Come and See What Prof Joel Ngugi has done: A Tale of old memories in the Oscar Sudi Bail Ruling

***Forthcoming* , Platform for law, Justice and Society (October, 2020)**

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When to the sessions of sweet silent thought

I summon up remembrance of things past,

I sigh the lack of many a thing I sought,

And with old woes new wail my dear time's waste

Sonnet 30

Introduction

Why reflect on memories when they hurt? Why think of the bad things of the past when you have today to live? In his *Sonnet 30,* Shakespeare speaks of regrets, disappointments and missed opportunities. He speaks of unpleasant memories and the things that he sought to have but he does not have. The tone of the poem can be described as dark and that of a person who is mourning and, in this case, for the things that he hoped to have but he does not have.

Today, the Oscar Sudi bail 'drama' forces us to reflect on our old memories as a country. The Magistrate Bail ruling reminds us of our old scars that we hoped to heal through the 2010 constitution. But just like Shakespeare, Charles Rubia, Matiba, Gitobu, Seroney, Koigi, Shikuku, Ayoma and others, the Sudi's bail drama reminds them of the infamous *Nyayo Chambers* and *Mwakenya cases.* The Magistrate bail ruling reminds us of the past that was marked with detention without trial, pre-trial incarcerations and the weaponization of criminal law.

On the other hand, the High Court bail ruling by Prof Joel Ngugi reminds us of some of the few memories that the country and mostly the legal profession cherishes. The good memory is that of Judicial heroes who stand up to uphold the rights of Kenyans when those in power struggle to limit the democratic space. One of those memories is the holding of Chief Justice Madan in the

often-quoted case, *Githunguri*[1]where he addressed the petitioner as follows **Stanley Munga Githunguri! You have been beseeching the Court for Order of Prohibition. Take the order. This Court gives it to you…. When you leave here raise your eyes up unto the hills. Utter a prayer of thankfulness that your fundamental rights are protected under the juridical system of Kenya.**

If you are looking for a Judicial hero, I will point one to you in this paper. John Gaya defines a Judicial hero as a judge who "boldly discover rights, refuse to be bound by out-of-date precedents and replace strict rules with flexible standards based on their notions of reasonableness, fairness, and efficiency."[2] A difference is pointed out between Military heroism and Judicial heroism, unlike in Military heroism which requires physical courage (One is required to take his gym programme seriously), A judicial hero must be courageous. Stefanus Hendrianto in his *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes*[3] describes a Judicial hero in the following terms;

> In sum, a judicial hero achieves such status through courageous and ambitious interpretation of the constitution, which amounts to a judge participating in economic, social, and political governance. A judicial hero has to play the role of the savior of society from social wrongs by discovering rights in the law and challenging the status quo.

Similarly, Cass Sunstein in his *Constitutional Personae*,[4] argues that judicial heroes usually take bold and courageous steps. Heroic judges must therefore believe in a transformative role for the judiciary and are willing to use judicial power to achieve desired results.[5] Put it differently, Judicial heroes are those that have been described as *Bold sipirts* and not *Timorous souls.*

In these times where the president has Coopted the opposition in the famous handshake agreement, where the executive has adopted what has been described as Autocratic Legalism[6] or

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PGD (KSL, 2020), LLB (MOI, 2019)

[1]*Stanley Munga Githunguri v Republic* [1986] Eklr.

[2] John Gava. "The Rise of the Hero Judge," (2001)24 *University of New South Wales Law Journal* 747.

[3] Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (Routledge 2018) at Pg. 15.

[4] Cass Sunstein, *Constitutional Personae* (New York, NY: Oxford University Press, 2015), 5.

[5] Ibid at 6

[6]See Kim Lane Scheppele, Autocratic Legalism (2018) 85 *The University of Chicago Law Review* 544.

hybrid Authoritarianism[7] or Abusive constitutionalism[8] (the concepts refer to the use of the law to subvert democracy, to do away with checks and balances, to fight the opposition, to silence any critic, silence the media[9]), where the Executive seeks to Militarise the state by either transferring state departments to the Military or appointing the military to head civil departments and where the war on corruption has been weaponized, the judiciary should not be composed by the likes of Justice Norbury Dugdale and Justice Sachdeva but should be composed of Judicial heroes who should refuse to act as the Executive gatekeepers! One such example is Prof Joel Ngugi.

R vs Oscar Sudi: When A magistrate sanitizes the violation of human rights?

The night of 11th September 2020 saw the home of Hon Oscar Sudi being converted to a 'Police post (barracks)'. A record of heavily armed 100 police officers surrounded his home seeking to arrest him[10]. The police were seeking to arrest for offences that were allegedly committed, three days prior. The context is important here; the 11th September was a Friday. The police wanted to arrest the said member of parliament on a Friday and charge him on Monday. These kinds of arrests are common in kenya and have been characterised as *kamata kamata Friday*[11]

After the Police failed to find him in the house, Hon Sudi presented himself to the Police on 13th September at Langas Police station in Eldoret, after learning that the Police were looking for him. The Police flew him to Nakuru and he was presented before the Magistrate court in Nakuru. The Prosecution sought to detain him for 14 days before he could even take a plea[12]. The main reason for the Pre-plea (charge) detention was to allow them to conduct investigations. The magistrate held that a case had been made and detained Hon Sudi for 7 days. The Magistrate offers two reasons for the ruling:

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[7] See Mark Tushnet, 'Authoritarian Constitutionalism: Some Conceptual Issues' in Tom Ginsburg and Alberto Simpser (eds*), Constitutions in Authoritarian Regimes* (Cambridge University Press 2014) at Pg. 36.

[8]See B Basheka and Christelle J Auriacombe, 'Abusive Constitutionalism in Africa: A Threat to Efficient and Effective Public Administration Systems?' (2019) 11(2) *African Journal of Public Affairs*.

[9] See Levitsky Steven and Ziblatt Daniel, *How democracies die* (New York: Crown Publishing, 2018) at page 10.

[10] See Fred Kibor, "Night of drama as police camp in MP Sudi's home, fail to arrest him" at https://www.standardmedia.co.ke/rift-valley/article/2001386166/night-of-drama-as-mp-sudi-escapes-police-arrest

[11] See *Ngenesi Kinyua aka Agnes Kinywa v Director of Public Prosecution & another* [2019] eKLR where Justice Odunga held the trend to be unconstitutional.

[12]*Republic v Sudi Oscar Kipchumba*, Nakuru Misc. Crim. Application No. 330 of 2020.

1.The release of Hon Sudi from custody at this particular moment will disturb public order, peace and security. The Court is invited to balance between pubic interest and the right of the respondent to be released on bond. In the peculiar circumstances of this case, the Court finds the public interest overrides the Respondent's right to be released on bond at this stage.

2. That the Respondent is a Member of Parliament and is likely to influence witnesses.

In summary, the magistrate chose to hear no evil and see no evil. To him the constitutional rights are subject to a perceived public interest (or is it public opinion?). This kind of reasoning is however not in line with the edicts and leitmotifs of our Constitution. Our Constitution which is arguably a Post-war constitution (Transformative) promises us a Human rights state[13]. At the centre of every post-war constitution is a limitation clause that requires justification for any limitation of the bill of rights[14]. This is because transformative constitutions[15] are founded on the need to create a new legal culture of` protection of rights[16] and remain as a key instrument to bring about a better and more just society".[17]

Simply put, the incorporation of the bill of rights in a post war constitution is to protect the rights of all including protecting the minority from the majority, to shield the minority view from the majority views. Put it differently, the blood flowing through the veins of our constitution eschews the reliance of public opinion in adjudication but calls the court to follow what is

[13] See Makau Mutua 'Hope and Despair for a New South Africa: The Limits of Rights Discourse' (1997) 10 *Harvard Human Rights Journal* 63; See also Benjamin Gregg, *The Human Rights State: Justice Within and Beyond Sovereign Nations* (Philadelphia: University of Pennsylvania Press, 2016)13; See also René Wolfsteller & Benjamin Gregg, 'A realistic utopia? Critical analyses of The Human Rights State in theory and deployment: Guest editors' introduction' (2017) 21:3 *The International Journal of Human Rights*219-229.

[14] See *Attorney-General & another v. Randu Nzai Ruwa & 2 others* Civil Appeal No. 275 of 2012; [2016] eKLR.

[15] On the concept of transformative constitutionalism, see Karl Klare, in his article, "Legal Culture and Transformative Constitutionalism," (1998) 14 *South African Journal of Human Rights* 146, who conceptualizes the concept to mean

> "By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed…to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law."

[16] Walter Khobe, 'Transformation and crisis Legal Education in kenya', (2016) 25 *Platform for law, justice and society*p.g 66-70.

[17] See *Amod v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 22.

referred to as a principled, law-based adjudication.[18]This is what the South Africa Constitutional court reminds us in State *v. Makwanyane*:[19]

> The duty of the court was to decide in accordance with the Constitution and the court should not be reduced to that of an election returning officer. It would set a very dangerous precedent if every time a Constitutional Court had to decide on a constitutional provision it had to canvass and seek public opinion so that it decides in accordance with it. That would make the role of the Constitution and the Constitutional Court useless and meaningless.

Let us pause here and confront this question, what was the Honourable Magistrate saying when he referred to demonstrations? Was he telling us that by people demonstrating justifies the limitation of the right to liberty under Article 29? The answer to all these questions can be one; Simply, the magistrate did what Adem Abebe customized as 'Abdication of responsibility'[20]. What happened is that the Magistrate allowed himself to be constrained by Public sentiments. The learned magistrate ignored the call by the High Court in *John Harun Mwau & 3 Others*[21] *:*

> Our responsibility and the oath we have taken require that we interpret the Constitution and uphold its provisions without fear or favour and without regard to popular opinion… our undertaking is not to write or rewrite the Constitution to suit popular opinion. Our responsibility is to interpret the Constitution in a manner that remains faithful to its letter and spirit and give effect to its objectives.

If it's about demonstrations and public sentiments, it should be noted that Kenyans expressed their collective sentiments on the 27th August 2010 and this is the most recent expression by all Kenyans. In fact, if the adage that Numbers do not lie is to be considered, 67% of Kenyans rubber stamped their wishes in the Referendum[22]. The point of reference therefore when seeking

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[18]*West Virginia State Board of Education v. Barnette* 319 U.S. 624, 638 (1943).
[19]See *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

[20] Adem K Abebe, 'Abdication of Responsibility or Justifiable Fear of Illegitimacy? The Death Penalty, Gay Rights, and the Role of Public Opinion in Judicial Determinations in Africa', 60 *The American Journal of Comparative Law*P.g 603.
[21]*John Harun Mwau & 3 Others v Attorney General & 2 Others Petition No 65 of 2011* [Consolidated with] Petitions No's 123 of 2011 and 185 of 2011[2012].
[22] See FACTS & FIGURES: Kenya Referendum 2010 at https://nation.africa/kenya/kenya-referendum/facts-figures-kenya-referendum-2010-643236

the public opinion should first be the constitution. This is the only place that expresses the sentiments of Kenyans[23]. The public expression is better captured by Willy Mutunga[24] who describes the vision of the 2010 constitution in this way:

> That oppressive constitutional outlook was dismantled in 2010, with the emergence of a democratic constitutional order following a referendum many years after the first political opening in 1992. At the heart of it, the making of the Kenyan 2010 Constitution is a story of ordinary citizens striving *and succeeding* to reject or as some may say, overthrow the existing social order and to define a new social, economic, cultural, and political order. Some have spoken of the new Constitution as representing a second independence. There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism and 54 years of independence[25]

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[23] See Van der Merwe et al, *Contract General Principles* 3 ed (2007) 18; see also Christie "The Law of Contract and the Bill of Rights" in Mokgoro and Tlakula (eds) *Bill of Rights Compendium* (2006) 3H8.

[24] Willy Mutunga,' Developing Progressive African Jurisprudence: Reflections from Kenya's 2010 Transformative Constitution', a paper presented at the 2017 LAMECK GOMA ANNUAL LECTURE held at Lusaka, Zambia on July 27, 2017; See also Willy Mutunga, The Vision of the 2010 Constitution of Kenya Keynote Remarks on the occasion of celebrating 200 years of Norwegian Constitution University of Nairobi May 19, 2014 where he noted that

> There is no doubt that the Constitution is a radical document that looks to a future that is very different from our past, in its values and practices. It seeks to make a fundamental change from the 68 years of colonialism and 50 years of independence. In their wisdom the Kenyan people decreed that past to reflect a status quo that was unacceptable and unsustainable through: provisions on the democratization and decentralization of the Executive; devolution; the strengthening of institutions; the creation of institutions that provide democratic checks and balances; decreeing values in the public service; giving ultimate authority to the people of Kenya that they delegate to institutions that must serve them and not enslave them; prioritizing integrity in public leadership; a modern Bill of Rights that provides for economic, social and cultural rights to reinforce the political and civil rights giving the whole gamut of human rights the power to radically mitigate the status quo and signal the creation of a human rights state in Kenya; mitigating the status quo in land that has been the country's Achilles heel in its economic and democratic development; among others reflect the will and deep commitment of Kenyans for fundamental and radical changes through the implementation of the Constitution. The Kenyan people chose the route of transformation and not the one of revolution. If revolution is envisaged then it will be organized around the implementation of the Constitution.

[25] See also Linus Mwangi, 'The 'Dying' Oracles of the Law and the Looming Resurrection of Dugdalian Jurisprudence' Available at https://thealchemyofatransformativeconstitution.wordpress.com who argues that

> *"If the Constitution of Kenya 2010 is transformative; if it is inherently activist; if it eschews authoritarianism and embraces the culture of justification in decision making; if it discards the traditional strict disjunction between law and politics; if it approbates interdependence while reprobating absolutism in the functioning of the three branches of government; if it contemplates a substantive conception of the principle of separation of powers; if it bridges our dark past and promises to delivers us to a holistically democratic and egalitarian society; if our Constitution is supreme and reigns above all, where can the above sentiments by aspiring candidates to the position of CJ find refuge?"*

The magistrate should at least have resorted to this call by the High Court of Gautengin in *the State V Oscar Leonard Carl Pistorius*, where the court correctly held that;

> Fortunately, regardless of the level of understanding among the general public, South Africa (read Kenya) has a Constitution which applies to everyone and which protects everyone, including those who transgress the laws.

Back at home, the Magistrate should have found solace in *Chamanlal Vrajlal Kamani*[26]in which the Court expressed itself as hereunder:

> **In my view, criminal proceedings ought not to be instituted simply to appease the spirits of the public yearning for the blood of its perceived victims. This is a country governed by the rule of law and any action must be rooted in the rule of law rather than on some perceived public policy or dogmas. The former has been branded an unruly horse, and when you get astride it, you never know where it will carry you.**

Oh, Public order, Peace and Security: When a Magistrate forgets the Kenya's history

During the Nyayoism and the Imperial Presidency, the Kanu-controlled Parliament enacted the *Public Order and Security Act*, *Preservation of Public Security Act Cap 57 Laws of Kenya and Regulation 6 (1) of the Public Security (Detained and Restricted Persons) Regulations, 1978* which allowed the Police to detain Who they deemed dangerous citizens in order to maintain law and order for the rest of the country. The main intent was to ensure that those who opposed Moi's rule would be detained. The Definition of the word dangerous was a *critic of the regime.* This is the law that was used to detain the Multiparty crusaders *inter alias* Charles Rubia, Kenneth Matiba, Seroney[27]. A good example are the events of 4th July, 1990 when Kenneth Matiba was arrested and detained because his detention was necessary to preserve security. The truth of the matter is that he and others had planned to hold a public rally at Kamukunji grounds in Nairobi on 7th July, 1990, in order to explain to members of the public the merits of a multi-party system of Government and also to answer the negative accusations which had been made against them[28].

[26]*Republic vs. Director of Public Prosecution & Another Ex Parte Chamanlal Vrajlal Kamani & 2 Others* [2015] eKLR.
[27] See *Zipporah Seroney & 5 others v Attorney General* [2020] EKLR.
[28] For a summary of the events, see *Kenneth Stanley Njindo Matiba v Attorney General* [2017] eKLR.

Shadrack B.O. Gutto, in his 'Constitutional Law and Politics in Kenya[29] provides a better summary of Kenya's history. He argues that the law in kenya was used as an effective weapon by those who were in power 'to narrow the arena of mass political involvement in democratic processes at the economic, social and cultural levels' and further that it was also used as a tool for repression against political opposition and resistance to neo-colonial fascism.[30] But apart from the law, He adds that the courts (Magistrates and Judges) contributed to the erosion of democratic constitutional rights[31].

It is a matter of public notoriety that Judges and Magistrates were the foundation of the erosion of constitutional rights in Kenya. If you doubt this, let's examine the case of *Willy Mutunga* v. *R*[32]. In this case, Willy Mutunga was charged with the offence of sedition (being in possession of seditious publications contrary to section 52(2) of the Penal Code). He was arrested on June 10, 1982 and charged before the learned Senior Resident Magistrate, Nairobi on June 12, 1982. He pleaded not guilty and applied for bail, which was refused at that stage. On June 18, 1982 he appeared before the learned chief magistrate when the applicant's counsel renewed the bail application but the same was again turned down. He approached the High court. While denying him the bail, Justice Sachdeva performed his gate keeping role as follows:

> Courts do not operate in a vacuum and cannot be oblivious of the fact that some subservice elements have unfortunately crept into the University and the state cannot simply ignore them

There are other examples of cases where courts acted as extensions of the Executive. For instance, in *Matiba v Moi*,[33]where the respondent was announced as the President by the Electoral commission, the petitioner sought to challenge the declaration. The court dismissed the petition because the Petitioner who had been tortured by the regime could not personally sign the petition but allowed his wife to sign the petition under a Power of Attorney.

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[29] Shadrack B.O. Gutto, 'Constitutional Law and Politics in Kenya Since Independence: A Study in Class and Power in A Neo-Colonial State in Africa' (1987) Vol. 5 *Z. L. Rev.*
[30] Ibid at Pg. 144.
[31] Ibid at Pg. 149.
[32] *W. Mutunga v. R* (Misc. Crim. App. No.101,1982) EKLR.
[33] Election petition 27 of 1993.

In *Kibaki v Moi*[34], the petitioner was challenging the election of the Respondent. The court dismissed the petition because the petitioner's lawyers did not serve the president personally. This is despite the court being informed that the President's security details frustrated the process.

In *Gibson Kamau Kuria v Attorney General*[35], the Petitioner won the Robert F Kennedy Centre for Justice and Human Rights award in the United States for defending violations of human rights in Kenya. The government moved in quickly and confiscated the Petitioner's Passport. The Petitioner approached the High Court for help, the High court dismissed the case on the ground that the chief justice 'had not made rules' to guide the litigation process.

It is in 2010 that Kenya saw the security argument being rejected by the Kenyan High court. Justice Warsame (as he then was) in *Republic v Muneer Harron Ismail*[36] traces the historical context of our constitution and held the view that incarceration before conviction is unlawful. He expresses himself thus

> We cannot subscribe to the views expressed by the learned State counsel that the respondents must be retained on mere allegation of national security. That would render obsolete the privileges and the rights enjoyed by the respondents under our Constitution. Perhaps to agree with the State would radically change the rights enshrined our Constitution and would turn this country into the concept proposed and expressed by Mr. Alberto Gonzales which is based on fear and anxiety. Definitely that kind of attitude would destroy the democratic gains and the legal jurisprudence that mitigates against trampling of individual rights mainly because of fear and phobia. We cannot afford to go into that direction for that would be retrogressive and reactionary attitude which would destroy the gains which we made in the enhancement of civil liberties. I therefore see that there is no legitimate reason to make me believe that the respondents are likely to interfere with our national security.

[34]*Kibaki v Moi Election petition* 1 of 1998.
[35] High Court Miscellaneous application 279 of 1985(unreported).
[36]*Republic V Muneer Harron Ismail & 4 others* [2010] eKLR.

The Magistrate's resort to the Public order, Peace and Security argument can only be justified on two reasons; either for his lack of knowledge of Kenya's history or he is the current Justice Sachdeva of our time.

In the following part, I propose the use of history as an interpretive tool in the adjudication of Article 29 and 49 of the constitution.

Using history as an interpretative tool: of monuments and memories

Every country carries its own history and Kenya is not an exception. The citizens of a country can decide to expressly document such history in the country's constitution or it can be read from the spirit of the constitution. Therefore, a constitution can serve two purposes: a monument or memorial. As a monument, a constitution celebrates its achievements in an optimistic fashion. As a memorial, it remembers the atrocities of the past and is aware of the limits of constitutionalism[37].A constitution therefore both *narrates* and *authors* a nation's history[38]. We can therefore understand a provision of a constitution if we try to understand our history. Pierre de Vos makes this point better when he says that

> Put bluntly, according to this approach one can get to grips with the meaning of the constitutional text if one refers to the specific apartheid past to identify all the wicked attitudes and practices that existed before commencement of the interim Constitution. It is thus only with reference to this shameful history that we can really understand what the text of the Constitution is trying to achieve[39]

When we view our constitution as being monumental and memorial, we do not look at a document that is only made of legal rules, we look at a document that tells us of our history. We look at a document that contains our values. We look at a document that is both reactive and aspirational. We look at a document that reminds us of the shackles(trauma) that we shed[40] and

[37] Karin van Marle, 'The Spectacle of Post-Apartheid Constitutionalism', (2007) 16:2*Griffith Law Review* 411-429.
[38] Ibid p.g 12.
[39] See P de Vos 'A bridge too far? History as context in the interpretation of the South African Constitution' (2000) 17 *South African Journal on Human Rights* 111.
[40]L Du Plessis, Theoretical (Dis-) Position and Strategic Leitmotivs in Constitutional Interpretation in South Africa, Eissn 1727-3781.

how we planned to change[41]. This is what Rawal, J (as she then was) said in *Charles Lukeyen Nabori*[42]that

> Our Constitution is not a cloud that hovers over the beautiful land of Kenya – it is linked to our history, customs, tradition, ideals, and values and on political, cultural, social and economic situations. Its dynamics and relevance is rooted in these values. Cut off from these factors it would become redundant and irrelevant. The Constitution is not a skeleton of dry bones without life and spirit. The least it is expected to have and which cannot be denied is the spirit of its framers.

When courts are met with cases that touch on article 29 (the right to liberty) and Article 49 (The rights of an arrested person), they are bound to not only read them but also consider the spirit in them. I argue that Judges should consider the history behind them. Kenyans decided to have these provisions as a reaction to the Moi's regime of pre-trial detention and detention without trials as I have noted in the preceding part.

The Supreme Court is to be commended for adopting the call of Renata Uitz in *constitutions, court and history: historical narratives in constitutional adjudication* who argues that constitutional interpretation has a tendency to rely on references to history and traditions (historical narratives) in order to clarify or supplement constitutional provisions, to determine their proper scope of application, and even sometimes to substitute constitional provisions[43]. In *Raila Amolo Odinga***(**2013)[44], Hon Njoki while seeking to interpret the provisions on elections in Kenya resorted to History so as to explain the import of the provisions. She held that

> [118]History is a great revealer of intent. Events inspire laws and public processes and at the heart of these laws and processes are shortcomings to be remedied, crises to be averted, needs to be met, and a nation to be efficiently and effectively governed. The disputed 2007 Presidential elections marked a turning point in electoral management in Kenya.

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[41] Van Beek UJ, *Democracy Under Scrutiny: Elites, Citizens, Cultures* (2010) 99.
[42]*Charles Lukeyen Nabori & 9 Others vs. the Hon. Attorney General & 3 Others* Nairobi HCCP NO. 466 of 2006 (HCK) [2007] KLR 331.
[43] As quoted by Walter Ochieng, The Supreme Court Versus Royal Media Services: History As 'Super Context' In Constitutional Interpretation, (2018) 34 *Platform forLaw, Justice and Society* at Pg. 50.
[44]*Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR

The supreme court has developed what it calls a Holistic interpretation of the constitution. In the *In Matter of the Kenya National Human Rights Commission*,[45] the Supreme defined the interpretation theory to mean:

> ***"****...But what is meant by a holistic interpretation of the Constitution? It must mean interpreting the Constitution in context****. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances.*** *Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result" (*emphasis supplied).

In *Communications Commission of Kenya*[46], the supreme court illustrated the use of history to consider the Articles of the constitution more clearly, it held that

> **As the historical, economic, social, and political background to these fundamental Articles 4(2), 33, 34, and 35 of the Constitution is narrated and analyzed the reasons behind their content must become very clear. That background also illuminates the fundamental rights in Article 34 of freedom of establishment, and independence of the media. It has also demystified and deconstructed the words independent of control by Government, political interests, or commercial interests in Article 34 within their historical, socio-economic contexts of Kenya**[47]

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[45]*In Matter of the Kenya National Human Rights Commission,* Sup. Ct. Advisory Opinion No. 1 of 2012; [2014] eKLR at para 26: See *Judges & Magistrates Vetting Board & 2 others v Centre for Human Rights & Democracy & 11 others* [2014] eKLR PETITION NO. 13A OF 2013 Where the supreme court stated that

> [206] This Court has set out construction guidelines, and mainstreamed the interpretation of Kenya's new Constitution. In particular, we have observed that the Constitution should be interpreted in a holistic manner; that the country's history has to be taken into consideration; and that a stereotyped recourse to the interpretive rules of the common law, statutes or foreign cases, can subvert requisite approaches to the interpretation of the Constitution

[46]*Communications Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others,* Petition Nos. 14, 14A, 14B. & 14C of 2014 (Consolidated) [2015] eKLR at para 156.

[47] See *In Re the Matter of the Interim Independent Electoral Commission,* Sup. Ct. Application No. 2 of 2011; [2011] eKLR, [para. 86]:

> *"The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). The Constitution has incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. The Constitution has a most modern Bill of Rights that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in*

Although Article 49(1)(g) permits the pre-charge detention, it does not countenance the practice of arresting before investigation. The historical context of Article 49 was a reaction to the scars of pre-trial detention and detention without trial. Had the Magistrate considered the historical context, he would have realised that the Pre-trial detention should only be the exception and not the rule. Simply, the when an application to limit the right to liberty is made, courts need to interpret the provision alongside the historical context of the provision. An example of the use of history in bail rulings is that of Ibrahim J (as he then was) in *Republic –Vs- Danson Mgunya*[48]:

> ***"Liberty is precious and no one's liberty should be denied without lawful reasons and in accordance with the law. Liberty should not be taken for granted. I will never take liberty for granted and I know neither will Dr. Khaminwa having both experience in the meaning of detention without trial and solitary confinement at Kamiti Prison during the struggle for the Second Liberation. Dr. Khaminwa suffered even more and longer incarcerations. We must interpret the Constitution in enhancing the rights and freedoms granted and enshrined rather than in a manner that curtails them. Each case must be decided in its own circumstances touch and context."***

Lastly, the magistrate should have considered our history because our 'Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest ofits legitimate object of rendering political goods.' [49]

The Right to Liberty as we know it: Sudi Oscar Kipchumba v Republic

> ***It does not give the court any joy to see offenders escape the penalty they really deserve but until they are proved guilty under the appropriate law, in our law courts, they are entitled to walk about on streets and tread Nigerian soil and breathe the Nigerian air as free as innocent men and women.***
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> Justice Obasek [50]

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the preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural, and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence in Kenya."

[48]*Republic –Vs- Danson Mgunya & Another* [2010] eKLR.

[49]*Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eklr No. 2 of 2011 at paragraph 62.

Prof Joel Ngugi's ruling[51] reminds us of the right to liberty as we know it. The ruling reminds us that the right to liberty although limitable, it can only be limited in accordance to article 24 (the limitation clause). Without mentioning it, Justice Joel Ngugi reminds us of what Etienne Mureinik calls a 'culture of Justification"[52]

When Hon Sudi sought a revision of the Magistrate's ruling, he met a Judicial Hero who was ready to uphold the right to liberty under the Kenya's Constitution. While Prof Joel Ngugi accepts that article 49 (1)(g) might allow pre-charge detention, he sets a double test that must be met by the prosecution. Firstly, that 'the state is acting in absolute good faith and the continued detention of the individual without a charge being preferred whether provisional or otherwise is inevitable due to existing exceptional circumstances' and secondly that the continued detention 'is the least restrictive action it can take in balancing the quadruple interests present in a potential criminal trial: the rights of the arrested individual; the public interest, order and security; the needs to preserve the integrity of the administration of justice; and the interests of victims of crime where appropriate'.

After laying the double test, Prof Joel Ngugi reminds everyone that the duty of the judge is not to what Justice Sachdeva did, the duty of the court is to protect the rights but not to dimmish them as follows:

> By virtue of Articles 21(1) and 259 of the Constitution, the Court must act to aggrandize not diminish the personal liberties of arrested individuals in line with the other three interests. Differently put, the State must demonstrate that there are compelling reasons to deny pre-charge bail while balancing all factors within the complex permutation presented by these quadruple interests and without reifying or essentializing any.

Prof Joel Ngugi proceeds to hold that the reasons advanced by the state do not meet the double test. To him, the reason that the Hon Ngugi would interfere with the witnesses was unsupported.

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[50] Justice Obasek in *Saidu V State* [1982] 2NCR 4; See also Onguto J in *Dennis Itumbi v Attorney General & 2 others* [2018] eKLR where he expressed himself thus:

> 63. There is no doubt that the Constitution prohibits the denial of liberty to any person. So important is the right that even where the Constitution has allowed liberty to be taken away as in the case of lawfully arrested persons, clear constitutional safeguards are in place: see Article 49. A citizen will not be deprived of his freedom and liberty with ease.

[51] *Sudi Oscar Kipchumba v Republic (Through National Cohesion & Integration Commission)* [2020] eKLR, CRIMINAL REVISION NO. 208 OF 2020.

[52] Etienne Mureinik, 'A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 at 32.

This is because it is not enough to proclaim the interference with interference but the state needs to adduce evidence to that effect. He concludes on this point by holding that 'in order to restrict the person's right to be released on pre-charge bail, the State must credibly and specifically demonstrate the likelihood of such interference'.

Prof Joel Ngugi similarly rejects the second reason that the Pre-charge detention is necessary on the ground of public order, peace and security. He holds that

> *Second*, the argument that the interests of public order, peace and security necessitate the pre-charge detention of the Applicant because his speech has led to "demonstrations against him" does not meet the high threshold of "compelling test" required by our Constitution'[53].

Unlike the Magistrate, Prof Joel Ngugi resorts to the historical context of the right to liberty under Article 29 and that of arrested persons under Article 49 in order to consider the ground of public order, peace and security. The Learned judge expressed himself thus:

> 31. There is a second reason to worry about the acontextual and simplistic pitting of "public order, peace and security" against the personal liberty interests and autonomy of the Applicant. It is that the logic espoused by this simplistic pitting is a dangerous anti-liberty ethos which was rejected by the Constitution of Kenya, 2010

The Prosecution should have known that fronting this anti-constitional argument of public order, peace and security. Prof Joel Ngugi had already expressed himself in ***Joseph*** *Thiongo*[54]as follows:

> *45. The Defence would be correct to argue that such a blunt response to the break down in law and order would be tantamount to sacrificing the rights of the Accused Persons in order to secure peace and security for the rest of society. Needless to say, our Constitution no longer countenances such an approach. Such was the approach to Law and Order that justified the authoring into our law books the infamous, Public Order and Security Act: the logic that it is necessary to simply detain some "dangerous" citizens in order to maintain law and order for the rest of the society. That logic has been*

[53] Ibid at Para 30.
[54] *Joseph Thiongo & 17 Others v Republic*[2017] eKLR.

substituted in our Constitution with the opposite logic: that every Accused Person is presumed innocent, and entitled to bail (and not to remain in remand) unless compelling reasons are shown.

46. The authority of the Court to deny bail where compelling reasons are shown can now not be invoked as a reason for the security apparatuses (and the State) to refuse to undertake their foremost duty to protect all citizens and maintain law and order in the society. Where the alleged sources of threat are known and the potential victims of the illicit activities known as here, it would be to reduce the State's monopoly of violence and duty to protect its citizens to a sacrilegious impotence to conclude that only the remanding of particular Accused Persons who are not themselves the alleged sources of threats is the method to protect the potential victims.

On his part, in *Michael Rotich*[55], Justice Luka Kimaru decried the trend of pre-charge detention. He held it to be unlawful the practice where the police seek to detain a person without a charge. He held as follows:

> It is unlawful for the police to seek to have a person who has been arrested to continue to remain in its custody without a formal charge being laid in court. If this trend continues, it would erode all the gains made in the advancement of human rights and fundamental freedoms as provided in the Bill of Rights since the **Constitution** was promulgated in August 2010. A person's right to liberty should be respected at all times unless there are legal reasons for such person to be deprived of his liberty. The police should only arrest a person when they have *prima facie* evidence that an offence has been disclosed which can result in such person being charged with a disclosed offence or a holding charge of the likely offence being presented in court. The police should do this because of only one reason: The **Constitution** says so.

It is the Supreme Court of India that offers the best description of the Right to liberty. In *Neeru Yadav*[56] the Supreme Court stated that

[55] *Luka Kimaru in Michael Rotich v Republic* [2016] eKLR, MISC. CRIMINAL APPLICATION NO.304 OF 2016.
[56] *Neeru Yadav –Vs- State of U.P. & Another* Criminal Appeal No.2587 of 2014.

…we are not oblivious of the fact that the liberty is a priceless treasure for a human being. It is founded on the bedrock of constitutional right and accentuated further on human rights principles. It is basically a natural right. In fact, some regard it as the grammar of life. No one would like to lose his liberty or barter it for all the wealth of the world. People from centuries have fought for liberty, for absence of liberty causes sense of emptiness. The sanctity of liberty is the fulcrum of any civilized society. It is a cardinal value on which the civilization rests. It cannot be allowed to be paralyzed and immobilized. Deprivation of liberty of a person has enormous impact on his mind as well as body. A democratic body polity which is wedded to rule of law, anxiously guards liberty. But, a pregnant and significant one, the liberty of an individual is not absolute. The society by its collective wisdom through process of law can withdraw the liberty that it has sanctioned to an individual when an individual becomes a danger to the collective and to the societal order."

The reason why Prof Joel Ngugi puts much emphasis on 'compelling reasons' is because the constitution entrenches the culture of justification rather than the culture of order/authority. This is the culture where 'every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defence of its decisions, not the fear inspired by the force at its command. The new order must be a community built on persuasion, not coercion"[57] Justice Majanja explains this culture in *Samura Engineering Ltd & Others*[58]where he notes that "By placing the values of rule of law, good governance, transparency and accountability at the centre of the Constitution, we must now embrace the culture of justification which requires that every official act must find its locus in the law and underpinning in the Constitution"[59]

The purpose of our article 24 is to entrench the culture of justification. It is mainly to ensure that for every limitation of a right by a state or a private individual or body, the same must be justified. The incorporation of Article was further not meant to be aspirational but rather binding. This can be seen in *Samuel Manamela & Another v The Director-General of Justice*[60]where the

[57] Etienne Mureinik, 'A Bridge to Where?: Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 at 32.
[58]*Samura Engineering Ltd & Others v Kenya Revenue Authority* Nairobi petition No. 54 of 2011.
[59]*Hon. Justice Kalpana Rawal and Others v Judicial Service Commission and Others*, Applications No. 11 and 12 of 2016.
[60]*S v Manamela* 2000 (3) SA 1 (CC).

Constitutional Court of South Africa, in considering the limitation clause which is in *parimateria* to Article 24, cautioned against using the factors set out therein as a laundry list or in the Kenya's supreme court words in *Karen Njeri Kandie V Alassane Ba*[61]that the test must not 'be conducted mechanically'[62].

Conclusion

The Magistrate and Prof Joel Ngugi make Lord Denning's differentiation of judges more real. To Lord Denning, judges can either be bold spirits or timorous souls. The timorous souls are those who are fearful of allowing a new cause of action while the bold spirits are those who are ready to allow it if justice so required[63] The case that I have made above is that if the gains of our constitution are to be realised, then the judiciary should be occupied by bold spirits, progressive judges. When timorous souls occupy the bench, the blood in the veins of the constitution stop flowing and the life of the constitution is cut short. If we intend to stop the powerful from abusing their powers, we need the bold spirits. In summary, For the spirit of the constitution to be realized, we need Judicial heroes, we need Prof Joel Ngugi.

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[61]The Supreme Court of Kenya in *Karen Njeri Kandie V Alassane Ba* (2015) EKLR, Petition No. 2 Of 2015.
[62]Ibid at para 77; See also the court of appeal in *East African Breweries Limited V the Hon. Attorney General*Civil Appeal No. 344 of 2013.
[63] Lord Denning in *Candler v Crane, Christmas & Co*. (1951) 2 KB 164, 178.