draft Constitution to ascertain whether it will have any effect on the laws of evidence vis-à-vis improperly obtained evidence.

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[12] Ibid.
[13] [1955] AC 197.

CHAPTER 1

Introduction

The debate about improperly obtained evidence has been long and protracted. There are generally speaking three schools of thought. The first school argues that evidence, so long as it is relevant, should be included (inclusionary). In terms of the second school any evidence which is improperly obtained should not be allowed anywhere near a court of law (exclusionary). Between these two extremes are those who advocate for a middle ground, namely that the court should have discretion in deciding whether to exclude or allow the evidence.

In this chapter, I will examine the historical perspective of the rules governing improperly obtained evidence. The various schools of thought on improperly obtained evidence will be analysed. I will also go through the advantages and disadvantage of excluding improperly obtained evidence. Lastly, I will endeavour to give my opinion on the debate on improperly obtained evidence.

1. 1 Exclusionary rule in U S A

The origins of the improperly obtained evidence rule can be traced to the Supreme Court of America jurisprudence where the rule was that any evidence unconstitutionally obtained was not admissible in evidence.

In United States, decisions on unconstitutionally obtained evidence can be traced as early as 1866 in *Boyd v United States.*[14] In the case, the Supreme Court likened the use of illegally obtained evidence against a defendant to compelled self-incrimination, which was prohibited by the Fifth Amendment.

The defendant was charged with the illegal importation of goods. In the proceedings, which were described by the Supreme Court as civil in form but criminal in nature,[15]the government sought to show the quantity and value of the goods imported by the defendant and relied on a federal statute to obtain a court order requiring the defendant to produce his invoice for the goods. The Supreme Court held that the Fourth Amendment barred compulsory production of the defendants' private books and papers.[16]

It was not however until 1916 when the Supreme Court made a landmark decision in *Weeks v United States* [17] where it stated its position on the unconstitutionally obtained evidence. In this case, the Supreme Court ordered evidence obtained in violation of the Fourth Amendment returned to a defendant who had been charged with using mail to transport lottery tickets. The court reiterated its position on unconstitutionally obtained evidence and spelt out the exclusionary rule in its most rigid form.

> 'If letter and private documents can thus be seized and held and used in evidence against a citizen accused of an offence, the protection of the 4th Amendment, declaring his rights to be secure against such searches and seizures, is of no value, and so far as those thus placed are concerned, might as well be stricken from the Constitution.'[18]

[14] (116) US 616 (1866).
[15] Supra at 634.
[16] Supra at 638.
[17] 232 US 383 (1916).
[18] Supra at 393.

The court further held that the lower courts failure to order the return of materials seized from the defendant illegally was a violation of the Constitution.

In 1949, the Supreme Court by a majority in *Wolf v Colorado*[19] declined to extend the rule to State prosecutions. The courts opined that the States should develop their own ways to discourage violation of the constitutional standards by the police.[20]

In 1961, the rule in *Wolf v Colorado*[21] was overturned in *Mapp v Ohio*[22]. The court held that the exclusionary rule was applicable to both State and Federal trials. The court applied the exclusionary rule to exclude evidence gathered through unlawful arrest or searches, evidence obtained during unlawful interrogations and where identification procedures were unlawful.[23]The rule on the exclusion of illegally obtained evidence was further developed to cover what was described as 'fruits of poisonous tree' doctrine. The doctrine stipulated that evidence lawfully obtained would be excluded if it were preceded by unlawful procedures.[24]

Although as evinced above, the American jurisprudence was directed at enforcing the exclusionary rule in the strictest manner, the courts have made various inroads to lessen the rules' rigidity. In *United States v Leon,*[25] the Supreme Court held that 'good faith' could be used as an exception to the exclusionary rule. Pursuant to *Leons* decision unconstitutionally obtained evidence could be admitted if the 'police acted in

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[19] 338 US 25 (1949).
[20] J Driscoll " Excluding Illegally Obtained Evidence in the United States"(1987) *Criminal Law Review* 553,554.
[21] Supra (n 19).
[22] 367 US 643(1961).
[23] Op cit (n 20) 555.
[24] *Wong Sun v US* 371 (1963).
[25] 104 SCt. 3405(1984), 468 US 897 (1984).

objectively reasonable reliance on a search warrant that subsequently proved to be invalid'.[26] The Supreme Court developed the doctrine of "fruits of the poisonous tree" further in *Nix v William*[27]. In the case the court held that, lawfully obtained evidence could be admitted even if it was obtained following an illegal police procedure so long as it was discovered from an independent source. An example would be where police obtain real evidence in contravention of the Fourth amendment but later some other police obtain warrant for the search relying on information from an informer and find real evidence the subsequent evidence found will be admissible. This is because the subsequent evidence is wholly unconnected with the unconstitutionally discovered evidence[28].

Another important development in the exclusion of evidence in the United States is the Miranda warnings. These warnings were established in *Miranda v Arizona*[29]

> '[W]e hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardised. Procedural safeguards must be employed to protect the privilege... [T]he following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in court of law, that he has a right to presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogations. After such warning have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogations can be used against him.'

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[26] Op cit (n 23) 556.
[27] 104 Sct 2505 (1984), 467 US 431 (1984)
[28] *Murray v United States* 487 US 533 (1988) see also S E van der Merwe *Principles of Evidence* 2ed (2002) 182.
[29] 348 US 436 (1966).

The above rules were issued to protect an accused from derogation of his rights under the Fifth Amendment that is the privilege against self-incrimination and the Sixth Amendment, the right to counsel.

Any statement made by an accused whether a confession or an admission is not admissible unless the *Miranda v Arizona*[30] warnings have been issued before the admission is made.[31]However, the rule has the following exceptions;

i) The public safety –where there is a threat to public safety. In *New York v Quarles*[32] the court stated that '[A] situation posing a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.'[33]

ii) The second exception is on pre-trial statements. The court in *Oregon v Hass*[34] and *Harris v New York*[35] held that where a pre-trial statement cannot be admitted because of a failure to give the Miranda warning, the statement can still be used in the cross-examination of the accused to impeach his credibility especially where his statement in the examination- in- chief differs with the prior statement.

iii) Where it can be proved that even though evidence was obtained in violation of the accused constitutional rights as envisaged in *Miranda v Arizona*[36], the evidence could still have been discovered through lawful means, the court will admit the evidence despite that it was obtained in breach of the accused rights.[37]

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[30] Supra (n 29).
[31] Supra at 476-7.
[32] 467 US 649 (1984).
[33] Supra 657 also see P J Schwikkard & S E van der Merwe *Principles of Evidence* 2ed (2002) 185.
[34] 420 US 714 (1975).
[35] 401 US 222 (1971).
[36] Supra (n 29).
[37] See *Nix v Williams* 467 US 431 (1984).

The American position should be viewed in light of the doctrine of constitutional supremacy in United States of America. The courts have a duty to protect the sanctity of the Constitution and the constitutionally enshrined rights and more so the rights provided in the Bill of Rights[38]. Oakes captures this duty clearly by stating,

> '[I]f constitutional rights are to be anything more than pious pronouncements, then some measurable consequences must be attached to their violations. It would be intolerable if the guarantees against unreasonable search and seizure could be violated without practical consequences. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule- entirely apart from any direct deterrent effect- is that it provides an occasion for judicial review and gives credibility to the constitutional guarantee.' [39]

Consequently, any evidence obtained contrary to the constitutional provisions and principles governing criminal investigations in the United States is not admissible. In addition, if the evidence is obtained under the doctrine of "fruits of the poisonous tree" it is not admissible unless it is obtained from a source independent of the illegal procedure. That notwithstanding, the exclusionary rule will not apply if the police act in good faith or if the illegality is trivial and more so if it does not prejudice the rights of the accused person.

The American position on the improperly obtained evidence has had influence in national, regional and international jurisdictions albeit in modified form.[40]

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[38] P J Schwikkard & S E van der Merwe *Principles of Evidence,* 2ed (2002) 169.
[39] D H Oakes "Studying the Exclusionary Rules in Search and Seizure" (1970) 37 *University Of Chicago LR* 665,756.
[40] The European Court of Human Rights has held that evidence obtained in violation of internationally recognised procedural safeguards could infringe the right to fair trial under Article 6 of the European court convention on the protection of human rights and fundamental freedoms see (*Saunders v United Kingdom* 1996 EHRR 313).

1.2 Inclusionary Rule- Common Law Approach

The common law position on improperly obtained evidence is antithesis to the United States of American position. Evidence is admissible so long as it is relevant notwithstanding how it was obtained. The rule regarding improperly obtained evidence was expressed in *R* v *Leatham*[41] where Crompton J stated 'It matters not how you get it, if you steal it even it would be admissible in evidence.' [42]. In *Kuruma s/o Kaniu v R*[43]

Kuruma had been searched by Kenyan police officers and, it was alleged, found to be unlawfully in possession of two rounds of ammunition, a capital offence under the Emergency Regulations in force. The law provided that only an officer of the rank of assistant inspector could lawfully search a person suspected of being in possession of ammunition, yet neither officers involved was of such rank. Consequently, the evidence purportedly found on Kuruma had been obtained unlawfully and he appealed against his conviction on the grounds that it should not have been admitted. The appeal was dismissed. Lord Goddard CJ stated

> '*In their Lordships opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained*...There can be no difference in principle for this purpose between a civil and criminal case. No doubt in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused...If, for instance, some admission of some piece of evidence, e.g. a document, had been obtained from defendant by trick, no doubt the judge might properly rule it out.'[44]

[41] (1861) Cox CC 498 501 quoted in R Emson *Evidence* (1999) 244.
[42] This approach was reaffirmed in *Kuruma s/o Kaniu v R* [1955] AC 197.

[43] Supra (n 41).
[44] Supra at 203-204 (emphasis added).

The courts in England have followed the principle laid in *R v Leatham*[45]and *R v Kurumas*[46] case and specifically Lord Goddard's dicta that unlawful conduct will not justify exclusion unless the evidence was obtained through trickery. This was evidenced in *R v Payne,*[47] where it was stated that the court had discretion to exclude evidence if it was obtained by trickery.[48]In *Collins v Gunn*[49] Lord Parker CJ suggested that if the prosecution obtained evidence through the use of oppression, false representation, tricks, and threats or bribes such evidence could be excluded.

The rule on admissibility of improperly obtained evidence was finally explained by the House of Lords in *R v Sang.*[50] The House of Lord held that

> 'Whereas the trial judge or magistrate had a discretion to exclude prosecution evidence if its (unduly) prejudicial effect outweighed its probative value, to ensure the accused received a fair trial, there was generally no broader discretion to exclude evidence just because it had been obtained by improper or unfair means such as by actions of an agent provocateur.'[51]

However, the court added that if a confession and self-incriminatory admission were obtained by trickery or unfair means after the commission of the offence admitting it would amount to self-incrimination and therefore the court had discretion to exclude such evidence. Examples of this would include fingerprints or medical evidence. According to Lord Diplock the rationale of the limited discretional rule, covering confessions and analogous evidence was to guard against violation of the privilege against self-incrimination (*nemo tenetur se ipsum prodere)*[52]. It was also recognised in

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[45] Supra (n 41).
[46] Supra (n 42).
[47] [1963] 1 W L R 367 CCA.
[48] Same approach was adopted in *R v Court* [1962] *Crim LR* 697 CCA.
[49] [1963] 3 WLR 931.
[50] [1979] 3 WLR 263 HL
[51] R. Emson *Evidence* (1999) 245.
[52] Supra (n.49) 932.

the same case that the discretion could be construed wider to exclude illegally obtained evidence if it would lead to the denial of a fair trial (*nemo tenetur se ipsum accusare).*

Lastly, it should be pointed out that there is a difference between testimonial evidence and real evidence in respect of the exclusion of improperly obtained evidence. This issue was dealt with in *Warickshall*[53] where some stolen goods were found in Jane Warickshall's bedroom. The court had to decide whether the goods could be admitted or not. The court held that the goods could not suffer the same fate as the confession, which led to their discovery. The court stated 'a fact, if it exists at all must exist invariably in the same manner whether the confession from which it derived be in other respects true or false.'[54]The court was categorical that real evidence was admissible despite the confession, which led to their discovery being illegal.

The common law approach was adopted in jurisdictions that belong to the Anglo-American law of evidence family.[55]However, these countries did not adopt the strict rigid common law stance, the countries modified the rule to allow for judicial discretion in dealing with improperly obtained evidence.[56] The adoption of various international covenants on human rights has also necessitated a flexible approach to comply with Bills of Rights in the various Constitutions. The deviation from the rigid common law approach could also be explained on the basis of the need to promote

[53] (1783) 1 Leach CC 263, 168 ER 234 as cited in P Mirfield *Silence, Confessions and Improperly Obtained Evidence* (1997) 7.
[54] P Mirfied *Silence, Confessions and Improperly Obtained Evidence* (1997) 7.
[55] S E Van der Merwe in P J Schwikkard & S E Van der Merwe *Principles of Evidence* 2ed (2002) 169.
[56] Ibid.

legality, conserve and enhance judicial integrity.[57] (See below on rationale for the exclusionary rule).

1.3 Rationale for Exclusionary and Inclusionary Rule

The competing and conflicting interests on both sides of the argument occasion the controversy on the admission or exclusion of improperly obtained evidence. Whereas it is accepted that relevant evidence should be admitted for the sake of justice, and more especially, where the accused is guilty, if the court admits evidence obtained unconstitutionally it will be taken to be condoning the states' illegal acts. On the other side of the coin, if the courts take a strict exclusionary approach, notwithstanding its relevance, the public will view this as an abandonment of the court's duty to protect them from criminals. Zuckerman[58] on this dilemma stated,

> '[T]here is uncanny symmetry between the consequences of an admissibility and inadmissibility rule. If applied consistently each of these rules will undermine public confidence in criminal process. If the court always admits illegally obtained evidence, it will be seen to condone the malpractice of the law enforcement agencies. If it always excludes it, it will be seen to abandon its duty to protect us from crime. The first thing that we must therefore accept is that the criminal trial presents a dilemma that cannot be solved by an inflexible rule. An unwillingness to grasp the intractability of this dilemma has contributed more than anything else to the backwardness of the law on illegally obtained evidence.'

The controversy on the admissibility of improperly obtained evidence is not made any better by the presence of strong arguments on both sides of the debate. Both arguments are persuasive and especially those who argue for the inclusion of the evidence. Some of the arguments by the inclusionary school includes-

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[57] S E van der Merwe in P J Schwikkard & S E der Merwe *Principles of Evidence* 2ed (2002) 170.
[58] A A S Zuckermann *Principle of the Law of Evidence* (1989) 345-346.

i) 'The end justifies the means.'[59]

ii) Relevance of evidence and its admissibility should not be premised on how it was obtained.[60]

iii) Excluding illegally obtained evidence does not deter the police from their conduct.[61]

iv) Since the criminals are not restricted in their choice of the weapons they use, the police should not be restricted in their ways of fighting crime.[62]

v) The court by involving itself into the investigation of the way evidence was obtained, it may lose focus on its principal objective of enquiry that is whether the accused is guilty or not.[63]

vi) The accused can get other remedies for breach of his constitutional rights other than the exclusion of the evidence.[64]

vii) It has also been contended that since policing is a social service whose main role is protection of the society, the society should put up with illegal police conduct.[65]

viii) If evidence is excluded it will only end up protecting the guilty from being convicted.[66]

ix) Due to the rise in crimes the police should not be inhibited by rules of exclusion[67]

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[59] S E Van der Merwe op cit (n 57) 173.
[60] Ibid.
[61] J Peterson ' Restriction in the Law of Search and Seizure' 1958 (52) *North Western University LR* 46, 55.
[62] Y Kamisar 'Comparative Reprehensibility' and the Fourth Amendment Exclusionary rule' (1987) 86 *Michigan LR* 43.
[63] A Peiris 'The Admissibility of Evidence Obtained Illegally: A Comparative Analysis' 1981 *Ottawa LR* 309 343.
[64] *People v Defoe* 150 NE 585 (1926).
[65] Zuckermann op cit (n 58) 345.
[66] S E Van der Merwe op cit (n 57) 173.

x) If the rule is used in its rigid form there is no room for proportionality, a breach however trivial will lead to exclusion of the evidence without considering the magnitude of the crime.[68]

xi) The law of evidence was not meant to deter the illegal conduct of the police neither was it meant to indirectly punish them.[69]

The above are some of the arguments advanced by the proponents of the inclusion of improperly obtained evidence. On the other hand, the arguments for exclusion 'are less concrete and more subtle.' [70] The arguments are: -

1.3.1 Preventive effect

The exclusionary rule can be used to compel adherence to constitutional principles. It has been argued that by removing the incentive for disobeying the constitutional provisions the court would be encouraging obedience[71]. The argument on deterrence could also be used in conjunction with the preventive effect argument. Deterrence here should not be construed in its narrow meaning; rather it should be interpreted in the broad sense. By excluding improperly obtained evidence, the court will be playing an educative role[72]. The exclusion of improperly obtained sends message to the investigative institution that unless they use the legally prescribed procedure, the

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[67] G Stewart "The Road to *Mapp v Ohio* and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases" (1983) 83 *Columbia LR* 1365 1394.
[68] S E Van der Merwe op cit (n 57) 174.
[69] J H Wigsmore *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 4ed (1940) Para 2183.
[70] S E Van der Merwe Op cit (n 57) 175.
[71] Ibid.
[72] Ibid.

evidence obtained would not be admitted. This will have a systemic effect on the investigation department.[73]

Kamisar pointed out,

> 'Deterrence suggests that the exclusionary rule is supposed to influence the police the way the criminal law is supposed to affect the general public. But the rule does not, and cannot be expected to, deter the police the way the criminal law is supposed to work. The rule does not inflict a punishment on police who violate the Fourth Amendment: exclusion of the evidence does not leave the police in a worse position than if they had never violated the Constitution in the first place. Because the police are members of the structural government entity, however the rule influences them, or is supposed to influence them by systemic deterrence i.e. through department's institutional compliance with the Fourth Amendment standards.'[74]

1.3.2 Due process in the context of Bill of Rights

It is accepted that the court has a duty to ascertain the truth. However, this should not be construed to mean that the truth should be ascertained at whatever cost.[75] There must be some limits within which the law enforcer must operate. It has been argued that although it is the duty of the criminal justice system to secure the conviction of the guilty, this should be done in terms of procedure[76]. The procedure itself must acknowledge the rights of an accused at every critical stage i.e. during pre-trial, trial and post trial proceedings[77]. Based on the above argument the constitutionally enshrined rights will be undermined if evidence that is obtained in its disregard is admitted.[78]

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[73] Y Kamisar "Comparative reprehensibility" and The Fourth Amendment Exclusionary Rule" (1987) 86 *Michigan Law Review* 43.
[74] Ibid.
[75] S E Van der Merwe op cit (n 57) 176.
[76] Ibid.
[77] Ibid.
[78] *Mapp v Ohio* 367 US 643 662 (1961).

Gard [79]says that '[t]he reason for excluding unconstitutionally obtained evidence is not to provide the aggrieved accused with some personal remedy or some distorted form of compensation but to ensure that a court of law can in accordance with its constitutional duty make valuable contribution to the upholding of constitutional principles which govern the criminal justice system as a whole.'

It could also be argued that the exclusionary rule is not an evidential barrier to fact-finding but a constitutional barrier. Since it is the Constitution that prevents the admission of evidence that is obtained contrary to its provisions, the court by admitting such evidence will not only be going against the laws of evidence but also against the constitutional provisions.[80]

One is alive to the fact that an accused who is factually guilty may be acquitted due to exclusionary rule. Much as this is detestable, it can be explained away by the fact that the 'exclusionary rule is not meant to provide a remedy to the particular accused but that in the long run the exclusionary rule will ensure the rights of other citizens will not be deprived of their constitutional rights'.[81]

1.3.3 The doctrine of legal guilt

In terms of the doctrine of the legal guilt ' a person is not to be held guilty of a crime merely on showing that in all probability based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if

[79] Gard (eds) Jones on Evidence: Civil and Criminal 13 as cited in PJ Schwikkard & SE van der Merwe op cit (n 57) 177.
[80] A P Paizes 1989 *SALJ* 432 478.
[81] S A Goldstein 'The State and the Accused: Balance of Advantages in Criminal Procedure" (1960) 74 *Yale Law Journal* 1149. Also see S E van der Merwe op cit (n.57) 177-178.

these factual determinations are made in procedurally regular fashion and by authorities acting within competencies duly allocated to them'[82]

1.3.4 Judicial Integrity

The courts have a duty to act as per the expectations and rules laid down in the Constitution. If the Constitution provides expressly that illegally obtained evidence should not be admitted and the courts proceeds to admit the evidence, the following deductions will inevitably be drawn; -

a) The court does not respect the Constitution and hence can violate it.[83]

b) Since the courts have a duty to respect the Constitution, by admitting the evidence, they are acting contrary to their oath.[84]

c) By disregarding a constitutional provision, the court is indirectly encouraging others to follow suit.[85]

d) The court can also be viewed as condoning and hence legitimising the acts of the government officer, which is unconstitutional.[86]

1.3.5 Principle of self correction

Any system that is effective should be able to rectify any abuses that arise within itself at the earliest possible moment[87]. It should not condone any abuse on the pretext that there are other remedies available elsewhere for the aggrieved party. For example, it should not condone abuse by saying that the aggrieved can sue for assault,

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[82] H L Packer *The Limits of the Criminal Sanction* (1969) 166.
[83] *Janis v United States* 428 US 443 458 (1966).
[84] *Elkins v United States* 364 US 206 217 (1960).
[85] Supra (n82).
[86] *Olmestead v United States* 277 US 438 485(1928).
[87] Gard op cit (n.79) 167-8.

damage to property [88]etc. If the system were to allow this to happen, the inevitable conclusion would be that: -

a) It is not truly a due process one, because it allows abuses of an individual rights which are considered essential for due process at the altar of adjudication.[89]

b) 'It is dependent upon any civil action, which the aggrieved may or may not institute against the perpetrator or any criminal charges the authorities an accused may follow up'[90].

c) It has to tolerate internal abuses for it to operate [91]

The argument of self-correction can also be extended to argue that the exclusionary rule is not primarily aimed at discouraging unconstitutional official conduct, its purpose is to serve as an effective internal tool for maintaining and protecting the value system as a whole.[92]

1.3.6 Primary and secondary rules

The exclusionary rules are contained in both the Constitution and the statutes. In addition, the police also have their own rules of procedure, which they are obligated to follow in performing their duties. The rules instruct on how evidence should be gathered and provide for exclusion of evidence acquired in breach of these rules. It could therefore be argued that the constitutional rule on exclusion of improperly obtained evidence enforces the primary rules on evidence. Van Rooyen put it more succinctly,

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[88] S E van der Merwe op cit (n. 57) 178.
[89] Ibid.
[90] Ibid.
[91] Ibid.
[92] S E van Der Merwe "Unconstitutionally Obtained Evidence" (1992) *Stell LR* 173,204.

'... [h]owever upon close analysis it is clear that the policy decision that certain relevant and credible evidence may not be obtained unless certain prerequisites met... has already been taken by the rules regulating pre-trial police powers (which I shall call 'primary rules') and is not newly imposed by the exclusionary rule (the secondary rules). The secondary rules merely 'enforces' the primary rules: if, for example the police in a given case voluntarily obey the primary rules, the result may well be that the certain evidence is lost and will accordingly not be used at the trial, a calculated risk that we must run if we are to have legal limits on police powers to infringe individual interests; if, on the other hand the police flout the primary rules, the secondary rule simply achieves the same result.'[93]

Conclusion

In this chapter, we have discussed the history of both the exclusionary and inclusionary rule of improperly obtained evidence. The rationale or the arguments advanced by both schools have also been presented. It should be noted however no system exists in its pristine state. Both the exclusionary and inclusionary approach have been lessened by exceptions such that although we may talk about exclusionary rule there are situations where evidence albeit improperly obtained will be admitted. The same case will also apply to the inclusionary approach where evidence will be excluded despite it being relevant on consideration of other grounds as canvassed above.

[93] J h van Rooyen "Lead-In Paper" (1975) Acta Juridica 70 79 see also S E van der Merwe op. cit (n.57) 179.

CHAPTER TWO

IMPROPERLY OBTAINED EVIDENCE IN KENYA

INTRODUCTION

The Judicature Act[94] enumerates the sources of law in Kenya. The sources are:

i) The Constitution

ii) Statutes of Kenya Parliament

iii) Some England statutes specified in the second schedule to the Judicature Act[95]

iv) Subsidiary legislation

v) Statutes of General application in force in England on 12 August 1897.

vi) The substance of English common law and doctrine of Equity in force in England on 12 August 1897.

vii) Islamic law, Hindu marriage rites and African customary law.[96]

The Evidence Act[97] is the principal Act governing law of evidence in Kenya.[98]

In Kenya, there is no express provision on improperly obtained evidence; neither is improperly obtained evidence defined in any of the statutes that in one-way or another deal with evidence. However, the Kenyan courts have adopted the English common

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[94] Chapter 8 laws of Kenya.
[95] Ibid.
[96] This category governs personal law of people subject or affected by them. They are not applicable as far as criminal or evidence law is concerned.
[97] Chapter 80 laws of Kenya.
[98] There are other Acts which also have provisions relating to Evidence e.g. Criminal Procedure Act (cap 75)
Police Act (cap 85) and Administration Police Act (Cap 86). However for the purpose of this dissertation they will not be considered for they do not deal with illegally obtained evidence

law position as far as improperly obtained evidence is concerned. The case of *Kuruma s/o Kaniu v R*[99] remains the authority on improperly obtained evidence in Kenya. In terms of this test, relevance determines the admissibility of evidence. Two area will be examined as far as improperly obtained evidence is concerned namely, confession and searches. The Constitution[100] provides for the protection of citizens against illegal searches while the Evidence Act[101] provides for exclusion of confessions if the confession is obtained in its contravention. In this chapter, I will strive to explore the rules regarding confessions and searches. What is a confession? When is a confession admissible or inadmissible? The judicial attitude of the Kenya courts will be analysed and a critique given. The rule relating to searches in Kenya will also be discussed. This chapter will lay a basis for chapter three on the likely impact of Article 74 of the draft Kenya Constitution on improperly obtained evidence.

2.2 Confessions

Confession is defined in two sections of the Evidence Act[102] that is ss 25 and 32.

Section 25 states:

> ' [A] confession comprises words or conduct or combination of words and conduct from which, whether taken alone or in conjunction with other facts proved, an inference may reasonably be drawn that the person making it has committed an offence.'

Confession is also defined in s32:

> 'When more persons than one are being tried jointly for the same offence, and a confession made by one of such person affecting himself and some other of such person is proved, the court may take the confession into consideration as against such other as well as against the person who made the confession'.

Section 32 goes ahead and defines confession as used therein:

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[99] (1955) A C 197, [1955] 1 All E R 236.
[100] Section 76 of the Constitution.
[101] Chapter 80 Laws of Kenya.
[102] Ibid.

'In this section "confession" means any words or conduct, or combination of words and conduct, which has the effect of admitting in terms either an offence or substantially all the facts which constitute an offence...'

Kenyan courts have not so far defined what would constitute a confession in terms of Evidence Act.[103]However, the dictum of Lord Atkins in *Pakala Naraya Swami v King Emperor*[104] on the definition of a confession is always quoted with approval. Lord Atkins succinctly defined a confession as follows:

'[N]o statement that contains self exculpatory matter can amount to a confession if the exculpatory statement is of some fact which, if true, would negative the offence alleged to be confessed. Moreover, a confession must admit in terms either the offence, or, at any rate, substantially all the facts which constitute the offence. An admission of gravely incriminating fact even a conclusive incriminating fact, is not of itself a confession...'

Sir Clement de Lestang reaffirmed this definition in *Anyangu v R*[105] by holding that:

'[A] statement is not a confession unless it is sufficient by itself to justify the conviction of a person making it of the offence with which he is tried.'

Section 26 of the Evidence Act[106] provides factors that would render a confession inadmissible. It reads:

'A confession or any admission of a fact tending to the proof of guilt made by an accused person is not admissible in criminal proceedings if the making of the confession or the admission appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the court, to give the accused person grounds to which would appear to him reasonable

[103] Ibid.
[104] (1939) All ER 397,405.
[105] Criminal Appeal no 5 of 1968.
[106] Op cit (n 101).

for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.'

The above section places threshold test for the exclusion of any admission or confession under the section namely, the confession or admission,

i) Must have been caused by inducement, threat or promise

ii) Have reference to the charge against the accused person

iii) The threat or promise must proceed from a person in authority

iv) The inducement, threat or promise must be sufficient to induce the accused to suppose they would gain an advantage or avoid any evil of a temporal nature.

2.2.1 Inducement, threat or promise

For a confession to be admissible, it must have been obtained voluntarily, without any inducement, threat or promise. The position of Kenyan courts is akin to that of the English common law. The English common law position was stated by Lord Parker, C.J. in *Callis v Gunn*[107]

> 'There is a fundamental principle of law that no answer to a question and no statement is admissible unless it is shown by the prosecution not to have been obtained in an oppressive manner and *to have been voluntary in the sense that it was it has not been obtained by threats or inducement.*'

Lord Parker was actually echoing the words of Lord Summer in an earlier case where the latter had said:

> 'It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.'[108]

There seems to have been confusion in the early East African cases on the burden of proof as to whether a confession was voluntary or not was on the prosecution or the

[107] [1964] 1 Q.B. 495 at 501 (stress added).
[108] *Ibrahim v The King* [1914] A.C 599, 609.

accused. Example in *R v Agricola Kanyerihe*[109] the court held that the burden of proof as to any particular fact was upon the person who wished the court to believe that the confession was involuntary.[110] However, the East African Court of Appeal in *Njuguna s/o Kimani and Ors v R* rejected this approach[111] and pointed out:

> '[I]t is incumbent upon the prosecution to prove affirmatively that such confession were voluntarily made and were not obtained by improper or unlawful questioning or other methods.'

The court further said it was the duty of every judge to ascertain the admissibility, giving attention to all circumstances in which the police officer obtained the confession, and more especially, if the accused gave the said confession while in police custody having been detained for a long period.[112]

Once the accused disputes that the confession was voluntary by either retracting or repudiating it, the correct procedure the court is supposed to take is to hold a trial within a trial before the confession can be admitted. The court will then on the basis of the evidence adduced during the trial within a trial decide on whether the confession is admissible or not.[113]

The confession must not have been obtained because of a threat, fear of prejudice or hope of advantage held out. The question as to what amounts to a threat is one of fact to be decided by individual judge well versed with the facts of each individual case. A mere moral exhortation would not render a confession inadmissible.[114]Likewise, mere exhortation to tell the truth will not necessarily render the confession

[109] [1936] 6 ULR 10.
[110] See page 46 below.
[111] (1954) 21 E.A.C.A 311.
[112] See also *R v Thompson* [1893] 2 QBD 12 and *D.P.P v Pin Ling* [1975] 3 All ER 175 (H. L)
[113] *Mohamed Ali and Anor v R* (1956) 29 K.L.R. 166
[114] *R v Wild* (1836), 1 Mood. C.C. 452.

inadmissible. Thus in *R v Reeves and Hancock*[115] the words 'you had better, as good boys, tell the truth' and ' Be a good girl and tell the truth'[116] were held not to vitiate the confession made thereafter. However, the use of the phrase 'you had better tell the truth' led to the exclusion of the confession in *R v Fennell*[117] and *R v Jarvis.*[118] In *R v Richards*[119] a confession was obtained after the accused was told '[I] think it would be better if you made a statement and told me exactly what happened'. The court held that the confession was inadmissible as the words used were capable of constituting an inducement.

A promise of an advantage or avoidance of any evil will be regarded as an inducement and a confession as a result will not be admissible. In *R v Thompson*[120] the accused was told 'tell me where the things are and I will be favourable to you' and in *R v Cooley*[121] the statement ' if you don't tell me you may get yourself into trouble and it will be worse for you' were held to be falling within this provision and the confessions made were excluded.

The court will also be obligated to ascertain the accused state of mind at the time the confession was made. If the accused was deprived of the capacity to make a free choice whether to confess or not, but he nevertheless made the confession, such confession cannot be said to be voluntary. This is because one of the rationales for excluding such confession is that it is unreliable. A confession made when the accused is not in his 'sober' state would fit this category and should be excluded due

[115] (1872) L.R 1 C.C. R 362.
[116] *R v Stanton* (1911) 6 Cr. App. R 198.
[117] (1881) 7 Q.B.D. 147.
[118] (1867) L.R. 1 C.C.R. 96.
[119] (1967) 51 Cr. App. R. 266.
[120] (1783) 1 Leach 291.
[121] (1868) 10 Cox C C 536.

to its unreliability. The court should exercise its discretion and decide on a case-to-case approach rather than formulating a rigid principle to govern such situations.[122]

2.2.2 Person in authority

As a rule, the threat, promise or inducement must have been made by a person in authority, for the confession to be inadmissible. A person in authority can be described as 'anyone whom the prisoner might reasonably suppose to be capable of influencing the course of prosecution.'[123]

Bains J defined a person in authority in *Rex v Todd*[124]in the following words:

> 'A person in authority means, generally speaking, anyone who has authority or control over the accused or over the proceedings or the prosecution against him. And the reason that is the rule is that confessions made as a result of inducement, held out by a person in authority are inadmissible is clearly this, that the authority that the accused knows such a person to possess, may well be supposed in the majority of instances both to animate his hopes of favour on the one hand and on the other to inspire him with awe...'

Such a person would therefore include a person engaged in the arrest [125]or by someone acting in the presence and without dissent of such a person.[126]

Consequently, where the person who is not in authority makes a promise or threat, which subsequently induces a confession, that promise will not affect the admissibility of the confession.[127]

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[122] *R v Isequilla* [1975] 1 All ER 77, R *v Davies* [1979] Crim L R 167. See also C Rupert *Evidence* 5ed (1979) 545.
[123] R Cross *Evidence* 5th ed (1979) 541.
[124] (1901) 13 Man. L.R 364
[125] *R v Simpson* (1834) 1 Mood 410.
[126] *Deokinan v R* (1969) 1 A.C. 20 (PC).
[127] *R v Taylor* (1939) 8 C &P 733.

The following persons have been held to be person in authority; chiefs[128], police[129], a customs officer investigating a suspected drug offence[130], the prosecutor [131]or his wife[132], a partners wife where the offence concerned a partnership [133]or his attorney[134], the prisoners employer if the offence had been committed against his person or property but not otherwise[135], a magistrate[136], magistrates clerk[137]. In *R v Godinho*[138] the court held that if the confession is induced by a person not in authority the confession would be admissible.

Trevelyan J, in *Muriuki v R*[139] speaking for the East African Court of Appeal said that a person in authority is one whom the prisoner might reasonably suppose to be capable of influencing the course of the prosecution.

From the above definitions, it would be logical to conclude that the court should regard any person who can influence the course of the prosecution as a person in authority. It is my thesis the court should only regard a person as one in authority if in the mind of the accused, the former could influence his fate.

The rationale of the rule that it is only a person in authority who can influence or induce the prisoner into making a confession. It is conceivable that if a person is given a promise either, expressly or impliedly by a person who can influence his fate, the

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[128] *R v Eriya Kasule & Anor* (1948) 15 EACA 148.
[129] *R v Ikojot &Agella* (1917) 2 U.L.R 26, *R v Shepherd* (1836) 7 C&P 579.
[130] *R v Grewal* (1975) Crim. LR 159.
[131] *R v Jenkins* (1822) Russ & Ry 492.
[132] *R v Upchurch* (1836) 1 Mood 465.
[133] *R v Warmingham* (1852) 2 Den 447 n.
[134] *R v Croydon* (1846) 2 Cox 67.
[135] *R v Fallon* [1975] Crim LR 341.
[136] *R v Gillis* (1866) 11 Cox 69.
[137] *R v Drew* (1837) 8 C&P 140.
[138] (1911) 7 Crim App. R 12.
[139] [1975] E A 223.

accused may make a statement, which could be self-incriminating and even may be willing to confess an act, he had not committed to obtain a favour. Such a confession is not reliable and therefore the court should not admit it.

Conversely, if the confession is made to a person not in authority, the confession will be admissible. Based on this rationale, the court in *Deokinan v The Queen* [140] admitted a confession that had been made to a friend of the accused who was in a nearby lock-up. However, the court voiced its scepticism about the merits of the rule that a confession is only inadmissible if the threat or inducement comes from a person in authority. In the words of Viscount Dilhorne:

> 'If the grounds on which confession induced by promise held out by persons in authority are held to be inadmissible is that they may not be true, then it may be that there is a similar risk that in some circumstances the confession may not be true if induced by a promise held out by a person not in authority, for instance if such a person offers a bribe in return for a confession.'[141]

Despite the fact that the common law rule that threat or inducement will only operate to exclude a confession if it comes from a person in authority has been abolished in Britain[142], it continues to be the law in Kenya! As has been stated by Viscount Dilhorne above, the 'risk of an inducement resulting in an untrue confession is similar whether or not the inducement comes from a person in authority.'[143]

2.2.3 Reference to the charge

The inducement, threat or promise must relate to the charge for the confession to be inadmissible. The Kenyan position is the same as the English common law approach

[140] (1969) 1 A. C 20, 33. [1968] 2 All ER 346.
[141] Ibid.
[142] Section 82(1) The Police and Criminal Evidence Act, 1984.
[143] A Keane *The Modern Law of Evidence* (1995) 279.

before 1967. However, in a unanimous decision, the House of Lord in *Commissioner of Customs and Excise v Harz and Power*[144] held that such was not the law in United Kingdom.

> The accused were charged with conspiracy to defraud. During his interrogation, customs officers told Harz that if he did not answer the questions put he would be prosecuted for breach of a statutory obligation to speak. No such obligation in fact existed. Subsequently Harz made a number of incriminating admissions, which were admitted in evidence at the trial. The Court of Criminal Appeal quashed the conviction because the admission had been induced by threat. The court rejected the argument that the threat or promise, which induces the confession, must relate to the charge or contemplated charge against the accused.

It is my thesis that although the object of the section[145] is noble, the section may actually end up emasculating the very rights of the accused which it intended to protect. The linking of the charge or contemplated charge to the threat, inducement should be dispensed with. So long as a threat is employed to obtain a confession, the confession should be excluded. If the evidence is obtained as a result of inducement or threat whether relates to the charge or not, the reliability of the evidence becomes doubtful. So long as the accused did not volunteer the confession, the court should hesitate before admitting the evidence whether the threat relates to the charge or not.

2.2.4 Lapse of time

Section 27 of the Evidence Act[146] deals with the duration of the threat, inducement or promise. Are there circumstances where a promise, inducement or threat can be said to be spent with regards to a confession given under section 26?[147] Section 27 reads:

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[144] [1967] 1 A. C. 760.
[145] Section 26 of the Kenya Evidence Act.
[146] Chapter 80 Laws of Kenya.
[147] Ibid.

> 'If such a confession as is referred to in section 26 is made after the impression caused by any such inducement, threat or promise has, in the opinion of the court, been removed, it is admissible.

On the wordings of the above sections, it could be interpreted that an inducement may become ineffectual as result of lapse of time or because of some intervening cause[148]. A subsequent caution given after the promise, inducement or threat but before the confession will render the confession admissible. However, the caution should have been given by a person superior in authority. In *R v Smith*[149] a threat by a sergeant-major that he would keep a company on parade until he was told who had been involved in stabbing other soldiers made a confession inadmissible, but the threat was regarded as spent the following day when the accused made a further confession to a different person under caution.

The court has however pointed out that duration of time will be a material factor in determining whether the inducement had become ineffective. Thus in *R v Doherty*[150]

> A constable told a prisoner in the morning that it would be better to tell the truth, and a confession was made the same evening to another constable after a proper caution. The court held the confession was inadmissible.

The Court of Appeal in *R v Smith*[151] laid down the following principle,

> '[I]f the threat or promise under which the first statement was made still persists when the second statement is made, then it is inadmissible. Only if the time limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement.

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[148] R Cross *Evidence* 5ed (1979) 543.
[149] (1959) 2 Q.B 35.

[150] (1874) 13 Cox CC 23.
[151] Supra (n.148).

2.2.5 Admission under compulsory process of law

The East African courts have adopted the position that admissions made under any compulsory process of law are admissible. They are admissible even if they had been obtained after threat of sanctions, which would have been provided under any law in case of a failure to answer any question, posed or volunteer information requisitioned. Justice Anley in *Mutagwaya v R*[152] opined that:

> '[I] think the question in each individual case will turn on whether the power used ... have been properly used or have been abused. If in the course of a bona fide search for information a demand... is made and a person incriminates himself, I see no reason why the incriminating answer should not be given in evidence at a subsequent trial.'

Although the court did not elaborate on the meaning of a bona fide search it may be inferred to be a search, which is not motivated by malice. The court could also have been referring to situations where a mistake occurs unpremeditated.

In England, the issue was discussed in *Commissioner of Customs and Excise v Harz*[153] Lord Reid noted:

> 'Some statutes expressly provide that incriminating answers may be used against the person who gives them and some statute expressly provide they should not. Where there is no such express provision, the question whether such questions are admissible must depend on the proper construction of the particular statute.'

Section 30 of the Kenyan Evidence Act, governs confessions obtained through deception, lack of caution or by tricks. The law in Kenya is that such confession if otherwise admissible, will not cease to be admissible merely because it was made in answer to questions, which, the accused need not have answered, whatever may have been the form of those questions. Neither will it be rendered inadmissible because the accused was not warned that they were not bound to make such confession and that

[152] (1950) U.L.R. 233.
[153] (1967) 1 A.C 760 (H.L).

evidence of it might be given. This section deals with evidence that is lawful but was obtained by trickery or other ways, which would be termed unfair but not necessarily unlawful. Though the Act provides that such evidence is still admissible, the court has discretion if in the opinion of the court and totality of the circumstances admitting the confession will render the trial unfair to the accused. The words of Lord Parker in *Callis v Gunn*[154] would offer guidance to courts in the interpreting this section. He reasoned that:

> 'In considering whether admissibility would operate against a defendant one would certainly consider whether the admission or confession was obtained in an oppressive manner, by force or against the wishes of the accused.'

In *Nayinda s/o Batungwa v R*[155] the East African Court of Appeal held that there was nothing in the section which negated the discretion of a judge to refuse to admit a statement which they thought was involuntary, or where the answer given was unguarded such that it would be unreliable or unfair to allow it in evidence against the accused.

Lastly, section 31 deals with information, which the accused gives and leads to the discovery of facts. It provides:

> 'Notwithstanding the provisions of section 26, and 29, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

[154] [1964] 1 Q.B. 495,501.
[155] (1959) E.A 688.

The inadmissibility of a confession does not render any evidence discovered as a result of it inadmissible. The position is the same as in English common law, which was stated in *R v Warwick*[156]. In the case:

> A woman was charged as an accessory after the fact, after receiving stolen property. In consequence of a confession made by her, the property was found concealed in her bed at her lodging. Although the court excluded the confession on the grounds that it had been obtained by promise of favour an argument by the defence counsel for the exclusion of the fact of finding the stolen property in her custody was rejected, the court stated that ' confessions are received in evidence, or rejected as inadmissible, under consideration whether they are or are not entitled to credit... this principle respecting confessions has no application whatever as to the admission or rejection of facts, whether the knowledge of them be obtained in consequence of an extorted confession or whether it arises from any other source, for a fact if it exists at all, must exist invariably in the same manner whether the confession from which it derives be in other respects true or false. Facts thus obtained, however, must be fully and satisfactory proved without calling in the aid of any part of the confession from which they may have derived.'

The above decision was cited and confirmed as the correct position in law in the case of *Kuruma s/o Kaniu v R*[157]. The Kenyan courts have cited the decision in *Kuruma s/o Kaniu v R*[158] with approval. The test has been that of relevance of the evidence, the procedure of obtaining it notwithstanding.

This section could be said to be negating all the safeguards ss 26 to 30 could have afforded to the accused. It would be tempting for the law enforcement officers to use improper means to try to get real evidence if they know that it has a chance of being admitted. My thesis is that in this case, the real evidence should be likened to 'the fruits from a poisonous tree' and the court should exclude it. This will have a

[156] (1783) 1 Leach 263.
[157] [1955] A C 197.
[158] Supra.

deterrent effect on the police, as they will be compelled to use lawful means in their law enforcement duties. The purpose of exclusion should not be viewed as merely enabling a guilty accused to be acquitted, whereas this maybe an unfortunate consequence, but the end result should be looked at the advantages the result will have on the society as a whole.

2.3 Unlawful search

As alluded to above, there is no law in Kenya expressly providing for admissibility or inadmissibility of improperly obtained evidence. The Evidence Act[159] does not have any provision regarding searches but the Constitution does. Section 76 of the Kenyan Constitution provides:

> 76 (1) Except with his own consent, no person shall be subjected to the search of his person or his property or entry by others in his premises.

However, the Constitution goes further to "claw back" what it has given in section 1 in subsection 2 by giving wide embracing provisos. It states,

> (2) Nothing contained in or done under the authority of any law shall be inconsistent with or in contravention of this section to the extent that the law in question makes provision-
> (a) that is reasonably required in the interest of defense, public safety, public order, public morality, public health, town and country planning, the development and utilisation of any property in such a manner as to promote the public benefit;
> (b) that is reasonably required for the purpose of promoting the rights or freedoms of other persons;
> (c) that authorises an officer of the government of Kenya, or local government authority, or a body corporate established by law for that purposes, to enter on the premises of a person in order to inspect those premises or anything thereon for the purposes of a tax, rate or due or in order to carry out work connected with property that is lawfully on those

[159] Chapter 80 Laws of Kenya.

premises and that belongs to that government, authority or body corporate, as the case may be; or

(d) that authorises, for the purpose of enforcing the judgement or order of a court in civil proceedings, the entry upon premises by order of a court,

and except so far as that provision or, as the case maybe, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Despite the fact that the above provision is geared towards protecting the citizens from unlawful search, ironically it also gives the state officers and their agents a wide discretion to carry out searches upon the person and their property. It is quite telling that whereas under the Constitution, public order, public morality and public benefit are grounds upon which this right may be derogated, the Constitution does not define what constitutes public order, public morality or public benefit. The term public morality is quite vague and no precise definition can be attached to it! Law is about enforcing the rights and duties provided by the law. Rules of morality are not enforceable unless they have been codified. Furthermore, the laws of Kenya do not give a methodology of ascertaining public morality.

S 76 (2) (b) provides a leeway for suppression of individuals' rights in order to promote the rights and freedoms of other persons. This exception goes against the grain, as it is not clear why an individuals right should be lesser than that of the other individual. The section does not also detail the type of rights that would invite the operation of this exception. Is it any right or freedom that would invite the suppression of the right against unlawful search of an individual or his property or the entry by others in his premise. It is my thesis that whereas the spirit of the exception is sound, its wording falls short of this expectation.

The section also provides that any other act which would be 'reasonably justifiable in a democratic society can be used as a ground to derogate from the rights under s 76. The question as to what would be reasonably justifiable in a democratic society is a subjective one. What the police officer on the beat may view as reasonably justifiable in a democratic society may not be the same before the eyes of a law teacher or the person in the streets.

The section, as earlier alluded to, only provides for freedom from unlawful search but is dead silent on the effect of such search on evidence. The Constitution does not state whether evidence obtained from a search, which contravenes s 76, is admissible. However, the case of *Kuruma s/o Kaniu v R*[160] would be a pointer that such evidence is admissible so long as the evidence is relevant.

2.4 Barriers to admissibility

As discussed above the position of the Evidence Act is that improperly obtained evidence is admissible so long as it is relevant and does not contravene ss 26 to 30 of the Act. However, the courts have discretion to exclude evidence, which in the totality of the circumstances its admission would render the trial unfair to the accused. This is only where the improperly obtained evidence, in the form of a confession is obtained through trickery.

[160] Supra (n.157).

The Kenyan courts have erected some safeguards to protect the accused from the general rules of confession and the admissibility of evidence obtained. These safeguards are both procedural and substantive. They are,

2.4.1 Burden of proving confession

The courts have insisted that if a confession is disputed, the duty is on the prosecution to proof that the said confession was voluntary. If the accused repudiates or retracts the confession the court will without more, order a trial within a trial to be conducted to ascertain whether the confession was voluntary or not. In *Tuwamoi v Uganda*[161] the court observed that:

> 'The present rule as applied in East Africa in regard to a retracted confession, is that as a matter of practice or prudence the trial court should direct itself that it is dangerous to act upon a statement which has been retracted in the absence of corroboration in some material particular, but that the court may do so if it is satisfied in the circumstances of the confession, it must be true.'

Even where the confession is voluntary, if it is manifestly untrue, the court will exclude it because it is unreliable.

In *Aneriko v Uganda*[162] the court pointed out that,

> 'If, however, a material element in a confession and one which must have been within the knowledge of the person making the confession is demonstrably untrue, the value of the confession as a whole is destroyed and it cannot be relied on.'

The case of *Aneriko v Uganda*[163] was cited with approval in *Ekai v Republic*[164]

[161] [1967] E A 84
[162] (1972) E A 193.
[163] Supra.
[164] Criminal Appeal No 115 of 1981.

2.4.2 Judges rules

Judges rules are rules of practice providing administrative directions for the guidance of police officers in the taking of statements and confessions from accused persons. Although they are only rules of practice and the judges have discretion to exclude or include confessions obtained in breach of them, the court will invariably consider them in determining the weight to be placed in particular evidence. In *Bassan and Wathioba v R*[165] the court pointed out that:

> 'We are not to be taken to be minimising the importance of compliance by the Police officers with the Judges rules. Failure to comply with the judges rules.... will no doubt usually result in the rejection of the statement...But it must be kept in mind that the judges rules are administrative rules and their breach does not automatically result in the exclusion of a statement. The breach is but one of the circumstances, though an important one, for the trial judge to take into account in deciding whether or not the statement was voluntary or was made in circumstances which render it unfair to the prisoner that it should be admitted in evidence.'

Sir Clement de Lestang reiterated that the Judge's Rules were only rules of practice, and it is always in the discretion of the trial judge to allow statements made by accused persons although they were obtained not in compliance with the rules[166].

That notwithstanding, the Judge Rules play a pivotal role in ensuring that the accused rights are protected. The police endeavours to observe them in order to ensure the court do not exclude the confession obtained. Although as mentioned above, it is not automatic that all the confession obtained in their contravention will be excluded, their disregard will be a strong indication that the accused confession was not voluntary or the accused was not in his guard when giving the confession.

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[165] (1961) E.A 84.

[166] *Anyangu v Republic* [1968] E A 239. The court also said that only the Judges rules in force in England before 1964 were applicable and not the 1964 rules.

Conclusion

The law in Kenya on improperly obtained evidence is far from clear. The Constitution, which is the basic law in Kenya, does not have any express provision that provides for exclusion of improperly obtained. Despite the protection of individuals from unlawful search in the Bill of Rights, it cannot be said with certainty that improperly obtained evidence would be excluded.

The Evidence Act provides for exclusion of a confession obtained in contravention of s26. However it goes further to provide that if facts discovered as a result of an inadmissible confession are admissible. This has led to police using unorthodox means to obtain confessions and any related evidence. It is my submission that the law should not allow proof of facts discovered as a result of inadmissible confession. The rule regarding connecting the threat, confession and inducement to the confession to the charge flies in the face of logic. Any threat, promise or inducement should render the confession obtained as a result inadmissible. It is my thesis that once a threat or promise is proved, the confession can no longer be said to be able to pass the test of being voluntary.

In addition, the law stipulating that only a threat, inducement or promise coming from a person in authority, necessitates the exclusion of evidence, should be amended. Any threat, inducement or promise will affect the voluntary of the statement and the reliability of the confession. However if the person making the threat, inducement or promise cannot in anyway influence the prosecution the threat, inducement or promise would not be material.

CHAPTER 3- IMPROPERLY OBTAINED EVIDENCE IN THE DRAFT CONSTITUTION

Article 74(3) of the draft Kenya Constitution provides:

> 'Evidence obtained in a manner that violates any rights in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

For the first time the Kenyan Constitution will provide expressly on evidence obtained in breach of its provisions. As discussed in chapter One, the Kenyan position is mainly an inclusionary approach tending more towards the English common law inclusionary approach rather than the exclusionary approach. The case of *Kuruma s/o Kaniu v R*[167] remains an authority as far as improperly obtained evidence is concerned. Thus the question to be dealt with in determining whether any evidence is admissible or not is not how it was obtained but rather its probative value. However, the courts as seen, have moved from the strict inclusionary approach as advocated in *Leatham v R,* [168] where the judge said that even if the evidence is stolen it is admissible. The courts have been keen to ensure judicial integrity is maintained, and thus will exercise its discretion to exclude any evidence if it is obtained in flagrant violation of the accused rights. However, this discretion is limited and the court will invariably admit the evidence so long as it does not conflict with the rules of confession.

In this chapter, I will examine and analyse Article 74(3) of the Draft Constitution. As the Article stands, it will have a revolutionary effect on the criminal and evidential

[167] [1955] AC 197, [1955] All ER 236.
[168] (1861) 8 Cox CC 498 at 501.

jurisprudence in Kenya. The draft Constitution not only expressly provides for improperly obtained evidence, but it elevates the right of its exclusion in the Bill of Rights thus putting it above the ordinary Constitutional rights. According to Article 33 (1), the rights under the Bill of Rights cannot be limited save to extend that the limitation is reasonable and justifiable in an open and democratic society[169]. Article 74(3) also imposes a duty on all legislations dealing with rights of accused person to conform to the rights provided under Article 74 (1). This is due to the fact that every law has to conform to the provisions of the Constitution and any provision that conflicts with any provision of the Constitution is void and invalid to the extent of its inconsistency.[170]

Interpretation of the Article 74 (3)

3.1 Interpretation of the Article 74(3)

Article 74 (3) places a threshold test for it to come into operation. These are:

(a) The evidence must have been obtained in a manner that violates a right in the Bill of Rights

(b) The admission of the evidence would result to an unfair trial; or

(c) The admission of evidence would otherwise be detrimental to the administration of justice.

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[169] Article 33 (1) provides *inter alia*: A right or freedom set out in the Bill of Rights may be limited only-

(a) by a limitation or qualification expressly set out in the provision containing that right or freedom and may be otherwise limited only by a law of general application; and

(b) to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors....'

[170] Article 2(2). Provides *inter alia*

'A law that is inconsistent with this Constitution is void to the extent of the inconsistency and any action or omission in contravention of this Constitution is invalid.'

3.2 Obtained in manner

Proof of violation of the Bill of Rights and the procurement of the evidence is requisite for Article 74(3) to become operational. The phrase 'obtained in a manner' may be interpreted as requiring either a strict causation or only a temporally relationship between the violation and the obtaining. The Canadian courts have interpreted an equivalent clause[171] in their Charter as not requiring a strict causal relation between the violation and the procurement. So long as there is some temporal connection, so be it. However, the relation should not be very remote. In *R v Strachan*[172] chief Justice Dickson stated:

> [T]he first inquiry under s.24 (2) would be to determine whether a Charter violation occurred in the course of obtaining the evidence. A temporal link between the infringement of the Charter and the discovery of the evidence features prominently in this assessment, particularly where the Charter violation and the discovery of the evidence occur in the course of a single transaction. The presence of a temporal connection is not, however, determinative. Situations will arise where evidence, though obtained following the breach of a Charter right, will be too remote from the violation to be 'obtained in a manner' that infringed the Charter. In my view, these situations should be dealt with on a case-by-case basis. There can be no hard and fast rule for determining when evidence obtained following the infringement of a Charter right becomes too remote.

In *R v Strachan,*[173] the accused was challenging the admissibility of evidence of cannabis found in his apartment after a search conducted in the violation of his right to an advocate under section 10(b) of the Charter. The police had a search warrant and therefore the violation of the right did not result to the obtaining of the evidence.

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[171] Section 24 (2) of the Canadian Charter of Rights and Freedoms provides:
'Where, in a proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regards to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.'

[172] (1988) 67 C.R. (3d) 87 (S.C.C).

[173] Supra.

The requirement for a strict causal relationship has been held to be inappropriate because:

i) It would require the court to use the 'but for' test. This test, necessitates the court to 'speculate in a highly artificial manner about whether certain evidence would or would not have been obtained but for the Charter violation.'[174]

ii) The examination is too restrictive view of the rights provided under the Charter. This is because the court will have to scrutinise the specific police conduct and the accused, and thus lose focus on the whole transaction.[175]

iii) A causation requirement would lead to inclusion of all real evidence obtained if obtained in breach of the right to retaining of a counsel, except where derivative evidence is obtained as result of accused statement.[176]

iv) The court will have to speculate whether real evidence obtained in breach of right of counsel would have been obtained if the counsels' advice had been obtained. This will inevitably lead to unequal treatment of real evidence.[177]

Where the Charter violation and the evidence are too remote, the court may not treat the evidence as having been 'obtained in a manner'. However, if evidence is obtained after a breach of the Charter, but there is no connection between the breach and obtaining, the court may nevertheless consider this fact in determining whether the admission of the evidence would bring the administration of justice into disrepute.[178]

All in all, the court will determine the relation between the breach and the obtaining in a manner in a case-to-case basis. Nevertheless, as pointed out, the

[174] Ibid. at 1002 (S.C.R).
[175] Ibid at 1002-3 (S.C.R).
[176] Ibid.2003-4 (S.C.R).
[177] Ibid. 2003. 1004-05. (S.C.R).
[178] Ibid. 1006 (S.C.R).

more remote the relationship between the breach and the evidence, the less likely the possibility of exclusion.[179]

Should Kenya adopt a strict causation theory?

Whereas it cannot be gainsaid that there must be some connection between the violation of the Constitution and the obtaining of the evidence that is sought to be impugned, the said relation should not be overemphasised. As earlier discussed, evidence is sometimes excluded in order to maintain judicial integrity.[180] A strict causation test will compromise the judicial integrity. It will also undermine the principle of self- correction. Exclusion of evidence is also aimed at ensuring that the police are deterred from violating individuals' rights. A strict requirement of relationship between the violation and the obtaining will also negate this noble goal.[181] It has been argued that a strict causation theory will, without doubt, 'divert attention from the two true tests in section 35(5) namely, whether admission of the evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'[182] Kenya should also adopt an approach akin to the South Africa and Canada approach. However a cautious approach need to be taken vis-à-vis the exclusion of evidence. The court should not be too fast to exclude the evidence wherever there is violation of a constitutional right. I would advocate for the 'but for' test. The court should exclude evidence obtained unconstitutionally, only if evidence would not have been obtained if there were no breach. There ought also to be a

[179] *R v Debot* [1989] 2 S.C.R 1140 at 1149. Also *R v Strachan* (Supra n.171).
[180] P J Schwikkard & S E van Der Merwe *Principles of Evidence* 2ed (2002) 206.
[181] Ibid.
[182] Ibid. Section 35 (5) provides:
'Evidence obtained in a manner that violates any rights in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

distinction between real and testimonial evidence in deciding whether to exclude evidence or not. Real evidence I would submit, existent independent of the breach, therefore it should only be excluded if the inclusion would bring administration of justice into disrepute.

Standing

The rule on standing requires the accused to proof that the evidence that he seeks to impugn was obtained in violation of his own rights. This rule is a requirement in both USA[183] and Canada. In Canada for an accused to challenge admissibility of evidence under s 24 (2) of the Charter, the accused must be able to satisfy the requirements of s 24 (1).[184] McIntyre J explained this requirement by stating that an application under s 24(2) can only be made within the context of proceedings under s 24(1).[185]This requirement was reiterated in *R v Rowbotham*[186], Ewaschuuk J stated that for an accused to challenge admission of evidence under s 24(1) he must proof that one of his rights has been infringed or denied.

Steph van der Merwe strongly opines that the requirement of standing is not a prerequisite to an application under s 35(5) of the South African Constitution.[187] He further argues that a requirement of standing would defeat both the 'preventive effects rationale' in addition a requirement of standing would compromise judicial integrity.[188]

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[183] *Rakas v Illinois* 439 US 128 (1978).
[184] J Sopinka et al *The Law of Evidence in Canada* (1992) 392.
[185] *Mills v R* [1986] 1 S.C.R 863.
[186] (1984), 13 W.C.B. 104.
[187] P J Schwikkard & S E van Der Merwe op cit (n 55) at 207.
[188] Ibid.

Langenhoven on the other hand is of the view that, standing is not a condition precedent under s 35(5).[189] He however adds that the fact that its not the rights of the accused person that were violated, should be taken into consideration when considering whether the admission of evidence would be detrimental to the administration of justice or not.[190]

The Kenyan courts should also resist the temptation of following the Canadian or the USA approach. Reading in standing as requirement prerequisite for an accused to plead Article 74(3) would defeat the purpose of the Bill of Rights. In addition, it will run counter to Article 29 of the Draft Constitution.[191]

3.2 Would render the trial unfair

The first test in determining, whether to exclude evidence, which is obtained in violation of constitutional right, is if it renders the trial unfair. Lamer J pointed out that evidence that would affect the fairness of a trial, would invariably result to disrepute on the administration of justice, and subject to consideration of other factors should be excluded.[192]

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[189] Langenhoven *Die Toelaatbaarheid van Ongrondwetlik Vekree Getuienis* 373 (as cited in P J Schwikkard & S E van Der Merwe op. cit. (n 55) at 207.

[190] Ibid.

[191] The Article provides that:

> (4) When interpreting the Bill of Rights, a court, tribunal or forum-
>
> (a) Shall promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

[192] *R v Collins* [1987] 1 S.C.R. 265, 56 C.R. (3d) 193

It should be noted from the onset that the unfairness referred to here is unfairness to the accused but not to the prosecution. This can be implied from the preceding provision of Article 74. Sub article (1), (2), (4) and (5) refer to rights of the accused and therefore it is only logical to surmise that sub article (3) also refers to the rights of an accused. This is also in line with the interpretation given to s 35(2) of the South Africa Constitution by South African court in *S v Lottering.*[193] However, this should not be construed to mean that unfairness to the prosecution would not be a factor in the trial. Unfairness to the prosecution may be considered when assessing whether exclusion or the admission of the evidence in issue, will be detrimental to the administration of justice.

Kriegler J explained what constitutes a fair trial in *Key v Attorney General, Cape Provincial Division, and another*[194]

> 'In any democratic criminal justice system there is tension between, on the one hand, the public interest in the bringing criminal to book and on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond pale. To be sure, a prominent feature of that tension is a universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by state agencies in the prevention, investigations or prosecution of crime. But none of that means sympathy for crime, and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given fair trial. Ultimately, as was held in *Ferreira v Levin* fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times, fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.'

[193] 1999 12 BCLR 1478 (N) 482i-j.
[194] 1996 (4) SA 187 (CC), 1996 (2) SACR 113 (CC) at para 13 and 14.

It is difficult to determine what is a fair trial. It has been stated that it is actually an elusive venture.[195] The court has to balance between different and conflicting interests. There is a conflict in deciding whether to exclude evidence, which though relevant is tainted with breach of constitutional right, or to insist on the protection and 'maintaining of pre-trial procedural standards.'[196]Public opinion also has to be considered when determining whether exclusion of evidence would be detrimental to the administration of justice or not.

As a rule, if the admission of evidence will affect the fairness of a trial, the admission of such evidence is likely to bring administration of justice in disrepute, and unless there are other reasons militating against its exclusion, the evidence should be excluded.[197]

If the admission of evidence is likely to affect the fairness of trial, the courts will usually exclude it. However, the court will still be obliged to consider seriousness of the violation and effects of the violation on the system.[198]

In *R v Collins*[199] Justice Lamer was of the opinion that in considering fairness of trial, the court has to consider the following factors:

> '(i) The nature of evidence obtained as a result of the violation of the right;
>
> and
>
> (ii) Nature of the right violated.'[200]

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[195] D T Zeffert et al *The South African Law of Evidence* 5ed (2003) 455.
[196] Ibid.
[197] *R v Collins* Supra (n 192) at 122.
[198] D Stuart *Charter Justice in Canadian Criminal Law* (1991) 398.
[199] Supra (n 192). 137
[200] Ibid.

The court also asserted that the nature of violation would not count so much in the evaluation. However, if the evidence obtained was real evidence, unless there is another reason (other than the violation of the accused rights) admission of the evidence will rarely render the trial unfair.[201] Real evidence, it was argued existed before the violation of the rights and therefore its admission would not render the trial unfair. This was distinguished from testimonial or other evidence obtained through the accused conscription. Unlike real evidence which existent independent of the violation of the accused rights, evidence obtained through a confession or coming from him did not exist *a priori* and therefore it admission would render the trial unfair.

Cory J gave a fair trial analysis in *R v Stillman.*[202] The judge stated that the court has to begin by classifying the challenged evidence as either 'conscriptive' or 'non-conscriptive.'[203]The court proceeded to give a summary of a fair trial analysis as follows:

1. 'Classify the evidence as conscriptive or non-conscriptive based upon the manner in which the evidence was obtained. If the evidence is non-conscriptive, its admission would not render the trial unfair and the court will proceed to consider the seriousness of the breach and the effect of the exclusion on the repute of the administration of justice.
2. If the evidence is conscriptive and the crown fail to demonstrate on a balance of probabilities that the evidence would have been discovered by alternative non-conscriptive means, then its admission would render the trial unfair. The court as a general rule, will exclude the evidence without considering the seriousness of the breach or the effect of exclusion on the repute of the administration of justice. This must be the result since an unfair trial would necessarily bring the administration of justice into disrepute.
3. If the evidence is found to be conscriptive and the crown demonstrates on a balance of probabilities that it would have been discovered by alternative non-

[201] Ibid.
[202] 1997 42 CRR (2d) 189 (SCC)
[203] *R v Stillman* supra (n 202) 223.

> conscriptive means, then its admission will generally not render the trial unfair. However, the seriousness of the Charter breach and the effect of exclusion on the repute of the administration of justice will have to be considered.'[204]

In analysing whether admission of evidence would render the trial unfair, the court has to determine whether the evidence is conscriptive or derivative and it has also to decide whether the conscripted evidence is discoverable.[205] The test for determining and classifying evidence as either conscriptive, derivative or the one for establishing whether conscriptive evidence is discoverable are different.[206] The discovering test enables the court to determine whether the breach of the Charter was necessary for the discovery and obtaining of the conscripted evidence. If the court finds that the evidence obtained by conscription could have been obtained, even if the Charter had not been breached, the court will proceed and allow the evidence discovered to be admitted. The evidence though obtained by conscription, would not render the trial unfair if admitted.[207] The court in carrying out the derivative inquiry, seeks to determine whether the evidence in question should be taken as conscriptive in nature because it has a close relation to other conscripted evidence. In this regards '[e]vidence is derivative evidence if it would not have been obtained but for the conscriptive evidence'.[208] In this exercise, the court will have to answer the question whether the evidence was obtained as a result of violation of the accused mind or body.

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[204] *R v Stillman* supra (n 202) at 231.
[205] *R v Feeney* [1997] 2 S.C.R. 13
[206] Supra.
[207] Supra.
[208] Supra.

Once the court has determined that the admission of evidence would not render the trial unfair, the court should then proceed and determine the seriousness of the Charter breach and the effect it has on the administration of justice.[209]

Like s35 (5) of the South African Constitution, Kenya draft Constitution[210] enumerates the rights of the accused person in a criminal trial. The Article contains some of the rights but not all as evinced by the wordings of the section that '[e]very accused person has the right to a fair trial, which *includes* the right to-...' [211] These rights were explained by Ackermann J in *S v Dzukuda*[212] as follows:

> '[A]n accused right to a fair trial under s35 (5) of the Constitution is a comprehensive right and 'embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our Constitutional court before the Constitution came into force'. Elements of this comprehensive right are specified in paras (a) to (o) of s (3). The word 'which include the rights' preceding this listing indicate that such specification is not exhaustive of what the rights to a fair trial comprises. It also does not warrant the conclusion that the right to a fair trial consists merely of a number of discrete sub-rights, some of which have been specified in the subsection and others not. The right to a fair trial is a comprehensive and integrated right, the content of which is will be established on a case-by-case basis, as our Constitutional jurisprudence on s35 (3) develops. It preferable, in my view, in order to give proper recognition to the comprehensive and integrated nature of the right to a fair trial, to refer to specified and unspecified *elements* of the right to a fair trial, the specified elements being those detailed in s (3) ...it would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof...At the heart of the right to a fair criminal trial and what infuses its purpose , is for the justice to be done and also to be seen to be done. But the concept of justice itself is a broad and protean concept. In considering what, for the purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind the dignity; freedom and equality are the foundation

[209] *R v Stillman* [1997] 1 S.C.R. 607
[210] Article 74 (1).
[211] Article 74(1) (stress added).
[212] 2000 2 SACR 443 (CC) at 9-11

> values of our Constitution. An important aim of the right to a fair criminal trial is to ensure adequately that innocent people are not wrongly convicted, because of the adverse effect that a wrong conviction has on the liberty, and dignity (and possibly other) interests in the accused. There are, however, other elements of the right to a fair trial such as, for example, the presumption of innocence, the right to free legal representation in given circumstances, a trial in public which is not unreasonably delayed, which cannot be explained exclusively on the basis of averting a wrong conviction, but which arise primarily from considerations of dignity and equality.'

The above quotation, which I have quoted extensively, could help the Kenyan court in determining and interpreting the rights of an accused person as envisaged in the draft Constitution.

In determining whether constitutional right violation would lead to unfair trial to the accused, the court could also employ the German concept of *Verhaltnismassigkeit* i.e. the principle of proportionality.[213] The proportionality principle as used in the Germany jurisprudence requires the court to exclude evidence even though it is probative if the means used to obtain the evidence is out of the proportion with the offence the accused is suspected to have committed. In this way, the court will use its discretion as provided under the Constitution to decide whether the breach in question entitles the court to conclude that it could lead to unfair trial. The metaphor that 'one should not use a sledge-hammer to kill a mosquito' fits very well with this requirement. It is my thesis that the use of proportionality will not only be apposite for determination of whether the breach would lead to unfair trial but also in determining whether the exclusion would detrimental to the administration of justice.

[213] Y Morriessetes 'The Exclusion of Evidence under the Canadian Charter of Rights and Freedoms: What to do and What not to do' (1984) 29 *McGill Law Journal* 521 at 530.

3.4 Nature of the evidence

In establishing the effect of admission of evidence to the fairness of a trial, the Canadian courts approach is determined by the evidence in question, while under the English common law the court treated testimonial evidence obtained in breach of the accused rights differently from real evidence obtained from the accused. Further, the Canadian court also distinguishes between evidence coming from the accused emanating from the accused, and real evidence obtained in breach of his rights but not coming from him.

Lamer J in *R v Collins*[214] pointed out that the comportment in which the evidence was obtained is not a major consideration but the nature of evidence obtained as result of the violation. He went on to state that if real evidence were obtained as a result of violation of the Charter, the violation alone would not render the trial unfair.

The situation will however differ from that where the accused is conscripted to give evidence against himself after violation of his charter rights. This, he pointed out, goes against one of the fundamental canon of a fair trial, that of right against self-incrimination.[215]

The Collins test was greatly modified in the landmark case of *R v Stillman.*[216] In the case, the court agreed with the decision in *R v Collins*[217] but added that, if an accused were forced to furnish the state with bodily samples for the States benefit, in breach of the Charter, this would amount to self-incrimination. According to the court, this will without doubt lead to unfair trial.

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[214] 1987 28 CRR 122.
[215] Supra.
[216] 1997 42 CRR (2d) 189 (SCC).
[217] 1987 28 CRR 122 (SCC).

The court in *R v Stillman*[218] did away with the distinction between real evidence and self-incriminatory statements. In this, the court was of the opinion that if a person is forced to give body parts or substance, this will not only infringe the persons right to body integrity but is also equivalent to coercing a person to give a self-incriminating statement.[219]

3.5 Detrimental to the administration of justice

This is the second leg in the evaluation of whether evidence obtained in violation of the Constitution is admissible. The inquiry as to whether admission of the evidence would be detrimental to the administration of justice is preceded by the test on whether the admission would render the trial unfair. Evidence that is improperly obtained will be excluded if it will be detrimental to the administration of justice despite the fact that its admission would not render the trial unfair. The wordings of the Kenyan draft Constitution is similar to s35 (5) of the South African Constitution, but differs from s 24(2) of the Canadian Charter. The latter's requirement is that if the admission of the unconstitutionally obtained evidence in the proceedings would 'bring the administration of justice into disrepute' that's when the evidence will be excluded. It has correctly been stated that the test of whether admission of evidence would bring administration into disrepute as provided in the Charter has a higher threshold than the test of gauging whether admission of the unconstitutionally obtained evidence would be detrimental to the administration of justice.[220] Cloete went further to state that:

> 'So far as the administration of justice is concerned, there must be a balance between, on the one hand, respect (particularly by law enforcement agencies) for the Bill of

[218] Supra (n 215).
[219] Sopinka, Lederman & Bryant *The Law of Evidence in Canada* 429.
[220] Cloete J in *S v Mphala* 1998 1 SACR 654 at 659.

> Rights and, on the other, respect (particularly by the man in the street) for the judicial process. Overemphasis of the former would lead to acquittals on what would be perceived by the public as technicalities, whilst overemphasis of the latter would lead at best to a dilution of the Bill of the Rights and at worst to its provisions being negated.'[221]

However it should be noted that unlike the Kenya draft Constitution and South African Constitution which both require a two paths of inquiry or two legs the Canadian Charter of Rights and Freedoms has only one leg. In Canada evidence which is obtained in a manner that infringed or denied rights or freedoms guaranteed by the Charter will only be excluded if the admission of the evidence would bring the administration of justice into disrepute. The Canadian Charter does not have 'fairness' as part of the requirement. Fairness had to be read-in to section 24(2). However, as was pointed out by Lamer J in *R v Collins*[222] evidence that affects the fairness of trial if admitted, will invariably be predisposed to lead to bring the administration of justice into disrepute.

Unlike in the Kenyan draft Constitution and the South African counterpart, under the Canadian regime, evidence that goes to the fairness of the trial will usually but not always be excluded. The Kenyan draft Constitution and the South African one require automatic exclusion of the evidence if it affects trial fairness.

It is my thesis that the Kenyans court in trying to come to terms as to whether admission of particular evidence would be detrimental to the administration of justice, it will be persuaded by the factors akin to those formulated by Canadian courts. The court will thus have to weigh whether the inclusion of evidence would be more

[221] Supra at 657.
[222] 1987 28 CRR 122 (SCC).

detrimental to the administration of justice than its exclusion. The court will have to decide on the purpose of the Article. In this regards the question that the court has to answer is whether the Article is intended to further the truth finding function of the court or the exclusion of the evidence is meant to punish the police. The long-term effect of the admission or exclusion will also have to be considered.

In considering the effect of exclusion of improperly obtained evidence on the administration of justice, the court will be concerned with the effect the exclusion of the evidence will have on the public. Whereas the court should not be seen as condoning breach of constitutional rights on the pretext of crime control, it will also not be in the interest of justice for the court to be seen to set free a factually guilty criminal due to the an error by the police. This is more apparent where the crime rate is high or if the offence in question was violent. The public opinion in this case will be considered. The public opinion may be determined in two ways. First, a judge may rely on the knowledge he may have on the community. The judge may also determine the community view through scientific methods such as public opinion polls carried out by professionals. Though the latter method may be more apt, it may be cumbersome and besides it may not be up to date as community views are subject to change. Thus, the method likely to be adopted by the court is the former. The method means that the judges' view will be taken to be the view of the public. As has been suggested, the best way is the use of the reasonable persons test. In this test, the relevant question would be:

'Would the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case?'[223]

The court will have to consider the factors discussed below to determine whether particular evidence would be excluded under the second leg or not. It should be noted that there is no exhaustive list of the factors, the court has to consider all the factors, but depending on the facts of each individual case, some factors will be given more prominence.

The following factors have however been considered to be relevant in Canada in determining what would or would not bring administration of justice into disrepute. These factors would also be relevant in determining what would be detrimental to the administration of justice. These factors are:

i) 'Wilfulness of Charter violation;
ii) Urgency of obtaining the evidence in the particular manner, and availability of other investigative techniques;
iii) Fairness to the accused;
iv) Seriousness of the Charter violation;
v) Seriousness of the crime under investigation;
vi) Effect of the violation on the reliability of the evidence;
vii) Availability of other ways to prevent similar Charter violation to the accused.[224]

However, as has been evidenced in the Canadian court some of the factors have gained more prominence. It is also noteworthy that some of the factors to be considered in the second leg are equally relevant in the first leg.

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[223] Y Morissettes ' The Exclusion of Evidence under The Canadian Charter of Rights and Freedoms: What To Do and What Not To Do' (1984) 29 *McGill L.J* 521 at 538.
[224] D Gibson ' Shocking the public: Early indications of the meaning of "Disrepute" in s 24(2) of the Charter' (1984) 13 *Manitoba Law Journal* 496 at 498.

3.5.1 Wilfulness of Constitution violation

One of the philosophies behind exclusion of evidence is to deter the police from willingly breaching constitutionally enshrined rights of individuals at the pretext of preventing or curbing criminal activities. Consequently, it will beat the purpose of the rule if the rule is used to exclude evidence which though improperly obtained, the police did not either know of the existence of the law or if they acted in good faith. Other than that, it is more likely to dampen the police spirit in their work thus defeating the spirit and purpose of the rule. The exclusionary rule should not be an end unto itself; rather it should be used as a means to an end. The end in this regards, is the attainment of justice. Good faith as an exception to the rule has also been acknowledged and accepted in other jurisdictions. In the United States of America, if the police have acted in good faith and acted reasonably the evidence obtained as a result will not be excluded. Situations may also arise where the police may have relied on a defective warrant. When this occurs, the court may still admit the evidence despite of the defect in the warrant. The rationale of this exception is that the exclusion will not serve any purpose be it educative or deterrence, in the contrary it may lead to disrepute by the public on the court system and administration of justice generally. The court should ensure that the exclusion of evidence does not sent the message that the court is lenient or tolerates the criminal activities of a factually guilty person. However, good faith should not be used as a pretext for the police to be inefficient and irresponsible. On the contrary, the police should strive towards learning better and lawful investigative methods and learning to curb criminal activities lawfully, adhering to the constitutional provisions. Anything contrary to this will doubtlessly bring administration of justice into disrepute.

3.5.2 Seriousness of Constitutional breach

One of the fundamental goals of the exclusionary rule is to ensure that constitutional provisions are adhered to. If the court without hesitancy admits unconstitutionally obtained evidence, it may be construed that it encourages breach of the constitutional rights. Therefore, it is indispensable for the court to ensure that constitutional rights are respected and not infringed at whim. However, a strict exclusionary approach may be detrimental to the administration of justice.

It is essential for the court to be flexible when dealing with infringement of constitutional rights in relation to the exclusion of evidence. Not every infringement of Constitutional rights may warrant exclusion of evidence obtained thereto. It has been observed correctly that some rights and freedom are more essential to the societies values than others are.[225] Example the sanctity of a person's home is one of the rights every society observes.[226]

Infringement of accused persons right may attract varying sanction depending on the right under consideration. Concomitant with this is whether the disregard of the Constitutional provision was deliberate or it was inadvertently. The court should not however condone wilful violation of Constitutional rights whether it is trivial or technical.

3.5.3 Urgency of obtaining evidence in a particular manner

Due to the exigencies of time and circumstances of particular case, the police may be compelled to use some means that though unconstitutional, circumstances demands

[225] *R v Carriere* (1983), 32 C.R. (3d) 117 at 140.
[226] Supra at 140.

their use. Among these reasons is safety of both the police and the public at large. Example would be if the police believe that following the laid down procedure would jeopardise recovery of vital evidence or more significantly if the police are forced to forcibly enter premises to carry out a search and the suspects are in possession of firearms, which they are likely to use.[227] All in all, it should be appreciated that the police are sometimes faced by tricky situations that require decisions likely to affect their security and that of the public. Much as the police have to abide by Marquis of Queens berry rules, some situations may demand digression.

3.5.4 Seriousness of crime under investigation

It should pointed from the outset that this ground should not be construed as proposing that if the offence under investigation is serious the police should throw caution to the wind and use seriousness of the offence as a pretext to trample upon the suspects rights. However in considering the effect of exclusion or admission of improperly obtained evidence on the repute of the administration of justice, the courts

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[227] In *S v Madiba* 1998 1 BCLR 38 (D) Hurt J stated that:

> '[I] do not consider that the act of forcing entry into this particular room was sufficiently grave violation to warrant a ruling that the evidence which they gained in the course of the search was inadmissible ...Even if I am wrong in that view, I come to the conclusion that, in the circumstances which prevailed, and given that:
> (1) the accused were suspected of a very serious crime involving the use of firearms to kill a person;
> (2) the information that [M] and [D] had at their disposal was that the accused were I possession of firearms and likely to resist arrests;
> (3) the surroundings, where the room in which the accused were, was situated, were such that a 'shoot-out' might occur if more prosaic methods of arrest and search were adopted by the police;
> (4) on the evidence that the police gave (which is the only evidence before this court in relation to this ruling), the interests of safety to the police, the community and the accused themselves, warranted the form of entry and demand which was decided upon;
> he extent of the infringement of the right to privacy was such as to pale into insignificant compared to the importance of achievement of the object which the police had in the course of their duties.

will have to bear in mind the nature of the offence. It is my submission administration of justice will be more adversely affected in the eyes of the public if suspects who are factually guilty are acquitted on technical grounds merely because his rights were violated. The court should strike a balance between seriousness of the offence and the rights infringed. The court should also consider the victims interests. Whereas it is appreciated that the court has to protect the rights of the accused, but it should not disregard the fact that victims rights have also been violated.

The court may face some difficulties when considering seriousness of the offence as a factor in deciding whether to exclude evidence or not. One of the issues is whether seriousness would be measured in terms of the penalty provided in the Penal code or seriousness should be measured according to the view of the community.[228] Considering that this point is to be considered in relation to the effect of exclusion of evidence on the repute of administration of justice, the paramount fact here is the communities view of the seriousness of the offence. However, since it is not practical to conduct an opinion poll, the test should be that of a reasonable person but only when the reasonable person is 'dispassionate and fully apprised of the circumstances of the case.'[229]

3.5.5 Effect of the violation on the reliability of the evidence

One of the fundamental functions of the court is truth seeking. Under the adversarial system, the parties adduce the relevant evidence, and based on the evidence before the court, the court makes the appropriate decision. However, this does not mean that the court will give the police a blank cheque to use any means to get this evidence. The

[228] W Charles, T Cromwell & K Jobson *Evidence and the Charter of Rights and Freedom* (1989) 334.
[229] Y Morissetes *The Exclusion of Evidence under the Canadian Charter of Rights & Freedoms: What to do and what not to do* (1994) 29 *McGill Law Journal* 522 at 538

police have to operate within the legal and constitutional framework. Nevertheless, the court should endeavour to strike a balance between the effect of exclusion on the repute of the criminal system and the nature of violation. The nature of evidence obtained as a result of the violation will also be material in determining whether to exclude the evidence or not. If the evidence is real and the violation is not so flagrant and wilful, the court should admit the evidence. This will be more especially if the evidence is crucial towards conviction of the accused.

Conclusion

This chapter has endeavoured to postulate the main factors that the court will consider when determining whether improperly obtained evidence will be admissible or not.

Despite the fact we have tried to enumerate various factors, they should not be construed as all the facts that have to be considered, the court has to approach each case on its own merits. As earlier discussed, the heart of the matter is fairness to the accused person. Fairness being an elusive concept to define, the best way would be to leave the court to determine the factors to be given prominence.

CONCLUSION AND RECOMMENDATION

From the foregone discussion, it is quite evident that the question of improperly obtained evidence i.e. whether to exclude it or not is quite complex. As earlier alluded to, the complexity of the issue is not made easier by the existence of both competing and conflicting interests on both sides of the divide.

Although the problem is neither novel nor original in the evidential systems of the world, it will be its maiden appearance in the Kenyan evidential system as a constitutionally enshrined rule. It will be the first time the court will be encumbered by applications of the defence counsels to exclude evidence, which though relevant, they would seek to be excluded on grounds of constitutionally enshrined right. It is a scenario where evidence might be excluded for reasons other than its probative value.

Whereas it is generally accepted that exclusionary rule is employed in most jurisdictions to further all or some of the following policies: -

a) Judicial integrity;

b) Deterrence;

c) Reliability; and

d) Protection of the accused;

It is not always true exclusion of evidence obtained in violation of Constitution achieves these goals. It is not always true that exclusion of evidence will preserve the integrity and repute of the judiciary. In some cases, exclusion of evidence has tended to occasion more disrepute to the system than if the evidence was included. This will

be detrimental to the administration of justice in all cases. This calls for other means to be used other than exclusion of the evidence.

The Kenyan court in interpreting Article 74 (3) of the Constitution should be alive to the following pertinent points: -

Exclusion of evidence may and usually denies the assessors and the court evidence that would be able to convince the court or the assessors the accused is guilty beyond reasonable doubts. The rule should not therefore be used to prevent the court from convicting a factually guilty person. The spirit of the exclusionary rule is not geared towards providing the accused person with a remedy against the police misconduct. It would therefore be a negation of the spirit of the Constitution if a factually guilty person uses the Constitution to escape from fruits of his misdeeds.

Secondly, even in other jurisdictions, exclusionary rule has not been allowed to operate unfettered. The rule has been subject to limitation based on the grounds such as good faith, and inevitable discovery. In the same vein, even where improperly obtained evidence is excluded from the main trial, it may still be used in proceeding other than the main trial. Example improperly obtained evidence may be used in bail proceedings, probation hearing and even in sentencing. It is my submission that most of the proponents of exclusionary rule subscribe to the adversarial system of evidence, where the objectives of the parties is not the truth but the winner. At the end of the day, the truth ends up being the loser. The court is pushed to concentrating on other side issues other than the truth. As a result, truth suffers and justice is emasculated. It is my thesis that the court should concentrate on its core function i.e. establishing the

innocence or guilty of the accused. Other side issue like determining whether the police officer acted unconstitutionally or not should be dealt with in other forum by other tribunals.

Thirdly, a pertinent question on the deterrence principle is whether exclusionary of evidence deters the police from committing further violation of the Constitution. It is my submission exclusionary rule has minimal effect on the police behaviour as far as deterrence of their conduct is concerned. The court has to take cognizant of this fact before deciding whether improperly obtained evidence should be excluded or not. The argument of systemic education may look attractive. It is my contention that though this is a noble end; it is not the duty of the court. The duty is on the police itself to ensure that their system is efficient and works according to the law. In case the police do not attain the required standards, a tribunal to ensure this should be set up. The court should not abrogate itself this duty. The courts' duty is to establish the truth, and once it oversteps this duty, its core function lies at the danger of being blurred. Even if it is necessary to deter the police, the court can employ other means to enforce the deterrence goal other than excluding evidence, which although relevant is tainted by the way it was obtained. Other ways that may be used is by taking disciplinary measures against the individual policeman. This may take the form of dismissal, demotions reprimand or cautions.[230]

Fourthly, exclusionary rule as used in other jurisdiction is also intended to ensure respect for the privacy of individuals and more so the accused. However, as has been

[230] J Robilliard & J McEwan *Police Powers and the Individual* (1986) 247.

pointed out, 'this is not the only value at stake'.[231] The purpose of criminal law is to ensure that each individual has security of both his person and property. Wherever a crime is committed, at foremost the privacy of an innocent citizen is violated or a person's right to property is infringed. It is the duty of criminal law is to ensure that the transgressor is punished. It behoves upon the court not to concentrate more on the rights of the transgressor forgetting that the transgressor has actually violated a person's rights. It is in the interests of the society members that all serious crimes are investigated and prosecuted both effectively and efficiently[232]. For the court to be fair, it must consider the interests of the accused, the victim and his family and the society as a whole.[233] This, it is my submission will not be achieved by exclusion of evidence whether improperly obtained or not if its inclusion may lead to conviction of the accused. Exclusion will only end up furthering the interest of the accused at the expense of the interests of both the society and the victim of the crime. Other ways, suggested below may be more appropriate to compensate the accused for violation of his rights than exclusion of highly probative evidence. This will ensure the interests of all the interested parties are balanced.

As in the other jurisdictions, Article 74(3) of the draft Constitution gives the court discretion in deciding whether to exclude unconstitutionally obtained evidence or not. The discretion given to the courts is geared towards ensuring that justice is done. The discretion gives the court the requisite flexibility for it to adjust to different circumstances. It is a truism and need not belabouring the fact that the court requires an element of flexibility to be able to come out with a just decision. Every case has some peculiarities, which the court may only be able to deal with if it is flexible

[231] Attorney Generals reference No. 3 of 1999 [2000] UKHL 63.
[232] Ibid.
[233] Ibid.

enough to make decisions considering these peculiarities. It should not be forgotten that the core duty of the court is to determine whether accused is guilty or not. This core duty should not be sacrificed at the altar of other objectives whether public or not, more so if the said objectives conflict with the courts primary duty.[234]

The court has to strike a balance between individual's rights and societies rights. This will be more especially when dealing with the improperly obtained evidence. The court has to balance these conflicting and competing interests. Should the court uphold the society's interests by admitting the improperly obtained evidence? Or should it uphold those of the accused by excluding improperly obtained evidence albeit its probative value? My thesis is that the court should admit the evidence so long as its probative value outweighs its prejudicial effects.

Flowing from the courts primary duty of determining the guilty or innocence of the accused, the court should be allowed to have access to all the relevant truth to enable it arrive at a just decision. The courts access to relevant evidence should not be hindered by other secondary consideration like how the evidence was obtained. However if the accused alleges that his rights have been violated, the accused should be availed other avenues to gain redress for the wrongs committed other than the exclusion of relevant evidence. This channels for redress should have a statutory backing.

[234] *R v Khan* [1974] 4 All E R 289, 301.

As earlier alluded to, Article 74 (3) of the Draft Kenyan Constitution gives the court discretion in deciding whether to exclude improperly obtained evidence or not. However like in any other situation in law, where an officer exercising judicial power has been given discretion, such discretion should be exercised judiciously. The officer has to exercise the discretion judiciously. The following factors as has been pointed out would guide the court in exercising the discretion;

a) 'the seriousness of the offence';[235]

b) 'the cogency of the evidence';[236]

c) 'nature of criminality';[237]

d) whether the evidence would have been obtained easily through other ways without infringing the Constitution or statute;[238]

e) whether the Constitutional provision was meant to 'circumscribe the power of the police in the interest of the public.'[239]

One of the inevitable results of exclusion of improperly obtained evidence would be that the society is forced to bear the burden of the misconduct of the police officer. By acquitting an accused who is factually guilty of an offence merely because the police did not follow the laid down procedure by the Constitution makes the society bear the burden for the police officers misdeed. This negates the criminal law principle that only the person who commits an offence should be punished. By excluding the evidence, the police officer goes unpunished for his misdeeds and so does the accused, who may go Scot-free due to exclusion of highly incriminating evidence

[235] *Bunning v Cross* (1978) 141 CLR 54,74.
[236] Ibid.
[237] Ibid.
[238] Ibid.
[239] Ibid.

because it was obtained improperly. As has been observed, it is not automatic that evidence obtained improperly will result to unfair trial. In *R v Sang*[240] was held:

> 'Evidence may be obtained unfairly... but it is not the manner in which it was obtained but its use at the trial if accompanied by prejudicial effects outweighing its probative value and so rendering the trial unfair to the accused which will justify the exercise of judicial discretion to exclude it.'

Way forward

As I have argued it is not desirable to exclude highly probative evidence merely because it was improperly obtained. The court should always be focused towards establishing the guilty or innocence of an accused person. Pursuant to this obligation, it should allow all evidence that may tend towards establishing the truth, for it is only when the court is in possession of whole truth able to make a just decision. So long as the evidence is highly probative as compared to its prejudicial effect, the court should not hesitate admitting it. It may be argued that the admission of the said evidence would lead to unfair trial. It is my submission that admission of the said evidence would not render the trial unfair unless of course the mode of obtaining it rendered it unreliable, which the court can determine.

On whether the admission of the said evidence would be construed that the court is likely to be seeing as condoning the breach of constitutional provisions and thus affecting the integrity of the court. To countenance such perception, disciplinary measures against the offending police officer should be instituted.

A Statute giving victims of police breach of constitutional rights remedies should be enacted. Such remedies would include award of civil damages. This remedy would

[240] [1980] AC 402

however be awarded if the accused proves he has suffered damage because of the violation of his rights. If there was a breach of the accused' rights but the accused was nevertheless convicted, the accused would only be entitled nominal damages. This would be recognition that some rights have been violated but the court would not award such amount such that the accused would be allowed to benefit from his criminal acts. If the accused person is found innocent, depending on the rights violated, exemplary damages would be allowed. These damages could be deducted either from the offending police officers pay or from a pool set up for that purpose then surcharged from the police officer pay.

The offending policeman could also be punished for his misdeeds. If it is established that the police officer acted deliberately or recklessly then he should be disciplined through demotion salary cuts or other ways, which may ameliorate the police officers conduct.

The court should also take a different approach when dealing with testimonial evidence as opposed to real evidence. If the court is confronted with confessional evidence, such evidence should only be admitted only if corroborated by real evidence. My argument is that real evidence existed before and independent of the breach of the Constitution. Unless the real evidence is conscripted, it cannot result to unfair trial. However, for real evidence to be admissible, it should pass the muster of having a higher probative value than its prejudicial effect. The treatment of real evidence obtained because of breach of Constitution should not be excluded on that ground alone. However as earlier advocated, if the admission of evidence is so

prejudicial to the accused such that it admission would be detrimental to the administration of justice such evidence should be excluded.

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