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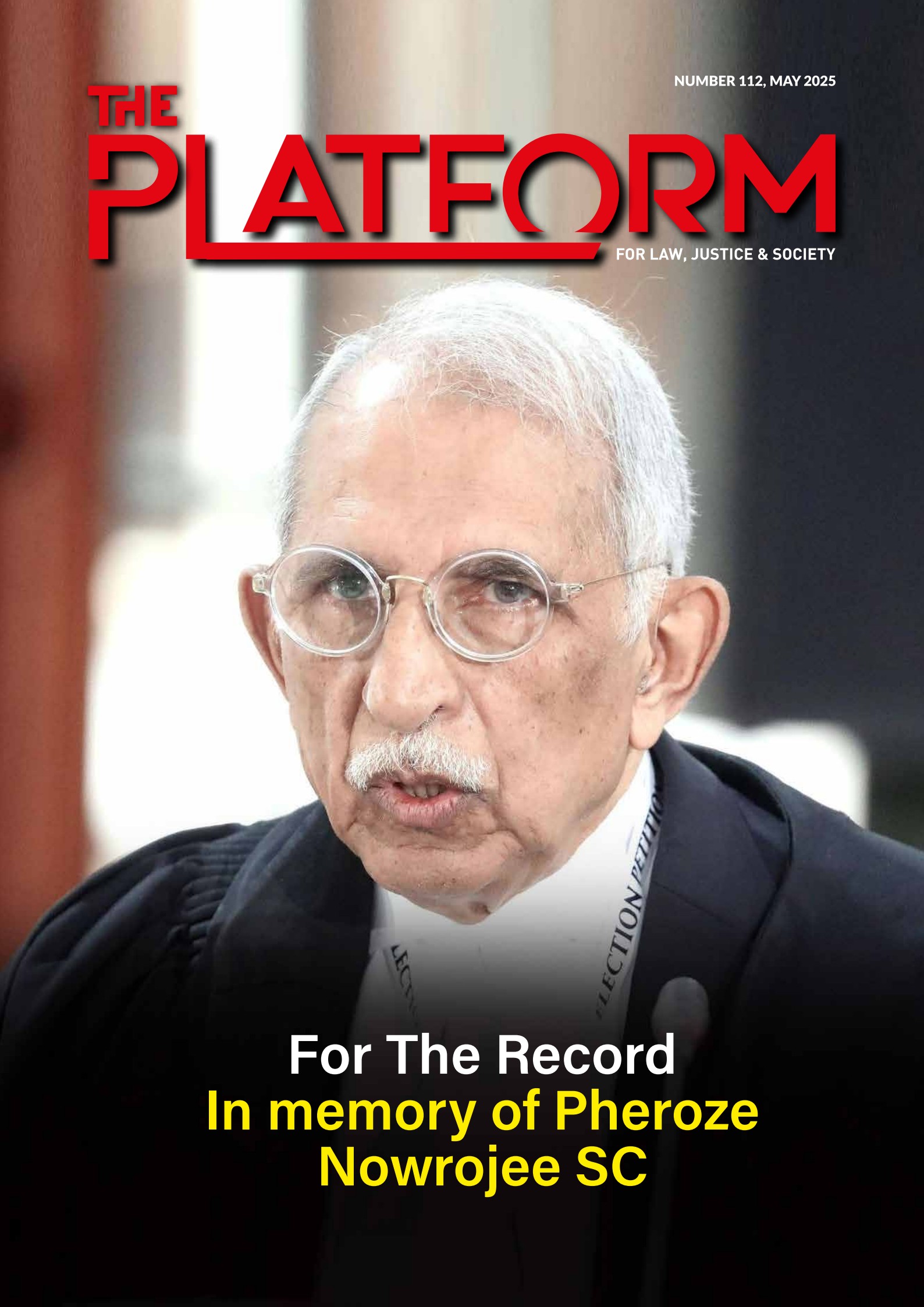

For The Record
In memory of Pheroze Nowrojee SC

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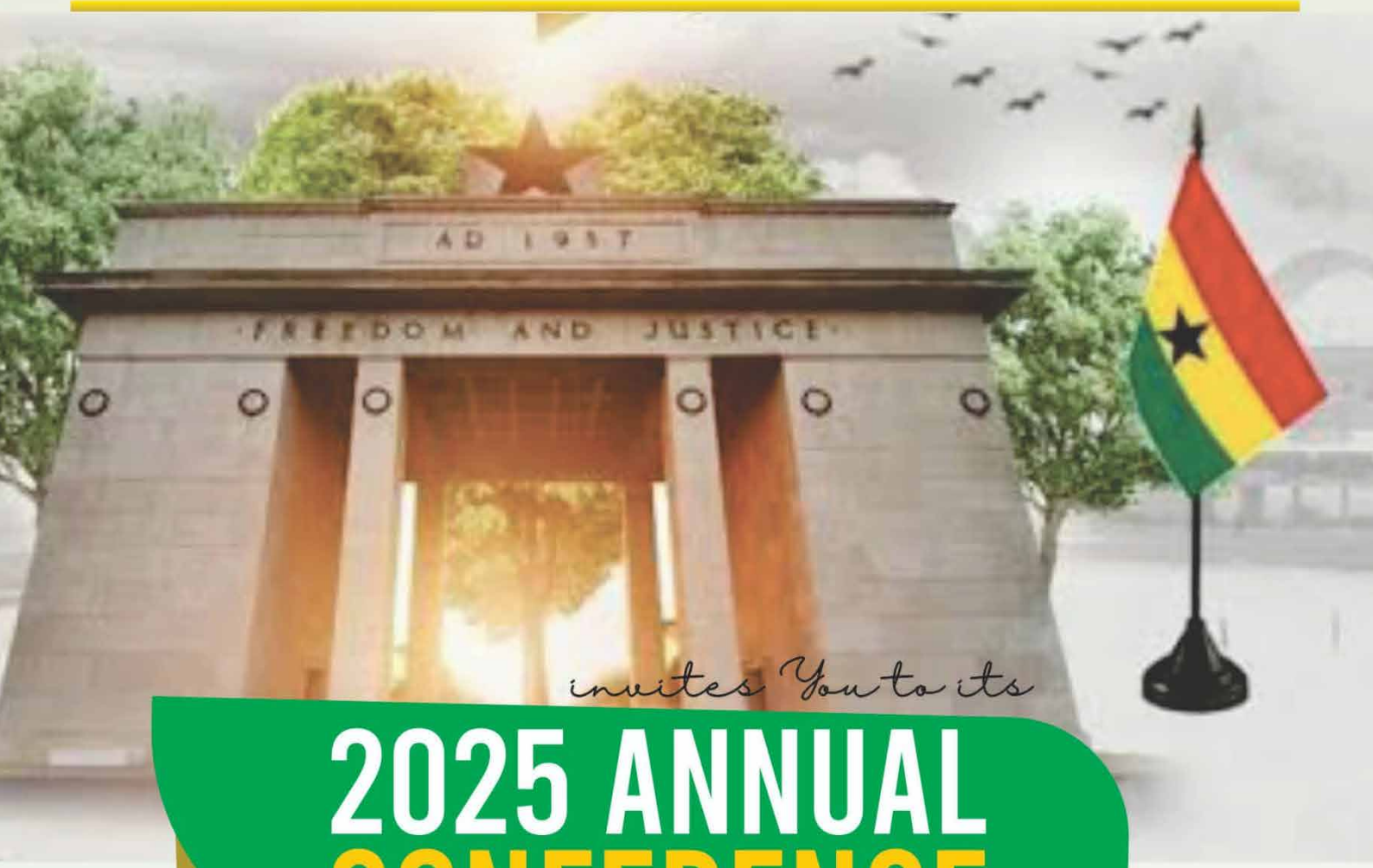

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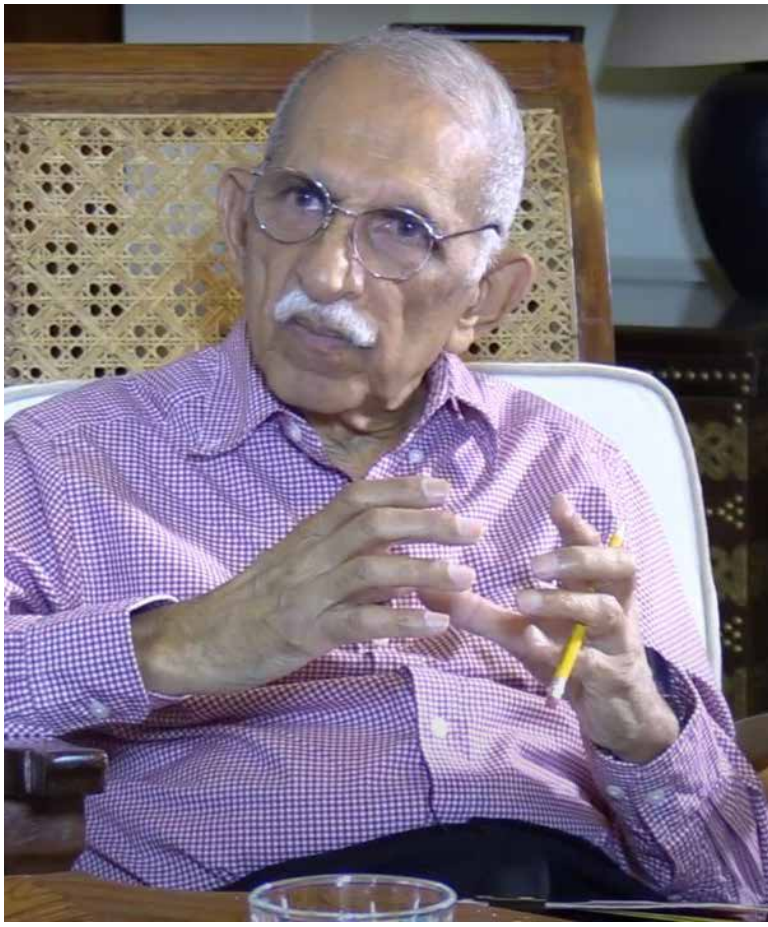

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EDITORIAL

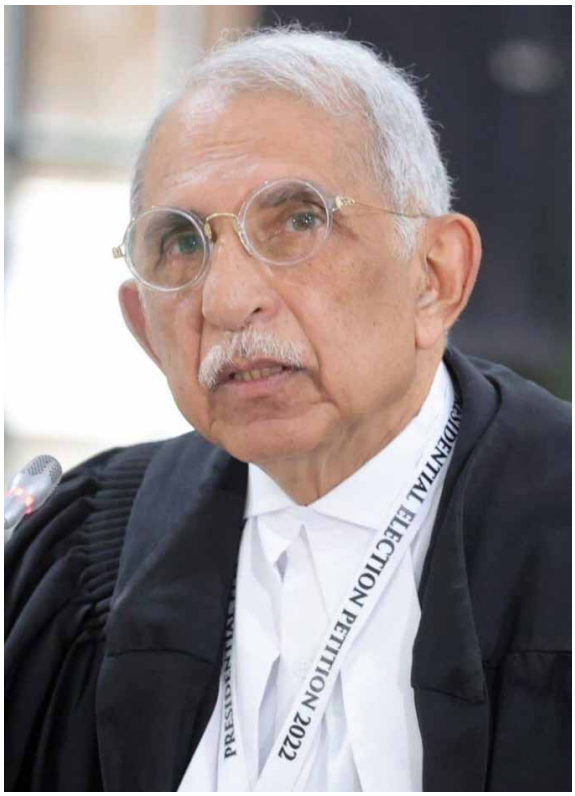
Honouring Pheroze Nowrojee SC: For the record

Kenya has lost a quiet giant. Pheroze Nowrojee, Senior Counsel, died earlier this month at eighty-four. During the darkest years of President Daniel Arap Moi's rule he often stood alone in our courtrooms, defending the rights to speak and to hope for a freer nation. His name became a synonym for courage because he took briefs many colleagues shunned, knowing each one placed him squarely in the sights of the State.

To grasp his choice, recall the mood of the 1980s and early 1990s. Newspapers were red-pencilled, rallies banned, and a single-party constitution muffled dissent. Torture chambers operated in the heart of Nairobi while most lawyers kept their heads down or queued for political favour. Pheroze walked the other way. He challenged sedition charges against Koigi wa Wamwere and Gitobu Imanyara, pressed for Raila Odinga's release, and filed habeas corpus petitions for nameless detainees whose families clutched hope outside the courtroom doors. Every brief carried a risk; to defend a critic was to become one in turn. Still, he never blinked.

The cost was heavy. His family shared the danger, living with the constant worry that the regime might punish them for his stand. Their quiet fortitude reminds us that the price of justice is often paid at home as well as in court.

He countered intimidation with meticulous record-keeping. Every affidavit, medical report and court order found its place in a carefully labelled file because he knew tyrants fear a paper trail more



The Late Senior Counsel Pheroze Nowrojee

than a speech. When multiparty politics returned in the mid-1990s, those files became evidence, teaching tools, and, for some victims, the first step towards compensation. "A country without memory," he used to say, "will repeat its errors."

His bravery was matched by craft. He addressed judges in measured sentences, trusting logic above volume. Many followed the law he set before them; others did not. Yet even the most compliant bench learned that abuses would no longer pass unchallenged. Young lawyers packed the gallery to copy his manner and draw strength from his example. A good number of today's leading advocates first cut their teeth carrying his bundles.

Recognition arrived late. Human-rights groups honoured him, universities sought his lectures, and politicians who had once opposed him issued glowing tributes this month. The praise is deserved, but we should remember that, in the hardest days, there were no medals, only late-night knocks and the fear that tomorrow's client might vanish before dawn.

Why does his story matter now? Because fear returns when citizens grow complacent. A generation born after Moi must understand that the freedoms they enjoy were won case by case by women and men like Pheroze. His method remains sound: use the law, preserve the record, trust the public. These tools are still our surest guard against creeping authoritarianism.

There is a private lesson too. Pheroze's family bore the same burden without the same acclaim. Their steadfastness shows that public acts of defiance rest on unseen acts of loyalty. In an age of instant outrage and short attention spans, such steadiness deserves notice.

Above all, his life sweeps aside cynicism. He never held office and never chased wealth, yet he shaped the nation more than many who did. Principle lasts longer than power. The files he kept, the clients he served and the lawyers he inspired form a living archive, a mirror held up to Kenya. We would be foolish to look away.

We have lost a brilliant mind and a brave heart, yet we still have the lessons he taught. Speak when silence feels safer. Write when others prefer fog. Stand firm even when the cost is borne at home. That is how Pheroze Nowrojee lived, and it is how the rest of us should try to carry on.

REPUBLIC OF KENYA

JUDICIARY

REPUBLIC OF KENYA

STATEMENT ON RESPECT FOR COURT ORDERS AND THE RULE OF LAW

My attention has been drawn to the deeply regrettable events that transpired today during the ongoing Kenya National Drama Festival in Nakuru, involving students from Butere Girls High School.

It is particularly disturbing that these events occurred against the backdrop of clear and binding court orders issued by the High Court sitting in Kisii, in *Anifa Mango v Principal, Butere Girls High School & 3 Others, Petition No. E006 of 2025*. In that decision, delivered on 3rd April 2025, the High Court directed the school administration and the organisers of the Kenya National Drama Festivals to facilitate and ensure that 50 students of Butere Girls High School participate in and perform their play titled *'Echoes of War'* at the national drama festival.

What transpired today raises grave concerns about the extent to which those orders of the High Court were respected and complied with. It is a foundational principle of our constitutional democracy that all persons and institutions — including State organs, State officers, and public officials — are bound by and must obey court orders. Defiance of court orders not only undermines the authority of the courts but also poses a serious threat to the rule of law, which is the bedrock of our society.

Even more troubling are reports of the use of force and violence against school-going children in the course of these events. Such actions raise serious constitutional questions about respect for the dignity, rights, and welfare of children, who enjoy special protection under the Constitution, the Children Act, and international human rights instruments.

I wish to make it clear to all state organs, state officers and public officers that respect for court orders is not optional. It is a constitutional imperative that safeguards our collective commitment to the rule of law, and constitutionalism. Any deviation from this path erodes public confidence in our institutions and poses a danger to our democracy.

I therefore condemn today's events as they deviate from path of the rule of law and constitutional duty to protect the rights of all — especially our children — in every sphere of public and private life.

Hon. Justice Martha K. Koome, EGH
Chief Justice and President of the Supreme Court of Kenya

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THE PLATFORM
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Call for Papers

Special Edition in Memory of Pheroze Nowrojee SC

The Platform for Law, Justice and Society invites scholarly articles, commentaries, case reviews, and thought pieces for a special edition dedicated to the life and legacy of Pheroze Nowrojee SC, the founding Chairperson of the Editorial Board.

Theme

We welcome contributions that reflect on Pheroze Nowrojee SC's impact on the legal profession and on society at large. Potential topics include, but are not limited to:

1. His contributions to constitutionalism, civil liberties, and human rights
2. Reflections on the evolution of legal practice and jurisprudence inspired by his work
3. Critical examinations of justice and society in relation to the ideals he championed
4. Comparative perspectives on public interest litigation and advocacy in Africa

Submission Guidelines

1. **Abstract:** Please include an abstract of not more than 300 words.
2. **Manuscript Length:** Articles should be between 1500- 3,000 words (including references). Shorter commentaries, case reviews, and thought pieces are also welcome.
3. **Formatting:** Use Cambria, size 12 font. Submissions should follow standard academic referencing guidelines.
4. **Originality:** Submissions must be original, unpublished work.

Submission Process

- Email your manuscripts in Microsoft Word or PDF format to: **editor@theplatformke.co.ke**, with a copy to: **miracleokumu@gmail.com**.
- In the subject line, please include: "Special Edition in Memory of Pheroze Nowrojee SC."
- Include a brief author biography and contact details in the body of your email.

Deadline

All submissions must be received by 25 May 2025.

For any inquiries, please contact the Editorial Board at: **editor@theplatformke.co.ke.**

We look forward to your contributions and to honouring the legacy of Pheroze Nowrojee SC through this special edition.

COVER STORY

For The Record: In memory of Pheroze Nowrojee SC

"I hope my legacy will reflect a steadfast adherence to professional ideals and persistent efforts to realize those ideals. The constancy of one's principles, even when faced with tempting offers or challenges, and the relentless pursuit of justice, are key aspects of my legacy. Despite the inevitable challenges and partial realizations of these ideals, the commitment to them remains crucial."

- **Pheroze Nowrojee SC**[1]

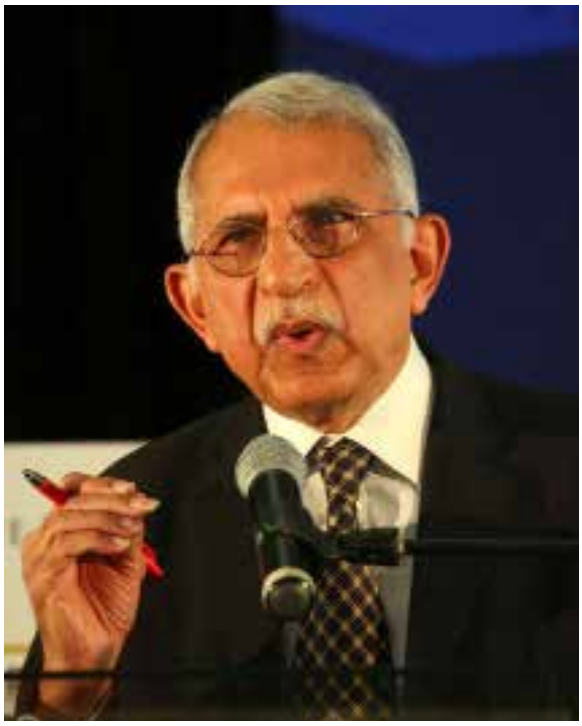
By Miracle Okoth Mudeyi

Prologue: A poem for Pheroze

Morning light rests on your briefs like dew,
Ink turning to witness, parchment to view.
The city yawns, yet you stand resolved,
Charting the frontiers where justice evolved.
Your voice is a lamp in the mist of the court,
A compass that points where tyrants distort.
In silence you listen, then speak for the weak,
Your words gather courage for all who still seek.
You walk with the ghosts of bold rebels long gone,
Their songs in your pocket, their cause in your tone.
Across scarred archives your footsteps remain,
Etching the promise that law can restrain.
So take, gentle mentor, these verses of mine,
Small stones on the cairn of your steadfast spine.
We measure our future by tracing your line,
For records may fade yet your ideals shine.

1. Opening reflections

The habit of taking notes at dawn is one I learnt from Pheroze Nowrojee SC. He believed clarity wakes early. When we met for tea last September, he spoke of "the continuing task" of defending the rule of law, his cadence soft but unyielding.[2] The phrase lingered. It felt less like advice and more like a verdict on anyone who calls them¬selves a lawyer in Kenya today. This memorial pays tribute to that lifelong verdict; crafted in courtrooms, lectures, books and quiet corridors where counsel persuade power to yield.

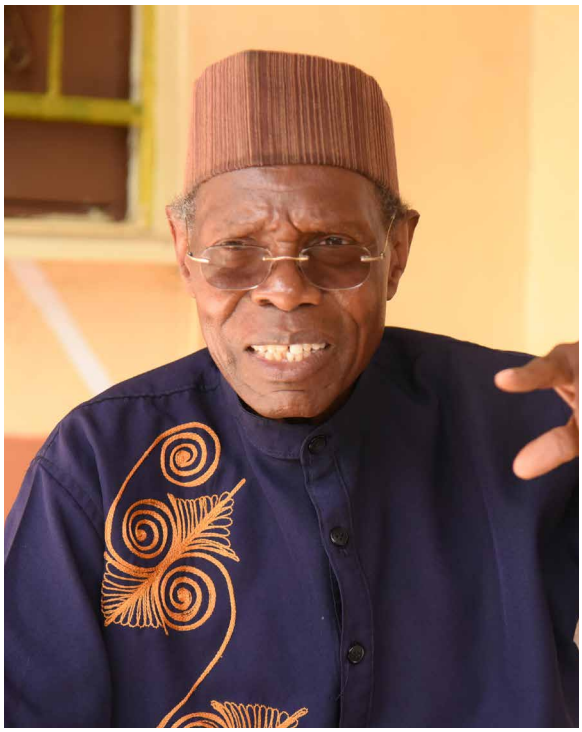


The Late Senior Counsel Pheroze Nowrojee

This tribute is written for posterity, for the legal fraternity, for those who knew him personally, for the youth who never met him but hear his name at seminars and mooting sessions, and for citizens who simply wish to understand how one lawyer helped shape the arcs of Kenyan jurisprudence. It is my intention to share an honest portrait of a man who stood courageously through the darkest nights and, in so doing, gave shape to the bright dawn of hope. His life's work affirmed that the cause of justice transcends individual gain, ephemeral politics, and fleeting recognition. It is a mission that requires sacrifice, humility, wisdom, and compassion in equal measure.

Pheroze Nowrojee was born into a Kenya still in chains yet restless for change. His grandparents had come as railway labourers, framing the steel path from Kisumu to Mombasa; he inherited from them a belief

[1]Pheroze Nowrojee speaking to an editor of this publication in the 2024, September edition.
[2]Miracle Mudeyi, 'Pheroze Nowrojee SC Discusses His Latest Book: Practising the Honourable Profession' (2025) September edition The Platform for Law, Justice and Society 11.



Koigi wa Wamwere, a prominent Kenyan politician, writer, and human rights activist, was detained multiple times without trial during the repressive regime of President Daniel arap Moi, particularly in the 1970s, 1980s, and early 1990s. His detentions were linked to his outspoken criticism of government corruption, authoritarianism, and calls for democracy.

that work done in service of others carries dignity beyond measure. Childhood in colonial Nairobi acquainted him early with the hard bargain between power and rights, spurring a determination to read law first in Delhi, then at the London School of Economics, where the writings of Gandhi and Nehru deepened his conviction that the advocate's craft is ultimately moral craft.

Returning home in the early 1970s, he found a republic already drifting towards one-party intolerance. Rather than seek comfort in commercial practice, he chose the far harsher road of political defence. Within a decade his name would be linked with Koigi wa Wamwere, Raila Odinga, Mwakenya detainees and many anonymous victims whose files never reached the newspapers.

2. Speaking truth to power

The Supreme Court once recorded in Speaker of the Senate v Attorney-General[3] that *"learned Senior Counsel Mr. Nowrojee… submitted, for eminently good cause, that the legislative path thus laid out should apply to each and every Bill"* while insisting that Parliament must "safeguard the place of both Chambers" in law-making.[4] There, in a single judicial aside, the Supreme Court captured the essence of the man: courteous, fearless, encyclopaedical in authority, yet animated always by the architecture of fairness. It is rare for the Court to memorialize counsel in its text; rarer still that the advocate's temper, patient, historically literate, allergic to bombast, seeps into the judgment itself. This memorial is not a tally of victories. It is the record of a life spent persuading power to remember its promises.

Nowrojee was fearless in court, never shy to speak truth to power. Chief Justice Willy Mutunga, in a notable Supreme Court ruling (Rai & Others v Rai & Others, 2013)[5], captured this quality in recounting Nowrojee's submissions. He noted how "Mr. Nowrojee [came] to the Supreme Court" and boldly asked the judges: *"Can the Kenyan Constitution countenance an injustice without redress? … Is there an injustice that the Supreme Court is unable to redress?"*.[6]

In that unforgettable exchange before the Supreme Court, Chief Justice Willy Mutunga recalled how Pheroze Nowrojee strode to the Bar and, with characteristic civility and candour, put three piercing questions to the Bench: *Can the Kenyan Constitution*

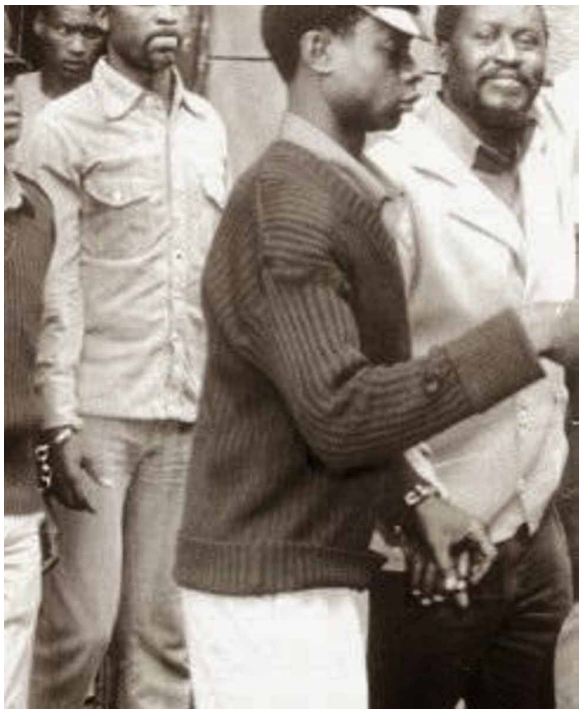
[3]Speaker of the Senate & another v Attorney-General & another; Law Society of Kenya & 2 others (Amicus Curiae) [2013] KESC 7 (KLR) at Para.132.
[4]Ibid.
[5]Rai & 3 others v Rai & 5 others [2013] KESC 21 (KLR)
[6]See Rai & 3 others v Rai & 5 others [2013] KESC 21 (KLR).

countenance an injustice without redress? Does it grant a right whose breach attracts no remedy? Is there any wrong this Court is powerless to cure?. Dr Mutunga noted that Mr Nowrojee had already supplied the moral compass: Article 159 obliges judges to dispense justice "without undue regard to procedural technicalities." Citing Nani Palkhivala's famous dictum, *"There is no injustice that the Supreme Court is powerless to redress"*, Nowrojee urged the Court to see itself as the ultimate sentinel against wrongs. Mutunga accepted the force of that ideal, but, after surveying India's Articles 32 and 136 and Kenya's Articles 23 and 165, concluded that while "no injustice is beyond the Constitution's reach,"[7] the High Court, not the Supreme Court, was the proper first forum for fundamental-rights claims. Even so, the Chief Justice closed by honouring Nowrojee's conviction: a constitution worthy of its name must always provide a remedy, and lawyers of conscience must unfailingly seek it.

Such piercing questions and authoritative references reflected his unwavering belief that no wrong should be beyond remedy. This fearless advocacy – blending moral conviction with legal acumen – defined Nowrojee's persona. He was not intimidated by authority or complexity; instead, he consistently challenged injustice head-on, armed with the law, logic, and an unshakeable moral compass.

3. The making of a constitutionalist:

Guarding liberty in the detention years
Returning home in the early 1970s, he opened chambers at a moment when Jomo Kenyatta's republic was hardening into the one-party state. Within a decade the Moi administration would brand dissent



Raila Odinga, one of Kenya's most prominent political figures, was detained without trial on multiple occasions during the authoritarian regime of President Daniel arap Moi in the 1980s and early 1990s. His detentions were a result of his involvement in the push for multi-party democracy and government accountability.

a crime, and the sedition docket became his daily work. Koigi wa Wamwere, Raila Odinga and the Mwakenya detainees found in him a counsel who understood both law and fear, and treated the latter as the lesser force. These trials accustomed him to late-night knocks on the door, hurried habeas corpus motions, and the alchemy of turning colonial-era procedure against the colonial instincts of a post-colonial state.[8]

The Kenyatta government began to use colonial Emergency Regulations against critics, and President Moi perfected the practice. Detention without trial became routine, and review tribunals acted as a façade for injustice. Pheroze Nowrojee walked into that darkness and argued

[7]Ibid.
[8]See Pheroze Nowrojee, 'The Legal Profession 1963-2013: All This Can Happen Again – Soon' in Jill Cotrell and Yash P Ghai (eds), *The Legal Profession and the New Constitutional Order in Kenya* (Strathmore University Press 2014) <https://www.kas.de/c/document_library/get_file?uuid=56ba9291-7c05-98d5-96b1-8161785ff854&groupId=252038> accessed 9 April 2025.

Gitobu Imanyara, a prominent Kenyan human rights lawyer, journalist, and political activist, was detained multiple times during President Daniel arap Moi's authoritarian rule, especially in the late 1980s and early 1990s. His detentions were largely tied to his fearless advocacy for multiparty democracy, press freedom, and constitutional reform.

that no executive order could outrank the Constitution. He exposed the tribunals as "a charade" that asked prisoners only about their health before renewing confinement, a truth Ngũgĩ wa Thiong'o confirmed in his own diary of captivity.[9]

The State soon decided to punish the messenger. Security officers twice detained John Khaminwa; they later seized Willy Mutunga, Gitobu Imanyara, Mohamed Ibrahim, and Nowrojee himself. Each arrest drafted new counsel into the struggle and taught the public to read courage in a lawyer's robe.[10] Aryeh Neier, after a 1991 fact-finding visit, noted that Kenya held "enough lawyers of conscience for the government to be unable to silence them all by singling out a few," and warned that harsher repression would hurt the regime's foreign support. That observation revealed the leverage of principled advocacy: every habeas motion became both legal action and diplomatic signal.[11]

Nowrojee knew that lasting change needed an informed citizenry, so he joined Gitobu Imanyara in producing *The Nairobi Law Monthly*. The magazine translated legal principle into stories the streets could own. Circulation leapt from a few hundred to fifteen thousand, with an estimated readership of one hundred and forty thousand, even as police raided vendors and confiscated bundles.[12] Frustrated, the Attorney-General banned "all past, present and future issues" through Legal Notice No 420 of 28 September 1990. Within days Nowrojee filed a petition that struck the notice down, restoring the journal and planting a judicial precedent against preventive censorship.[13]

The victory rippled. Churches offered pulpits, civil-society groups organised teach-ins, and lawyers framed every protest in constitutional language. Historian Daniel Branch records that counsel such as Paul Muite, Kiraitu Murungi, Gibson Kamau Kuria, Imanyara, and Nowrojee converted anger over the fraudulent 1988 queue vote into a public campaign for multipartism and a new basic law.[14] Parliament repealed section 2A in 1991; courts began to test presidential decrees; and a movement once confined to detention reviews walked into the open.

[9]Nowrojee, 2014, p. 35.
[10]Nowrojee, 2014, p. 38.
[11]Neier quoted in Nowrojee, 2014, p. 51.
[12]Nowrojee, 2014, p. 49.
[13]Nowrojee, 2014, p. 49.
[14]Daniel Branch, Nic Cheeseman and Leigh Gardner, *Our Turn to Eat : Politics in Kenya since 1950* (Lit ; London 2010).

The advocate as shield

Moi's counter-attack aimed at the legal profession itself. State agents bank-rolled friendly candidates for Law Society elections and encouraged members to sue the Society to stop its press statements. Judges, however, dismissed every attempt, upholding the Society's statutory duty "to protect and assist the public in all matters touching the law".[15] The failed offensive proved the Bar's institutional resilience and confirmed that collective action, not solitary heroism, sustains freedom.

By the time multiparty elections arrived in 1992, the Moi administration faced an electorate that had heard constitutional arguments in sermons, market stalls, and court corridors. Much of that civic literacy traced to a quiet counsel who preferred measured speech to oratory but never mistook civility for compromise. He showed Kenya that a lawyer could block a knock-on-the-door at midnight and, in the same breath, light a lantern for public debate. That double gift—shield and torch—remains his most enduring bequest.

In September 2024, recalling his most defining courtroom moments, Senior Counsel Pheroze Nowrojee said that two verdicts tower over the rest.[16] First, he spoke of the Nairobi Law Monthly decision, in which his team convinced the High Court to strike down the Attorney-General's ban on the magazine, a prohibition that had muffled dissent at the height of single-party rule. That decision, he observed, showed the Kenyan judiciary was willing to face executive censorship and opened a crucial space for press freedom. He then highlighted the 2017 presidential-election petition,[17] calling it Kenya's equivalent of *Brown v. Board of Education*: the nation's first annulment of a tainted poll, a judgment that did not resolve every electoral flaw yet set an enduring legal and moral benchmark for future contests. Together, he reflected, the two cases demonstrate the law's capacity to force open closed political doors and to anchor accountability in turbulent times.

4. A literary soul in lawyer's robes

Amidst his exploits in courtrooms and classrooms,[18] it could be easy to overlook that Pheroze Nowrojee was also a man of letters – a writer and a poet with a deep love for literature. Yet his literary accomplishments were significant and form an integral part of his legacy.

Pheroze's poetic spirit occasionally found literal expression in published poems. In 2001, he won the **BBC Africa Poetry Award**, a prestigious accolade that took many by surprise – those who only knew him as a lawyer discovered that he wielded not just the dry language of the law, but also the evocative language of poetry.[19] His poetry often reflected the themes closest to his heart: justice, freedom, identity, and the Kenyan experience. He once mused that writing poetry gave him a different kind of voice to express the inexpressible – the pain of a political prisoner's solitude, or the faint hope that flickers in a slum child's eyes. The same empathy that guided his legal work flowed through his poems.

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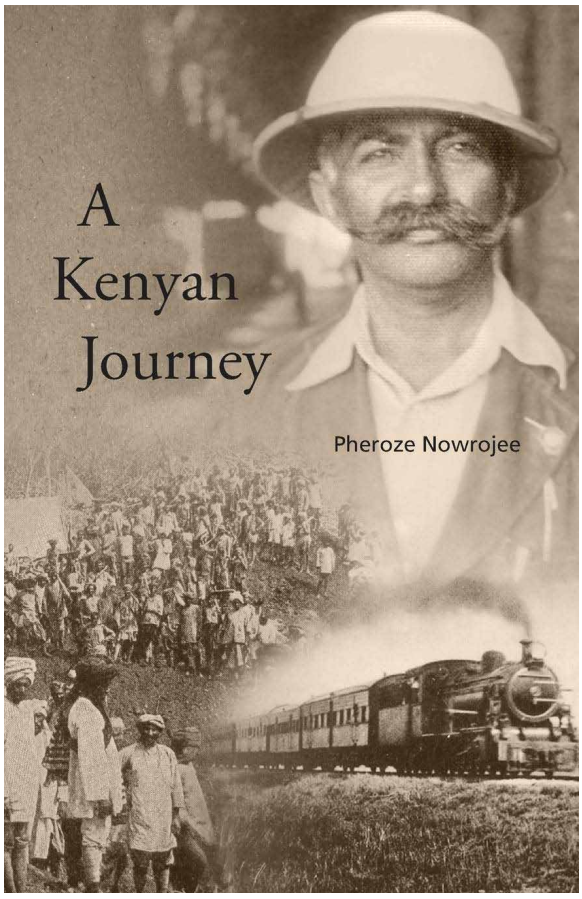
[15]See Nowrojee, 2014, p. 39.
[16]Miracle Mudeyi, 'Pheroze Nowrojee SC Discusses His Latest Book: Practising the Honourable Profession' (2025) September edition The Platform for Law, Justice and Society 11.
[17]See Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Auke & another (Interested Parties); Attorney General & another (Amicus Curiae) [2017] KESC 42 (KLR)
[18]See Yale Law School, 'Pheroze Nowrojee Gives Annual Gandhi Lecture' (*MacMillan Center for International and Area Studies at Yale* 6 October 2017) <https://macmillan.yale.edu/stories/pheroze-nowrojee-gives-annual-gandhi-lecture> accessed 9 April 2025.
[19]Chris Wanjala, 'Old English Style Mars Nowrojee's Attempts to Versify' (*Daily Nation*3 October 2014) <https://nation.africa/kenya/life-and-style/weekend/old-english-style-mars-nowrojee-s-attempts-to-versify-1029866> accessed 26 April 2025.



As an author, Nowrojee's best-known work is *A Kenyan Journey*, a memoir-cum-commentary in which he interwove personal narrative with Kenya's broader fight for freedom.[20] Readers of the book are struck by how seamlessly he blends his own life story with the national story – from his childhood recollections of colonial Nairobi, to his student days abroad during the tumult of the 1960s, to his frontline role in Kenya's second liberation (the struggle for multiparty democracy in the 1980s and 90s). *A Kenyan Journey* is not a dry autobiography; it reads as a reflection on what it means to yearn for justice in an unjust world. True to form, Pheroze uses the book to champion the cause of freedom, effectively making the personal political. One critic noted that the memoir *"combined personal narrative with the larger fight for freedom,"* encapsulating Pheroze's belief that individual stories only truly matter in their connection to the collective struggle.

Beyond poetry and memoir, Pheroze was a prolific essayist and public intellectual. He wrote numerous articles and delivered lectures on constitutional law, human rights, and the role of the judiciary in safeguarding democracy. In these writings, he distilled lessons from history and comparative jurisprudence for a Kenyan audience. For instance, he often cited global examples to illustrate why judicial independence is paramount – and he wasn't shy about critiquing instances where Kenya's judiciary faltered or excelled. Over the years, some of his writings attained near-canonical status in Kenyan legal education. It was said that the elegance of his writings on judicial independence and the rule of law could only be rivaled by his insight, and that these works became "required reading" for law students. Generations of upcoming lawyers pored over Pheroze's speeches and articles, gleaning both knowledge and inspiration.

His crowning achievement in writing came with the publication of *Practising an Honourable Profession* in 2024.[21] Described as his magnum opus, this book is part memoir, part legal philosophy – essentially Pheroze's love letter to the legal profession and an impassioned plea to uphold its highest ideals. In it, Nowrojee contends that the law is far more than a set of written rules; rather, it is a living, "self-sustaining organism" that must continually adapt to society's evolving needs. He argues that lawyers are the caretakers of this organism and thus must themselves embody integrity, independence, and bravery – virtues he lived by throughout his career. The pages of the book are enriched with anecdotes from his life, reflections on landmark cases, and candid assessments of Kenya's legal

[20]Pheroze Nowrojee, *A Kenyan Journey* (Manna Books 2019).
[21]Pheroze Nowrojee, Practising an Honourable Profession (Law Africa 2024).

and political journey. It was fitting that Practising an Honourable Profession was launched when Pheroze was in his early 80s, as it collects a lifetime of wisdom. In one chapter, he emphasizes how partial victories over time can accumulate into significant change – likening legal struggle to a patient diplomatic negotiation where each small gain matters. In another, he recounts the dramatic 2016 incident in Kenya's Supreme Court (during the judges' retirement age saga) where he ended up addressing an empty bench after the judges walked out – a scenario he uses to discuss the ethical duties of advocates and judges alike.[22]

Even in recounting that tense moment – with Chief Justice Willy Mutunga telling him *"We have finished, Senior Counsel… we are out,"* as the judges rose to leave – Pheroze's writing extracts principles.[23] He explains to the reader why he continued speaking to the vacant chairs: to make the point that the court itself was abdicating its responsibility and that he would not be silenced by procedural theatrics. The episode, dramatic as it was, becomes in Pheroze's hands a teachable moment on the rule of law. It illustrates the kind of lawyer he was: one who would literally speak truth to power, even if power had left the room. And it underlines the book's recurring thesis that the honour of the legal profession lies in fearlessly upholding justice, even when confronted with hostility or indifference from the bench.[24]

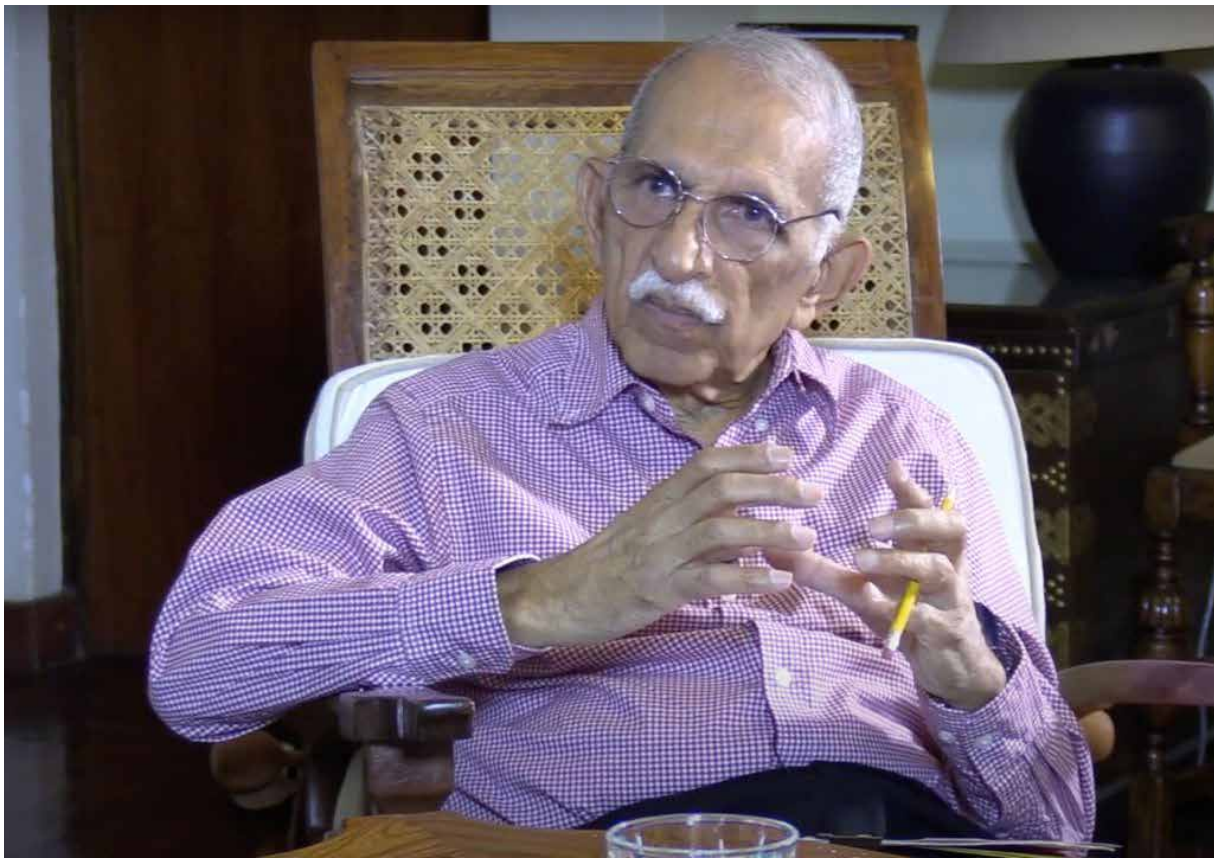
5. Concluding reflections

Indeed, the best tribute we can offer Pheroze Nowrojee is to carry forward his mission. In one of his last essays, he cautioned that freedom can be "nibbled away in bits" if we are not vigilant. Kenya and Africa at large must remain watchful, he urged, because the struggle for justice is a continuous one. *Who will take up his mantle?* This question, posed in the wake of his passing, hangs in the air. The answer lies in each of us who were touched by his example – the generations of lawyers, activists, and ordinary citizens he inspired. They, we, hold the key to ensuring that his vision of a just country built through just means endures.

Beyond the courtroom, Nowrojee was a prolific writer and educator. He taught at the University of Dar-es-Salaam, the University of Nairobi, and the Kenya School of Law.

Pheroze's life reminds us that the law, at its best, is a calling of service. He demonstrated that a lawyer can be a nation-builder, a conscience-keeper, even a liberator. He once said that he "lived law rather than merely practicing it." That ethos is what set him apart. He lived and breathed the values enshrined in our Constitution, not out of obligation, but out of love for his country and its people. He showed that courage and kindness can go hand in hand: one

[22]Pheroze Nowrojee, 'May a Chief Justice Walk out on a Party during a Trial?' 76 The Platform for Law, Justice and Society 6.
[23]Pheroze Nowrojee, 'May a Chief Justice Walk out on a Party during a Trial?' 76 The Platform for Law, Justice and Society 6.
[24]Pheroze Nowrojee, Practising an Honourable Profession (Law Africa 2024).



Pheroze Nowrojee's legacy is enshrined in Kenya's journey toward democracy and human rights. His principled stance, intellectual rigor, and compassionate advocacy continue to inspire generations of lawyers and activists. As the Law Society of Kenya aptly described him, he was "one of the most eminent legal minds and moral beacons of our time."

could fiercely oppose a dictator in court in the morning, then spend the afternoon gently mentoring a pupil, and do both with sincerity.

In the end, Pheroze Nowrojee SC leaves us not in sorrow alone, but with a challenge and an inspiration. *"Those dark days can return,"* he warned – but he also showed us how to prevent that. As we close the record on this remarkable life, we recall one final image: Pheroze in his later years, standing at a podium despite his frailty, speaking softly yet with that quiet thunder that commanded every ear. *"The lawyer's job is to argue for justice,"* he said – and his own life was the ultimate argument for justice, an argument he made persistently and persuasively over half a century. I write these reflections in my voice, having been inspired and mentored by this gentle giant. Pheroze's passing on April 5, 2025, at the age of 84 marked the end of a monumental chapter in Kenya's legal history. The tributes pouring in spoke of a towering figure in the fight for human rights and constitutionalism. Yet, for all his towering intellect and courtroom mastery, those of us who met him remember his warmth, humility, and the gentle smile that often preceded his incisive arguments.

Senior Counsel Pheroze Nowrojee, may you rest in peace. Even though there is silence now in your courtroom, your voice is still loud, in the principles you stood for, in the institutions you strengthened, and in the countless lives you touched. Kenya's journey towards freedom and constitutionalism is immeasurably richer thanks to you. For the record, and for the future, we remember. Your legacy lives on.

Miracle Okoth Okumu Mudeyi is an editor of The Platform magazine.

DEFIANCE IN ACTION

Pheroze Nowrojee SC's enduring charge: Teargas, tyranny, and the East African Union's fragile egos of Human-Rights abuse

By Ayaga Max[1]

Abstract

This article critically examines the rising trend of authoritarian repression in East Africa, focusing on Kenya, Uganda, and Tanzania, where political leaders have increasingly deployed state violence, censorship, and psychological intimidation to suppress dissent. Through recent case studies—including the tear-gassing of schoolgirls in Kenya, the abduction of Kizza Besigye by Uganda, and the arrest of Tanzanian politician Tundu Lissu—the paper argues that the region is experiencing a coordinated assault on civil liberties under the guise of democracy. Central to this repression is the fragility of the political egos at the helm: leaders whose intolerance for critique mirrors the paranoia of historical despots such as Stalin, Hitler, and Pinochet. The author contends that East Africa's ruling elites, like their 20th-century counterparts, fear not armed rebellion but the subversive power of art, protest, and satire. It concludes that unless citizens and institutions confront this creeping autocracy, the region risks entrenching a culture where fear replaces freedom and conformity is enforced through state violence disguised as governance. In confronting this moment, the paper draws strength from the spirit of the late Pheroze Nowrojee, whose life and work remind us—

The Late Senior Counsel Pheroze Nowrojee

especially in this month of his demise—that "for the record, we have to fight for the record." This is not only a call to document injustice but a moral imperative to resist the erasure of truth in the face of tyranny.

Teargas and Tyranny: The East African Union of Human Rights Violations and Fragile Egos

Are all the three East African countries' leaders reading from the same script of harming and silencing political dissidents?

On Wednesday, Tanzanian police arrested the leading opposition leader, Tundu A. Lissu, after he addressed a rally—no

warrant, no explanation, no procedural fairness.[2] On Thursday, he was charged with treason a few months to the election date. In Uganda, Dr. Kizza Besigye was abducted while in Kenya in November and forcefully transferred to Kampala.[3] He was eventually charged with treason, a few months to the election date. In Kenya, on Wednesday, former Kakamega Senator Cleophas Malala was tear-gassed and barred from overseeing the rehearsal of the Butere Girls High School's play Chaos of War, a performance that daringly critiques state brutality.[4] On Thursday, the girls were forced to stage the play at 7.30 a.m. with no audience and no cameras. They chose to stage a walkout in protest. In June 2024, President Ruto described the Gen Z peaceful protestors as dangerous and treasonous criminals.[5]

Across the region, political spaces are shrinking rapidly. In Tanzania, hundreds have allegedly disappeared after criticizing President Samia Suluhu Hassan.[6] In Uganda, the National Unity Platform (NUP) opposition party continues to suffer under a barrage of unlawful detentions and abductions.[7] In Kenya, youth activists involved in the anti-Finance Bill protests of June 2024 were abducted, tortured, and threatened.[8] What binds these three countries today appears not to be just

Former Kakamega Senator Cleophas Malala

geography or economic cooperation under the East African Community—but a shared, disturbing contempt for dissent and a creeping normalisation of authoritarianism.

It is almost comical—if not tragic—that in 2025, three grown adults wielding the might of nations still crumble under the weight of mere words. President Samia Suluhu Hassan, General Yoweri Museveni, and President William Ruto preside over governments that claim to be democratic yet respond to criticism like spoiled emperors scorned at court.[9] Their egos are so fragile

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[2]Fumbuka Ng'Wanakilala, 'Tanzanian Police Arrest Main Opposition Leader, Party Says' (Bloomberg, 9 April 2025) https://www.bloomberg.com/news/articles/2025-04-09/tanzanian-police-arrest-main-opposition-leader-party-says accessed 10 April 2025.

[3]Al Jazeera, 'Uganda's Kizza Besigye "kidnapped" in Kenya, taken to military court' (20 November 2024) https://www.aljazeera.com/news/2024/11/20/ugandan-opposition-politician-kidnapped-in-kenya-taken-to-military-jail accessed 10 April 2025

[4]Emmanuel Wanjala, 'Teargas fired as stand-off over Malala play escalates' (The Star, 9 April 2025) https://www.the-star.co.ke/news/realtime/2025-04-09-teargas-fired-as-stand-off-over-malala-play-escalates accessed 10 April 2025

[5]Kemunto Ogutu, 'Ruto Labels Protesting Youth as Dangerous & Treasonous Criminals' (*The Africana Voice*, 30 June 2024) https://www.africanavoice.com/all-news/kenya-news/ruto-labels-protesting-youth-as-dangerous-treasonous-criminals/ accessed 10 April 2025.

[6]Chimba Jerry, 'Tanzania: Police Under Scrutiny Over Disappearances' (*Institute for War and Peace Reporting*, 25 March 2024) https://iwpr.net/global-voices/tanzania-police-under-scrutiny-over-disappearances accessed 10 April 2025.IWPR Academy+9

[7]David Walugembe, 'NUP political prisoners' status remains unclear' (*Daily Monitor*, 9 April 2025) https://www.monitor.co.ug/uganda/news/national/nup-political-prisoners-status-remains-unclear-4947808 accessed 10 April 2025.

[8]Human Rights Watch, 'Kenya: Security Forces Abducted, Killed Protesters' (6 November 2024) https://www.hrw.org/news/2024/11/06/kenya-security-forces-abducted-killed-protesters accessed 10 April 2025

[9]'Nobody can lecture me on democracy, says Museveni' (*Daily Monitor*, 26 January 2018) https://www.monitor.co.ug/uganda/news/national/nobody-can-lecture-me-on-democracy-says-museveni-1737816 accessed 10 April 2025; Polygraph, 'Ruto paints Kenya as democracy while crushing Gen Z protests' (*Voice of America*, 16 July 2024) https://www.voanews.com/a/ruto-paints-kenya-a-democracy-after-crashing-gen-z-protests-/7700331.html accessed 10 April 2025; 'Samia Suluhu defends state of democracy under her rule' (The EastAfrican, 16 September 2021) https://www.theeastafrican.co.ke/tea/news/east-africa/samia-suluhu-defends-state-of-democracy-3552152 accessed 10 April 2025


President Samia Suluhu

that even a high school play (Echoes of War), a tweet, or a protest song triggers the full force of the state. If these leaders were half as committed to governance as they are to silencing dissent, their countries would be thriving democracies by now. Their reaction to critique is so violently disproportionate, one would think they rule by divine right rather than democratic mandate. Every chant, placard, or political rally is met with riot gear and repression, revealing not power, but insecurity draped in state regalia. As Selwyne Duke once mused, “The further a society drifts from the truth, the more it will hate those who speak it.”[10] And indeed, these leaders hate truth-tellers with an intensity only explainable by the hollowness of their own narratives.

What we are witnessing is not strength but the insecurity of men terrified of mirrors. For leaders who boast of their popular mandates, they appear awfully allergic to the opinions of the very people who elected them. Like the emperor Caligula, who once declared "Let them hate me, so long as they fear me," these modern-day autocrats hide their inadequacy behind riot shields, surveillance, and propaganda. And yet, no amount of teargas or censorship can deodorize the stench of fear seeping from State Houses in Dodoma, Kampala, and Nairobi. To rule through fear is not to rule at all—it is to govern like shadows terrified of the sun. James Baldwin once wrote, “The most dangerous creation of any society is the man who has nothing to lose,”[11] but perhaps the inverse is just as true: the most pitiful creation is a leader who has everything, yet is terrified of losing control over public opinion. In silencing critics, these presidents expose their greatest weakness—an allergy to accountability and a fear that the people may finally see through the façade. One wonders: if criticism from students, poets, and pastors rattles them this much, what monsters lurk in their own minds? Kids?

In Tanzania, the trajectory of repression has been consistent since the era of the late President John Pombe Magufuli. While some hoped that President Samia Suluhu would mark a new dawn of democracy and inclusivity, early signs of her leadership suggested otherwise.[12] Although she released some political prisoners and allowed exiled opposition figures to return, this proved superficial. By early 2023, the same tactics of intimidation had resumed.[13] Tundu Lissu, who had survived an assassination attempt in 2017 and spent years in exile, returned

[10]John D'Agostino and W. Scott Stornetta, 'The Reality Coefficient - How To Know Oneself in an Age of AI' (*Horizons*, Winter 2025, Issue No. 29) https://www.cirsd.org/en/horizons/horizons-winter-2025-issue-no-29/the-reality-coefficien accessed 10 April 2025.
[11]McKenzie Jean-Philippe, '35 Poignant James Baldwin Quotes on Love and Justice That Are Especially Timely' (*Oprah Daily*, 12 June 2020) https://www.oprahdaily.com/life/g32842156/james-baldwin-quotes/ accessed 10 April 2025.
[12]Nic Cheeseman, 'The end of the honeymoon in Tanzania: CCM reverts to type' (*Democracy in Africa*, 9 December 2024) https://democracyinafrica.org/the-end-of-the-honeymoon-in-tanzania-president-samias-govt-reverts-to-type/ accessed 10 April 2025.
[13]ibid

to Tanzania in January 2023 to contest the political space once more. However, he has faced relentless harassment from the police and state agencies.[14] His rallies are disrupted, permits denied, and his supporters arrested. The arbitrary arrest on April 10, 2025, without a warrant, smacks of a state machinery intolerant of scrutiny.[15] Moreover, human rights organisations such as the Legal and Human Rights Centre (LHRC) in Dar es Salaam have documented hundreds of enforced disappearances since 2021, particularly targeting critics of the ruling Chama Cha Mapinduzi (CCM) party and journalists reporting on corruption and police brutality.[16]

Uganda which has long been labelled as a "military democracy", has deepened its descent into outright autocracy under President Yoweri Museveni. In power since 1986, Museveni's regime has increasingly relied on a blend of constitutional manipulation and brute force to suppress opponents.[17] The fate of Dr. Kizza Besigye is emblematic. A former ally turned opponent, Besigye has endured arrests, house detentions, tear gas attacks, and multiple court battles. Besigye was kidnapped in Nairobi, where he had been meeting diaspora supporters, and secretly driven to Kampala by military operatives and held incommunicado at a military barracks in Nakasongola.[18]

Dr. Kizza Besigye

Such extrajudicial cross-border operations represent a frightening new precedent in East Africa. It recalls the 2018 abduction of Rwanda's opposition figure Paul Rusesabagina from Dubai to Kigali,[19] or even the earlier 2017 deportation of Miguna Miguna from Kenya to Canada.[20] Uganda's record under Museveni also includes the November 2020 massacre of over 50 people following the arrest of opposition MP Robert Kyagulanyi, alias Bobi Wine.[21] The

[14]Reuters, 'Tanzania opposition leader arrested at rally, his party says' (9 April 2025) https://www.reuters.com/world/africa/tanzania-opposition-leader-arrested-rally-his-party-says-2025-04-09/ accessed 10 April 2025.
[15]ibid
[16]Legal and Human Rights Centre, 'Policy Brief to Addressing Unlawful Arrests and Disappearances in Tanzania: Ensuring Accountability and Adherence to Legal Procedures' (20 November 2024) https://humanrights.or.tz/sw/report/download/Lhrc_policy_brief_2024 accessed 10 April 2025.
[17]Michael Mutyaba and Maria Burnett, 'Fault Lines in Five More Years of Museveni's Rule' (*Center for Strategic and International Studies*, 9 July 2021) https://www.csis.org/analysis/fault-lines-five-more-years-musevenis-rule accessed 10 April 2025.
[18]Al Jazeera, 'Uganda's Kizza Besigye "kidnapped" in Kenya, taken to military court' (20 November 2024) https://www.aljazeera.com/news/2024/11/20/ugandan-opposition-politician-kidnapped-in-kenya-taken-to-military-jail accessed 10 April 2025.
[19]American Bar Association Center for Human Rights, 'Rwanda: Background Briefing on Proceedings Against Paul Rusesabagina' (30 January 2023) https://www.americanbar.org/groups/human_rights/reports/background_briefing_rwanda_paul_rusesabagina/ accessed 10 April 2025
[20]Kenya National Commission on Human Rights, 'Report of the Kenya National Commission on Human Rights on Violations of Human Rights in the Matter of Miguna Miguna' (KNCHR, 2018) https://www.knchr.org/Portals/0/CivilAndPoliticalReports/KNCHR%20Report%20on%20Miguna%20Miguna%20Final_2.pdf accessed 10 April 2025
[21]Human Rights Watch, 'One Year Later, No Justice for Victims of Uganda's Lethal Clampdown' (18 November 2021) https://www.hrw.org/news/2021/11/18/one-year-later-no-justice-victims-ugandas-lethal-clampdown accessed 10 April 2025.

In 2024, Kenya experienced a significant wave of youth-led protests, primarily driven by Generation Z, in response to the proposed Finance Bill 2024. This bill aimed to increase taxes on essential goods and services, exacerbating the already high cost of living and sparking widespread public outcry.

violence against NUP supporters has not ceased since. Hundreds of young people in Kamwokya, Luweero, and other NUP strongholds have been abducted, some never to return. Parliamentarians like Hon. Francis Zaake and Hon. Allan Ssewanyana have been tortured, some left with permanent injuries.[22] The Uganda Human Rights Commission, once a bastion of justice, now functions more as an apologist than an arbiter of justice.

Kenya, for its part, masks its repression under a democratic veneer. Boasting one of Africa's most progressive constitutions and a vibrant judiciary, it has long stood out as a beacon in the region. Yet beneath this façade, Kenya too is sliding into illiberalism. The June 2024 maandamano protests against the controversial Finance Bill exposed the state's increasing intolerance for civic expression.[23] Thousands of youth—most notably Gen Z activists—took to the streets of Nairobi, Kisumu, and Mombasa.[24] Their slogans were not just about tax injustice, but about the broader erosion of hope, employment, and government accountability. The response from the state was brutal. Live bullets, water cannons, and mass arrests were the order of the

[22]African Centre for Treatment and Rehabilitation of Torture Victims and International Rehabilitation Council for Torture Victims, 'Torture Prevention and Accountability in Uganda: Joint Alternative Report Submitted in Application to Article 19 of the UN Committee Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment at the 73rd Session of the UN Committee Against Torture for the Examination of Uganda' (April 2024) https://irct.org/wp-content/uploads/2024/04/ACTV_CAT_Report_Final.pdf accessed 10 April 2025.

[23]Kenya Human Rights Commission, '2024: A Year of Blatant State Repression Through Regime Policing' (2 January 2025) https://khrc.or.ke/press-release/2024-a-year-of-blatant-state-repression-through-regime-policing/ accessed 10 April 2025.

[24]Kenya Human Rights Commission, '2024: A Year of Blatant State Repression Through Regime Policing' (2 January 2025) https://khrc.or.ke/press-release/2024-a-year-of-blatant-state-repression-through-regime-policing/ accessed 10 April 2025.

day.[25] According to the Kenya National Commission on Human Rights, at least 36 protestors were killed and over 500 arrested between June and August 2024.[26]

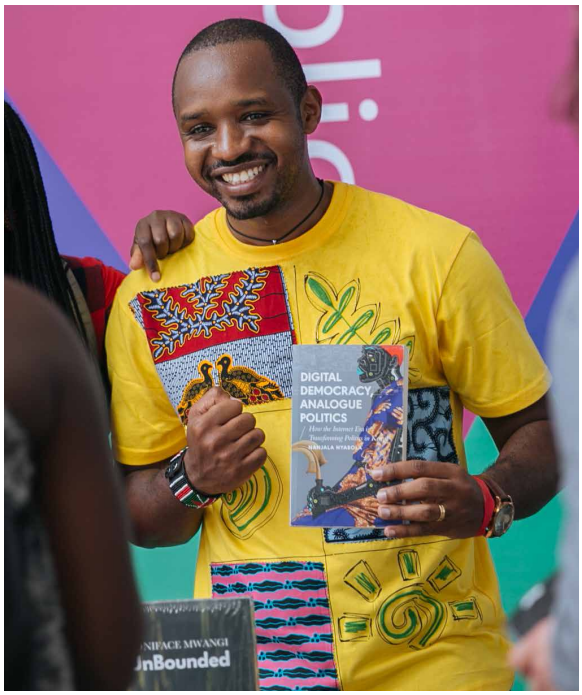
Worse still, there were credible reports of abductions allegedly carried out by the DCI, NIS and other shadowy security units. Youths were picked up from their homes in the dead of night, driven around blindfolded, beaten, and dumped kilometres away with chilling warnings: "Stop talking or you'll disappear for good."[27] The Law Society of Kenya, under the leadership of President Faith Odhiambo, has called for a judicial inquiry, but little progress has been made. Today's incident involving Cleophas Malala further reveals how even political insiders who deviate from the ruling script are not spared.[28] His attempt to support a school play that mirrors the anguish of the youth was met with teargas and police barricades. This sends a chilling message that artistic expression and youthful dissent will be policed into silence.

This wave of coordinated repression across the East African region cannot be dismissed as mere coincidence. It reveals a pattern: governments increasingly adopting the language of democracy while deploying the tools of dictatorship. Elections are held, yes, but they are neither free nor fair. Media outlets operate, but under heavy censorship and threats. Courts issue judgments, but many go unenforced or are reversed via executive pressure. In all three countries, the security apparatus operates with near-impunity. The police, once public servants, now serve as agents of fear.


Faith Odhiambo, Law Society of Kenya President

The role of regional and international actors in this crisis has been minimal at best, complicit at worst. The East African Community has been conspicuously silent, preferring trade diplomacy over human rights enforcement. The African Union's Charter on Democracy, Elections, and Governance might as well be written in invisible ink, given its lack of enforcement.[29] Western partners, while occasionally issuing statements of concern, continue to

[25]Human Rights Watch, 'Kenya: Witnesses Describe Police Killing Protesters' (28 June 2024) https://www.hrw.org/news/2024/06/28/kenya-witnesses-describe-police-killing-protesters accessed 10 April 2025.
[26]Kenya National Commission on Human Rights, 'Update on the Status of Human Rights in Kenya during the Anti-Finance Bill Protests, Monday 1st July, 2024' (1 July 2024) https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1200/Update-on-the-Status-of-Human-Rights-in-Kenya-during-the-Anti-Finance-Bill-Protests-Monday-1st-July-2024?gsid=97ad6dc1-eeeb-4dbf-bdbe-2584141ff73e accessed 10 April 2025
[27]NTV Kenya, 'Abductions: Four of six missing youth found alive' (6 January 2025) https://ntvkenya.co.ke/news/abductions-four-of-six-missing-youth-found-alive/ accessed 10 April 2025.
[28]Emmanuel Wanjala, 'Teargas fired as stand-off over Malala play escalates' (*The Star*, 9 April 2025) https://www.the-star.co.ke/news/realtime/2025-04-09-teargas-fired-as-stand-off-over-malala-play-escalates accessed 10 April 2025
[29]Abadir M Ibrahim, 'Evaluating a Decade of the African Union's Protection of Human Rights and Democracy: A Post-Tahrir Assessment' (2012) 12 African Human Rights Law Journal 30-68.



Activist Boniface Mwangi

fund security programs in these countries, thereby indirectly enabling state brutality. The US, UK, and EU continue to partner with Uganda and Kenya in counterterrorism efforts, pouring millions into their security budgets, even as those same budgets are used to oppress domestic populations.

Civil society, often the last line of defence, is being systematically undermined. NGOs in Tanzania have been deregistered en masse for allegedly promoting "foreign values".[30] In Uganda, the Financial Intelligence Authority now uses money laundering laws to freeze accounts of rights organisations.[31] In Kenya, protest organisers have faced trumped-up charges ranging from unlawful assembly to cybercrime.[32] The state seeks not just to arrest bodies, but to paralyze institutions of resistance.

There is also a dangerous psychological war underway—a campaign to paint dissent as treason, protestors as paid agents, and critics as enemies of development. State-sponsored bloggers and influencers flood social media with hate, disinformation, and defamation[33]. Activists like Boniface Mwangi in Kenya, Stella Nyanzi in Uganda, and Fatma Karume in Tanzania are routinely attacked online and offline. The aim is to isolate them, exhaust them, and erase them from public memory.

Yet, in the face of these threats, voices of resistance persist. In Tanzania, lawyers like Fatma Karume continue to challenge state overreach despite being disbarred.[34] In Uganda, artists like Bobi Wine have turned their music into a megaphone for freedom.[35] In Kenya, youth-led movements such as #OccupyParliament and #RejectFinanceBill2024 are redefining civic engagement.[36] These individuals, often operating at great personal risk, remind the region—and the world—that the fight for justice is not over.[37]

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[30]CIVICUS, 'Against the Wave: Civil Society Responses to Anti-Rights Groups' (November 2019) https://www.civicus.org/documents/reports-and-publications/action-against-the-anti-rights-wave/AgainstTheWave_Full_en.pdf accessed 10 April 2025

[31]ECNL, 'Watchdogs Targeted Under AML/CFT Suspicions' (2020) https://learningcenter.ecnl.org/news/watchdogs-targeted-under-amlcft-suspicions#:~:text=In%20December%202020%2C%20the%20Ugandan%20government's%20Financial,of%20at%20least%20four%20human%20rights%20groups. accessed 10 April 2025.

[32]Kenya Human Rights Commission, '2024: A Year of Blatant State Repression Through Regime Policing' (2 January 2025) https://khrc.or.ke/press-release/2024-a-year-of-blatant-state-repression-through-regime-policing/ accessed 10 April 2025.

[33]Samantha Bradshaw, Ualan Campbell-Smith, Amelie Henle, Antonella Perini, Sivanne Shalev, Hannah Bailey, and Philip N. Howard, 'Industrialized Disinformation: 2020 Global Inventory of Organized Social Media Manipulation' (2021) https://demtech.oii.ox.ac.uk/wp-content/uploads/sites/12/2021/03/Case-Studies_FINAL.pdf accessed 10 April 2025.

[34]Carmel Rickard, 'Tanzanian Lawyers in Uproar After Judge Suspends Their Immediate Past President from Practice' (AfricanLII, 27 September 2019) https://africanlii.org/articles/2019-09-27/carmel-rickard/tanzanian-lawyers-in-uproar-after-judge-suspends-their-immediate-past-president-from-practice accessed 10 April 2025.

[35]Mimeta, 'Uganda: Silencing Creativity in the Shadow of Authoritarianism' (8 April 2025) http://www.mimeta.org/mimeta-news-on-censorship-in-art/2025/4/8/uganda-silencing-creativity-in-the-shadow-of-authoritarianism accessed 10 April 2025.

[36]Ingutia Brian Collins, 'The Impact of Social Media in Shaping Kenya's Politics: Gen Z Uprising and the Rejection of the Finance Bill 2024' (2025) 1 African Multidisciplinary Journal of Research (Special Issue 1) 47-68.

[37]ibid

Still, we must ask: how many more must be disappeared, tortured, or exiled before the region wakes up? How many more school plays must be banned, rallies disrupted, or court orders ignored before East Africa admits it is at war with its own people? The dream of Pan-African unity and liberation is turning into a nightmare of shared repression. How will history judge us?

When President William Ruto's government unleashes tear gas on schoolgirls at Butere Girls High School for daring to stage a play that critiques his regime[38], or when President Samia Suluhu's government sends police to arrest Tundu Lissu without a warrant for merely addressing a rally,[39] or when General Yoweri Museveni orchestrates the abduction of Dr. Kizza Besigye from Kenyan soil and drags him back to Ugandan custody like a fugitive of war,[40] one cannot help but draw an eerie connection to the world's most ego-fractured and insecure dictators.

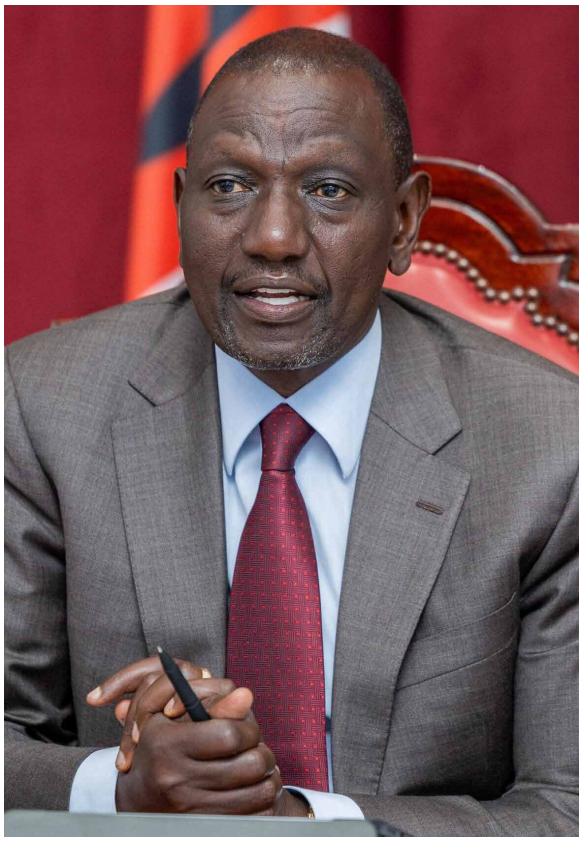
This is the same psychological DNA that compelled Adolf Hitler to execute his closest allies in the 1934 "Night of the Long Knives" because he feared dissent within the Nazi party.[41] It is the same fragility that saw Joseph Stalin order the execution of poet Osip Mandelstam for penning a satirical poem in 1933 mocking his moustache and cruelty.[42] Maybe like Stalin, one of these leaders will order a purge on men whose only crime will be a raised eyebrow.

In East Africa today, our rulers aren't content with dismissing criticism—they are hellbent on annihilating the very possibility of it. These are leaders whose hearts flutter with paranoia at the sight of microphones, whose hands tremble when artists dare to speak the truth, and who believe public opinion must be manufactured, not earned.

Adolf Hitler, particularly in the later stages of consolidating his power, did execute some of his closest allies — most infamously during the Night of the Long Knives (June 30 – July 2, 1934). The Night of the Long Knives secured Hitler's absolute control by eliminating both internal and external rivals, reassuring the German military leadership, and terrifying the broader Nazi Party into submission.

The insecurity runs so deep it pierces the very soul of their governance. Museveni, who has now ruled Uganda for nearly 40 years, once banned a satirical play in 2017 titled The State of the Nation, calling it

[37]ibid
[38]Emmanuel Wanjala, 'Teargas fired as stand-off over Malala play escalates' (*The Star*, 9 April 2025) https://www.the-star.co.ke/news/realtime/2025-04-09-teargas-fired-as-stand-off-over-malala-play-escalates accessed 10 April 2025
[39]Fumbuka Ng'Wanakilala, 'Tanzanian Police Arrest Main Opposition Leader, Party Says' (Bloomberg, 9 April 2025) https://www.bloomberg.com/news/articles/2025-04-09/tanzanian-police-arrest-main-opposition-leader-party-says accessed 10 April 2025.
[40]Al Jazeera, 'Uganda's Kizza Besigye "kidnapped" in Kenya, taken to military court' (20 November 2024) https://www.aljazeera.com/news/2024/11/20/ugandan-opposition-politician-kidnapped-in-kenya-taken-to-military-jail accessed 10 April 2025
[41]Edward G. Gunning Jr., 'The Night of the Long Knives: Reconsidered' (2022) City College of New York https://academicworks.cuny.edu/cc_etds_theses/995 accessed 10 April 2025.
[42]Gabriel Fine, 'Osip Mandelstam's 'Black Earth' Reaps Sweetness from the Darkest Soviet Years' (9 July 2021) Calvert Reads https://www.new-east-archive.org/articles/show/12939/osip-mandelstam-black-earth-poetry-collection-review-soviet-stalin-calvert-reads accessed 10 April 2025.


President William Ruto

"insulting."[43] William Ruto's government now equates a high school drama festival piece, Echoes of War, with subversion and national threat, just as Idi Amin once banned newspapers for referring to him by his first name.[44] Samia Suluhu, who came into power with promises of tolerance, now presides over a Tanzania where dozens of CHADEMA party members have been "disappeared," and artists like rapper Roma Mkatoliki have been kidnapped and tortured for politically charged lyrics.[45] This is the psychological profile of tyrants past: paranoid, insecure, and unfit to lead societies that breathe freedom. Saddam Hussein had his son-in-law killed for questioning military decisions and blamed it on his clan.[46] Kim Jong-un allegedly executed his Defence Minister in 2015 for "disrespect" after he dozed off in a meeting.[47] In East Africa, criticism need not even be spoken; to dissent in your heart, or in your script, or in your dreams is now enough to summon the wrath of power.

Like Kim Jong-il, who once executed a general for merely drinking during mourning[48], our trio seems ready to jail someone simply for thinking the government is a joke. Their egos are so outsized, they mistake criticism for coups and satire for sedition. These are men and women who probably lose sleep not over poverty or hunger, but over memes. It's almost poetic in its absurdity—leaders who have everything, terrified of teenagers with hashtags. History warns us of leaders who can't stand mirrors: Nero set Rome ablaze to silence dissent, Hitler crushed cabaret artists and poets, and now, here in East Africa, a rally, a slogan, or a school play is enough to summon the full wrath of the state. How thin must your skin be to declare war on drama students? The difference between our present and the past is narrowing fast—and while they may not yet have built gulags, they're certainly laying the psychological foundations for them.

[42]Gabriel Fine, 'Osip Mandelstam's 'Black Earth' Reaps Sweetness from the Darkest Soviet Years' (9 July 2021) Calvert Reads https://www.new-east-archive.org/articles/show/12939/osip-mandelstam-black-earth-poetry-collection-review-soviet-stalin-calvert-reads accessed 10 April 2025.
[43]BBC News, 'Uganda's Media Council bans State of the Nation play' (18 October 2012) https://www.bbc.com/news/world-africa-20155281 accessed 10 April 2025.
[44]Bernard Tabaire, 'The Press and Political Repression in Uganda: Back to the Future?' (2007) 1(2) *Journal of Eastern African Studies* 193-211.
[45]Lucy Ilado, 'Tanzania music ban 'a futile exercise'' (5 March 2018) Music In Africa https://www.musicinafrica.net/magazine/tanzania-music-ban-futile-exercise accessed 10 April 2025.
[46]Douglas Jehl, 'Iraqi Offers Regrets in Killing of Defecting Sons-in-Law' (*The New York Times*, 10 May 1996) https://www.nytimes.com/1996/05/10/world/iraqi-offers-regrets-in-killing-of-defecting-sons-in-law.html accessed 10 April 2025.
[47]France 24, 'North Korea 'executes defence chief' who fell asleep at meeting' (France 24, 13 May 2015) https://www.france24.com/en/20150513-north-korea-executes-defence-chief-treason-charges accessed 10 April 2025.
[48]Faine Greenwood, 'North Korean military officer executed—by mortar round—for drinking during mourning period for Kim Jong Il' (The World, 31 July 2016) https://theworld.org/stories/2016/07/31/north-korean-military-officer-executed-mortar-round-drinking-during-mourning-period-kim-jong accessed 10 April 2025.

These aren't leaders; they are shadows wearing crowns, terrified of light.

It is no accident that William Ruto panicked at a high school play, or that Samia Suluhu dispatched police to arrest Tundu Lissu for speaking in metaphors, or that Museveni considers any public performance that doesn't praise him to be an existential threat. These East African leaders follow a long and pitiful tradition of despots who feared art more than armies.

In 1937, Joseph Stalin ordered the execution of the Soviet theatre director Vsevolod Meyerhold for promoting "anti-Soviet ideals" through avant-garde stagecraft.[49] Stalin had already sent the great poet Osip Mandelstam to a gulag for writing a short poem that dared to describe his moustache as "the cockroach mustache."[50] William Ruto, too, couldn't handle a drama piece titled *Echoes of War* — a high-school student play that critiqued police brutality — without sending riot police to Butere Girls and force them to walk out of performing the play.

If Stalin was frightened by a poem, and Ruto by a schoolgirl's play, then the conclusion is inevitable: both were never secure in the legitimacy of their rule, only in the volume of their suppression.

Consider also the ghost of Augusto Pinochet, Chile's military dictator, who in the 1970s banned Victor Jara's music for its leftist themes and had the singer's hands crushed before executing him in a stadium filled with dissidents.[51] Today, the Ruto administration

Joseph Stalin

persecutes kids not adults artists and playwrights, kids.

Samia's presidency arrest of rapper Roma Mkatoliki in 2017 by state operatives is a direct echo of Nigeria's military dictatorship, which once arrested and beat the legendary Fela Kuti for songs exposing corruption.[52] But perhaps the most pathetic link lies with Museveni, who banned political theatre in Uganda in 2009, fearing that even village plays were sowing rebellion.[53] Like Hitler —

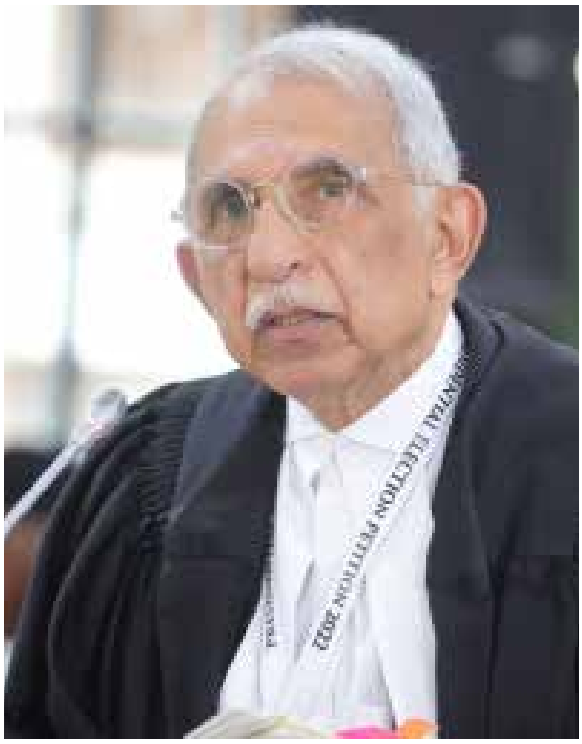
[49]Fiveable, 'Vsevolod Meyerhold and the rise of avant-garde theatre' (*Fiveable*, no date) https://library.fiveable.me/history-theatre-ii-cities-at-play-from-renaissance-rise-realism/unit-12/vsevolod-meyerhold-rise-avant-garde-theatre/study-guide/d1utKoTI2EmMabwa accessed 10 April 2025.

[50]ibid

[51]Adam Augustyn, 'Victor Jara, Biography and Death' (*Britannica*,) https://www.britannica.com/biography/Victor-Jara accessed 10 April 2025.

[52]Richard Harrington, 'Fela Kuti & The Chords Of Africa' (*The Washington Post*, 6 November 1986) https://www.washingtonpost.com/archive/lifestyle/1986/11/07/fela-kuti-38/69e5f304-aa23-44ce-a3c2-c9d3e3c119ee/ accessed 10 April 2025

[53]A. K. Kaiza, 'Museveni: Trapped in His Own Shrinking Web of Patronage?' (*The Elephant*, 24 June 2017) https://www.theelephant.info/analysis/2017/06/24/museveni-trapped-in-his-own-shrinking-web-of-patronage/ accessed 10 April 2025



During the repressive regime of President Daniel arap Moi in the 1980s, Nowrojee emerged as a fearless defender of political detainees, activists, and journalists. He notably represented figures like Wamwere and Raila Odinga, challenging the constitutionality of sedition laws and advocating against detention without trial.

who in 1933 burned thousands of books and banned Bertolt Brecht's politically critical plays — Museveni too would prefer a nation of silent audiences clapping on command, never questioning.

What unites these autocrats — past and present — is a shared phobia of the imagination. For what is art if not the most dangerous form of resistance? Hitler feared Thomas Mann and exiled him.[54] Stalin exiled Boris Pasternak and suppressed Doctor Zhivago.[55] Franco in Spain imprisoned playwrights and banned all Basque literature.[56] Today, Ruto teargasses school going children and prevents them from performing a play, Museveni labels dissident poets "foreign agents," and Samia speaks of "maintaining order" while targeting musicians who ask too many questions.

These are not leaders—they are frightened gatekeepers of thin-skinned regimes, unable to endure a stanza, a verse, or a scene that holds a mirror to their power. And like all insecure rulers before them, they will attempt to burn every script that does not worship them. But what they fail to learn from history is this: you can exile the poet, jail the singer, censor the script—but you cannot kill the idea. Tyrants fall. Art endures.

This month as we remember Mwalimu Pheroze Nowrjee and his famous dictum for the record, it is time for citizens of East Africa to confront this grim reality. Let the record reflect that we fought to protect our constitution before it was too weak to protect us. While we may not win in the interim, the future will judge us well. When Pheroze Nowrojee, SC, was asked why he kept going to court to challenge the Moi regime, even though he knew Moi had the courts by the balls, he said, 'I did that—for the record.' We have to fight, in books, in plays, in articles- For the Record. We are not just neighbours bound by treaties and roads; we are becoming a community of violation—a triad of regimes reading from the same dark script. If this script is not torn apart and rewritten by the people, then soon, silence will be our only common language.

Ayaga Max is a third year law student at the University of Nairobi, Faculty of Law.

[54]David Post, 'From My 'Commonplace Book,' No. 9: Thomas Mann, Richard Wagner, and Adolf Hitler' (*Reason*, 20 January 2025) https://reason.com/volokh/2025/01/20/commonplace9-thomas-mann-richard-wagner-and-adolf-hitler/ accessed 10 April 2025.
[55]Karen Van Drie, 'International Banned Book: Doctor Zhivago by Boris Pasternak' (*Global Literature in Libraries Initiative*, 18 December 2017) https://glli-us.org/2017/12/18/international-banned-book-doctor-zhivago-by-boris-pasternak/ accessed 10 April 2025
[56]Christian Claesson, 'Vernacular Resistance: Catalan, Basque, and Galician Opposition to Francoist Monolingualism' in Christopher Kullberg and David Watson (eds), *Vernaculars in an Age of World Literatures* (Bloomsbury Academic 2022) 51-80

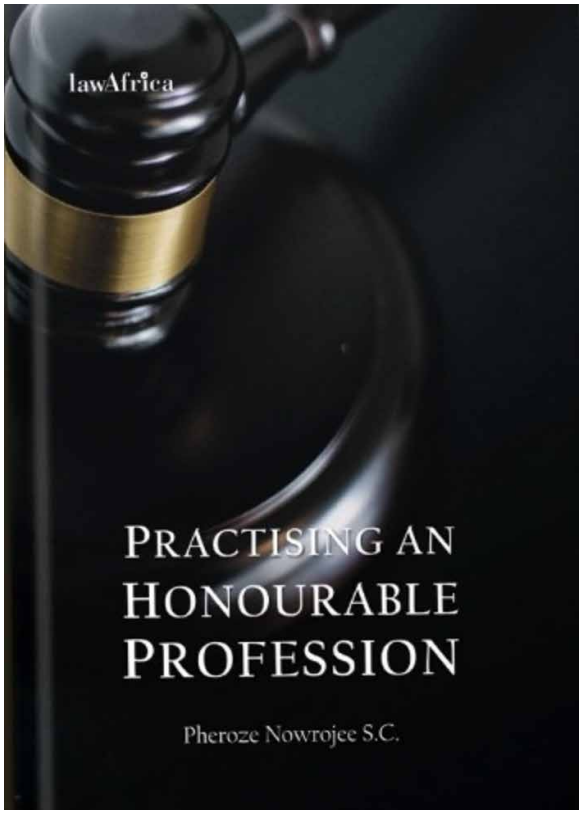
A CALL FOR JUSTICE

End the era and errors of extrajudicial executions and enforced disappearances: A befitting Legacy to SC Pheroze Nowrojee

By Beverline Anyango Ongaro

It is indisputable that senior counsel Pheroze Nowrojee was a legal polyglot because his legal practice was diverse: yet executed meticulously with the understanding and unpinning that the law is a tool to liberate. His footprints and fingerprints remain indelible in the quest for the enjoyment of human rights by all people. A cursory glance at collections of articles in my library-captioned above- is a poignant reminder of his consistency and candor in demanding accountability for extra-judicial executions (EJE) and enforced disappearances (ED). I collected this article as GPO Oulu was a fellow peer at Political Leadership Development Programme under the Youth Agenda Association wherein as youth leaders, we were being trained to be transformative leaders.

Sadly, at the time of SC Pheroze's demise, EJEs and EDs continue to be witnessed. The Kenya National Commission on Human Rights, in its *State of Human Rights Report 2023/2024* highlights this forlorn situation. Yet, Kenya is a State Party to various international and regional human rights treaties, which guarantees every person the right to life and impose obligations on the State to undertake prompt, effective and impartial investigations and afford effective remedies for the violations. Equally, the Constitution of Kenya guarantees the right to life and impose similar obligations on the State.



What then should we do to honour the legacy of this luminary son of Kenya, and a legal leading light? In his book, *the Practising an Honorable Profession* (2024), Pheroze Nowrojee challenges lawyers , *' the lesson of history is that oppression does not end if opposition to it is silent…The defence of democracy and the Rule of Law becomes part of practice of a lawyer.'* This article will highlight the measures anchored on human rights standards that legal practitioners can undertake for prevention and accountability of EJEs and ED. **A longer version of this paper will be featured in the special issue in memory of Pheroze Nowrojee.**

Beverline Anyango Ongaro is an Advocate of the High Court of Kenya

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HAKI IWE NGAO NA MLINZI

A CHAMPION'S ROAR

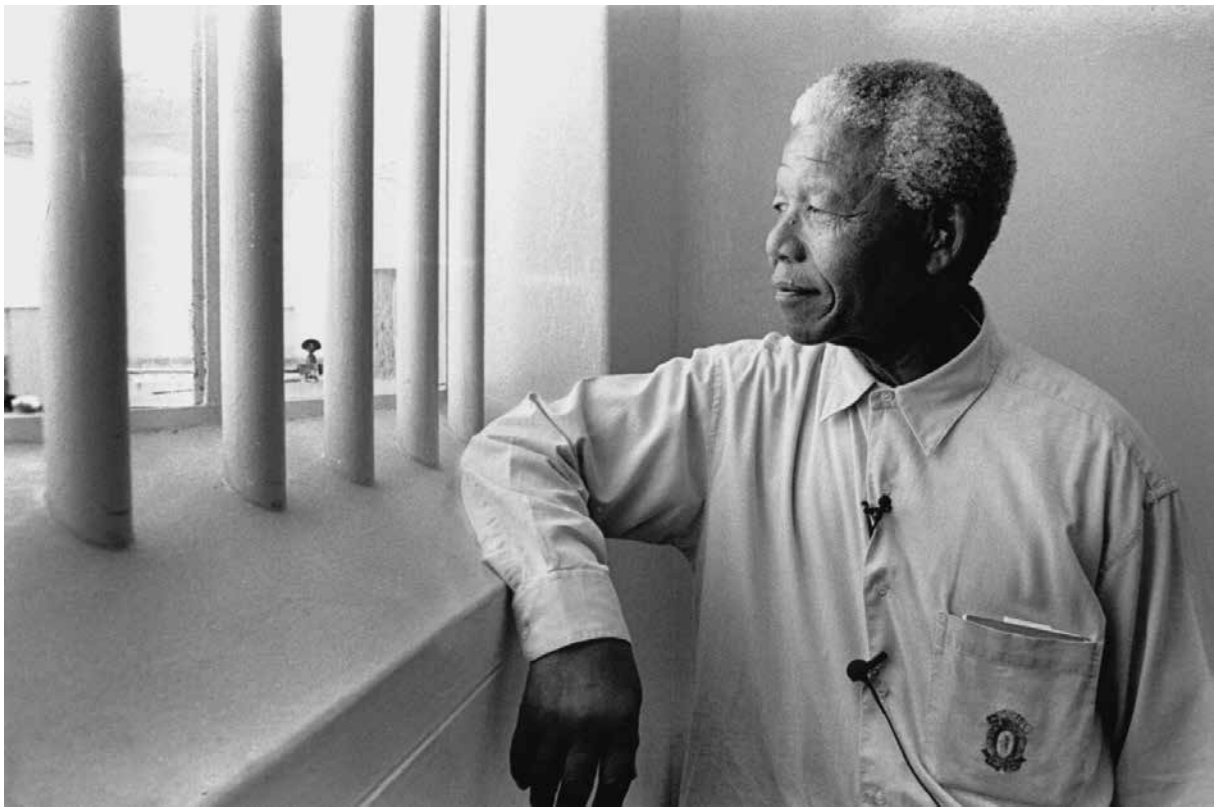
Honouring the legacy of Pheroze Nowrojee, SC: The lion of human rights and constitutionalism in Kenya

By Tioko Emmanuel Ekiru

Abstract

Senior Counsel Pheroze Nowrojee stands out as an extraordinary beacon of courage, excellence, professionalism, and integrity for his principled commitment to the expansion of democratic space, protection of fundamental rights and freedoms, rule of law, and promotion of the tenets of constitutionalism, particularly during Kenya's darkest political period under Moi's/ KANU regime in 1980s and 1990s. Born in 1941 into a family with deep roots in Kenya dating back to 1896, Nowrojee's legal career was profoundly marked by his unwavering devotion to representing prominent political figures, human rights activists, government critics, journalists, and opposition leaders who were detained, persecuted, or falsely accused for their radical opposition against Moi's oppressive regime. He represented iconic figures such as Koigi Wamwere and Raila Odinga, cementing himself as a 'moral compass in turbulent times.' Beyond the courtroom arena, Nowrojee was a prolific writer, educator, and mentor who influenced the generation of legal scholars, legal practitioners, academics judges, human rights defenders and members of the civil society movement. His writings on human rights, constitutional law and judicial independence remain essential part of useful materials to be used in law schools, courts and other intellectual spaces. Though his recently demise undeniably defines the end of a monumental chapter in Kenya's human rights and constitutional discourse, his legacy endures as a formidable champion of human rights and constitutionalism, akin to the revered Yuri Schmidt in Soviet Russia. Just like Yuri Schmidt who was celebrated as a 'lion of human rights' for his fearless resistance of the Russian oppressive regime, Nowrojee too will be remembered for decades as Kenya's 'lion of human rights and constitutionalism.' His passing is a solemn call to us all that the defence for the rule of law is a continuous task that requires constant vigilance, persistence, unwavering moral courage and the willingness to stand up-again and again-for what is right even in the face

The Late Senior Counsel Pheroze Nowrojee



Nelson Mandela like Pheroze Nowrojee stand as towering figures in the global and East African struggle for human rights, justice, and democracy. Though they came from different countries and contexts — Mandela from South Africa and Nowrojee from Kenya — both devoted their lives to challenging oppressive regimes, defending the rule of law, and uplifting the oppressed through both activism and the legal profession.

of turbulence.This commentary explores on the Nowrojee's contribution to the Kenyan democratization journey from the past to the present. The commentary highlights that all Kenyans, regardless of their station of life, must be ready to sustain the fight for a fair and just society for all. This fight can happen through street protests or legal battles, just like Nowrojee did.

1. Introduction

Since claiming its independence from the British colony in 1963, Kenya has cultivated a legacy of producing brilliant and exceptional legal minds who are committed to the advancing the cause of justice, human rights, and constitutionalism. Among these notable legal luminaries, Pheroze Nowrojee stands out as an extraordinary beacon of courage, excellence, professionalism, and integrity for his principled commitment to the expansion of democratic space, protection of fundamental rights and freedoms, rule of law, and promotion of the tenets of constitutionalism.

Like the global human rights Icons who went ahead of him, such as C.M.G Argwings-Kodhek, Pio Gama Pinto, Mahatma Gandhi, Nelson Mandela, Desmond Tutu, and Kofi Annan, Pheroze Nowrojee was a voice of the voiceless. He strongly believed that lawyers must always stand for justice, even in the face of tyrants. According to many of his countless admirers, Nowrojee was not just a lawyer; he was a moral compass in an era where many chose silence.[1] In the Annual

[1]ICJ,'Pheroze Nowrojee legal Titan, Human Rights Defender and Voice of Conscience' https://icj-kenya.org/news/pheroze-nowrojee-legal-titan-human-rights-defender-and-voice-of-conscience/ accessed in(16 April 2025)

conference organized by the Law Society of Kenya in 2024 in Diani, Kwale County, Nowrojee insisted that lawyer's duty is not just to argue the law but to argue justice, even if justice is inconvenient to those in power.

It should be recalled that at the crucial period of repressive and darkest Kenya's chapter under the one-party KANU regime, in the 1980s and 1990s, Nowrojeee held the torch of justice with devotion by defending political detainees, human rights activists, government critics, journalists, and opposition leaders who were victims of state oppression. His consistent adherence to the fidelity of the rule of law earned him recognition as a 'moral compass in turbulent times.'

His recent passing at the age of 84 was a big blow to the country in general. It symbolically marks the end of a monumental chapter in Kenya's human rights and constitutional discourse. However, Nowrojee will be remembered for decades as a formidable human rights and constitutionalism 'lion' like Yuri Schmidt who was vetted as a 'lion of human rights' in Russia.[2] Yuri Schmidt just like Nowrojee fearlessly defended political prisoners, dissidents and critics of Russia government over several decades. He was renowned for taking on highly sensitive and dangerous cases, including representing environmental whistleblower Alexander Nikitin, the family of assassinated lawmaker Galina Trovita, and Mikhail Khodorkovsky.[3] Schmidt's courage, intelligence made him a leading and respected human rights lawyer in hostile environment. He dedicated himself to human rights work for about 50 years. Here I explore on the contributions of Nowrojee in Kenya's democratization journey highlighting his biography, educational journey, legal training, contribution to the advancement of human rights and constitutionalism, prominent cases he represented, mentorship role, political offices he occupied, professional boards he was involved, the publications, life hobbies and some of the awards he received during his lifetime.

2. Biography of, Pheroze Nowrojee SC

Pheroze was born in 1941 in Nairobi into a family deeply rooted in Kenya's history. In April 1896, his grandfather arrived in East Africa to work as an engine driver for the Uganda Railway, an experience that shaped the family narrative in colonial Kenya. Nowrojee, in his acclaimed memoir *A Kenyan Journey* (2015), described this experience as a pivotal moment for his family. The book is both poetic and political. It traces Nowrojee's heritage and his family's trajectory, including themes such as identity and belonging. Similarly, the book also acts as a personal reflection on the impact of colonialism, migration, and the formation of Kenya as a modern nation-state.

As a family man, Nowrojee was married to Villo Nowrojee, and together they were blessed with three children: two daughters, namely Binaifer and Sia, and a son, Elchi. Their daughter, Binaifer Nowrojee, is also a lawyer. Binaifer has held prominent positions, including becoming the first woman from the Global South to be the President of the Open Society Foundation.[4] Nowrojee's family is well-known for their strong commitment to the justice and human rights cause.

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[2]Khodorkovsky'A Lion of Human Rights' https://khodorkovsky.com/a-lion-of-human-rights/?utm; Dan Glode,'Yuri Schmidt 1937-2013- The Nugget Newspaper, available at https://www.nuggetnews.com/story/2016/04/12/news/yuri-schidt1937-2013/2600.html?utm accessed on (16 April, 2025).

[3]Khodorkovsky'A Lion of Human Rights'(n2 above.)

[4]See Binaifer Nowrojee's Special Lecture titled,' Defending Open Society in a Dangerous World' that was delivered at the University of Cape Town' https://www.opensocietyfoundations.org/newsroom/defending-open-society-in-a-dangerous-world-binaifer-nowrojee-delivers-special-lecture-at-the-university-of-cape-town accessed on (16 April 2025).

3. Early education, legal career training, and contributions

Nowrojee commenced his early education at Catholic Parochial Primary School in Nairobi before attending Billimoria High School in Panchgani, India. He obtained Bachelor of Arts degree at Bombay University in 1957, and he later studied law at Lincon's Inn, London, qualifying as a barrister in 1965. He later earned an LL.M. from Yale University in the USA in 1974.[5] In 1967, Nowrojee was admitted to the Kenyan Bar. His initial legal training, both in Kenya and the United States, gave him a strong unique understanding of local and global perspectives in his legal work. Nowrojee had also practised law across East African countries, including Tanzania (1970) and Zanzibar (1989). Moreover, he represented clients from Uganda and Seychelles as well.

His devotion in human rights and constitutionalism space spanned over six decades. Nowrojee's areas of specialization include, constitutional, political, and human rights cases. Nowrojee's upbringing significantly redefined his legal philosophy by instilling in him a deep sense of justice. His early exposure to law through accompanying his father, Eruch Pheroze, to courtrooms, particularly during the Mau Mau Lari massacre trials in Githunguri in1953, where the father was the counsel for defense shaped his curiosity to pursue law as a career.[6] In addition, Nowrojee's intellectual journey was further enriched by his studies in India, where he was influenced by Mahatma Gandhi's non-violent resistance doctrine and Jawaharlal Nehru's vision of a secular, just society.[7]

In the academic space, Nowrojee contributed to the development of legal education in East Africa by involving himself in teaching at University of Dar es Salaam (1974-1977), the University of Nairobi (1979-1985), and the Kenya School of Law (1968-1970, 1978-1985).

4. Outstanding contributions to righting wrongs of state repression and human rights abuses from the past to present

Nowrojee played a monumental role in shaping Kenya's human rights and constitutionalism landscape from the past to the present period. As we noted earlier, during Kenya's turbulent political party era under the one-party regime in the 1980s and 1990s, Nowrojee stood as amoral compass for justice. Nowrojee is well-known for tirelessly dedicating himself to representing prominent political figures, human rights activists, government critics, journalists, and opposition leaders who were detained, persecuted, or falsely accused for their radical stand against Moi's oppressive regime. Through his advocacy work, Nowrojee played a pivotal role in Kenya's political transformation. For example, alongside other pro-reform activists such as Willy Mutunga, Nowrojee contributed to the environment that saw a peaceful transition of power in 2002, when Mwai Kibaki came to power dealing a blow to Moi's decades of one-party dominance.[8] He helped through his multi-dimensional legal expertise in the constitutional review process leading to drafting of Kenya's 2010 Constitution.[9] The part that follows examine some of the landmark cases in which he appeared.

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[5]See Kenya Scholars and Studies Association available at https://www.conference.kessa.org/2024-kessa-keynotes/; see also David Wanjala,'Pheroze Nowrojee: the man, the legend, and the colossus in the legal profession' https://nairobilawmonthly.com/pheroze-nowrojee-the-legend-in-the-legal-profession/ accessed on (16 April 2025)

[6]Jillo Kadida, ' How senior counsel Pheroze Nowrojee Fell in love with law https://www.the-star.co.ke/news/big-read/2020-11-03-how-senior-counsel-pheroze-nowrojee-fell-in-love-with-law

[7]John Kamau,'Pheroze Nowrojee: The advocate who confronted tyrants' https://www.businessdailyafrica.com/bd/lifestyle/profiles/pheroze-nowrojee-pheroze-the-advocate-who-confronted-tyrants-4993006 accessed on (16 April 2025)

[8]Makau wa Mutua, Kenya's Quest for Democracy: Taming Leviathan (Lynne Rienner Publishers 2008), PP 2-10

[9]ICJ, 'Pheroze Nowrojee legal Titan, Human Rights Defender and Voice of Conscience'(n1 above.)

4.1 High-Profile Human rights and Constitutional Decisions

4.1.1Joseh Ogiddy Obuon v Republic (1983) eKLR, High Court at Nairobi (Milimani Law Courts)[10] Criminal Appeal No.3 of 1983

The appellant, Sgt Joseph Oggidy Obuon, was charged and convicted by a Court Martial for treason contrary to section 69(i)(a) of the Armed Forces Act, Chapter 199, Laws of Kenya and section 40(i)(a)(iii) of the Penal Code, Chapter 63 Laws of Kenya. The prosecution alleged that the appellant conspired with others, including Raila Odinga, to overthrow the Kenyan government in an attempted coup on August 1, 1982. The appellant was allegedly to have recruited armed forces personnel to take part in the botched coup. The Court, in this case, dismissed the appellant's appeal after the appellant admitted he was, indeed, involved in meetings and activities related to the coup attempt.

Pheroze Nowrojee contributed significantly as part of the defence team representing those accused and linked to the case, including Raila Odinga. Nowrojee's main argument in the case centred on challenging the constitutionality of the seditions laws used to suppress free speech, particularly of those who opposed to Moi's regime. He argued that these laws were colonial and the practice of detention without trial was an affront to human rights and fundamental freedom and also a broader attack on Kenya's democracy. Nowrojee's contributions in this case significantly bolstered his reputation as a human rights defender in the face of turbulent times. He cemented his legacy as a leading champion for constitutionalism and civil liberties. In addition, Nowrojee's legal groundwork profoundly influenced human rights movements and other dissident groups such as Mwakenya to agitate for the expansion of democratic space in the country.

4.1.2 Nakuru Chief Magistrate Criminal Case No 2273/92R v Koigi Wa Wamwere &3 Others

This case involved the trial of a human rights activist, a former member of parliament and a critic of Moi's regime, and three others who were charged for the allegation of attempted robbery with violence contrary to section 297(2) of the Penal Code due to the raids on Bahati Police station near Nakuru, 150 kilometres(kms) northwest of Nairobi. The prosecution claimed that the accused, along with others, entered the station with knives and swords, intending to attack the station. The amnesty and other observers challenged this argument by saying that the charges were politically motivated, targeting mainly Wamwere and his co-accused for their stand against the regime in power.

In this case, Nowrojee argued that weaponization of sedition laws as a wider scheme of the government to suppress free speech went against the core tenets of fair trial enshrined in the Constitution. Nowrojee's defence of Koigi wa Wamwere significantly influenced the future of human rights efforts by exposing the misuse of criminal law, such as on sedition and robbery with violence, to attempt to silence political dissent. The case catalyzed legal and human rights reforms aimed at protecting political freedoms, freedom of expression, and the right to a fair trial.[11]

4.1.3 Nairobi Law Monthly Case of 1990

The Nairobi Law Monthly magazine was

[10]The judgment was delivered on October 1983.
[11]'Kenya: Abusive Use of the Law: Koigi wa Wamwere and Three Other Prisoners of Conscience on Trial for Their Lives' https://www.refworld.org/reference/countryrep/amnesty/1994/en/94441 accessed on (17 April 2025)


The Late Wafula Chebukati

founded in 1987 by the human rights activist Gitobu Imanyara, and the current founder of the Platform Magazine. The magazine was a leading voice of dissent in the 1990s. It openly exposed human rights abuses, challenged President Moi's one-party system by calling for the repealing of the oppressive laws, multi-party democracy, dissolution of the parliament, and amendment of the Constitution to allow for the recall of the President.[12]

Imanyara and other contributors were considered dangerous dissidents by President Moi's authoritarian regime. The magazine was banned, including its possession.

The ban was part of a broader crackdown on political dissenting groups who were considered to be anti-Moi's regime. Nowrojee and his team challenged the ban on the publication in the High Court, particularly pointing out that the ban was a clear violation of constitutional rights such as freedom of expression and the freedom of the press. The Court, through Justice Shields, lifted the ban. The victory in this landmark decision was seen as a triumph for the freedom of the press and human rights advocacy efforts even during the perilous times of the 'naked' dictatorship of President Moi. Similarly, this case is widely credited as a catalyst for the Second Liberation and the expansion of civil liberties in Kenya. Nowrojee's for example, recognized the instrumental role of this decision in building momentum for the Second Liberation, which culminated in the repealing of Section 2A, to allow multipartyism in the early 1990s. He underscored as follows:

"*It was back on the streets. It was an important victory for liberty in Kenya. Like Imanyara himself, the existence itself, and the contents of this history-making magazine, was a key propellant and part of the Second Liberation and Kenyan freedom.*" [13]

4.1.4 Raila Odinga & Stephen Kalonzo Musyoka v Independent Electoral and Boundaries Commission &others[2017] KESC 31(KLR)(Presidential Election Petition No.1 of 2017)

This was a groundbreaking decision by the Supreme Court of Kenya that culminated the nullification of the presidential election results of the 2017 General election. The main petitioners in this case, Raila Odinga and Kalonzo Musyoka, the presidential candidate and the deputy president of the National Super Alliance (NASA) respectively, had challenged the procedure by which the August 8, 2017, presidential election was conducted. They submitted to the Supreme Court that the Independent Electoral and Boundaries Commission (IEBC) and its Chairperson, Wafula Chebukati, as well as the incumbent president, Uhuru Kenyatta, the Jubilee presidential candidate,

[12]Mi1chael A. Hiltzik, 'Kenya Bans Leading Dissident Periodical: Suppression: President Moi also inveighs against church leaders and political figures urging a change in domination by his party' https://www.latimes.com/archives/la-xpm-1990-09-30-mn-2506-story.html accessed on (17 April 2025)
[13]'How senior counsel Pheroze Nowrojee fell in love with law'(n4 above.)

Raila Amolo Odinga and Stephen Kalonzo Musyoka following the proceedings of the 2017 Presidentia Election petition.

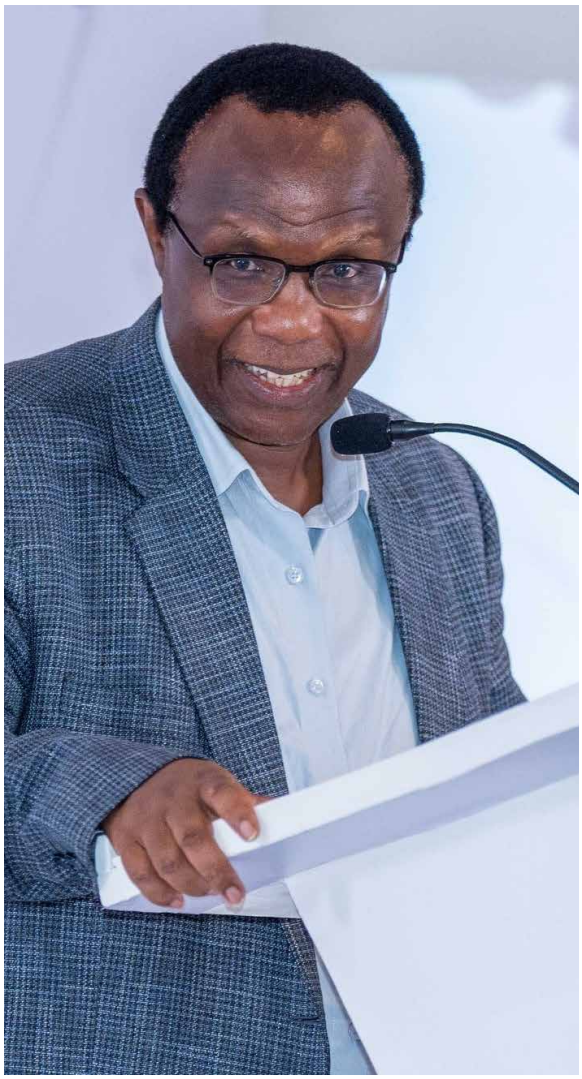
committed irregularities during the electoral process.

On September 1, 2017, the Supreme Court of Kenya captured the attention of the global community by nullifying the presidential election. The Court found that there were significant failures of the IEBC to transmit the election results from polling stations to the constituency tallying centre and to the national tallying centre. The Court also held that the IEBC did not comply with the constitutional and statutory provisions for elections, and as a consequence, it held that the election conducted did not meet the constitutional muster of Article 81(e) which provides that the electoral system shall comply with the principle of "free and fair elections." The Court proceeded to declare the election conducted by the IEBC a nullity. It ordered a fresh presidential election to be conducted within 60 days as mandated by the Constitution.

In this Raila Odinga's 2017 presidential election petition, Nowrojee as part of the defence team, played an instrumental role. He delivered a powerful 40-minute submission that was credited with being pivotal in nullifying the victory of Uhuru Kenyatta.[14] This decision by the Supreme Court was hailed as the first one by an African court to overturn a presidential election result. Nowrojee's submissions exposed irregularities, and illegalities in how the IEBC violated the principles of free and fair elections through intimidation, and coercion of public officers. He further highlighted that numerous Forms 34A and 34B(official election result forms) had fatal inconsistences, and illegalities, including missing signatures.

This decision according to Nowrojee directly addressed Kenya's past legacy of presidential election petitions which were being dismissed on technicalities grounds.

[14]John Kamau, ' Pheroze Nowrojee: The advocate who confronted tyrants'(n5 above.)


David Ndii

In addition, he noted that this decision followed the most important principle of politics of constitutional supremacy as opposed to the supremacy of individual politics. Unlike earlier cases, the Supreme Court in Raila Odinga's 2017 decision adopted a "process-centric approach", focusing on whether the election process itself had complied with the Constitution and electoral laws.[15] The decision marked a shift from the old practice of upholding the election results even in the instances where substantial irregularities are registered. The case demonstrated the commitment of the apex Court to uphold the principle of electoral integrity over mere procedural compliance.

4.1.5 David Ndii v Attorney-General [2021] ekLR (HC); IEBC V David Ndii&2 Others [2021]ekLR(COA); and the AG and 2 Others v David Ndii&79 Others, SC Petition No.12 of 2021(SCOK)

The David Ndii case also known as the Building Bridges Initiatives (BBI case) arose from the initiative process engineered by President Uhuru Kenyatta and Raila Odinga proposing sweeping amendments to Kenya's 2010 Constitution through the popular initiative process under Article 257 of the Constitution. Initially, both the High Court and the Court of Appeal declared some clauses of the constitutional amendment bill unlawful and unconstitutional.[16] The two Courts also established that the basic structure doctrine (BSD) is applicable in Kenya, citing, among other things, a 1973 judgment of the Supreme Court of India, which marked the first watershed moment of the BSD recognition.[17] Aggrieved by this decision, the proponents and supporters of the BBI filed an appeal to the Supreme Court. The Supreme Court, among other things, held that the President could not initiate a popular initiative a mandate vested to the ordinary citizen and that the BSD is not applicable in Kenya. This pronouncement by the apex Court marked the end of the BBI discourse.

In this case, Nowrojee was part of the legal team advocating the Constitution against unconstitutional amendment. He specifically articulated some of the key principles

[15]Gerald Ochieng, ' Adjudging a Presidential Petition: Lessons from F Raila Odinga & another v IEBC &4 Others'(2023) The Platform for Law, Justice and Society, PP 1-16.
[16]See the High Court determination in *David Ndii v Attorney-General* [2021] ekLR (High Court); *IEBC V David Ndii&2 Others* [2021] ekLR(Court of Appeal).
[17]*Kesavananda Bharati v The State of Keral and Others*, AIR (1973) SC 1461.

that influenced the Court(s) ruling. First, he observed that public participation is a constitutional principle essential in constitutional amendment process, and it must be meaningful and sufficient to uphold national values and principles as enshrined in Article 10 of the Constitution. Secondly, although the apex Court affirmed that the BSD is not explicitly provided in the Kenyan Constitution, Nowrojee in his submissions stressed that the BSD is a vital component of the Constitution which can only be altered through the primary constituent power, which includes civic education, public participation, collation of views, debate and referendum to protect the Constitution from the sort of hyper-amendment process that took place under Kenyatta 1 and Moi regimes. Most importantly, he pointed out that the President has no power to initiate a constitutional amendment since such powers are vested to the ordinary citizens.

This case, among other classical cases, reflect Nowrojee's broader commitment to the goal of constitutionalism, human rights, rule of law and democratic governance. In addition, the case serves as a precedent for demarcating the boundaries of constitutional amendments, the presidential role and the role of lawyers in guarding the Constitution against hyper amendment.

5. Mentorship as an Obligation of a Legal Professional

Nowrojee was not only recognized as a legal titan but he was also widely referred to as a "lawyer's lawyer" for his unwavering advocacy skills graced with calm demeanour, humility, sharp mind, courage, integrity and professional ethics. Similarly, he was renowned for embodying all the time the highest ideals of the legal profession by mentoring generations of the Kenyan legal community (Judges, law students, legal practitioners, legal academic and scholars of the law). His mentorship extended to various human rights defenders, including the members of the civil society movement. Some of the individuals he mentored now occupy significant positions in the Kenya's legal landscape and beyond. Because of his humble character, Nowrojee has graciously mentored, inspired and supported young lawyers often during difficult times. In many instances, he insisted to young lawyers, a good lawyer is the one who read, read and knows the law.

Part of the skills Nowrojee emphasized include:

"The reading of briefs thoroughly, the statute of the case carefully, including the statutory instruments/ subsidiary legislation, Kenya past and present and also what is going on in the profession in general."[18]

In this discussion, we must appreciate that Nowrojee's commitment in instilling vast knowledge to young lawyers through the culture of thorough reading emanated from his appreciation of how deep understanding of law, history and society play a fundamental role in shaping an individual advocacy effort in pursuit for justice. Nowrojee generally viewed mentorship not as an option but a moral obligation that he loved to fulfil with humility and generosity as one of the critical duties for legal professionals in the profession. He believed that sharing knowledge and guiding young lawyers was essential part of his obligation to cementing and sustaining the constitutional values to be carried along by the future generations who would continue to fight for a just world for all.

6. Political Offices Involvement

Nowrojee's lifelong dedication to building the Kenyan State through advocacy work from the decades of turbulence,

[18] Jillo Kadida, 'How senior counsel Pheroze Nowrojee Fell in love with law(n4 above.)

Pheroze Nowrojee played a significant role in Kenya's constitutional reform process, serving as Vice-Chair of the Ufungamano People's Commission on Constitutional Reform (2000–2001) and contributing to the development of the 2010 Constitution.

including resisting oppression, was not only professional but also personal commitment. He understood that injustice, if left unchecked, would resurface in new forms that will only be defeated through renewed resistance such as being a member of a political movement. Given this, Nowrojee joined political parties' offices to allow him to check the government from within and also to contribute beyond the courtroom by advocating the expansion of the democratic space in the country. His involvement also originated from the core belief that legal defence was an insufficient tool for driving change without political engagement. Bearing this in mind, some of the Nowrojee's political offices;included FORD-Kenya, Member of National Executive Council (NEC), 1992-1999; FORD-Kenya, Secretary for Legal & Constitutional Affairs, 1994-1999; and National Treasurer, Social Democratic Party, 2002-2012. Equally, he was Vice-Chair of the Ufungamano People's Commission on Constitutional Reform 2000–2001. Over the years he has been an influential part of the political and social movements for constitutional and social change in Kenya.

7. Professional Board Membership

Nowrojee has been a crucial figure in Kenya public affairs and legal history. He was a Co-Chair of the Asian African Heritage Trust, an Indian Diaspora/Kenyan history trust, an organization dedicated to preserving the

history of the Indian Diaspora in Kenya. A part from this, Nowrojee's served on many boards such as those of Nairobi Law Monthly, Kituo Cha Sheria, Media Institute and the Independent Medical and Legal Unit (IMLU). He was also the Chairperson for CB Madan awards committee in the Platform magazine, founded by Hon. Gitobu Imanyara shortly after the promulgation of the 2010 Constitution.

8.The Publications

Nowrojee was a prolific writer. He used to write poetically and with clarity of minds. His research covers extensively on constitutional law, human rights, and judicial independence aspects. Some of his essays, articles and dozens of speeches are used as instructional materials in law schools, courts and other intellectual spaces. Some of the acclaimed books he authored include, Pio Gama Pinto: Patriot for Social Justice' (2007), A Vote for Kenya: The Elections and the Constitution' (2013), A Kenyan Journey' (2014), (about his family history), Conserving the Intangible' (2015) and Practising an Honourable Profession' (2024). Beside this, Nowrojee was accomplished and a talented poet, having won the BBC African Poetry Competition Prize in 2001.

9.Hobbies and Leisure Activities

To complement his legal work in the courtrooms, Nowrojee enjoyed hobbies such as reading history, law, politics, and occasionally fiction, as well as writing, sketching and watercolour painting. These hobbies provided a creative environment on which Nowrojee would reflect on the broader social justice framework beyond the courtroom. Moreover, these hobbies were not just leisure activities but tools that assisted him to deepen his understanding in the pursuit for justice, human right, and constitutionalism in the Kenyan democratic arena.

10.Awards and Recognitions

Nowrojee's exceptional contributions to human rights, constitutional law and justice in Kenya and beyond led him to receive numerous prestigious awards. These include the International Commission of Jurists (Kenya) ICJ Jurist of the Year, 1995; the International Bar Association (IBA) Bernard Simons Human Rights Prize, 2002-2004; the Law Society of Kenya Roll of Honour, 2005; the Maasai People Safeguarding Rights Award, 2007; and the CB Madan Constitution Prize, 2014.

These were awarded for his commitment to defending human rights, advancing constitutionalism, mentoring and tirelessly leading key legal battles in the courtrooms to challenge the tyrants.

11. Postscripts: The Defence of the Rule of Law is a Continuous Task

Nowrojee's life and illustrious career in law teaches us that defence is a never one-time act, but a continuous, unending task that demands constant vigilance, persistence, unwavering moral courage and the willingness to stand up-again and again-for what is right even in the face of turbulence. His legacy is woven in the Kenyan human rights history and it challenges us all to keep defending the values that make a just society possible for all, including the voiceless.[19]

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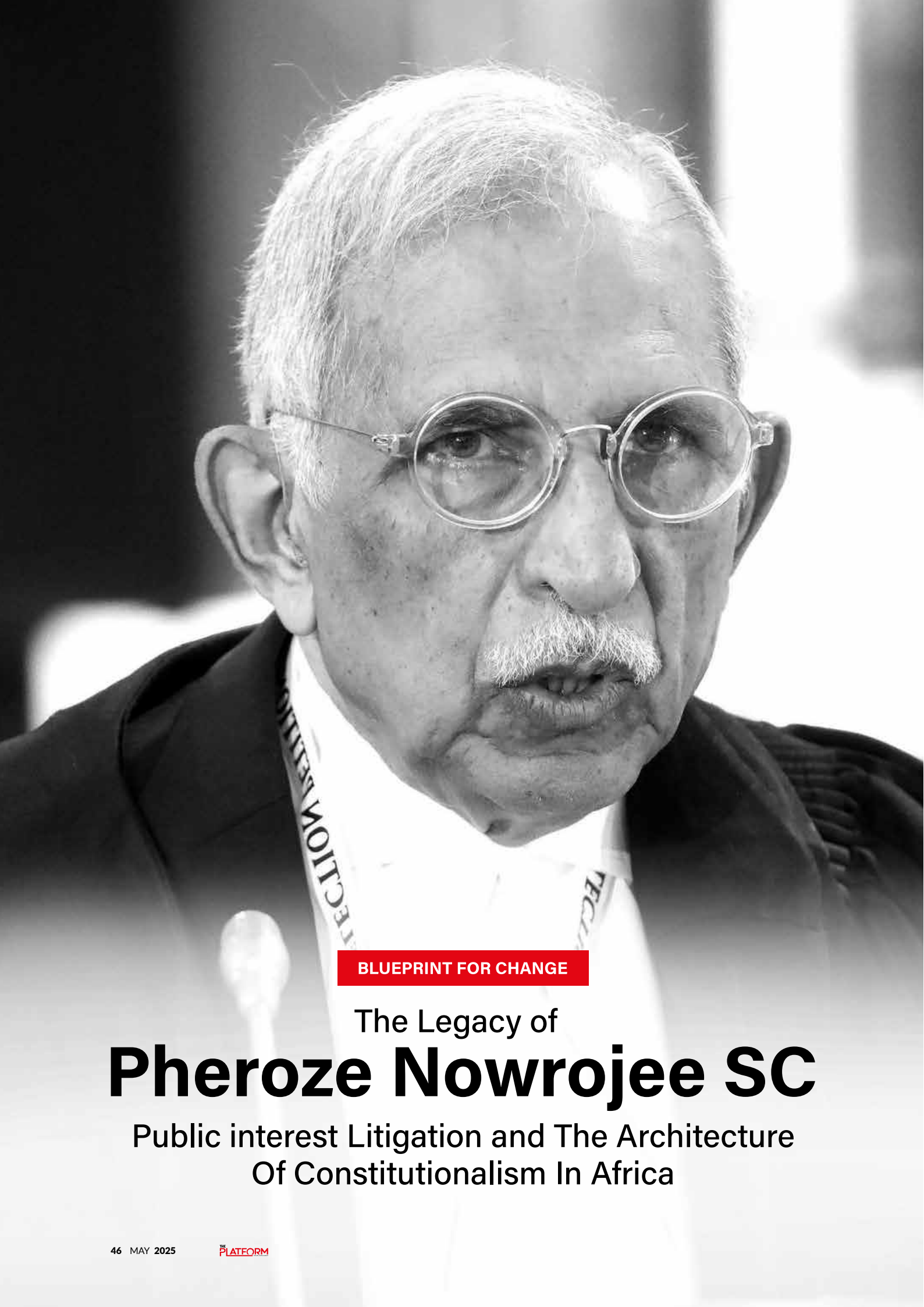
[19]ICJ, 'Pheroze Nowrojee legal Titan, Human Rights Defender and Voice of Conscience'[(n 1 above.)



BLUEPRINT FOR CHANGE

The Legacy of

Pheroze Nowrojee SC

Public interest Litigation and The Architecture Of Constitutionalism In Africa

By Felix Odira

Abstract

Few names in African legal history have the same quiet thunder of justice as Pheroze Nowrojee SC. Nowrojee was a tireless architect of constitutionalism, a titan of the courtroom, and a poet of principle. His death on 5 April 2025, at the age of 84, signalled the end of an era—but not the end of his legacy. For many years, this gentle giant was a ray of hope in Kenya and beyond, using the law as a shield for the downtrodden and a sword against oppression rather than just a formality. His life's work in public-interest litigation changed the definition of justice and permanently influenced the structure of constitutionalism throughout Africa.

Introduction

In Kenya and throughout Africa, the legal profession has frequently walked a tightrope between conservatism and revolution. Pheroze Nowrojee SC, a man whose eloquence, intelligence, and dedication to justice elevated litigation to an art of resistance and reform, is one of the great individuals who re-defined the role of lawyers in society. Nowrojee was a constitutional craftsman, not just a legal technician. Together, his writings, mentorship, and courtroom interventions influenced the development of public-interest litigation as an emancipatory force.

The Man Behind the Legend

Nowrojee was born in Nairobi in 1941 into a family steeped in Kenyan colonial history—his grandfather was an engine driver for the Uganda Railway—and his path to legal fame was as international as it was rooted. After receiving his education in India, the United Kingdom, and the United States—where he earned a Master of Laws at Yale—he returned to Kenya in 1967 to practise before the High Court. Across more than fifty years he traversed the courts of Kenya, Tanzania, and Zanzibar, touching the lives of countless people who dared to hope for a just society.

Yet Nowrojee was not only a lawyer. He was a teacher and mentor, a poet who won the BBC Africa Poetry Competition in 2001, and a writer whose works—such as *A Kenyan Journey*—blended personal narrative with the broader struggle for freedom. His voice carried the conviction that justice is a right to be fought for, not a privilege to be begged for, both inside and outside the courtroom.

Public-Interest Litigation: A weapon for the voiceless

Public-interest litigation in Kenya emerged as a response to a legal system built on repression and exclusion, not merely as a mechanism for challenging governmental wrongdoing. It is at the core of Nowrojee's legacy—a legal device that he transformed into a powerful engine of social change. He viewed the courts as a battleground for Africa's soul, a continent where colonial legacies and post-independence autocracies often stifled dissent. His cases were more than lawsuits; they were moral struggles that revived constitutional guarantees.

One emblematic example is the *Nairobi Law Monthly* case of 1990. When the Moi regime banned the magazine, edited by Gitobu Imanyara, for its fearless criticism of power, Nowrojee argued before the High Court that the ban violated the right to free expression, a cornerstone of any democracy. The court lifted the ban, emboldening the press and, by extension, all Kenyans who wished to be heard.

Another landmark came in 2017. Speaking for forty minutes on behalf of presidential-election petitioners, Nowrojee convinced the Supreme Court that the poll had failed constitutional standards—

prompting it, for the first time in African history, to annul a presidential victory. "We had established the precedent that adherence to the Constitution's provisions binds all governance," he later observed, underscoring that no one—even a president—stands above the law.

Building the architecture of constitutionalism

Nowrojee's work extended beyond individual cases; it shaped Africa's constitutional order. During Kenya's bleakest years under one-party rule in the 1980s and 1990s he defied a system thriving on repression. Representing dissidents such as Koigi wa Wamwere and Raila Odinga, he challenged sedition laws and detentions without trial, arguing that curtailing liberties was an assault on the nation's soul. His courage earned him both the reverence of a generation and physical injuries—he was once beaten by police while visiting clients in detention.

Outside the courtroom, he influenced Kenya's constitutional landscape. As Vice-Chair of the Ufungamano People's Commission on Constitutional Reform (2000–2001) he helped lay the groundwork for the transformative 2010 Constitution, celebrated for devolved governance and robust human-rights protections. His essays on judicial independence and the rule of law remain essential reading for law students. Speaking at a Kenya School of Law lecture on 12 March 2025, he remarked: "The lawyer's job is not just to argue the law; it is to argue for justice, even when that is inconvenient for those in authority."

Beyond Kenya, Nowrojee embodied a pan-African commitment to justice, practising in Tanzania and Zanzibar and mentoring advocates throughout East Africa. His human-rights advocacy echoed the struggles of societies where the rule of law served both as a battleground and a pathway to freedom—akin to Mandela's South Africa, Nkrumah's Ghana, and Nyerere's Tanzania. In an Africa often scarred by authoritarianism, his legacy demonstrates that constitutionalism is a necessity for dignity and development, not a luxury.

The touch of humanity

Colleagues recall his humility—Martha Karua speaks of his fearless leadership in "rescuing" young lawyers in court. From Otiende Amollo to Faith Odhiambo, his mentorship forged a legion of legal minds who continue his work today. He received a standing ovation for a lifetime of service at the 2024 Law Society of Kenya conference, frail but resolute. President William Ruto hailed him as "a brilliant legal mind"; Raila Odinga mourned "the People's Attorney"; and Gitobu Imanyara captured the collective grief: "What a loss to the legal profession and to this country."

A Legacy unfinished

Though Pheroze Nowrojee SC is gone, his legacy remains unfinished. Through fearless advocacy and unwavering faith in justice he fortified a constitutionalism that will shape Africa's future. In a world where freedom is often "nibbled away in bits," as he warned, the law can be a force for good—but only in the hands of those brave enough to confront power.

As Kenya and Africa mourn this legal colossus, one question endures: who will take up his mantle? The generations of lawyers, activists, and citizens he inspired hold the answer. Because Nowrojee did not merely practise law—he lived it—his vision of a just society stands ready for those bold enough to carry it forward. May Senior Counsel rest in peace. Though his courtroom now lies silent, his voice resounds still.

Felix Odira is a student at the Kenya School of Law, passionate about constitutionalism, human rights, and strategic litigation. With a background in legal research and writing, I seek to contribute to the evolving discourse on law and justice in Africa through articles and legal commentaries.

A TRIBUTE TO GREATNESS

Honourable Chief Justice's Address During the Special court tribute proceedings in Honour of the late Honourable Justices David Majanja and Daniel Ogembo – 4th April 2025

By Hon. Martha Koome

1. I am pleased to be presiding over this closing of file proceedings in honour of two towering jurists the late Hon. Justice David Majanja and the late Hon. Justice Daniel Ogembo.

2. This Special Sitting, while marked with grief at the loss of our dear colleagues, is equally a celebration of their remarkable contributions to the law and to our society. Their lives and service exemplified judicial excellence – marked by integrity, diligence, humility, and an unwavering commitment to justice.

3. The tradition of holding Special Court Tribute Proceedings for our departed colleagues serves as a powerful reminder that we are all stewards in the temple of justice. It is a moment for collective reflection – to honour those who have served with distinction, and to recommit ourselves to the values that defined their lives: integrity, fidelity to the rule of law, and excellence in the dispensation of justice.

4. The presence of judges from across the Supreme Court, Court of Appeal, High Court, Employment and Labour Relations Court, and the Environment and Land Court, sitting together on this bench signifies the unity and shared purpose that binds us all in service to justice. Regardless of the level at which we serve, we are all guided by the same constitutional calling to deliver justice to the people of Kenya.

5. From the remarks and reflections of those who have spoken before me, one thing is clear: Justices Majanja and Ogembo embodied the highest ideals of our profession. They each brought a distinctive voice and vision to the Bench, contributing richly to the growth of our jurisprudence and enhanced our system of the administration of justice.

In Tribute to Justice David Majanja

5. Justice Majanja's judicial career,

The Late Justice David Majanja

spanning from his appointment in 2011 to his untimely passing in 2024, was characterised by intellectual brilliance, bold thinking, and an enduring commitment to constitutionalism. He served in various court stations, and was serving in the Civil Division at Milimani at the time of his passing. He had just been re-elected to serve a second term as a Commissioner of the Judicial Service Commission – a reflection of the trust his colleagues placed in his leadership.

6. Known as an *"intellectually astute judge,"* Justice Majanja stood out for his passion for transformative jurisprudence. He did not simply interpret the law; he breathed life into the Constitution. His judgments were marked by clarity, depth, and a fearless commitment to constitutional values. His contributions, particularly in the development of constitutional and public law, will shape legal thought in Kenya for generations.

7. As a JSC Commissioner, he championed key institutional reforms – from strengthening judicial integrity and gender mainstreaming, to enhancing policy frameworks on judicial

conduct, sexual harassment, and data management. His impact extended beyond the courtroom into the very heart of our judicial governance.

8. Justice Majanja was also admired for his collegial spirit and mentorship. He was firm yet approachable, principled yet compassionate. His ability to simplify complex legal questions inspired younger members of the Bench and Bar alike. His passing leaves an unfillable void – but also a legacy that will continue to inspire.

In Tribute to Justice Daniel Ogembo

9. Justice Ogembo's path to the High Court was paved with hard work and humility. Joining the Judiciary as a magistrate in 2004, he rose through the ranks and was appointed a High Court Judge in 2016. He served with distinction in Eldoret, Nairobi (Milimani) Criminal Division, and later as the Presiding Judge in Siaya.

10. A jurist of quiet strength, Justice Ogembo was known for his diligence, humility, and unwavering commitment to service. He was especially respected for his work ethic – diligently clearing case backlogs and delivering justice efficiently and fairly. His expertise in criminal law made a lasting impact, with his judgments cited for their precision and depth.

11. Those who appeared before him speak of a judge with a calm and respectful demeanour – a man who listened attentively and dispensed justice with clarity and compassion. His engagements with communities, such as his outreach

The Late Justice David Majanja

at the GK Prison in Siaya, reflected a profound belief in justice that transcends courtroom walls.

12. Justice Ogembo's life was also marked by integrity and mentorship. He remained grounded and accessible, providing support and guidance to junior judicial officers. He exemplified the

principle that justice is not only about delivering rulings and judgments, but also about how we treat others – with courtesy, humility, and respect.

Their Enduring Legacy

13. As we reflect on the lives of these two jurists, we see shared values that should inspire us all: a deep respect for the rule of law, a passion for service, and a commitment to fairness and dignity for every person. They showed us that a judge can be both an intellectual giant and a deeply humane person – that justice is best served when principle meets compassion.

14. Justice Majanja's intellectual rigour and reformist zeal, and Justice Ogembo's humility and dedication to the cause of justice, remind us that character is as important as intellect in judicial office. Both men earned the title "Honourable" through daily acts of honesty, respect, and service.

15. Their legacies live on – in their landmark judgments, in the institutional reforms they helped shape, in the lawyers and judicial officers they mentored, and in the lives of countless Kenyans who encountered justice through their courts. In remembering them, we recommit ourselves to the high calling of our office.

In Closing

16. On behalf of the Judiciary of Kenya, and on my own behalf, I extend our deepest condolences to the families, friends, and colleagues of Justices David Majanja and Daniel Ogembo. We stand with you in grief, even as we celebrate the towering contributions of your loved ones to our nation's legal landscape.

17. Let their memory continue to guide us – to be principled, fearless, and humane in our service. Let us follow their example in applying the law with both firmness and empathy. As Justice Majanja once reminded us, *"even procedural rules must bend to serve justice."* As Justice Ogembo showed us, even routine cases deserve our full attention and compassion.

18. In their honour, let us renew our commitment to uphold the Constitution and to serve the people of Kenya with humility and integrity. That is the tribute they deserve. That is the legacy they leave us to carry forward.

19. Honourable Justices David Majanja and Daniel Ogembo, we salute you. May your souls rest in eternal peace.

20. Finally, this is the decision of the Court:

Having heard the Submissions made in form of tributes in the honour of the two departed Judges and having considered the Application by the Hon. the Attorney General of Kenya, we find merit in the Application. Accordingly, we hereby direct that:

1) That these Special Proceedings be and are hereby adopted as a permanent record of this Court.

2) The Certified copies of the proceedings be availed to the families of the Late Justice David Majanja and the Late Justice Daniel Ogembo as well as all High Court Archives and the Law Society of Kenya.

3) This being a matter of great professional and public interest, there shall be no orders as to costs.

4) Orders Accordingly.

Dated and delivered at Nairobi this 4th day of April, 2025.

Unanswered questions: A critical examination of the Supreme Court of Kenya's jurisprudence on presidential election petitions

By Christopher Kinyua

By Aromo Marion

Abstract

The paper honours the legacy of the late Senior Counsel Pheroze Nowrojee, a pioneer in the advancement of electoral litigation in Kenya. The paper critically examines the Supreme Court evolving jurisprudence on presidential election petitions under the 2010 Constitution. Grounded in Article 140, the paper explores the Courts decisions in the 2013, 2017 and 2022 presidential petitions that have progressively shaped Kenya's electoral legal framework and integrity. Despite these strides several critical questions remained unanswered or half answered by the Court; the jurisdictional dilemma surrounding disputes arising from first-round presidential elections, legal status of spoilt votes among others. The paper interrogates these unresolved legal gaps.

1.Introduction

A distinctive feature of the design of the electoral system in the 2010 Constitution is the Constitutional entrenchment of an array of electoral principles that form the normative foundation for the conduct of elections in Kenya.[1] Article 81 of the Constitution establishes the principle of "free and fair elections" as the cornerstone of electoral system in the country. This provision constitutionalizes and describes the environment in which election are to be conducted.[2] Article 86 of the Constitution, makes provisions for the means through which elections are conducted on the voting day, whatever voting method is used, the requirement is the system must be simple, accurate, verifiable, secure, accountable and transparent.[3]

The Supreme Court since its inception has developed and continued to enrich the jurisprudence on presidential election petitions, primarily grounded on Article 140 of the Constitution. Through landmark and precedence setting decisions the court has underscored its critical role in safeguarding electoral integrity and principles and upholding constitutionalism. Kenyans' have participated in three general elections since the promulgation of the 2010 Constitution,

[1]Walter Khobe Ochieng, *'Protecting the Integrity of the Electoral Process: The Promise of Maina Kiai Judgment',* Journal of Law and Ethics, Vol. 3, 2018, Kabarak University School of Law
[2]*Ibid*
[3]*Ibid*

PHOTO BY RICHARD MUNGUTI | NMG

Mr. Raila Odinga and running mate Ms. Martha Karua during the submission of their petition challenging the presidential election results at the Supreme Court on 22 August, 2022.

with the three general elections giving birth to four presidential elections which the Supreme Court has had to decide.

The *Raila Odinga & Others v Independent Electoral and Boundaries Commission & Others* [2013] was a result of the 2013 general election, the *Raila Odinga & Another v Independent Electoral and Boundaries Commission & Others* [2017] which saw the Court, for the first time in Kenya's history, nullify a presidential election, the *Raila Odinga & Another v Independent Electoral and Boundaries Commission & Others* [2017] challenging the repeat election results, and the *Raila Odinga, Martha Karua & Others v Independent Electoral and Boundaries Commission & Others* [2022] challenging the 2022 presidential results.

The four petitions have refined the threshold of proof, the burden of proof and evidence, the standard of scrutiny applied in such petitions, principle of substantive compliance in elections, among others, thus contributing to development of electoral jurisprudence that balances legal precision with democratic legitimacy. However, several questions remained unanswered up to date, they include; definition and scope of 'fresh elections', standard of proof in electoral disputes, role and authority of IEBC commissioners, and legal status of spoilt votes.

This paper undertakes a critical examination of the Supreme Court's jurisprudence on presidential election petitions in the country, while at the same time examining the unresolved legal questions that have emerged over the years. The paper seeks to contribute to the discourse on electoral justice and commemorate Pheroze Nowrojee career as the father of presidential elections petitions.

Presidential Petitions in Kenya

Article 140 of the Constitution serves as the cornerstone of presidential election petitions, providing the foundational legal framework within which disputes concerning the validity of presidential elections are adjudicated.

(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of declaration of the results of the presidential election.

(2) Within fourteen days after the filing of a petition under clause (1), the Supreme Court shall hear and determine the petition and its decision shall be final.

(3) If the Supreme Court determines the election of the President-elect to be invalid, a fresh election shall be held within sixty days after the determination.[4]

Article 163 establishes the Supreme Court of Kenya as the apex court of the country and its jurisdiction includes;

'Exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140'[5]

Before the enactment of the 2010 constitution, there were no time limits in the constitution and the electoral laws on when the petitions were to be lodged.[6] Currently, Article 140[7] of the Constitution came into place to provide clear time limits for presidential election petitions, including timelines on filing and ruling.

The challenging of the presidential election petitions is entirely done by the Supreme Court as stipulated in Article 163 of the COK. The presidential election petitions were introduced to ensure that the process is in line with the provisions of the Constitution as the ground norm and electoral laws.

It also provides a platform where parties involved can challenge the irregularities and malpractices often encountered in elections. Presidential petitions challenge the validity of the process, the outcome or any aspect of an election.

An election petition is not ordinary legal dispute between two individuals. Though it may involve a few parties, it is treated as a contest in which the interests and rights of the voters are concerned and quite apart from the laws governing other kinds of legal disputes- special laws of procedure and substance apply to election petitions.[8]

The legacy of Pheroze Nowrojee SC in legal activism and constitutional interpretation

The late Pheroze Nowrojee over many decades has been an influential part of the political and social movements for constitutional and social change in the country. He boldly called out injustices against the suppression of civil freedoms and advocating for equality in Africa and beyond. Nowrojee's life and career exemplified the highest standards of professionalism and ethics. He highly encouraged all legal practitioners to adhere to the principles of fairness and respect while administering justice to all.[9]

A renown author having authored *Pio Gama Pinto: Patriot for Social Justice* [2007], *A Vote for Kenya: The Elections and the Constitution* [2013], *A Kenya Journey* [2014], and *Conserving the Intangible* [2015].

One of the many Constitutional landmark cases that Nowrojee stood for was when

[4]Constitution of Kenya, 2010, art 140
[5]*Ibid*, art 163 (3)(a)
[6]https://kenyalaw.org/kenyalawblog/comparative-analysis-of-presidential-election-petitions-in-kenya-and-other-jurisdictions/ [Accessed on 17/4/2025]
[7]Constitution of Kenya 2010, art 140
[8]*'The Presidential Election Petition: The Mwananchi Friendly Version'*, National Council for Law Reporting, April 25, 2013
[9]The Platform Magazine, for law justice and Society, https://www.theplatformke.co.ke/news-details.php?nid=46

he defended Raila Odinga, who was the opposition leader in 1980's defended him during his detentions under the Moi regime. Raila Odinga was detained without trial as part of the government's heightened repression against political opposition.[10] By claiming that the detentions were unlawful and motivated by political reasons, Nowrojee used legal tactics to challenge their legitimacy. His actions were crucial in obtaining Odinga's release and exposing the oppressive nature of the government, which fueled Kenya's democratic reform movement.

Another instance that had a lasting impact on constitutional law in Kenya is in the 2007-2008 presidential petition where Nowrojee was very instrumental in challenging the election results. This case was a turning point in Kenyan politics since it exposed serious anomalies in the election process and led to widespread agitation throughout the nation. Nowrojee's legal arguments were essential in exposing these shortcomings and set the stage for great reforms in Kenya's electoral laws.[11]

In his one-on-one interview with Miracle O. Mudeyi an Advocate Trainee and a champion of Constitutional law on his book Practicing the honorable profession, he says that:

> *"The judiciary, both judges and magistrates, has done a tremendous job. Despite attempts by the regime to intimidate them, we have seen a significant shift. Unlike in the past, where we expected judges to throw out cases challenging the regime, today we have better expectations and stronger support from the public. However, it is essential that lawyers and advocates continue to bring these cases before the courts and to push the judiciary to uphold the law and the Constitution."*[12]

He opines that legal practitioners should be at the forefront in advocating for integrity in the system. The constitutional giant that he is led to numerous achievements in regards with constitutional review procedure that resulted in the 2010 Constitution's adoption.

History of Presidential Election Petitions

The first presidential election petition under the COK 2010 was in Raila Odinga Vs Independent Electoral and Boundaries Commission and 3 others [2013] Eklr which was the first to be heard on its merits.

Justice Robert H. Jackson once said of the US Supreme Court, "we are not final because we are infallible, but we are infallible only because we are final." The infallibility that finality brings may, in the long view, be one of the few merits of the Supreme Court's 2013 judgment on the presidential elections.[13]

The court found that there were four issues to be determined. The first being if the president elect (Uhuru Kenyatta) and his Deputy president (William Ruto) were elected validly, this being the crux of the case. The second issue was if the presidential election held on March 4,2013 was free, fair, transparent and credible as the law requires.

The court's approach in reaching determination was criticized of not entirely relying on the Constitutional provisions. An analysis of the decision by the Africa Centre for Open Governance found that sixty

[10]Raila Odinga, *The Flame of Freedom* [2013[
[11]M. Wahome," *Pheroze Nowrojee SC: Unabashed, unbending and unwavering.*
[12]Miracle Mudeyi," *Pheroze Nowrojee SC discusses his latest book: Practicing the Honorable Profession"*
[13]*'Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal test',* Africa Centre for Open Governance, April 20, 2013

PHOTO BY CHARLES ONYANGO/XINHUA

Kenyan veteran opposition leader Raila Odinga (2nd R, front) displays documents at Milimani Law Courts in Nairobi, capital of Kenya, Aug. 22, 2022.

per cent of the judgment, by length was leisurely rehash of the facts and arguments made by the parties in court. Everything else is given short shrift: seven paragraphs are spent on reviewing and resolving the issue of the failed technology; another nine paragraphs dispose of the IEBC's discretion to do manual tallies; 11 are dedicated to the voters' registers and astonishingly for a court given to brevity, 27 paragraphs are set aside to explain why rejected votes must not count in computing presidential percentages.[14] To paraphrase, the judgment was detailed and important, but the parts that are detailed are not important and those that are important are not detailed.

In 2017, the same parties reconnected in Raila Amolo Odinga & Another V Independent Electoral and Boundaries Commission & 2 Other (2017), with the following up for determination by the apex court; Whether the 2017 presidential election was held in conformity with the principles established in the Constitution and the election law; Whether the 2017 presidential election was conducted in an irregular or unlawful manner; and If there were anomalies and violations, and how did they affect the election's integrity, If at all?[15]

The decision was not only an epochal moment for the election regime in Kenya,

[14]'*Verdict on Kenya's Presidential Election Petition: Five Reasons the Judgment Fails the Legal test*', Africa Centre for Open Governance, April 20, 2013
[15]Raila Amolo Odinga & Another V Independent Electoral and Boundaries Commission & 2 Other (2017)

Raila Odinga, the Azimio La Umoja coalition candidate, rejected the results of the August 9, 2022, presidential election, where William Ruto was declared the winner. Odinga accused IEBC Chairman Wafula Chebukati of acting unilaterally and violating electoral laws, citing a split within the IEBC where four of seven commissioners disowned the results, calling the tallying process "opaque

but also in the region. Here, the Supreme Court annulled the 2017 presidential election citing numerous breaches of the electoral law.[16] The court underscored that a presidential election must not only conform to the principles of universal suffrage and free and fair elections but must also be conducted in strict compliance with constitutional and statutory requirements. The court emphasized the principle of substantive compliance, holding that even where qualitative results appear credible, qualitative irregularities may vitiate the election.

In 2022 presidential petition *Raila Odinga & Another v IEBC & Others* [2022] the Court clarified the burden and standard of proof in presidential petitions, affirming that while the burden lies with the petitioner, the standard is a balance of probabilities, rising to beyond reasonable doubt where criminality such as fraud is alleged. The court offered a critical interpretation of the role of technology in elections, noting that while technology must guarantee transparency and verifiability, mere failures or delays (such as in uploading Forms 34A and 34B) do not automatically invalidate the election unless they substantially affect the results.[17]

The court addressed the role of commissioners of IEBC differing the question to the lawmakers to amend the electoral laws to provide for the functions of rest of the six commissioners of the electoral body. The court in concluding noted that overturning a presidential election requires compelling evidence, given the potential constitutional crisis such a decision may cause.

2. Jurisprudential gaps and unanswered legal questions

Evidentiary standards and burden of proof

Since the 17th century, elections have been the standard method used in contemporary representative democracies. Legislative offices may be filled through elections. Sometimes for municipal and regional government, as well as the judiciary and executive branches. Elections are the foundations of democracy.[18] The confidence that the people's representatives are elected is provided by a free and fair election. An

[16]Gerald Ochieng, *'Adjudging a Presidential Petition: Lessons from Raila Odinga & Another v IEBC & 4 Others,'* Platform for Law, Justice and Society, 2023 https://dx.doi.org/10.2139/ssrn.4462670
[17]Raila Odinga & Another v IEBC & Others [2022]
[18]T. Osipitan, "Problems of Proof under the Electoral Act 2002," Judicial Excellence, Essays in Honor of Hon. Justice Anthony Iguh HSC CON, Snapp Press Ltd, Enugu, 2004, p 289-304.

election is essentially a competition between candidates for political seats for the votes of the people. Unless there is a situation where the aspirants are unopposed, there will often be at least two candidates for elective positions. In order to ensure free and fair elections, rules and regulations are typically established.

Challenging elections is a fundamental part of the election process. The right to vote is meaningless without the ability to enforce it through legal means. Election results can be disputed by a candidate or an elector in that region by initiating legal proceedings known as 'election petitions'.

The procedures of burden and standard of proof in a petition must be established well prior a complaint is submitted so that the parties involved will be aware and have a reasonable understanding of what will be required by the parties involved in case of a dispute.[19]

Burden of proof is concerned with the question of whose duty it is to place evidence before the court. The general rule about the burden of proof in all election matters entirely rests on the petitioner to prove that the election was not conducted in a free and a fair manner as was held in Hon Martha Wangari Karua Vs IEBC and 3 others 2019 by the Supreme Court. Be that as it may, this structure implies that challenging elections presupposes a fundamental assumption that authorities and their acts are presumed to be proper. As the person who initiated the challenge, the petitioner bears the duty of providing adequate evidence to substantiate the assertion that a specific feature of the electoral process was faulty.

This is the same position that was also used by the Supreme Court in the presidential election petition stating that the party

Martha Wangari Karua

which makes the petition has the duty to give the initial burden of proof before the respondents are invited to bear the evidential burden. This burden can only be shifted to the other party in extreme instances while they want to prove an affirmative defense.

In the Standard of proof, the threshold of proof should be *above the balance of probability.* However, the election law has not clearly defined the extent to which a party must prove its case in order to persuade the court that the fact that it is displaying is correct. Standard of proofs varies from country to country. In Kenya, there are three standards frequently applied in presidential election petitions: preponderance of the evidence, evidence beyond reasonable doubt and clear and convincing evidence.

[19]Judy T*he burden and standards of proof required in election petitions in Kenya with particular reference to the presidential election petition No.5*

The question of jurisdiction in relation to disputes arising from the first round of a presidential election in Kenya is a critical constitutional and legal issue, especially when considering the role of the Supreme Court under the 2010 Constitution. The Supreme Court has exclusive original jurisdiction to hear and determine disputes relating to the election of the President under Article 140.

The Question of Jurisdiction in relation to Disputes Arising from the First Round of Presidential Election

Article 138 of the Constitution provides for the procedure at presidential elections, providing that a presidential candidate shall be declared elected as president if they receive:

(a) *More than half of all the votes cast in the election; and*
(b) *At least twenty-five per cent of the votes cast in each of more than half of the counties.*[20]

If no candidate is elected, a fresh election is held within thirty days.[21] The legal dilemma arises here, what happens when disputes arise in relation to the first presidential election? What court should such disputes be filed at as such disputes fall outside what prescribed under Article 140 of the Constitution.

Elisha Z. Ongoya together with Senior Counsel Willis Otieno in their book, *A handbook on Kenya's electoral laws and system*,[22] on matters determining disputes arising from the first-round presidential election results give the following opinion:

> *'The constitution and the Elections Act are silent on the mode of resolving disputes arising from the first round of presidential elections. It is reasonable to expect disputes and challenges to arise from the first-round presidential elections where a candidate may dispute the results as announced by*

[20]Constitution of Kenya, art 138(4)
[21]Constitution of Kenya, art 138(5)
[22]Elisha Ongoya & W.Otieno, *'A handbook on Kenya's electoral laws and system,'* https://aceproject.org/ero-en/regions/africa/KE/kenya-handbook-on-kenyas-electoral-laws-and-system

the Independent Electoral and Boundaries Commission. The constitution in Article 140 only envisages disputes relating to challenges to the election of a president-elect and provides that they have to be heard by the Supreme Court. That jurisdiction conferred on the Supreme Court is restricted to challenges to the election of a president elect.'

The question of jurisdiction in relation to disputes arising from the first round of a presidential election remains unsettled within Kenya's Constitutional framework. Article 140 provides a clear procedure and route for the filing of a petition challenging the election of the president-elect, implying that the Supreme Court's jurisdiction is only invoked upon declaration of a winner. Article 138 on the other hand provides the requirements for one to be declared as the president-elect by the IEBC. Any disputes arising out of Article 138 consists a jurisdictional grey area which remains an unanswered question in Kenya's presidential election jurisprudence.

Reflections on justice, public confidence and reform

The authority of a constitutional court does not lie merely in the legality of its decisions but also in the perceived fairness of its conclusions and logic. In presidential election petitions, that authority is intensified. The judiciary must adjudicate differences which cone directly to the center of sovereignty in democracy. Even as the Supreme Court has gone a long way in consolidating the electoral disputes legal framework, there still exists a prevailing public impression of secrecy, inconsistency, and reluctant jurisprudence-most especially in areas that are very sensitive politically.

Drawing on the legacy of the late Pheroze Nowrojee SC, he reminds us that the law can never be procedural or just be in a text form, His activism articulated a practice of law that was mindful of the power dynamics, socially conscious and unapologetic in its defense matters constitutional morality. His deep belief in the redemptive potential of law obliges us to ask the question of whether the Court's jurisprudence on presidential petitions has been able to seize the lived reality of election injustice, or cleaned it of its emotional import through legal formalism. Most importantly, the Court's way of dealing with burden of proof differently, the hesitant probing of the IEBC's institutional duty has left essential questions unanswered. These disparities run the risk of undermining public trust in the judiciary's ability to function as a counter-majoritarian institution and a guardian of election integrity, in addition to testing doctrinal truth.

In the context of these challenges, this paper recommends a two stage reform agenda. Firstly, a jurisprudential fortitude: the court must be prepared to deal at length with factual and institutional claims, even when this means disrupting political preconceptions. Secondly, doctrinal precision must be pursued in well argued, predictable and open decisions that lay out in clear language the principles that govern electoral justice system. These reforms align with Nowrojee's view of law as an instrument of public responsibility and social justice. The Supreme Court being the apex court in the republic, it is expected to embrace this vision as not an option but as a requirement.

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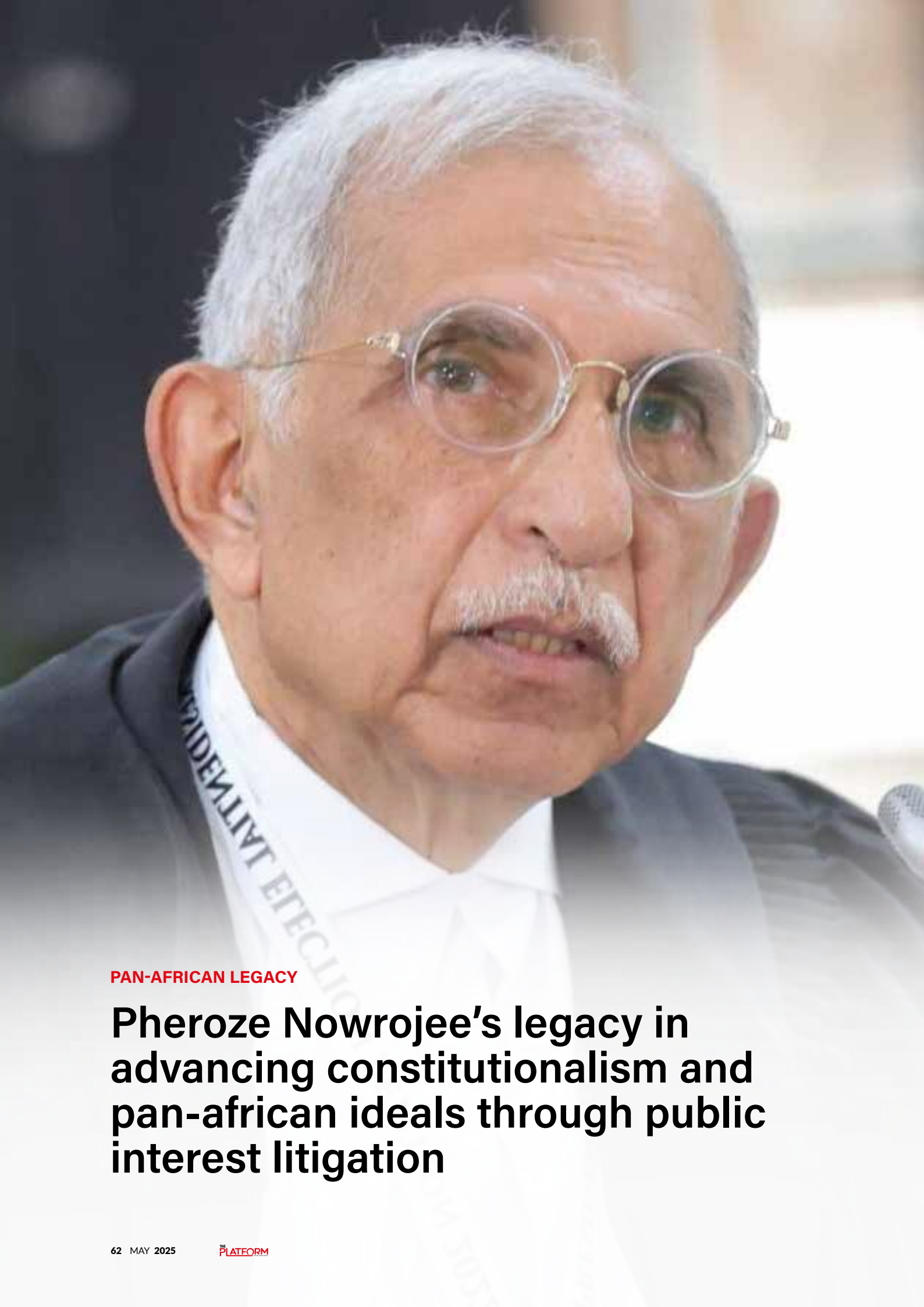

PAN-AFRICAN LEGACY

Pheroze Nowrojee's legacy in advancing constitutionalism and pan-african ideals through public interest litigation

By Vincent Mahugu

Abstract

Pheroze Nowrojee SC (1941–2025), a towering East African advocate, wielded public interest litigation to strengthen constitutionalism while advancing Pan-African ideals of justice and unity. This article examines how his landmark Kenyan cases, including the 2017 presidential election petition and defences of dissidents like Koigi Wamwere, upheld constitutional protections and resonated with Pan-African goals of democratic accountability and resistance to oppression. His practice across Kenya (1967), Tanzania (1970), and Zanzibar (1989), alongside his mentorship and writings, fostered a regional legal consciousness rooted in African dignity and self-determination. By grounding arguments in Kenya's Constitution and the African Charter on Human and Peoples' Rights, Nowrojee challenged authoritarianism and bolstered judicial independence, inspiring continent-wide reform. Set against post-colonial Kenya's political repression, his work bridged national legal advocacy with Pan-African aspirations for equitable governance. Through case analysis, mentorship insights, and reflections on his intellectual contributions, this study argues that Nowrojee's legacy offers a blueprint for addressing modern African challenges to democracy and human rights, affirming law's role in uniting a continent through justice.

Introduction

Pheroze Nowrojee SC was a legal titan whose career exemplified public interest litigation's power to safeguard constitutionalism and embody Pan-African ideals. Admitted as an advocate in Kenya (1967), Tanzania (1970), and Zanzibar (1989), he confronted post-colonial tyranny and empowered marginalized communities, leaving an enduring mark on East African jurisprudence. During Kenya's authoritarian eras under Presidents Jomo Kenyatta and Daniel Arap Moi, Nowrojee challenged unconstitutional state actions, aligning his advocacy with Pan-African principles of self-determination and solidarity against neo-colonial oppression. His regional practice and mentorship furthered a vision of law as a tool for African unity, echoing Kwame Nkrumah's call for collective progress. This article argues that Nowrojee's strategic litigation, mentorship, and writings not only fortified Kenya's constitutional framework but also advanced Pan-African goals of accountable governance, offering a model for contemporary legal advocacy. Analysing his landmark cases, mentorship, and intellectual contributions, it celebrates a legacy that continues to inspire justice across Africa.

Constitutionalism Through a Pan-African Lens

Nowrojee's constitutional philosophy positioned law as a bulwark against oppression, resonating with Pan-African ideals of liberation and equity. In post-independence Kenya, where the 1963 Constitution's protections were eroded by executive overreach, he championed the Bill of Rights as a shield for civil liberties. His practice across East Africa; Kenya (1967), Tanzania (1970), and Zanzibar (1989), reflected a commitment to regional legal integration, a practical expression of Pan-African unity. Unlike advocates focused solely on national courts, Nowrojee's cross-border work fostered a shared legal framework, aligning with the Organization of African Unity's emphasis on collective advancement (Organization of African Unity, 1963).

His critique of Kenya's post-colonial regimes illustrates this dual commitment. He challenged the Kenyatta government's resource misallocation, arguing it violated

equality guarantees under Section 82 of the 1963 Constitution (Constitution of Kenya, 1963). During Moi's one-party state, he contested laws restricting freedoms of expression and assembly, asserting they breached domestic and international standards, notably Articles 9 and 10 of the African Charter on Human and Peoples' Rights (Organization of African Unity, 1981). This approach framed Kenya's constitutional struggles within a continental fight against authoritarianism, drawing parallels with liberation movements in Ghana and South Africa. Nowrojee's constitutionalism transcended national boundaries, harmonizing Kenyan law with Pan-African aspirations for dignity and self-rule.

Public Interest Litigation as Pan-African Advocacy

Nowrojee's public interest litigation masterfully used constitutional law to confront power, with impacts echoing across Africa. In one of his most prominent cases, the 2017 presidential election petition (*Odinga & Another v. Independent Electoral and Boundaries Commission & Others, 2017*), resulted in the Supreme Court's historic nullification of Uhuru Kenyatta's victory; a first in African judicial history. Representing Raila Odinga, Nowrojee argued that electoral irregularities violated Article 81 of the 2010 Constitution, which mandates free and fair elections (Constitution of Kenya, 2010). His submission dissected vote tallying discrepancies, invoking Article 2's supremacy clause to affirm judicial oversight over executive actions. The ruling upheld Kenya's democratic framework and set a Pan-African precedent, influencing courts in Zimbabwe (*Chamisa v. Mnangagwa*, 2018) and Malawi (*Chilima v. Mutharika*, 2020) to assert electoral accountability.

His defence of Koigi Wamwere during Moi's crackdowns was equally significant. In *Wamwere v. Republic* (1985), Nowrojee challenged sedition laws under the repealed Penal Code (Cap. 63), arguing they contravened Section 79's guarantee of free expression in the 1963 Constitution. He invoked Article 19 of the International Covenant on Civil and Political Rights (United Nations, 1966), aligning domestic law with global standards, a strategy resonant with the African Charter's universal rights framework (Article 1). These efforts exposed state repression, contributing to Kenya's Second Liberation and paralleling Pan-African struggles against oppressive laws in Nigeria and Uganda. Nowrojee's lifting of the *Nairobi Law Monthly* ban in 1990 further secured press freedom under Section 79, bolstering civil society's role in East African democratic reform.

By grounding arguments in the African Charter and regional precedents, Nowrojee positioned Kenya's constitutional battles as part of a continental quest for governance accountability. His litigation strengthened judicial independence, a cornerstone of Pan-African visions for self-determined nations, and inspired lawyers to view courts as tools for regional transformation.

Mentorship and Writings: Building a Pan-African Legal Legacy

Beyond litigation, Nowrojee's mentorship and writings solidified his Pan-African legacy. He guided lawyers like Martha Karua and James Orengo in high-stakes

constitutional cases, shaping Kenya's democratic trajectory. His teaching at the University of Dar-es-Salaam (1974–1977), University of Nairobi (1979–1985), and Kenya School of Law (1968–1985) cultivated East African lawyers committed to human rights and regional solidarity. This institution-building mirrored Pan-African efforts to create structures for collective progress, akin to the African Union's legal harmonization initiatives (African Union, 2000).

His writings, notably *A Kenyan Journey* (Nowrojee, 2015), critiqued colonialism's lasting impact and advocated for constitutions that protect African dignity. Reflecting on his family's East African roots, he framed his career as anti-colonial resistance, a narrative aligned with Pan-Africanist ideals of reclaiming agency. His 2024 Law Society of Kenya lecture emphasized judicial independence as a safeguard against tyranny, drawing parallels with South Africa's post-apartheid judiciary. By sharing knowledge across borders, Nowrojee fostered a legal consciousness transcending national boundaries, echoing Kwame Nkrumah's vision of a united African polity (Nkrumah, 1963). His mentorship and writings thus built a Pan-African legal legacy, equipping advocates to pursue justice continent-wide.

Contemporary Relevance and Conclusion

Nowrojee's legacy remains vital for addressing Africa's modern challenges, from democratic backsliding to regional conflicts. His integration of constitutionalism and Pan-Africanism offers a framework for lawyers tackling electoral fraud or human rights abuses, as seen in Kenya's 2022–2023 protests against state overreach. His regional practice underscores the need for cross-border legal cooperation, crucial amid African Continental Free Trade Area agreements. His mentorship and writings laid the groundwork for a Pan-African legal community capable of addressing shared issues like climate litigation or refugee rights.

Pheroze Nowrojee SC wove constitutional advocacy with Pan-African ideals, using litigation to defend Kenya's democratic core while advancing African unity. His cases, mentorship, and writings bridged national reform with continental aspirations, proving law's power to unite through justice. Honouring his legacy requires wielding constitutions with his courage, ensuring Africa's legal systems reflect the dignity and solidarity he championed.

May his noble spirit rest in everlasting peace.

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References

International Covenant on Civil and Political Rights, Res. 2200A (XXI). (1966). United Nations General Assembly.

Mutua, M. (2008). *Human rights: A political and cultural critique*. Philadelphia: University of Pennsylvania Press.

Nkrumah, K. (1963). *Africa must unite*. London: Heinemann.

Odinga & Another v. Independent Electoral and Boundaries Commission & Others. (2017). Presidential Petition No. 1 of 2017, Supreme Court of Kenya.

Organization of African Unity. (1981). *African Charter on Human and Peoples' Rights*. Banjul: OAU.

Independent or synonymous?

Reassessing the relationship between fair and equitable treatment standard and the minimum standard of treatment under customary international law in international investment law

By Stephanie Lore Okoyo

Abstract

The Fair and Equitable Treatment Standard herein stated as FET is an International Investment treatment applicable to states in their relations inter se and to relations between states and foreign investors. It is made available to a foreign investor by the host state to protect his investment in a foreign country regardless of the treatment given to its own national investors. However, since its inception, it has always had the problem of lack of a clear universal definition. To address this problem, one of the main approaches that some states have taken is to link the FET standard to the Minimum Standard of Treatment(MST) under Customary International Law(CIL). However, the big question that follows from this approach is whether the FET is truly just MST in disguise, or whether it stands alone. This paper explores the nature of FET standard, arguing that it is not merely a reflection of MST but an independent evolving standard with broader elements and its own identity in International Investment Law.

1.0 Introduction

The Fair and Equitable Treatment standard has been considered a vague provision that lacks a definition. The lack of a clear universal meaning has left more room for interpretation. What does it mean for a government action to be 'Fair' and 'Equitable'? Fair to whom and in what sense? Equitable in relation to which standard of reference? Should one look to domestic law, customary practice, the investor's subjective expectations or the arbitrator's own personal sense of fairness?[1] These among many others, are questions that have been asked in attempts to find the meaning of the FET standard.

The standard is interpreted on a case by case basis by arbitrators hailing from different backgrounds, each of whom at some level imbues the words of the treaty with meaning derived from his or her own experience. Worry is based on the fact that the standard has been given many different interpretations in arbitral cases hence instead of promoting stability and certainty among investors, this situation produces exactly the opposite effect.[2]

In an effort to try and answer the questions, there have been main approaches

[1]Maupin, Julie A., Public and Private in International Investment Law: An Integrated Systems Approach (August 29, 2013). Virginia Journal of International Law, Vol. 54, No. 2, 2014, available at SSRN: https://ssrn.com/abstract=2144019 p, 15
[2]Klein Bronfman; Fair and Equitable Treatment: An Evolving Standard, p 612< https://www.mpil.de> accessed on 5 February, 2025

formulated regarding the meaning of the standard. Some of these approaches include the FET being linked to International Law, meaning it is to be interpreted using the principles of International Law, including but not limited to CIL[3]. It has also been linked with additional substantive principles as a way of being more precise about the content of the FET obligation. The more specific the clause, the clearer its scope and content.[4]

Apart from these, it has also been linked to the MST standard under CIL which has not really contributed much to clarifying the meaning of the standard, but only lowered the protection granted to the investor.[5] The MST itself does not also have a standard definition that can be relied on. This approach has had issues of whether the FET standard really qualifies to be linked to the MST standard under CIL in relation to it meeting the elements of state practice and *opinio juris* required to form Customary International Law or is it just an independent standard with broader elements.

William L. Clayton, United States, signs on behalf of his Government the Final Act of the Havana Charter of the United Nations Conference on Trade and Employment.

2.0 History and nature of the FET standard

The first version of the FET standard was introduced by the Havana Charter[6] in 1948 under article 11(2) which established that foreign investments should be assured "just and equitable treatment"[7]. It is noteworthy that the Havana Charter did not, in itself, provide a guarantee, but rather that 'it merely authorized the International Trade Organization to recommend that this standard be included in future agreements.'[8] However, it never really came into force.

At around the same time in 1948, the Organization of American States adopted the Economic Agreement of Bogota which mentioned at art 22 that "foreign capital shall receive equitable treatment". Unfortunately, this document too was never ratified.[9] Both initiatives failed to come into force due to lack of support. However, the standard later on emerged

[3]Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II , p 23 < https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf> accessed on 5 February, 2025
[4]Ibid, p 29
[5]Bronfman, supra n 2, p 632
[6]The Havana Charter available under https://www.globefield.com/havana.htm
[7]Bronfman, supra n 2 , p 618 < https://www.mpil.de> accessed on 5 February, 2025
[8]Stephen Vasciannie, The Fair and Equitable Treatment Standard in International Investment Law and Practice,70 British YIL, 108 (1999)
[9]Chapter 1: The Emergence of the Concepts of the Minimum Standard of Treatment and the FET https://icsid.worldbank.org

in the 1960s and 1970s in the Bilateral Investment Treaties(BITs). Today, the BITs and Multilateral Investment Treaties(MITs) are the major sources for provision dealing with the standard. The standard has been embraced not only by developed states but also by developing states.[10]

The FET standard does not have a clearly defined point of reference. It constitutes an absolute and non-contingent standard of treatments meaning it is a standard whose exact meaning is determined by reference to specific circumstances and not reference to treatment accorded to other investments. The FET standard achieves great importance as a non-contingent standard since it is inflexible hence assures the investor a certainty in the treatment he will receive such that, if the reference point for national investors is modified and the treatment accorded to them changes, the treatment accorded to the foreign investor will not be interfered with.[11] In comparison to the Most Favoured Nation (MFN) standard, the level of protection may be insufficient where the host state provides inadequate protection to its nationals or investors from the most favoured nation. In such cases, FET helps to ensure there is at least a level of protection, derived from fairness and equity, for investor concerned.[12]

3.0 FET standard in relation to the Minimum Standard of Treatment (MST) under CIL

The reference to FET in International Investment Agreements has created a controversy about whether the FET standard is autonomous, that is it has a content of its own, or whether it is limited to the MST of aliens under Customary International Law. For this reason, different states apply the standard in two different ways. Countries such as Germany, Switzerland and Sweden draft the rule in such a way that creates an autonomous, treaty-based standard while countries such as the US, France and the UK prefer to require the FET standard in accordance with IL, thus indicating that they require a standard of treatment that corresponds to the rules of CIL.[13]

Under Art 1105(1) of the North American Free Trade Agreement(NAFTA), "each party is required to accord to investments of investors of another party treatment in accordance with International Law, including FET and full protection of security."[14] The FET standard, under the NAFTA treaty, underwent an evolution by the Free Trade Commission (FTC) organ which issued a binding interpretation on 21st July 2001 with the intention of defining the standard more clearly.

It stated that art 1105(1) prescribes the CIL minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors or another party. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the CIL minimum standard of treatment of aliens. Therefore, the FET standard was measured against CIL and was therefore viewed as part of the minimum standard required by CIL.

This interpretation had the effect of lowering the FET standard's protection capacity hence defining it as a stricter

[10]OECD, International Investment Law, A Changing Landscape: A Companion Volume to International Investment Perspectives, 78 (2005)
[11]Bronfman, supra n 2, p 621
[12]UNCTAD(ed.) Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements, 1999, 1 et seq (16)
[13]Rudolf Dolzer; The Impact Of International Investment Treaties On Domestic Administrative Law, p 961 < https://www.iilj.org/wp-content/uploads/2016/08> accessed on 20th February, 2025
[14]Art 1105(1) North American Free Trade Agreement (NAFTA) (1992)

The North American Free Trade Agreement (NAFTA) was a landmark trade agreement between Canada, Mexico, and the United States, in effect from January 1, 1994, to July 1, 2020, when it was replaced by the United States-Mexico-Canada Agreement (USMCA). NAFTA was inspired by the success of the European Economic Community and built on the 1988 Canada-U.S. Free Trade Agreement. It was negotiated under U.S. President George H.W. Bush, Mexican President Carlos Salinas de Gortari, and Canadian Prime Minister Brian Mulroney, signed in 1992, and ratified in 1993

standard to be followed by host states.[15] This was seen in The Neer Claim[16] case where it was stated that "the treatment of an alien, in order to constitute an International delinquency, should amount to an outrage, bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[17]

This ruling brought out the fact that the state would only be responsible for outrageous and shocking governmental conduct hence limiting the protection opportunities for foreign investors to only outrageous and shocking governmental conduct. Most of the states that consider the FET standard as synonymous to MST under Customary International Law are probably states that want to limit foreign investors' opportunities of bringing claims against them.

4.0 The evolution of the MST standard

States on the other hand have acknowledged that the interpretation that was imposed by the Free Trade Commission(FTC) did not equate FET to Customary International Law as defined in the Neer case and that it referred to what CIL means at this time and that is being in its evolved form.[18] In the case of ADF Group Inc v United States of America[19] the US expressed the view that the CIL referred to in the NAFTA art 1105(1) is not "frozen in time" and that the MST does evolve. The standard has evolved and

[15]Supra note, 2, p 648-649
[16]Neer Claim, "United Nations Reports of International Arbitral Awards IV", 1926, (60), in: OECD (ed.), the International Minimum Standard in Customary International Law, Annex to Fair and Equitable Treatment Standard in International Investment Law, 2004,26
[17]ibid
[18]Ibid, n10, p 667
[19]ICSID Case No ARB(AF)/00/1, Award, 9 January, 2003, par 179, p86 < https://www.oecd.org> accessed on 5th February, 2025

The Trans-Pacific Partnership was a proposed 12-nation trade agreement among Pacific Rim economies, including the U.S., Japan, Canada, Australia, Mexico, and Vietnam, signed in 2016 but never ratified. It aimed to reduce tariffs, harmonize regulations, and address modern trade issues like digital commerce and labor standards.

gone beyond the Neer standard that was very strict to offer a lower liability threshold requiring "a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons."[20]

Despite the evolution of the MST standard to offer more grounds of protection for the foreign investors, it is still not considered synonymous with the FET standard. However, both standards may overlap significantly with respect to issues such as arbitrary treatment, discrimination and unreasonableness as a result of the evolution of the standard.[21]

5.0 FET as an independent standard with broader elements

One of the main approaches that has been taken over time to help in the interpretation of the FET standard is adding to it precise elements such as manifest arbitrariness and denial of justice among others hence making the standard more predictable in its implementation and subsequent interpretation.[22] Some of these elements are quite similar to the elements under the evolved MST standard. However, the FET standard provides quite broader opportunities such as under legitimate expectation for the foreign investor to bring a claim compared to the MST standard. The MST standard only offers the bare minimum standard.

In the Comprehensive and Progressive Agreement for Trans-Pacific Partnership Preamble (CPTPP) treaty[23], the concept of FET does not require treatment in addition to or beyond that which is required by the MST under CIL[24]. Under Article 9.6(4), if a party takes or fails to take an action

[20]Glamis Gold Ltd v United States, UNCITRAL Rules, Award, 8 June 2009 < https://unctad.org/systems/files/official-document/unctaddiaeia2011d5-en.pdf > accesses on 5th February, 2025
[21]Fair and Equitable Treatment Standard in International Investment Law, p 25< https://www.oecd.org> accessed on 5th February , 2025
[22]UNCTAD Series, supra n 3, p 29
[23]Comprehensive and Progressive Agreement for Trans-Pacific Partnership Preamble. https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf
[24]Ibid, Article 9.6(2)

that may be inconsistent with an investor's expectations, it does not constitute a breach of this article, even if there is a loss or damage to the covered investment as a result.[25] It continues to say, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduced, by a party does not constitute a breach of this article, even if there is loss or damage to the covered investment as a result.[26]

This shows that FET standard cannot be synonymous to the MST under the CIL. The treaty has brought out the fact that under MST, legal expectation or any other expectation being breached will not result in breach of the FET standard even if there is loss or damage to the investment. However, FET as an independent standard proves to be quite broader in that any act inconsistent with the principle of legal expectation does result to a breach of the standard.

Many scholars have argued that FET standard is independent from the MST standard. Ionna Tudor, in his article 'The Fair and Equitable Treatment Standard in International Foreign Investment Law' stated that the Minimum Standard is not appropriate to address the complexities of modern trade and investment.[27] He has also stated that equalizing the FET standard to the MST would limit the rights offered to investors to 'extreme cases' only.[28]

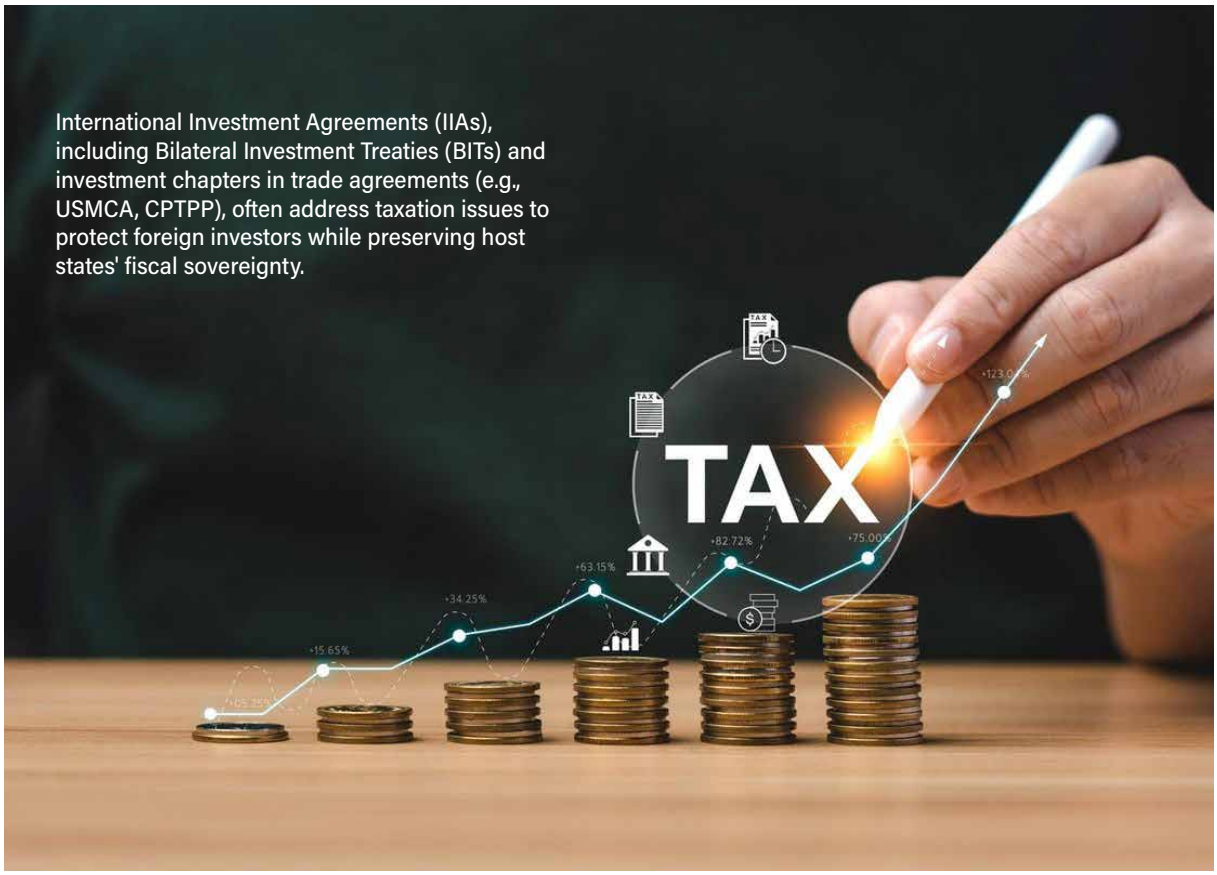
The autonomous approach, on the contrary, offers the foreign investor a type of guarantee which is much more generous and designed to be operational.[29] Bronfman in his article 'FET: An Evolving Standard', argues that it could not have been the intention of states to lower the standard of protection when in fact they signed treaties to grant the best protection to investors.[30]

In the case of Occidental v Ecuador[31], certain refunds of the value added tax (VAT) were denied to the claimants. It was held that as part of the FET provision, states are under an obligation not to modify the legal and business framework of an investment.[32] However, the FET standard has evolved again from this 'strict stability obligation' as was the situation in the Occidental case to 'softer stability obligation' acknowledging that changing circumstances and new challenges often require states to bring about changes in their laws.[33] These changes however ought to be for public policy reasons, and they ought to be reasonable, proportionate and serve a legitimate objective.[34] Despite the evolving nature, the FET standard still maintains its principles that are making it broader than MST hence it remains an independent standard from the MST standard.

6.0 Does the FET standard meet the requirements for development into CIL?

A practice becomes CIL when it has met two requirements. In the case of Nicaragua v USA, ICJ Report 1986,14 the court noted that 'for a new customary rule to be formed, not only must the acts concerned

[25]Ibid, Article 9.6(4)
[26]Ibid, Article9.6(5)
[27]Tudor; The FET Standard in International Foreign Investment Law, 60 (Oxford U. Press 2008) at 65-68
[28]Ibid at 67
[29]ibid
[30]Bronfman; FET: An Evolving Standard, 10 Max Planck Yrbk. UNL, at 666, 678
[31]Occidental v Ecuador, Judgment, [2005] EWCA Civ 1116, [2006] QB 432, [2006] 2 WLR 70, [2006] 2 All ER 225, [2005] 2 Lloyd's Rep 707, [2005] 2 CLC 457, [2005] 2 All ER (Comm) 689, IIC 203 (2005)
[32]Prabhash Ranjan(2023) Investor-state dispute settlement and tax matters: Limitations on state's sovereign right to tax, Asia Pacific Law Review, p 226 < https://doi.org/10.1080/10192557.2022.2102588>
[33]ibid
[34]Ibid



International Investment Agreements (IIAs), including Bilateral Investment Treaties (BITs) and investment chapters in trade agreements (e.g., USMCA, CPTPP), often address taxation issues to protect foreign investors while preserving host states' fiscal sovereignty.

amount to a settled practice, but they must be accompanied by the opinion juris sive necessitates.'[35] In the understanding of CIL today, there has to be practice of all investment treaties existing. The meaning of the FET standard in the BITs differ and tribunals interpret the treatment in their own terms hence this makes it quite challenging to have uniform state practice. There is also lack of a real demonstration by states of their willingness to incorporate the standard in CIL. This is revealed in the multilateral as well as bilateral conduct of states.[36]

In tax-related matters, states may exclude taxation issues from the scope of the protection of International Investment Agreements (IIAs) or the jurisdiction of any tribunal. States may also decide to expressly bind themselves to given tax-related commitments.[37] There may be several types of tax exclusions of tax matters within an IIA such as general taxation carve outs as that present in the Cambodia- Singapore BIT[38] which states that 'the provisions of this agreement shall not apply to matters of taxation in the territory of either contracting party'.

An agreement may also specify what treaty will prevail. It may also specify exclusions based on the type of tax or protection such as is in the Canada-Tanzania BIT[39] which reads that 'the provisions of art 4 and 5 shall apply to all taxation measures, other than taxation measures on income, capital gains or on the taxable capital of corporations'.

[35]ICJ Reports, 1986, p14, 76 ILR, p.347
[36]Bronfman, supra n 2, p 670
[37]Stefano Castagna, Essential Elements of Taxation-Investment Protection and Dispute Settlement, p 429, par 18.08
[38]Adopted 4th November 1996, entered into force 24th Feb 2000, art 5.2
[39]Adopted 17th May 2013, entered into force 9th December 2013, art 14.4

Tax Veto also exist to impede or limit the investor's ability to file a claim through investment arbitration and an example is found in the Japan- Peru BIT of 2008 at article 23.5(b).[40]

This shows how under tax matters different treaties have different ways of handling the taxation issues. There is no uniformity in how the matters are handled hence this shows a lack of state practice. Tax liability must also always be assessed, if necessary, on a case by case basis. There is no general rule to answer what amount of tax will be due and by whom.[41] This further shows and suggests that FET is not applied uniformly by all states but is treaty based. If tribunals could interpret the FET standard in a uniform and predictable manner, then the FET standard could pass for CIL. However, this not being the case concludes that FET cannot develop into CIL and therefore it cannot be synonymous to the MST under CIL.

Conclusion

Having looked at the history and nature of the FET standard, its evolution and its formulation in relation to the MST under CIL, I can conclude that the FET standard is an independent standard with principles helping it to be more specific in treaties and offering broader yet limited options for protection of foreign investors. The FET standard also not meeting the requirements for formation into CIL justifies the fact that it is not synonymous to MST. However, it is also quite evident that this is not the case in all countries because there are those which believe in FET to be synonymous to MST standard under CIL. The FET standard has proven to be quite important in the protection of the rights of foreign investors and their investments. The main problem starts from interpretation of the FET standard. I recommend all treaties applying the FET standard to be amended to include a standard definition and interpretation. Having a standard definition or interpretation of the FET standard in all treaties can go a long way.

The Fair and Equitable Treatment (FET) standard is a fundamental protection for foreign investors under International Investment Agreements (IIAs)—including Bilateral Investment Treaties (BITs) and investment chapters in trade agreements (e.g., USMCA, CPTPP). It ensures that host states treat investors fairly, predictably, and without arbitrary or discriminatory conduct.

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[40]Adopted 21st November 2008, entered into force 10th December 2009, available at :https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1733/download accessed 21st February 2025

[41]Stefano, supra n 29, p 433, par 18.22

References

International Instruments

Art 1105(1) North American Free Trade Agreement (NAFTA) (1992)

Case Laws

Glamis Gold Ltd v United States, UNCITRAL Rules, Award, 8 June 2009

ICSID Case No ARB(AF)/00/1, Award, 9 January, 2003, par 179, p86

Nicaragua v USA ICJ Reports, 1986, p14, 76 ILR, p.347

Occidental v Ecuador, Judgment, [2005] EWCA Civ 1116, [2006] QB 432, [2006] 2 WLR 70, [2006] 2 All ER 225, [2005] 2
Lloyd's Rep 707, [2005] 2 CLC 457, [2005]
2 All ER (Comm) 689, IIC 203 (2005)

Journal Articles

Maupin, Julie A., Public and Private in International Investment Law: An Integrated Systems Approach (August 29, 2013). Virginia Journal of International Law, Vol. 54, No. 2, 2014, available at SSRN: https://ssrn.com/abstract=2144019 p, 15

OECD, International Investment Law, A Changing Landscape: A Companion Volume to International Investment Perspectives, 78 (2005)

Prabhash Ranjan(2023) Investor-state dispute settlement and tax matters: Limitations on state's sovereign right to tax, Asia Pacific Law Review, p 226

Stephen Vasciannie, The Fair and Equitable Treatment Standard in International Investment Law and Practice,70 British YIL, 108 (1999)

UNCTAD(ed.) Fair and Equitable Treatment, UNCTAD Series on Issues in International Investment Agreements, 1999, 1 et seq (16)

Books

Bronfman; FET: An Evolving Standard, 10 Max Planck Yrbk. UNL, at 666, 678

Rudolf Dolzer; The Impact Of International Investment Treaties On Domestic Administrative Law, p 961

Stefano Castagna, Essential Elements of Taxation-Investment Protection and Dispute Settlement, p 429, par 18.08

Tudor; The FET Standard in International Foreign Investment Law, 60 (Oxford U. Press 2008) at 65-68

Websites

Fair and Equitable Treatment Standard in International Investment Law, p 25< https://www.oecd.org> accessed on 5th February, 2025

Comprehensive and Progressive Agreement for Trans-Pacific Partnership Preamble. https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf

The Havana Charter available under https://www.globefield.com/havana.htm

The right to cancel the right to counsel? A cursory look into the judicial interpretation of the right to counsel at state expense in Kenya

By Abuya John Onyango

Abstract

This paper critically examines the judicial interpretation of the right to counsel at state expense in Kenya proposing reforms to augment the realization of the right. It highlights the importance of the right to counsel at state expense to the realization of the right to fair trial. The paper advocates for a due process test that recognises the right to counsel at state expense as an integral element in realizing the right to fair trial without which the trial would be rendered unfair and conviction quashed. This offers protection to the indigent accused persons in the Kenyan criminal justice system.

Key Words: *Legal Representation, State Expense, Poor, Accused Person, Kenya.*

1.0 Introduction

The adversarial court system demands that the accused person is legally represented as the failure to get a counsel may place them on unequal footing with the prosecution[1].

The right to legal representation (right to counsel) is a fundamental constitutional and legal safeguard in Kenya, ensuring that accused persons and litigants have access to legal assistance.

The right to counsel is thus crucial for the enjoyment of the right to fair trial which is a fundamental aspect of the criminal justice system.[2] The Constitution of Kenya provides for the right of the accused to counsel and for those who cannot afford, the right to counsel at state expense.[3]

However, for the enjoyment of the right to counsel at state expense, the accused person should be at the risk of suffering substantial injustice if not legally represented.[4] The

[1]Pett v Greyhound Racing Association (1968) 2 All E.R 545.
[2]Ishita B & Shivangi K, "CONCEPT OF FAIR TRIAL - A HUMAN RIGHT" Indian Journal of Law and Legal Research 4(5) 2022 2.
[3]Article 50 2(g) & (h), Constitution of Kenya 2010.
[4]ibid

constitution has not defined the meaning and the scope of the substantial injustice provision thus bringing uncertainty as to who is eligible for the right to counsel at state expense. The Legal Aid Act provides for the test for substantial injustice which outlines eleven factors to be considered.[5] However, the factors have often left out many indigent accused persons leaving them ineligible for legal representation at state expense.[6]

In the case Republic v Karisa Chengo,[7] the Supreme Court affirmed the test for substantial injustice provided for in the Legal Aid Act. In addition to the relevant provisions of the Legal Aid Act, the Supreme Court highlighted various other factors which include: the seriousness of the offence, the severity of the sentence, the ability of the accused person to pay for his own legal representation, whether the accused is a minor, the literacy of the accused, and the complexity of the charge against the accused.[8]

This continues to pile up the stumbling blocks for the indigent accused persons to get justice under the Kenyan criminal justice system.[9] This is because the tests provided are oriented more towards the probability of success of the accused's case and the cost of litigation and not the right of the accused person to a fair trial. This has left many of the indigent accused persons to suffer the risk of conviction and imprisonment.[10]

This paper examines the judicial interpretation of the right to counsel at state expense and notes that the Kenyan courts have adopted a narrow approach that has limited the enjoyment of the right by many of the indigent accused persons. The paper recommends for a due process test that recognises the right to counsel at state expense as a necessary requirement for the enjoyment of the right to fair trial. This test ensures that none of the indigent accused is condemned unheard and unrepresented by an advocate.

2.0 The Right to legal representation

The right to counsel is a crucial element for the realization of the right to a fair trial.[11] This has been affirmed by various courts across the world as shall be considered below.

In Pett v. Greyhound Racing Association,[12] the court noted that for justice to be done within the criminal justice system, the accused person ought to have a lawyer to argue their case. At page 549 His Lordship stated thus:

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

[5]Section 36 (4), Legal Aid Act No.6 of 2016.
[6]Rukwaro R, "A critical analysis of the right to counsel as a means to a fair trial for the unrepresented accused in Kenya" LLB Dissertation, Strathmore University Law School 2021 48.
[7]Republic v Karisa Chengo and 2 others 2015 eKLR.
[8]Ibid.
[9]Rukwaro R, "A critical analysis of the right to counsel as a means to a fair trial for the unrepresented accused in Kenya" LLB Dissertation, Strathmore University Law School 2021 48.
[10]ibid
[11]Busalile J Mwimali, "Conceptualisation and Operationalisation of The Right to a Fair Trial in Criminal Justice in Kenya" LLD Thesis University of Birmingham 2012 63.
[12](1968) 2 All E.R 545.

better than a lawyer who has trained for the task"

The Trial Chamber I of the Special Court for Sierra Leone in its decision on the application of the 1st Accused, Samuel Hinga Norman in Prosecution v. Sam Hinga Norman,[13] for self-representation, gave an insightful opinion on the role of the defence counsel. The Chamber noted that:

"The role of a defence counsel is institutional and is meant to serve, not only his client, but also those of the Court and the overall interests of justice." It further noted firstly that the right to counsel was predicated upon the notion that representation by counsel was an essential and necessary component of a fair trial. Secondly, that the right to counsel "relieves trial judges of the burden to explain and enforce basic rules of courtroom protocol and to assist the accused in overcoming routine and regular legal obstacles which the accused may encounter if he represents himself, for, the Court, to our mind, is supposed, in the adversarial context, to remain the arbiter and not a proactive participant in the proceedings."

The court above affirmed the importance of the court remaining neutral in an adversarial system to which the criminal justice system is characterised.[14] The right to be represented by a lawyer facilitates the role of the court in remaining neutral during the trial process.[15]

In David Macharia Njoroge v Republic,[16] the court noted the importance of legal representation in adversarial process noting that:

While Kenya's Constitution guarantees the right to counsel, systemic issues like underfunding, police resistance, and court delays hinder its full realization. Strengthening legal aid and enforcing compliance are critical for justice.

"The right to legal representation is almost axiomatic in an adversarial system. Under the adversarial system, court proceedings are left between the two parties to fight it out. The Bench serves as the umpire and intervenes only to enforce compliance with the rules and ensure fairness of the proceedings. Where it is applied in criminal matters, the adversarial system may result in an incalculable prejudice to the accused person whose liberty or life may be at stake. It is for this reason that accused persons are accorded the right to appoint legal representation of their own choosing."

In the case of Powell v Alabama,[17] the court emphasized on the importance of legal representation by stating that:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by

[13]Moinina Fofanah and Alieu Kondowa, Case No. SCSL-04-14-T, (CDF case) 2007.
[14]Madalyn K Wasilczuk, "Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense," New York University Journal of International Law and Politics 45(1) 331.
[15]ibid
[16]David Macharia Njoroge v Republic 2011 eKLR.
[17]Powell v. Alabama, 287 U.S. 45 69 (1932)

counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

In Gideon v Wainwright,[18] the court recognized the need for poor accused persons to be legally represented despite the offences they are charged with. The court noted that:

"In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

3.0 Legal framework on the right to legal representation

3.1 International and regional instruments

The Universal Declaration of Human Rights provides for the equality of arms which encompasses the right of the accused person to legal representation to ensure equality before the law between the accused and the prosecution.[19] The International Covenant on Civil and Political Rights provides for the right to be informed of the right to be represented by a counsel if they don't have legal assistance and the right to have legal assistance assigned to them, in any case where the interest of justice require, and without payment by them in cases where they don't have sufficient means to pay for one.[20]

Article 6 (3) (c) of the European Charter on Human Rights provides that the accused persons in criminal proceedings should be able to defend himself in person or through legal assistance of his own choosing.[21] If he has not sufficient means to pay for

[18]372 U.S. 335 (1963).
[19]Article 7 of the Universal Declaration of Human Rights, United Nations 1948.
[20]Article 14 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171.
[21]Article 6 (3)(c) of the European Convention on Human Rights, 4 November 1950, CETS No.194.

legal assistance, to be given it free when the interests of justice so require.[22] The African Charter on Human and People's Rights provides for rights to fair trial which includes the right to defend oneself through a counsel of his choice.[23]

Article 2 (5) and (6) of the Constitution of Kenya provides that the general rules of international law shall form part of the law of Kenya and any treaty or convention ratified by Kenya shall form part of the Law of Kenya under the Constitution.[24] This means that the provisions of the international and regional conventions form part of the law of Kenya and their provisions on the right of the accused to legal representation at state expense ought to be fulfilled in Kenya.

The report on African Commission in Advocats Sans Frontiers (On behalf of Bwampanye) v. Burundi, African Commission on Human Rights,[25] observed that:

> *"…Legal assistance is a fundamental element of the right to fair trial. More so where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty he faced, it was in the interest of justice for him to have the benefit of the assistance of a lawyer at each stage of the case… the right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. They must in other words, be able to 'argue their cases …on an equal footing."*

The right to legal representation is firmly anchored in Kenya's 2010 Constitution: Article 50(2)(g): Guarantees every accused person the right to "choose, and be represented by, an advocate of their choice.

3.2 National Legal Instruments

3.2.1 The Constitution

Article 50 (2) (g) and (h) of the Constitution provides for the right of the accused to fair trial which includes the right to choose, and be represented by an advocate, and to be informed of this right promptly and to have an advocate assigned to the accused person by the state and at state expense if substantial injustice would otherwise result.[26] The right of accused person to counsel at state expense is a constitutional right and is thus enforceable in courts.[27]

A duty is therefore imposed on the government to ensure the right is protected, promoted and fulfilled.[28]

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[22]ibid
[23]Article 7(1)(c) of the African Charter on Human and People's Rights, 27 June 2981, 1520 U.N.T.S. 217.
[24]Article 2(5) & (6), Constitution of Kenya 2010.
[25]Comm. No. 213/99 (2000)
[26]Article 50 2 (g) and (h), Constitution of Kenya 2010.
[27]Article 22 ibid.
[28]Article 21 ibid.

National Legal Aid Services (NLAS) are public or government-supported initiatives aimed at ensuring access to justice by providing free or affordable legal assistance to individuals who cannot afford private legal representation — especially vulnerable, marginalized, or low-income populations.

3.2.2 Statutes

The Persons deprived of Liberty Act[29] and the National Police Service Act[30] Provide for the right of the accused to be informed of their right to legal representation. The refugees are also identified to be subject to the Kenyan law thus entitled to the rights enshrined therein including the right to counsel.[31]

3.2.3 Legal Aid Act

The Legal Aid Act establishes the National Legal Aid Services (herein referred to as NLAS),[32] a body whose main function is to establish and administer a national legal aid scheme that is affordable, accessible and sustainable.[33] The NLAS is to be governed by the board whose mandate is to facilitate, monitor, and evaluate the performance of the service.[34] It provides different legal aid services including but not limited to legal advice, legal representation and assistance.[35] The Act provides that a person who is indigent and resident in Kenya including: a citizen of Kenya, a child, a refugee under the Refugees Act, a victim of human trafficking, an internally displaced person and a stateless person is eligible to apply for legal aid services.[36]

The National Legal Aid Act moved a step further to actualise the right to legal representation at state expense through establishment of a scheme that is cheaper and affordable and set conditions to be met for one to benefit in the scheme.

The Act states that NLAS must determine whether a person has financial resources, for an indigent person, which is important when considering the eligibility of an accused person for legal representation at state expense.[37] The Act provides for general principles of legal aid stating that the service shall provide legal aid services in civil matters, criminal matters, children matters, constitutional matters, matters of public interest or any other type of case or type of law that the Service may approve.[38] It continues to provide that despite the provision above, the Service shall determine the legal needs of indigent persons and of disadvantaged communities in Kenya.[39] This considers the indigent persons in Kenya. However, the factors established for granting

[29]Section 6 (b) of the Persons Deprived of Liberty Act (Act No. 23 of 2014)
[30]Fifth Schedule Rule 2, National Police Service Act, (Act No. 11 of 2011)
[31]Section 16 (1), Refugees Act, (Act No. 13 of 2006)
[32]Section 5 of the National Legal Aid Act No.6 of 2016
[33]Section 7 ibid.
[34]Section 10 ibid.
[35]Section 2 ibid.
[36]Section 36 (1) ibid.
[37]Section 36 (3) ibid.
[38]Section 35 (1) ibid.
[39]Section 35(2) ibid

legal aid services disadvantage the indigent persons in Kenya.

Once a person is eligible for legal aid, the NLAS considers the following factors before granting legal aid services:

a) The success of the case is commensurate to the cost incurred
b) Availability of resources
c) Sustainability of incurring such costs
d) Nature, seriousness, the importance of the case justifies the cost
e) The conduct of the applicant warrants assistance
f) A matter of public interest
g) Proceedings are likely to occasion the loss of any right of the applicant
h) Complexities of the case such as involvement of expert witness
i) In the interest of a third party that the applicant is represented
j) Denial of legal aid would result in substantial injustice
k) Any other reasonable ground to justify the grant of legal aid.[40]

The order of the factors to be considered before one is granted legal representation at state expense advocate for a cost-basis interpretation on who is eligible for the right.[41] Justice therefore become a secondary factor to be considered thus denying most poor accused persons the chance to enjoy the right to counsel at state expense.[42] The courts have thus found a justifiable way to deny an accused person the right to counsel at state expense on the basis of the cost incurred will not justify the accused being granted the right rather than considering the injustice caused to the accused when they fail to be legally represented.

4.0 The application of article 50 (2) (h) of the constitution by the courts

4.1 Arusei v Republic

The Kenyan courts have a rich jurisprudence on the right to legal representation. In Arusei v Republic through State Counsel,[43] the court ruled that:

> *"As regards breach of Article 50 (2) (h) of the Constitution, the right thereunder is not absolute. An advocate can only be assigned to an accused at state expense if the court is satisfied that substantial injustice will result before enforcing it… the applicant has not attempted to demonstrate that he has suffered any substantial injustice to warrant the court to and that the right was infringed. It is not just enough to allege… The right under Article 50(2)(g) cannot be limited by dent of Article 25(c) of the Constitution while the right under Article 50(2)(h) which is not absolute and can be limited."*

The court therefore established that the right to counsel at state expense was not an absolute right and could be limited. This would mean that a person cannot enjoy the right to counsel at state expense by mere virtue of being accused of an offence. The court must be satisfied that a substantial injustice would result without which the accused person will not be eligible for the right.

4.2 Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & Another

This position was affirmed in the case of Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & another; Office of the

[40]Section 36 (4) ibid.
[41]Deborah L Williams, "Benefit-Cost Analysis in Natural Resources Decision making: An Economic and Legal Overview" 11(4) Natural Resources Lawyer 1979 761.
[42]Pauline M Muhanda, "Access To Justice for Persons Living in Poverty the Legal and Institutional Framework in Kenya" LLM Thesis University of Nairobi 2015.
[43](E013 of 2023) 2024.

The right to legal representation is a fundamental component of the right to a fair trial and access to justice. It ensures that individuals, especially those accused of crimes or involved in legal disputes, have the opportunity to defend themselves effectively with the assistance of a lawyer.

Directorof Public Prosecutions & another (Interested Parties)[44] where the court stated that:

> *"49. Flowing from the foregoing, it is evident that the constitutional requirement under Article 50(2)(h) to assign an accused person representation crystallized upon enactment of the Aid Act. However, the right is not absolute. An accused person is required to make an application to the National Legal Aid Service for consideration."*

4.3 Thomas Alugha Ndegwa v Republic

In Thomas Alugha Ndegwa v Republic,[45] the court noted that the right to legal representation at state expense is pegged on some values under the constitution including social justice, equality before the law, protection of marginalised and vulnerable persons and the need the principle of natural justice. It stated that:

> *"While these two provisions, and more so Article 50(2)(h), are specific on legal aid, there are many other provisions of the Constitution that are relevant to the concept of legal aid. These include the value of social justice under Article 10; provisions on equality before the law under Article 27; provisions on protection of marginalised and vulnerable persons and the requirement under Article 159 that justice shall be done to all irrespective of status. The overarching notion to be derived from these provisions is that it is difficult to achieve justice where one party has to compete with the elaborate machinery and resources available to the opposite party."*

The court also noted that the appellant was serving a life sentence thus eligible to apply for legal aid. It proceeded to state that:

> *"21. In the instant application, it is clear the framework for full implementation of*

[44] 2021.
[45] 2016.

Article 50 (h) is now in place as required by the Constitution. Section 40 of the Act requires that a person who wishes to receive legal aid may apply to the Service in writing so long as such an application is made before the final determination of the matter by a court, tribunal or any other forum to which the application relates. In light of the constitutional and statutory provisions aforementioned, the provision of legal aid is a constitutional, legal and human right. The appellant is serving a life sentence and in the circumstances of this case, substantial injustice may result unless represented. We therefore find that the applicant, according to section 41 of the Legal Aid Act is eligible to make the application for legal aid to the Service in person or through any other person authorized by him in writing. The Service may at its discretion grant legal aid to the applicant subject to such terms and conditions, as the Service considers appropriate."

However much the court appreciated that the appellant was serving a life sentence making him eligible to apply for right to counsel at state expense, it still referred the appellant to NLAS. It also noted that the appellant would be entitled to the right at the discretion of the service. This is unfair considering that serving a life sentence locks one out of the society completely presenting a substantial injustice if at all he is not legally represented.[46]

4.4 David Macharia Njoroge v Republic

In the case of David Macharia Njoroge v Republic,[47] The court stated that:

"Article 50 sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence."

The court proceeded to note that:

"We are of the considered view that in addition to situations where "substantial injustice would otherwise result", persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expense."

The court observed that persons accused of capital offences where the penalty is loss of life had the right to legal representation at state expense. This limits the right to them only thus it would be discriminatory considering that all accused persons facing the risk of imprisonment are likely to experience substantial injustice.

4.5 John Sakwa v Director of Public Prosecutions

The High Court in John Sakwa v Director of public prosecution[48] affirmed that the constitutional requirement that legal representation be provided at state expense include all situations where an accused person is charged with an offence whose penalty is death. The implication of this would be that all persons, regardless of their

[46]Michael Sang, "Revisiting the Legal Debate on the Constitutionality of the Life Sentence in Kenya: The Case for Its Continued Relevance." Journal of Conflict Management and Sustainable Development 11(1) 2023 283.
[47]David Macharia Njoroge v Republic 2011.
[48]John Sakwa v Director of Public Prosecution 2013.

economic circumstances, would be entitled, as of right, to legal representation at state expense if they are charged with an offence whose penalty is death.

4.6 Alloys Omondi Nanga v Republic

In Alloys Omondi Nanga v Republic[49] the Court of Appeal noted that free legal aid was not provided for under the independence constitution. However, the courts extended free legal aid to indigent accused persons charged with murder. The court noted that:

> *"In this country there is a long-standing practice in our criminal justice system of giving free legal aid to indigent accused persons charged with murder undoubtedly to ensure that justice is done to such an accused person. That practice has been extended to appellants who have been convicted of the capital offence of robbery under section 296(2) and attempted robbery with violence under section 297(2) of the Penal Code. Free legal aid is not however enshrined in the constitution or in any statute and the Government has no obligation to give free legal aid. In the Court of Appeal, however, rule 24(1) authorizes the Chief Justice or the Presiding Judge of the Court of Appeal to assign an advocate to represent an applicant or appellant in criminal application or appeal if it appears desirable in the interest of justice."*

The court also affirmed the freedom of an accused person to accept the counsel appointed by the state. It was stated that:

> *"However this case shows that not every accused person appreciates the free legal aid given by the government and that it is therefore prudent that where free legal aid is given that an accused person should be required to indicate his acceptance of the counsel assigned to him or otherwise in writing or alternatively the trial Judge should inform the accused person of his right to reject the counsel and to record his remarks before the plea is taken. If he declines the counsel assigned to him it should be made clear to him that the only other alternative is for him to act in person. We strongly recommend such a practice and that appropriate forms be designed, if necessary."*

4.7 Republic v Karisa Chengo

In the case of Republic v Karisa Chengo[50] the Supreme Court established that not all accused persons in criminal proceedings are entitled to right to counsel at state expense. It continued to establish factors that would aid the courts in determining the eligibility of an accused person for the right to counsel at state expense. It noted that:

> *"Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the Legal Aid Act, various other factors which include:*
>
> *a) the seriousness of the offence.*
> *b) the severity of the sentence.*
> *c) the ability of the accused person to pay for his own legal representation.*
> *d) whether the accused is a minor.*
> *e) the literacy of the accused.*
> *f) The complexity of the charge against the accused."*

[49] 2006.
[50] Republic v Karisa Chengo and 2 others 2015 eKLR.

The Supreme Court overruled the decision in David Macharia Njoroge Case where the court had limited substantial injustice to capital offences only. It stated that:

> *"87. Article 50(2)(h) of the Constitution provides that "[e]very accused person has the right to a fair trial, which includes the right…to have an advocate assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly." It does not define what "substantial injustice" means. However, in David Macharia Njoroge v. Republic, (supra), the Court of Appeal held that "substantial injustice" results to "persons accused of capital offences" with "loss of life" as the penalty if they have no counsel during their trials. We do not entirely concur with that holding, as it has the effect of limiting the right to legal representation in criminal trials only to cases where the accused person is charged with a capital offence. The operative words in article 50 (2) (h) are "if substantial injustice would otherwise result…." While it is therefore undeniable that a person facing a death penalty and who cannot afford legal representation is likely to suffer substantial injustice during his trial; the protection embedded in article 50 (2) (h) goes beyond capital offence trials."*

The Supreme Court noted that the right to counsel at state expense is not open ended in stating that:

> *"88. We must however emphasize the fact that in accordance with the language of the Constitution, this particular right is not open ended. It only becomes available "if substantial injustice would otherwise result"*

The Court affirmed the discretion of the court in defining substantial injustice where it stated that:

> *"In recognizing the discretion exercisable by any Court in making the determination as to whether the accused person is entitled to legal aid, the Supreme Court of India held as follows: "The court may judge the situation and consider from all angles whether it is necessary for the ends of justice to make available legal aid in the particular case. In every country where free legal services are given it is not done in all cases but only where public justice suffers otherwise. That discretion resides in the Court."*

This recognizes the important role the courts play in interpreting the substantial injustice provision.[51] The courts should therefore be careful not to misuse the discretion by blowing a kiss of death to the right to counsel at state expense for the indigent accused persons in Kenya.

5.0 Conclusion

The Kenyan Courts have been reluctant to expand the scope of those entitled to counsel at state expense to include all accused persons facing the risk of imprisonment and are too poor to pay for a counsel.[52] In Kenya, an indigent accused person has to meet all the factors highlighted in the Legal Aid Act for them to be eligible for the right to counsel at state expense. This limits the enjoyment of this right by many accused persons who are too poor to pay for legal representation.[53]

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[51]Erick K Mutua, "Access to Justice in Kenya: A critical Appraisal of the Role of the Judiciary in advancement of Legal Aid Programs" LLM Thesis University of Nairobi 2018.

[52]See the case of Argersinger v Hamlin 407 U.S. 25 (1972), where the United States Court noted that accused persons facing the risk of imprisonment were entitled to the right to counsel at state expense. The court stated that: *"The requirement of counsel may well be necessary for a fair trial even in a petty offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more…"*

[53]https://icj-kenya.org/news/petty-offences-are-biased-against-the-poor/ accessed on 9 April 2025.

The Due Process Test is a legal standard used to assess whether an individual's rights—particularly their right to a fair hearing or treatment by the law—have been violated. It is rooted in the concept of procedural fairness and substantive justice.

As noted in the South African case of Hlantlalala v Dyanty[54] it is high time for the Kenyan courts to recognise the right to counsel at state expense as a necessary element for enjoyment of the right to fair trial by indigent accused persons.[55] This would mean that the failure to be legally represented in a trial would render the trial unfair and a failure of justice thereby necessitating the setting aside of the conviction of the accused person.[56] The court in Hlantlalala v Dyanty stated that:

> *"With the coming of the new constitutional order, an accused was for the first time afforded a right to legal representation at state expense, if substantial injustice would otherwise result. This right can be said to have been put on the same footing as his basic right to have his own legal representative, for they were placed alongside each other in the Constitution as being rights included in the right to a fair trial…*
>
> *In the light of all these considerations it must be held that the irregularity in the present case by which the appellant was deprived of legal representation at state expense at his trial was one which per se produced a failure of justice and an unfair trial. Consequently, his conviction must be set aside without consideration of the merits."*[57]

6.0 Recommendations

6.1 The Due Process Test

This paper recommends a due process test that recognizes the right to counsel at state expense as part of the due process of the law in realizing the right to fair trial.[58] The absence of a lawyer would then vitiate the trial process.[59] This reflects the United States approach where the law provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial and to have the assistance of counsel for his defence.[60] The fourteenth amendment provides that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[61]

The fourteenth amendment read together with the sixth amendment provides that

[54]1999 2 SACR 541 (SCA).
[55]ibid
[56]ibid
[57]ibid
[58]https://supreme.justia.com/cases-by-topic/due-process/ accessed on 9 April 2025.
[59]See the South African case of S v Du Toit and Others 2005 2 SACR 411 where the Court observed that the right to counsel is enshrined as a fundamental right in the constitution thus one of the cornerstones of the right to a fair trial and the interference with the right is an irregularity so gross as to vitiate the trial per se.
[60]Sixth Amendment, United States Constitution 1787.
[61]Fourteenth Amendment ibid.

Kenyan courts have progressively defined the scope and limits of the constitutional right to legal representation at state expense, particularly through landmark judgments that balance individual rights against state resources.

no person shall be deprived of their liberty without due process of the law.[62] An indigent accused person facing the risk of imprisonment must therefore be legally represented for the due process of the law element to be satisfied.[63] This has been elaborated by the courts as shall be considered below.

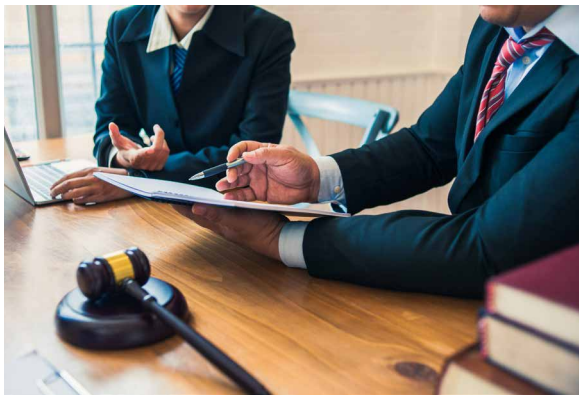
In Washington v Texas,[64] the court stated that:

> *"We have held that due process requires that the accused have the assistance of counsel for his defense, that he be confronted with the witnesses against him, and that he has the right to a speedy and public trial."*

In relying upon the case of Powell v Alabama and Gideon v Wainwright,[66] the court in Argersinger v Hamlin[67] noted that:

> *"The requirement of counsel may well be necessary for a fair trial even in a petty offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more… Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor, as well as in felony, cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware*

[62]https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701 accessed on 9 April 2025.
[63]Washington v. Texas, 388 U.S. 14 (1967).
[64]ibid.
[65]287 U.S. 45 (1932).
[66]372 U.S. 335 (1963).
[67]407 U.S. 25 (1972).



Article 50(2) of the Constitution outlines the rights of an accused person: to have an advocate assigned by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly.

> *of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution."*

The court observed that the accused persons are always victims in a criminal justice system that does not focus on protecting their interests but in dispensing with crime from the society.[68] The court noted that this informed the need of the defendants having a lawyer throughout the trial process. It observed that:

> *"As Dean Edward Barrett recently observed: Wherever the visitor looks at the system, he finds great numbers of defendants being processed by harassed and overworked officials. Police have more cases than they can investigate. Prosecutors walk into courtrooms to try simple cases as they take their initial looks at the files. Defense lawyers appear having had no more than time for hasty conversations with their clients. Judges face long calendars with the certain knowledge that their calendars tomorrow and the next day will be, if anything, longer, and so there is no choice but to dispose of the cases. Suddenly it becomes clear that, for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous… We must conclude, therefore, that the problems associated with misdemeanor and petty [n5] offenses often [p37] require the presence of counsel to insure the accused a fair trial."*

Finally, the court affirmed that no accused person could be imprisoned without the assistance of a lawyer for this would be in breach of the due process clause. It stated that:

> *"We hold, therefore, that, absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial… That is the view of the Supreme Court of Oregon, with which we agree. It said, in Stevenson v. Holzman, 254 Ore. 94, 102, 458 P.2d 414, 418: We hold that no person may be deprived of his [p38] liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances. The denial of the assistance of counsel will preclude the imposition of a jail sentence."*

This would quench the thirst for justice in the Kenyan criminal justice system that has always been there for many years.[69] Due process test would ensure all indigent accused persons enjoy the right to fair trial of which the right to counsel at state expense is an incentive.[70]

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[68] ibid.

[69] https://judiciary.go.ke/the-changing-landscape-of-justice-in-kenya-a-60-year-journey/ accessed on 9 April 2025.

[70] See the South African case of S v Khanyile & 2 Others 1988 3 SA 795 where Justice Didcott asserted that the right to be represented by a counsel is one of the necessary elements of a fair trial and a decision rendered without counsel for the defendant in the absence of a waiver was per se unfair.

Bibliography

Statutes and Conventions

International

Universal Declaration of Human Rights, United Nations 1948.

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171.

European Convention on Human Rights, 4 November 1950, CETS No.194.

African Charter on Human and People's Rights, 27 June 2981, 1520 U.N.T.S. 217

National

Constitution of Kenya 2010.

United States Constitution 1789.

Legal Aid Act No.6 of 2016.

Persons Deprived of Liberty Act (Act No. 23 of 2014)

National Police Service Act, (Act No. 11 of 2011)

Refugees Act, (Act No. 13 of 2006)

Case Laws

Kenya

Republic v Karisa Chengo and 2 others 2015 eKLR.

David Macharia Njoroge v Republic 2011 eKLR.

John Sakwa v Director of Public Prosecution 2013.

Alloys Omondi Nanga v Republic 2006 eKLR.

Sheria Mtaani Na Shadrack Wambui v Office of the Chief Justice & Another 2021 eKLR.

Thomas Alugha Ndegwa v Republic 2016 eKLR.

Arusei v Republic (E013 of 2023) 2024.

United Kingdom

Pett v Greyhound Racing Association (1968) 2 All E.R 545.

United States

Washington v. Texas, 388 U.S. 14 (1967).

Powell v. Alabama, 287 U.S. 45 69 (1932).

Gideon v Wainwright 372 U.S. 335 (1963).

Argersinger v Hamlin 407 U.S. 25 (1972).

South Africa

S v Du Toit and Others 2005 2 SACR 411.

Hlantlalala v Dyanty 1999 2 SACR 541 (SCA).

S v Khanyile & 2 Others 1988 3 SA 795.

SierraLeone

Samuel Hinga Norman in Prosecution v. Sam Hinga Norman Moinina Fofanah and Alieu Kondowa, Case No. SCSL-04-14-T, (CDF case) 2007.

African Commission on Human and People's Rights

African Commission in Advocats Sans Frontiers (On behalf of Bwampanye) v. Burundi, African Commission on Human Rights Comm. No. 213/99 (2000).

Website

https://icj-kenya.org/news/petty-offences-are-biased-against-the-poor/ accessed on 9 April 2025.

https://supreme.justia.com/cases-by-topic/due-process/ accessed on 9 April 2025.

https://constitutioncenter.org/the-constitution/articles/amendment-xiv/clauses/701 accessed on 9 April 2025.

https://judiciary.go.ke/the-changing-landscape-of-justice-in-kenya-a-60-year-journey/ accessed on 9 April 2025.

Thesis

Rukwaro R, "A critical analysis of the right to counsel as a means to a fair trial for the unrepresented accused in Kenya" LLB Dissertation, Strathmore University Law School 2021.

Busalile J Mwimali, "Conceptualisation and Operationalisation of The Right to a Fair Trial in Criminal Justice in Kenya" LLD Thesis University of Birmingham 2012.

Pauline M Muhanda, "Access to Justice for Persons Living in Poverty the Legal and Institutional Framework in Kenya" LLM Thesis University of Nairobi 2015.

Erick K Mutua, "Access to Justice in Kenya: A critical Appraisal of the Role of the Judiciary in advancement of Legal Aid Programs" LLM Thesis University of Nairobi 2018.

Journal Articles

Ishita B & Shivangi K, "CONCEPT OF FAIR TRIAL - A HUMAN RIGHT" Indian Journal of Law and Legal Research 4(5) 2022.

Madalyn K Wasilczuk, "Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense," New York University Journal of International Law and Politics 45(1) 2012.

Deborah L Williams, "Benefit-Cost Analysis in Natural Resources Decision making: An Economic and Legal Overview" 11(4) Natural Resources Lawyer 1979 761.

Michael Sang, "Revisiting the Legal Debate on the Constitutionality of the Life Sentence in Kenya: The Case for Its Continued Relevance." Journal of Conflict Management and Sustainable Development 11(1) 2023 283.

Breaking the code of silence: An evaluation of whistleblower regulations, protection, and incentives in Kenya's financial sector

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Abstract

This Article seeks to critically asses the effectiveness of whistleblower regulations in promoting the reporting of financial misconduct and other violations within Kenya's broad financial sector which encompasses the Banking Industry, Securities, Insurance, Micro-Finance Institutions, SACCOS, and the other players in the Financial Market.

The article focuses on several key areas. It begins by assessing the awareness and understanding of these regulations among participants in the financial market, such as employees, investment firms, brokers and capital market intermediaries, among others. This analysis highlights the necessity of adequate mechanisms to inform individuals of their rights and the processes for reporting wrongdoing.

Additionally, the article evaluates the legal protections afforded to whistleblowers against retaliation; potential job loss or harassment, and examines whether the incentives provided, such as financial rewards, are sufficient to motivate individuals to report financial misconduct. The article further investigates whether the whistleblowing reporting channels, if any, are clear, accessible, and secure in ensuring confidentiality and the anonymity for whistleblowers, as well as the interaction of sector-specific mechanisms with broader legal frameworks.

The article also delves into the practical implementation of whistleblower regulations, exploring successful prosecutions or recoveries of illicit gains resulting from whistleblower information, if any, and identifying challenges faced by regulatory bodies such as the Capital Markets Authority. This includes case studies that illustrate both the pivotal role of whistleblowers in uncovering financial misconduct and the adverse effects of inadequate protection on investigations. The article further compares Kenya's whistleblower protection framework with international best practices. Highlighting lessons from jurisdictions with probably, stronger protections. It concludes by addressing unique challenges within the various segments in the financial sector and

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Kenya's financial sector is one of the most advanced in Africa, characterized by innovation, digital transformation, and regulatory reforms.

identifying potential gaps in the current regulatory framework, and finally offering recommendations for reforms to enhance whistleblower protections and encourage greater reporting of financial misconduct.

Introduction

The financial sector in Kenya plays a focal role in the national economy, contributing significantly to economic growth, job creation, and the overall development of financial services. The key segments of this sector are banking, insurance, capital markets, fintech, and Savings and Credit Cooperatives (SACCOs). The banking sector, which is the largest component, has at least 40 licensed banks and has shown resilience and innovation, particularly in mobile banking and digital financial services.[3] The insurance industry, though smaller, is also growing, albeit gradually. The Capital markets, since its inception in the 1950s, has steadily developed and taken roots; with the Nairobi Securities Exchange (NSE) serving as a powerhouse trading platform. Furthermore, the fintech sector has emerged as a transformative force, with innovations such as mobile money revolutionizing access to financial services, especially for the unbanked population.

The regulatory framework of Kenya's financial sector is multifaceted; thus, a Fragmented Model of Regulation i.e. Involves several Regulators. The Central Bank of Kenya (CBK) is responsible for monetary policy and regulation of banks, ensuring macroeconomic stability and consumer protection. The Capital Markets Authority (CMA) oversees the securities industry, promoting prudential and efficient capital markets. The Insurance Regulatory Authority (IRA) regulates the insurance sector, while the Sacco Societies Regulatory Authority (SASRA) supervises SACCOs.

Problem Statement

Despite the advancements in Kenya's financial sector, the prevalence of financial misconduct remains a significant challenge, undermining trust and stability. Financial fraud, mismanagement, and or financial misconduct, have been recurrent issues in Kenya, with losses estimated at billions of Kenyan Shillings annually. Such misconduct not only threatens market integrity, but also deters foreign investment and hampers economic growth.

Role of Whistleblowing

In this regard, whistleblowers emerge as crucial agents in curbing financial malpractice. They provide crucial information that can lead to the detection and prosecution of illicit activities in the market, thereby, fostering a culture of accountability and transparency. However, the effectiveness of whistleblower protections and regulations in Kenya is debatable; in that it is always argued that there is a disconnect between policy and practice.

[3]Kenya Financial Stability Report 2023

While Kenya's Bribery Act and Employment Act offer partial protections, the Whistleblower Protection Bill (2024) could transform accountability if enacted. Key challenges include cultural resistance, delayed legislation, and inadequate enforcement.

Whistleblowing is the disclosure by an organization's member(s) (former or current), of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.[4] The International Labour Organization defines whistleblowing as the reporting by employees or former employees of illegal, irregular, dangerous or unethical practices by employers. A whistleblower is thus, any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning economic crimes.[5]

Legal Framework for the Protection of Whistleblowers

In 2003, Kenya ratified the United Nations Convention on Anti-Corruption (UNCAC) and further grounded its commitment in 2007 by signing The African Union Convention on Preventing and Combatting Corruption; both of which accentuate the need for member states to enact whistleblower protection measures.

Due to Parliament's failure to enact and operationalize the Whistleblower Protection Bill into Law; which would have been an all-encompassing legislation, whistleblower protection laws and policies are fragmented in different Acts and Policies. The Bribery Act defines a whistleblower to be a person who makes a report to the Commission or the law enforcement agencies on acts of bribery or other forms of bribery. Section 21 of the Act categorically states that a whistleblower in a complaint or case shall not be intimidated or harassed for providing information to law enforcement institutions or giving testimony in a court of law.[6] The Anti-Corruption and Economic Crimes Act and the Public Officer Ethics Act, though not comprehensively, have some bits of whistleblower protection aspects; they provide for the protection of informers[7] and witnesses in economic crimes cases.

[4]Near, Miceli et al 1985 Organizational Dissidence; *The Case of whistleblowing*
[5]United Nations Office on Drugs and Crime, 2015
[6]S20 Bribery Act Cap79B
[7]S41, Public Officer and Ethics Act 2003

Whistleblowing — the act of exposing misconduct, corruption, or illegal activity — can play a vital role in promoting transparency and accountability. However, it often comes with significant personal and professional costs and risks, especially when protective systems are weak or poorly enforced.

Rationale for Incentivization and Protection of Whistleblowers

Incentivization and Protection of whistleblowers has emerged to be pertinent subject of discussion, internationally; in the fight against corruption, economic crimes in the quest to uphold fidelity in the financial market. Protection of whistleblowers, particularly, is a necessary element of a coherent strategy to combat corruption, which includes other measures to create an ethical culture in public and financial sectors.

Whistleblowers, whether in public or private sector, report illicit actions such as corruption, money laundering, tax evasion, drug trafficking, environmental crimes, illicit trade, securities fraud, *inter alia*. Whistleblowing is a crucial mechanism in the struggle for integrity and for the public's interest.[8] This allows the public to be aware of violations and breaches that would otherwise remain concealed; accountability and transparency.

Costs and Risks of whistleblowing and the need for Incentives

The rationale for whistleblower protection is anchored on the need to be protected from reprisals, or rather, retaliation, disproportionate punishment and unfair treatment. Whistleblowing has proved particularly effective in addressing financial crimes; from tax evasion to securities fraud. However, whistleblowers in many countries globally, Kenya included, end up paying a steep price,[9] facing many pressures and challenges such as the direct threat of violence if the person they reported discovers,[10] threats of breach of confidentiality, job loss, among others; thus, the need to incentivize this venture and protect those who courageously 'blow the whistle'.

[8]Wolfe at al 2014 p.10
[9]Organization for Economic Cooperation and Development 2009
[10]Alexander R 'The Role of Whistleblowers in the fight against economic crime' journal of financial crime (2005), 131

David Sadera Munyakei's story is the perfect exemplification of the risks and costs that whistleblowers endure in pursuit of ethical accountability and prudence in the financial market. In 1993, working as a Clerk at the CBK, David Munyakei realized that he was processing the payments for the export of non-existent gold. Realizing this, and after reporting to his superiors in vain, he decided to present this sensitive documentation to a member of the fourth estate and two opposition MPs; Paul Muite and Peter Anyang' Nyong'o exposing what would famously be known as the Goldenberg scandal; which costed Kenya an estimate 10% of the country's then GDP.[11] Munyakei was arrested and charged with communicating information with unauthorized persons in contravention of the Officials Secrets Act. His case was later dismissed; but since problems come in threes, he was fired by CBK, and fearing for his life, fled to Mombasa.

Whistleblowing becomes a risky endeavor especially for public servants and workers in the financial sector who have access to privileged information; they got to balance the statutory duty to report wrongdoing with non-disclosure agreements, or rather, their contractual duty of confidentiality. For instance, recently in some countries, there has been a widespread corporate behaviour of using Gagging Clauses in employment contracts; these have a potential to halt potential whistleblowers from reporting wrongdoing and specifically; financial misconduct.

These gagging clauses in employment contracts and settlement agreements, are clauses which purportedly bar a worker from disclosing information about his or her current or former workplace[12]. There are three general types of gagging clauses;

i. Those requiring workers to report internally before giving any other body such sensitive information.
ii. Thore requiring an employee to waive any monetary award received from whistleblowing; this potentially disincentivizes whistleblowing consequently, discouraging it.
iii. Those claiming a breach of contract by a whistleblower based on confidentiality clauses in an employment contract

However, the Public Officer and Ethics Act, via Section 41 potentially discourages whistleblowing as it provides that, 'a person who, without lawful excuse, divulges information acquired in the course of acting under the Act is guilty of an offence and is liable, on conviction, to a fine not exceeding five million shillings or to imprisonment for a term not exceeding five years or to both.'[13]

Noteworthy, the Witness Protection Act only provides protection to witnesses.[14] Consequently, only persons who agree to testify in Court are protected under this Act. Thus, whistleblowers, who may want to preserve their anonymity or hide their identity cannot be legally protected by the provisions of the Witness Protection Act.

The Capital Markets (Whistleblower) Regulations 2022 defines a whistleblower to be any person who provides to the Authority new and timely information relating to misconduct or contravention of laws relating to securities leading to the recovery of penalties or illicit gains.[15] The Regulations also guarantee for the confidentiality of the whistleblower's identity and provides for

[11]'Goldenberg; story of a whistleblower' The East African Magazine
[12]Pyper D 2016 *Whistleblowing and gagging clauses*, Briefing Paper No CBP 7442 (London House of Commons Library)
[13]*ibid*
[14]S3 Witness Protection Act 2006
[15]S2 Capital Markets (whistleblower) Regulations 2022

The Capital Markets Authority (CMA) of Kenya has established a formal whistleblowing framework to encourage the reporting of misconduct and unethical practices within the capital markets. This aligns with its mandate to ensure transparency, integrity, and investor protection.

an incentive reward of 3% of the amount recovered; subject to a maximum of Five Million shillings.[16] However, the reward is subject to statutory deductions.[17] Notably, the Regulations provide that a reward shall not be awarded to convicted criminals, and persons employed, or formerly employed by the government who were under an obligation to report such misconducts.[18] One cannot fail to wonder, does such a provision encourage public servants in the financial sector to alert relevant authorities in case of a regular financial misconduct as David Munyakei did?

There is need to create reasonable reward incentives to encourage individuals to smoke out financial misconducts that potentially destabilize the economy. Incentives need not be monetary rewards only; career-based incentives such as promotions and scholarships would potentially encourage players in the financial sector to mask out money launderers, those committing securities fraud, and other economic crimes.

Reporting Mechanisms

The ability to file reports effectively and easily represents a fundamental aspect that establishes a functional whistleblower system. The financial sector in Kenya maintains different whistleblowing approaches between regulatory entities which results in an uncoordinated protection system thus inhibiting reporting activities.

The Capital Markets Authority (CMA) has achieved the most substantial progress through its Whistleblower Protection Framework by creating an online system where securities violators can provide anonymous reports. According to theoretical standards, this system can be accessed online through the CMA website.[19] Through its whistleblower, system the framework enables internal market intermediaries' staff members and external parties together with investors to disclose offenses including insider trading and market manipulation and fraudulent public offers.

Despite being a banking regulator in Kenya, the Central Bank of Kenya (CBK) operates without establishing a specific whistleblower portal. The report-by-email and postal mail methods offered by this system present operational barriers since it has no online anonymous reporting option.[20] When whistleblowers file reports by regular communication pathways their confidentiality risks exposure while also placing them at risk for retaliation against them. The barring of confidentiality protection for law or ethical conduct

[16]S12 Capital Markets (Whistleblower) Regulations 2022
[17]*ibid*
[18]S13 Capital Markets (Whistleblower) Regulations 2022
[19]Capital Markets Authority, *Whistleblower Protection Framework*, CMA Website (2020), available at: https://www.cma.or.ke
[20]Central Bank of Kenya, *Contact Us – Report Fraud*, CBK Website (2023).

informers runs contrary to Section 12 of Leadership and Integrity Act, 2012.[21]

The Insurance Regulatory Authority (IRA) along with SASRA (Sacco Societies Regulatory Authority) operate complaints systems yet those systems were not built to specifically handle whistleblower procedures. These systems do not provide any protection for anonymity or they do not have whistleblower policy documents publicly available.

The available systems face two main problems related to usability and assurance about their reliability. Many financial institutions place their whistleblower mechanisms inside both HR departments and internal compliance units. The dual investigative responsibilities of such units diminish the trust whistleblowers have in them because these units serve both as internal investigators and as institutional supporters. The compliance officer serving a tier-one bank would not report suspicious behavior because senior executives hold positions that monitor reporting functions.

The processes experience negative impacts from poor user experience alongside a scarcity of awareness. Staff members generally lack understanding about reporting channels while such staff who reach the channels remain doubtful about the proposed solutions. The financial sector regulators operate without an integrated reporting system to manage communication through a shared database and security-protected unified reporting platform.

To resolve this issue the establishment of a secure National Financial Sector Whistleblower Reporting Platform should integrate all regulators featuring CBK and CMA and IRA and SASRA and RBA. Through this designated platform, financial sector whistleblowers could report their concerns in real time while enjoying complete confidentiality together with anonymous reporting features and system-enabled feedback and status updates. The platform requires statutory backing and banks should display public information about this system throughout their financial institutions.

Enforcement and Outcomes

Several Kenyan laws include progressive whistleblower protection elements but actual enforcement shows unpredictable results because it relies on regulator capabilities and whistleblower determination.

The Bribery Act, 2016 under Section 14 ensures legal protection to whistleblowers who report bribery-related misconduct by safeguarding them against any disadvantageous or victimizing actions.[22] The legal protection extends only in general terms without any established rules to secure its enforcement. Organizations fighting against whistleblowers encounter legal consequences and lack defined protection schedules for their staff.

Whistleblowers helped the CMA achieve major market corrections through their enforcement activities according to recent records of public action. The exposure of a pyramid scheme operating under the pretense of being a licensed fund manager became possible through a whistleblower report in a Ponzi scheme entity known as Pavera.[23] The CMA exercised rapid action to remove the license and started compensation structures for investors who suffered due to fraud. The case showed

[21]Leadership and Integrity Act, No. 19 of 2012, Section 12(2) (Kenya).
[22]Bribery Act, No. 47 of 2016, Section 14 (Kenya).
[23]https://nation.africa/kenya/news/abandoned-by-state-defeat-in-court-final-betrayal-of-victims-robbed-sh34bn-by-pyramid-scheme-4984724#story

that whistleblower reports provide timely benefits, which help authorities, make early interventions.

Examples of success happen infrequently compared to other situations. A commercial bank compliance manager reported violations in syndicated lending activities during 2019, which led to her legal suspension and employment termination afterward. The Employment and Labour Relations Court took two years to handle her case after she filed her suit for unfair termination but offered limited compensation. The Employment Act, 2007 Section 46(h) forbids workers to lose their job for reporting misconduct yet authorities show minimal progress in implementing this protection.[24]

Whistleblower reports face resistance from institutions, which show reluctance to take action on received whistleblower complaints. Financial companies hesitate to display their internal weaknesses while regulators frequently encounter resource constraints, which hinder their swift response ability. Whistleblower reports involving complicated financial deals with hidden insider trading need technical analysis and investigative resources, which current enforcement agencies typically do not possess. The process of executing follow-up action frequently encounters setbacks due to institutional capture together with political interference.

To enhance enforcement outcomes, Kenya should invest in:

i. Dedicated whistleblower investigation units within regulatory agencies.
ii. Inter-agency collaboration protocols to pool expertise and resources.
iii. Legal support mechanisms to assist whistleblowers facing retaliation.
iv. Expedited judicial processes for whistleblower-related litigation.

Comparative Analysis with International Best Practices

Examining whistleblower protection systems worldwide particularly in the United States, European Union and specific African nations like South Africa will help structure better reforms for Kenya.

The SEC Whistleblower Program under Section 922 received its foundation through the Dodd-Frank Wall Street Reform and Consumer Protection Act, which was enacted in 2010 within the United States. Under the program, whistleblowers can use legal counsel for anonymous reporting which offers financial rewards between 10% to 30% of monetary sanctions exceeding $1 million.[25] The program has generated more than $1 billion in payouts while recovering significant monetary sanctions since its founding thus proving that financial rewards with independent institutions yield excellent results.

The European Union passed Directive (EU) 2019/1937 on whistleblower protection that compels member states to set up protected reporting systems to protect workers from retaliation while requiring prompt follow-up action in no more than three months. The framework demonstrates importance because it extends to both private and public sectors with binding legal requirements.[26]

Through the Protected Disclosures Act, 2000, South African employees preserve their rights to report unlawful or irregular employee conduct without fear of reprisal.

[24]Employment Act, No. 11 of 2007, Section 46(h) (Kenya).
[26]Securities and Exchange Commission (U.S.), *Office of the Whistleblower*, https://www.sec.gov/whistleblower
[26]Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

Although this legislation exists, there has been an inconsistent enforcement pattern because it lacks financial rewards along with a central reporting platform. South Africa maintains independent oversight bodies like the Public Protector to demonstrate how organizational self-governance can be achieved.[27]

Lessons for Kenya include:

i. A stand-alone whistleblower office should acquire authority for conducting investigations followed by referrals.
ii. A system of financial bonuses should be established based on the actual recoveries achieved.
iii. Every institution must have protected and anonymous reporting channels according to legal requirements.
iv. The institution requires structured deadlines for all report submissions as well as required response protocols.

Sector-Specific Challenges and Considerations

The protection system must recognize distinct features that exist between different financial sector segments of Kenya.

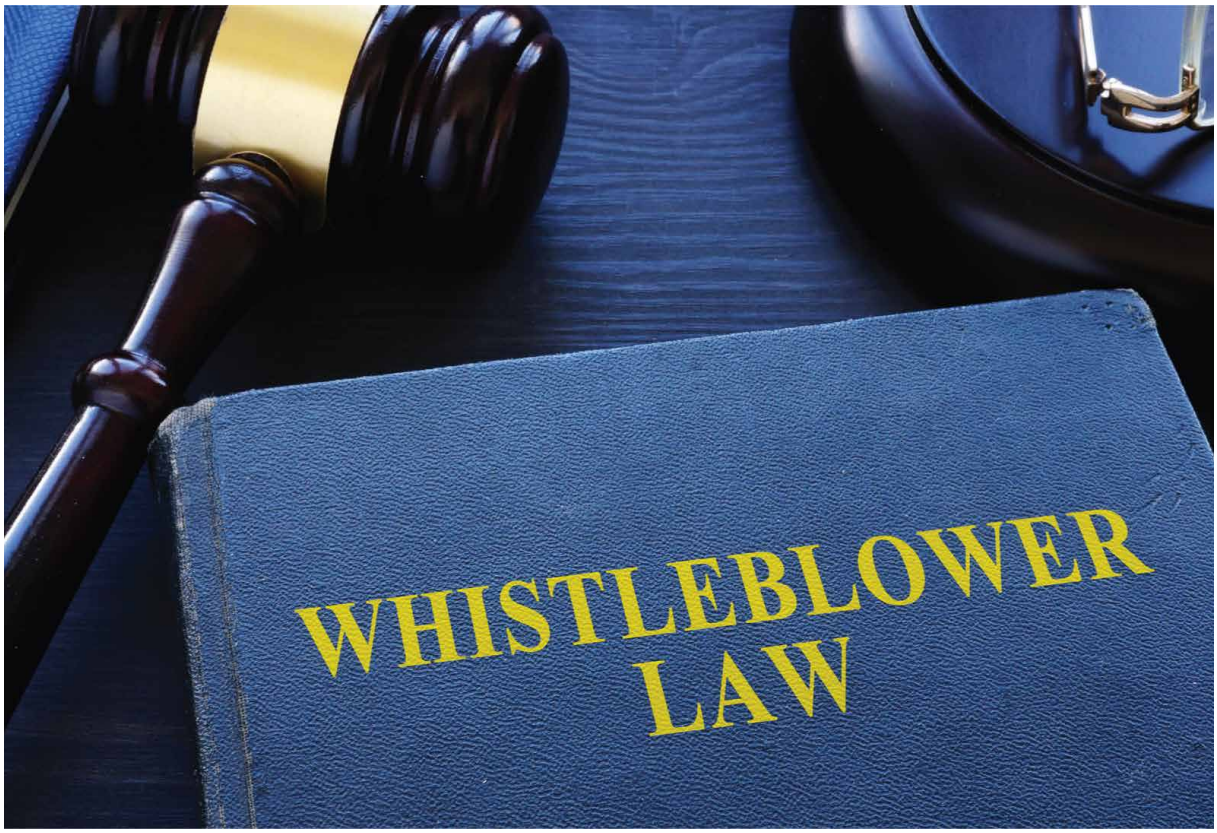
Organizational conduct within the banking sector is primarily influenced by secrecy along with conservatism and restrained by reputational factors. Banking institutions exhibit caution regarding reports, which might endanger faith in deposits or draw regulatory intervention. Organizations typically conceal evidence when the responsible officials have accumulated advanced positions within the company. Protector programs for whistle-blowers are absent from the central legislation and prudential guidelines of the Banking Act and CBK which leaves internal reporting procedures to rely on arbitrary human resource management policies.[28]

The complex long-term difficult-to-understand insurance products enable fraud in this industry sector. Insurance organizations modify premium costs and conduct extended claims handling with poor transparency about their liabilities. Staff members who report irregularities in this field face complex technical issues because the regulatory system established by the IRA does not provide any specific guidance or protection.[29]

The capital markets contain most financial violations, which occur inside licensed intermediaries and listed companies through methods like front running and price manipulation and insider trading. The detection of such fraudulent activities depends on testimonies from inside sources yet these workers typically face no security or receive no rewards for their disclosures. Under the Capital Markets Act (Cap. 485A), the CMA can investigate misconduct yet its enforcement discretion remains high and the institution receives insufficient funding.

Both Fintech companies and SACCOs exist under partially distinct regulatory environments. The lack of clear whistleblower guidance within the SACCO Societies Act and associated SASRA regulations exacerbates this. Internal committees at SACCOs frequently serve as whistleblowing protocols though these committees often display politicized or conflicting behavior. Fintech companies fall under multiple regulatory frameworks that depend on their service models including mobile money and digital lending leading to regulatory uncertainty and exploitation.[30]

[27]Protected Disclosures Act 26 of 2000 (South Africa).
[28]Banking Act, Cap. 488 (Laws of Kenya); CBK Prudential Guidelines (2013).
[29]Insurance Act, Cap. 487 (Laws of Kenya).
[30]Sacco Societies Act, No. 14 of 2008 (Kenya).



Kenya's legal framework for whistleblower protection is evolving, with existing laws providing partial safeguards and a pending comprehensive bill aiming to strengthen protections.

The implementation of sector-specific whistleblower protocols must go directly into sectoral laws or regulations to provide unique approaches for addressing particular risks together with cultural factors in each field.

Areas for Reform and Policy Recommendations

Enact a Standalone Whistleblower Protection Law

Parliament should speed up the law making processes to establish an independent whistleblower protection law, which consolidates protections from existing laws regarding the Bribery Act and Leadership and Integrity Act. All protections from the Bribery Act, Leadership, and Integrity Act together with sectoral laws must be concentrated into one unified law. The new law should identify what qualifies as a protected disclosure and establish retaliation protection measures while offering financial benefits and procedural standards.

Establish a Centralized Online Reporting Platform

The establishment of a single online investigation framework should be part of the reform initiatives. The Capital Markets Authority (CMA) has established its own system yet other regulators including CBK, IRA, SASRA, and RBA remain behind in this development. A combined secure platform would guarantee confidential reporting and accelerate compliance procedures for the entire financial sector throughout other regulators.

Establish an Independent Whistleblower Protection Authority

The creation of a self-governing Whistleblower Protection Authority should be established as part of legal framework. A new Whistleblower Protection Authority

should operate like a European Ombudsman or an American Office of the Whistleblower through which reports would be managed while identities stay protected and retaliation investigations would take place followed by potential referrals to criminal or regulatory enforcement platforms.

Introduce Financial Incentives

Financial rewards to whistleblowers that amount to 5–10% of confiscated funds will result in major increases to reporting instances especially when these cases involve substantial financial gains. The financial incentives need to become part of the law and their funding must originate from imposed regulatory fines.

Mandate Whistleblower Frameworks in All Financial Institutions

All CBK-licensed banks, CMA-regulated intermediaries, insurance companies, SACCOs, and fintech firms should be legally required to:

i. Develop internal policies;
ii. Offer anonymous channels;
iii. Train employees on whistleblower rights.

Promote Public Awareness and Sector-Wide Culture Change

Regulators should launch periodic campaigns to inform stakeholders about reporting mechanisms and their protections under law. Whistleblowing should be framed as patriotic and ethical.

Streamline Judicial Redress

Establish fast-track courts or tribunals for whistleblower retaliation and dismissal cases, ensuring timely and adequate compensation.

Conclusion

As Transparency International notes, the absence of a comprehensive whistleblower protection law not only discourages potential whistleblowers from coming forward, but also perpetuates a culture of silence and impunity.[31] Admittedly, there have been advancements and efforts in acknowledging and protecting whistleblowing internationally and even in Kenya; unfortunately, our legal framework is not sufficiently comprehensive, and to add salt to the injury, enforcement of the current policies, albeit scanty, remains weak. The current whistleblower protection structure in Kenya shows good intent through various legislation yet stockpiles insufficient protection to handle modern financial sector complexities and digitization and interconnected risks. Internal reporting systems remain fragmented while inadequate protection laws and distrust by institutions alongside no financial rewards serve as obstacles that block whistleblowing and enable wrong behaviors to continue. The time demands reform of whistleblower protection because Kenya currently makes minimal use of these vital players fighting financial crime. Kenya should develop a financial system integrity structure by learning from worldwide best practices standards but adapting them to match domestic needs to defend truth-tellers and punish offenders. The necessary protection of whistleblowers becomes apparent because all nations that seek transparent governance and trustworthy financial systems require this measure.

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[31] Transparency International Kenya

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Echoes of repression: Navigating the constitutional crossroads of Artistic freedom, youth expression, and state power in the 'Echoes of War' Drama

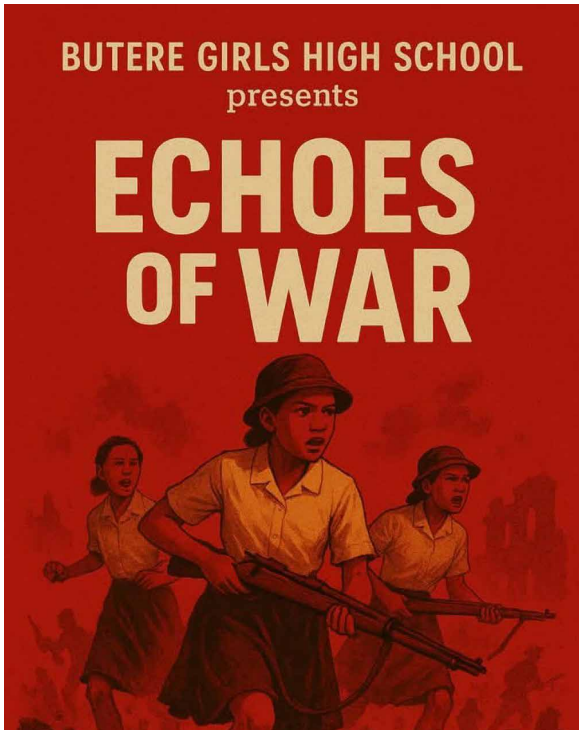
When art provokes the state, who protects the stage?

By Elvis Presley Were

Introduction

In April 2025, the national consciousness of Kenya was jolted by a high school play—*Echoes of War*—a socio-political dramatization staged by Butere Girls High School. The play dared to critique power, demand justice, and amplify youth agency through metaphor and performance. What followed was nothing short of constitutional theatre: censorship by state authorities, public outcry, a courtroom showdown, and eventual vindication—became a rare convergence of art, law, youth activism, and the politics of fear. It utilized theatrical metaphor to critique authoritarianism, youth unemployment, and digital resistance, resonating strongly with the Gen Z demographic. The state's attempt to silence it through administrative fiat reflects deeper anxieties about narrative control and ideological sovereignty in educational spaces.

This article delves deeply into the legal and societal implications of the incident through the lens of Constitutional Law, Administrative Law, and Human Rights, and grounded in Kenya's domestic jurisprudence and its international obligations. It argues



that the treatment of the play underscores systemic discomfort with youth-led dissent and the symbolic power of art and youth activism in defense of expressive freedoms and participatory democracy.

1. The Stage that shook the state: Contextual prelude

Echoes of War is a fictional portrayal of a dystopian African republic plagued by authoritarianism, inequality, and civic disillusionment. Yet beneath the dramaturgy lies a sharp indictment of contemporary governance in Kenya. The play did not

The Kenya National Drama and Film Festival (KNDF) is one of the country's most prominent cultural and educational events. It showcases creative talent from schools, colleges, and universities across Kenya through theatre, film, music, and dance, all while promoting education, cultural expression, and national unity.

name names. It did not point fingers. But like good allegory, it drew blood. It told of an unnamed nation governed by elites clinging to power while silencing the voices of the youth.[1] Its protagonists were Gen Z characters who used social media, poetry, and protest to reclaim their stolen future. To the seasoned eye, it was fiction. To the politically anxious, it was sedition in school uniform.

Through its central Gen Z characters, who mobilize digitally to demand justice and reform, the play confronts issues such as youth unemployment, systemic exclusion, state violence, and the commodification of democracy. This was no accident. Its subversive genius lies not just in what it says—but who says it: high school students.[2] In a society where student voices are trivialized, their audacity to stage critique amounted to insurgency, well, at least to the powers that be.

The symbolism was surgical. The stage was set not just for a performance, but for a confrontation with authority. And the state responded accordingly!

2. The invisible hand: Censorship without signature

Following resounding acclaim at county and regional levels, *Echoes of War* was tipped to be a national winner. But days before the National Drama Festival, a stunning development occurred: the school's drama club was dissolved. What makes this incident remarkable is not merely the censorship, but the process—or lack thereof—by which it was effected. No formal notice was issued. The affected students

[1]Stephen Letoo, "'Echoes of War': Butere Girls' bold critique of governance and generational divide" (Citizen Digital, 10 April 2025) https://www.citizen.digital/news/echoes-of-war-butere-girls-bold-critique-of-governance-and-generational-divide-n360832 accessed 16 April 2025.
[2]Rene Otinga, 'Echoes of War: Inside Butere Girls Play Written by Malala' (Kenyans.co.ke, 10 April 2025) https://www.kenyans.co.ke/news/110903-echoes-war-inside-butere-girls-play-written-malala accessed 16 April 2025.

were not heard. In silencing the play without cause or hearing, the Ministry of Education acted ultra vires—and in breach of the students' constitutional rights. The action was devoid of justification or procedural safeguards, set out under Article 47 of the Constitution of Kenya which guarantees the right to fair administrative action [3], as also held in Republic v Principal Secretary, Ministry of Interior and Coordination of National Government Ex parte Salim Awadh Salim [2018] eKLR, which buttressed that administrative decisions must not only be lawful but also procedurally fair, reasonable, and expeditious.[4] Students were recalled. The play was axed. No reasons were offered. No hearing granted. Sources whispered that orders had come from "above"—a euphemism in Kenya's political lexicon for the Executive. The Ministry of Education remained evasive, and the Kenya National Drama and Film Festival Committee cited logistical realignments. But the real rationale lay elsewhere: political discomfort.

This kind of censorship—covert, unacknowledged, and without procedural fairness—is the most dangerous kind. It masks suppression as bureaucratic realignment, thereby avoiding public scrutiny. It exemplifies the kind of informal coercion that legal theorists term "soft censorship": repression not through outright bans, but through opaque intimidation.

The consequences were devastating students who had spent months preparing were dismissed overnight. Costumes were shelved. Dialogue silenced. A generation's creative labor rendered invisible.

This moment exemplifies what legal scholar Bry Willis calls the "invisible violence of bureaucracy"—where denial of rights is not through batons, but through silence, erasure, and quiet displacement.[5]

3. Enter the Courtroom: Law as the new theatre

Outraged by the silencing, Anifa Mango, a former Butere Girls student turned advocate, filed a constitutional petition under certificate of urgency. The case, *Anifa Mango v Principal Secretary, Ministry of Education & Others*, was heard before Justice Wilfrida Okwany in the High Court of Kenya at Nyamira.[6]

The reliefs sought included:

- A declaration that the students' right to freedom of expression (Article 33) had been violated;
- A declaration that the administrative actions were unlawful under Article 47;
- An order compelling the Ministry to reinstate the students to the national competition.

The courtroom became the second stage on which *Echoes of War* was performed—not by actors, but by advocates. Justice Okwany delivered a scathing judgment, stating:

"***Where students raise their voices through theatre, the state must listen—not with suspicion but with constitutional fidelity.***"

Justice Wilfrida Okwany emphasized that the state cannot use administrative

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[3] *Constitution of Kenya 2010*, art 47
See Clause (2) provides that if a right or fundamental freedom is likely to be adversely affected by administrative action, the person has the right to be given written reasons.
[4] *[2018] KEHC 8265 (KLR)*
[5] Bry Willis, 'The Violence of Bureaucracy: Part I' (LinkedIn, 25 May 2024) https://www.linkedin.com/pulse/violence-bureaucracy-part-i-bry-willis-egvwe/ accessed 15 April 2025.
[6] *Anifa Mango v Mrs. Jennipher Omondi, Principal Butere Girls High School & Others*, Constitutional Petition No. E006 of 2025 (High Court at Kisii, 3 April 2025) https://khrc.or.ke/wp-content/uploads/2025/04/4TH-APRIL-BUTERE-GIRLS-COURT-DOCS-1.pdf accessed 16 April 2025

machinery to unlawfully restrict the rights of students under the pretense of order or discipline.

The Court found that:

- The administrative act lacked legal justification and contravened Article 47 of the Constitution as well as the Fair Administrative Action Act by denying the students fair administrative procedures;
- The disbandment of the drama team amounted to a constructive gag order;
- The students' right to participation under Article 55 was unlawfully infringed.
- There was a manifest violation of Article 33 of the Constitution, which protects freedom of expression, including artistic and academic freedom;[7]
- Undermined Article 55, which obliges the state to ensure youth participation in cultural and civic life.

Courts have emphasized that freedom of expression—especially in political and artistic contexts—is the backbone of any constitutional democracy.[8]

The judgment was not just a win for the girls. It was a jurisprudential signal: the Constitution walks in classrooms too.

4. Educational policy cannot override foundational freedoms: The onstitution as a script for liberation

Article 33(1) of the Constitution affirms every person's right to freedom of expression, which includes "freedom to seek, receive or impart information or ideas." 33(1)(b) explicitly includes artistic creativity within this ambit.[9] The state often attempts to draw a boundary between political expression and art. It does not exist in a vacuum. Its scope has been clarified by judicial pronouncements, such as Geoffrey Andare v Attorney General [2016] eKLR, which held that expression is not merely about words—it is about symbolic acts, performances, and critique. There can be no democracy without dissent, and no genuine dissent without the right to express it through diverse mediums.[10]

In *Echoes of War*, students employed Brechtian devices—breaking the fourth wall, using irony, and staging performative protest. The message was potent: youth are not the future; they are the present, denied a voice. To have treated this as a security threat is to misread the Constitution and trivialize the intelligence of the citizenry. The state's reaction betrayed a fear not of the content, but of its resonance.

The banning of *Echoes of War* thus exemplifies a misreading—or intentional erasure—of the constitutional scope of artistic speech. The play's metaphoric critique of governance was legitimate expression, not incitement.

It echoes Justice Louis Brandeis' classic dictum in *Whitney v California* (US Supreme Court, 1927):

"***If there be time to expose through discussion the falsehood and fallacies… the remedy is more speech, not enforced silence.***"

The constitutional remedy for disquieting art is not suppression—it is conversation.

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[7]*Constitution of Kenya 2010*, art 33. This Article is central in debates involving artistic and political expression, especially in education, media, and public discourse.
[8]See Demas Kiprono, 'Court Ruling Recognises Freedom Of Expression As An Instrumental Right' (ICJ Kenya, 29 March 2024) https://icj-kenya.org/news/court-ruling-recognises-freedom-of-expression-as-an-instrumental-right/ accessed 20 April 2025.
[9]*Constitution of Kenya 2010*, art 33.
[10][2016] KEHC 7592 (KLR)

5. Administrative Overreach and the Collapse of Procedural Legality

Administrative law serves as a check on discretionary power. It ensures that decisions affecting rights are made fairly, rationally, and transparently. Article 47, reinforced by the Fair Administrative Action Act, 2015, requires that public bodies provide written reasons for adverse actions and afford affected persons the opportunity to be heard.

In democratic governance therefore, there is a requirement, under the doctrine of legality, which was further buttressed in Noor Maalim Hussein & 4 Others V Minister Of State For Planning, National Development And Vision 2030 & 2 Others [2012] Eklr that state power must be exercised within established legal bounds.[11] This principle is embedded in Article 47 of the Constitution and operationalized by the Fair Administrative Action Act, 2015. Yet, in the Butere Girls incident, administrative authority morphed into an instrument of repression. It lacked legal form, procedural integrity, and violated the principle of audi alteram partem—the right to be heard. The requirement to provide adequate reasons for administrative action is significant to public administration in two ways. First, it illustrates that proper consideration of the matter took place. Second, adequate reasons help in setting standards that may serve as guidelines to be applied in treating similar administrative action in the future, thus enhancing consistency in the decision-making process.[12]

In *Mumo Matemu v Trusted Society of Human Rights Alliance [2013] eKLR*, the Court of Appeal warned against public decisions made without substantive reasoning or procedural fairness, calling such decisions an affront to the rule of law. Similarly, in *Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party) (Petition E016 of 2023) [2024] KEHC 2890 (KLR) (18 March 2024) (Judgment)*, the High Court criticized covert state repression as unconstitutional.[13]

The Ministry of Education's action—carried out without notice, hearing, or even a written directive—embodies procedural injustice. The affected students were neither informed of the reasons behind the ban nor given an opportunity to respond. This violated their right to be heard, a cardinal principle enshrined in both constitutional law and common law. The right to be heard is not a privilege to be accorded at the pleasure of administrators, but a right guaranteed by the Constitution. Any administrator granted statutory authority to make decisions or take actions that may negatively impact an individual or group must remain mindful of Sections 4 and 5 of the Fair Administrative Action Act (FAAA). In particular, they are required to provide prior notice of the intended action, allow the affected party or parties to present their views, take all relevant factors into account and offer clear reasons for the decision made.[14]

The state's failure to provide justifiable cause, even after litigation began, highlights a concerning trend: executive fiat replacing lawful procedure. The disbandment of the drama team and substitution of the school was not just an internal matter—it was an unlawful and unconstitutional administrative act. This raises a broader

[11] [2012] KEHC 4225 (KLR)
[12] Muigana & 16 others v County Government of Nyandarua (Petition E007 of 2023) [2024] KEHC 960 (KLR) (8 February 2024) (Judgment)
[13] Katiba Institute & 8 others v Director of Public Prosecutions & 2 others; Ayika (Interested Party) (Petition E016 of 2023) [2024] KEHC 2890 (KLR) (18 March 2024) (Judgment)
[14] Republic v National Cohesion and Integration Commission; Chama Cha Mawakili Limited (Exparte) (Judicial Review Application E057 of 2022) [2022] KEHC 10206 (KLR) (Judicial Review) (14 July 2022) (Judgment)

Youth rights and the civic role of education are deeply connected in fostering democracy, active citizenship, and social justice. Education empowers young people not only to know their rights but also to participate meaningfully in shaping society.

constitutional question: can state convenience override individual rights in the name of order? The High Court answered with resolute clarity—no.

6. Youth rights and the civic role of education

Article 55 of the Constitution imposes an affirmative duty on the state to ensure the youth access opportunities to associate, participate in political, social, and economic life, and be represented in decision-making bodies.[15] However, this provision is often viewed aspirationally, rather than as enforceable law.

The Butere Girls controversy forced the judiciary to give teeth to Article 55. The students were not just acting—they were participating in national discourse, engaging in the sociopolitical education that institutions are constitutionally obligated to promote.

Courts have increasingly recognized the importance of educational spaces in fostering democratic values. It plays a vital role in Kenya's development and governance landscape, particularly because the Constitution of Kenya, 2010, recognizes public participation as a key national value and foundational principle of governance. In *Okiya Omtatah Okoiti v Communication Authority of Kenya & 8 others [2018] eKLR* the Court emphasized that civic education, especially among youth, is essential to constitutional implementation.[16] The decision to bar them undermined this participatory intent. It denied the girls not just a platform, but a constitutional identity—as youth citizens entitled to provoke, reflect, and dissent. It reflected

[15]See Article 55 that affirms the constitutional recognition of youth as a vulnerable yet vital group, central to Kenya's democratic and developmental agenda. It obliges public authorities to create enabling environments for youth empowerment and inclusion.
[16][2018] KEHC 7513 (KLR)

International Law: A Mirror and a Mandate" reflects the dual function of international law in global affairs. It operates both as a mirror, reflecting the values, norms, and power dynamics of the international community, and as a mandate, setting binding rules and aspirational standards that guide state behavior and shape international relations.

a deeper cultural discomfort with youth autonomy and critical thinking. As the South African Constitutional Court observed in *Minister of Education v Harris [2001] ZACC 25:*

"***Democracy demands informed participation. Education is its foundation, but the freedom to express is its fuel.***"[17]

In Kenya, this fuel was nearly extinguished—until the courts intervened.

7. International Law: A Mirror and a Mandate

Kenya is a signatory to numerous international treaties that buttress domestic rights. Under Article 2(6) of the Constitution, these instruments form part of the law of the land.[18]

- ICCPR, Article 19(2): "*Everyone shall have the right to freedom of expression... including freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.*"[19]
- ICESCR, Article 15: States must recognize the right of everyone to take part in cultural life.[20]
- African Charter on Human and Peoples' Rights, Article 9: Every individual shall have the right to receive information and to express and disseminate opinions.[21]

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[15]See Article 55 that affirms the constitutional recognition of youth as a vulnerable yet vital group, central to Kenya's democratic and developmental agenda. It obliges public authorities to create enabling environments for youth empowerment and inclusion.
[16][2018] KEHC 7513 (KLR)
[17]Minister of Education v Doreen Harris (https://www.saflii.org/za/cases/ZACC/2001/25media.pdf)
[18]Article 2(6) states: *"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."*
[19]*International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 19(2). *"Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."*
[20]*International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 15- This article affirms the cultural rights of individuals, recognizing the vital importance of cultural participation, creative expression, and the protection of intellectual and artistic contributions.
[21]*African Charter on Human and Peoples' Rights* (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, art 9.

Butere Girls High School is a renowned national public secondary school for girls located in Butere, Kakamega County, in western Kenya. The school has a long and distinguished history in academics, leadership, and the arts, making it one of Kenya's most iconic educational institutions for young women.

By banning the play without lawful justification, Kenya flouted these provisions. The United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has repeatedly stressed that artistic expression must be treated with the same constitutional sanctity as journalistic or political speech.

The Butere Girls decision reinforces Kenya's commitment to international norms. It represents a rare moment where global human rights law was not just cited, but actualized.

8. Conclusion: From the stage to the statute books

Echoes of War was not just a play—it was a constitutional rehearsal. It dramatized the promise and peril of youth voice in Kenya's fragile democracy. In banning it, the state revealed a disquieting instinct to suppress dissent. In litigating it, the students reclaimed their rights. And in ruling on it, the courts renewed the soul of the Constitution.

This episode demands more than applause. It demands reform:

- Education policy must embed rights-based training for administrators;
- Legal aid must be extended to students whose freedoms are infringed;
- Creative spaces must be declared constitutionally protected forums.

Let no school principal again be asked to choose between loyalty to the Ministry and fidelity to the Constitution. Let no student ever again be punished for telling the truth artistically. Let *Echoes of War* remind us that sometimes, the strongest arguments are made in monologue—not pleadings. Because when students speak, the Constitution must listen.

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A LEGACY OF PEACE

The Legacy and memory of Pope Francis: A humanity-centered Papacy

By Ayaga Max Liambilah

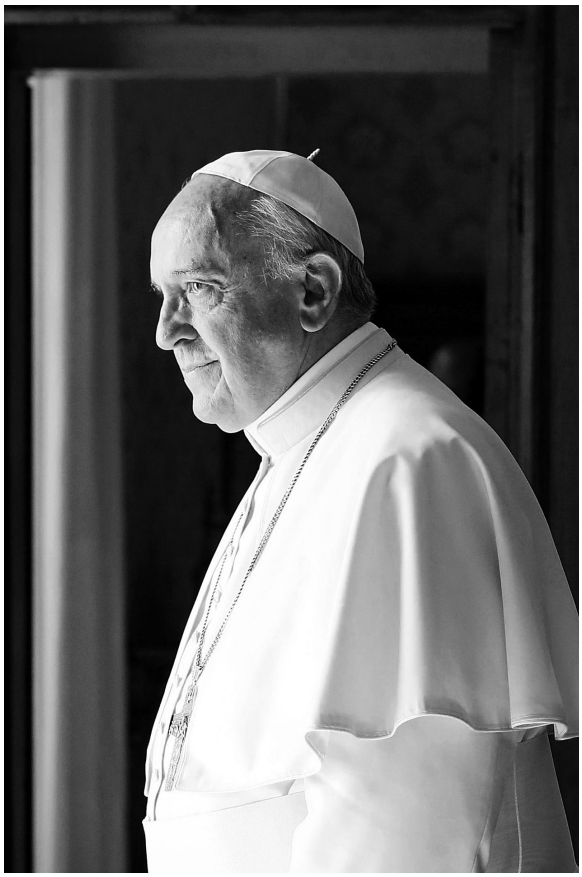
"Human rights are not only violated by terrorism, repression or assassination, but also by unfair economic structures that create huge inequalities."
(From the 2015 speech to the United Nations)

When Jorge Mario Bergoglio stepped out onto the balcony of St. Peter's Basilica on the evening of March 13, 2013, few outside Argentina knew much about him. He wore a simple white cassock, no gilded cape, no bejeweled cross, no red shoes. His voice was soft, almost hesitant, as he leaned into the microphone:

"***Buona sera***," he said simply — Good evening.

He did not bless the crowd immediately, as tradition prescribed. Instead, he bowed his head and asked the millions watching across the world to pray for him first. In that small but radical moment, the world glimpsed what would define Pope Francis: a break from imperial distance toward human closeness, a quiet revolutionary who would seek to change the Church not by tearing it down, but by recalling it to its simplest, most ancient truths.

On that evening, the College of Cardinals elected Jorge Mario Bergoglio as the



The Late Pope Francis

266th pope of the Catholic Church. Few anticipated that this Jesuit from Buenos Aires—known primarily for his pastoral simplicity and theological conservatism—would emerge as one of the most transformative figures in the contemporary Church. Pope Francis has, over the course of his papacy, reoriented the Church's posture toward mercy, dialogue, and service, while confronting enduring internal crises and redefining the Church's global diplomatic role.

I. An Unlikely Pope

Jorge Mario Bergoglio's election was, by most accounts, unexpected. Born in 1936 in a modest Buenos Aires neighborhood to Italian immigrant parents, he grew up amid the smells of his mother's cooking and the rumble of factory life. He trained briefly as a chemist before feeling the pull of the priesthood. Entering the Jesuits—a Catholic religious order known for its intellectual rigor and missionary zeal—he rose quickly, becoming provincial superior of the Argentine Jesuits at just 36.

Yet his tenure was controversial. During Argentina's brutal "Dirty War" in the 1970s, Bergoglio was accused by some of not doing enough to protect priests targeted by the regime. Later, he would reflect bitterly on his leadership at that time, calling himself "authoritarian" and "self-absorbed." That honesty, rare among high-ranking clerics, foreshadowed the kind of pope he would become: introspective, reluctant, willing to admit mistakes publicly.

Before the 2013 conclave, few cardinals saw him as the front-runner. His age—76—and his peripheral origin worked against him. But it was precisely because he stood outside the traditional power centers of Rome that many saw in him a chance for the Church to reconnect with the forgotten and the marginalized. When the votes were counted, and the white smoke rose, Jorge Mario Bergoglio became the first Jesuit pope, the first pope from the Americas, and the first to choose the name Francis, after St. Francis of Assisi—the poor man of God who embraced lepers and sang to the sun and moon.

II. The People's Pope

Francis refused to live in the Apostolic Palace. Instead, he chose a modest suite at the Casa Santa Marta guesthouse, eating

in the common dining hall with Vatican employees and guests. This was not just symbolic. It reflected a deep reorientation of the papacy toward service rather than sovereignty. Unlike his predecessors who maintained a regal distance, Francis disarmed the Vatican's rigid hierarchies by embodying the simplicity he preached.

Economically, Francis's lifestyle was a direct critique of excess — not just within the Church but globally. He consistently condemned the "idolatry of money" and the "economy of exclusion," famously coining the phrase "this economy kills." His apostolic exhortation *Evangelii Gaudium* (2013) was a manifesto against economic injustice. Unlike abstract theological documents, it read more like an activist's call to conscience. He argued that while economic systems serve profits, they often crush human dignity.

Francis's memory will forever include images of him washing the feet of Muslim prisoners, embracing disfigured men in Vatican Square, visiting refugee camps, and choosing to travel to marginalized countries ignored by global superpowers — South Sudan, Myanmar, the Central African Republic. This intentional outreach expanded the geographic and emotional boundaries of Catholic compassion.

His visit to Kenya in November 2015 captured the spirit of his people-centred global ministry. Arriving to exuberant crowds in Nairobi, he immediately departed from script. Speaking before a packed University of Nairobi ground, he thundered against corruption, calling it "a way of death" and likening it to sugar: sweet but ultimately destructive.

In Kangemi, one of Nairobi's poorest slums, Francis discarded the formal speeches and spoke directly to residents:

"*I am here because I want you to know that your joys and hopes, your difficulties and sorrows, are not indifferent to me,*" he said. He condemned the "new forms of colonialism" that leave the poor to rot in slums while the wealthy build gleaming towers nearby. The scene of a white-robed pope weaving through the narrow muddy paths of Kangemi, blessing children and embracing elderly women, remains etched in the memory of many Kenyans. President Uhuru Kenyatta called the visit "*a historic call to conscience*," while Raila Odinga, then opposition leader, praised Francis as "*a pope for the people*.

Critically, his simplicity wasn't naive idealism. Francis understood power. He chose symbolic acts with political weight, knowing they would reverberate through a deeply media-saturated age. His simplicity was a form of strategic pastoral leadership: not a retreat from power, but its redirection toward service. This will be an enduring part of his legacy: a pope who reimagined authority not as domination, but as proximity to suffering.

Even in death, Pope Francis bore witness to the ideals of a commoner— humility and simplicity that had shaped every aspect of his life and papacy. In his will, he asked for a simple wooden coffin, eschewing the layers of precious metals and elaborate ornamentation that had often accompanied papal burials in centuries past. He insisted that there be no golden trappings, no excessive public display, and no extravagant funeral rites. True to his wishes, after a modest and prayerful funeral Mass, his body was placed in a plain wooden casket and buried outside the Vatican, in a simple grave rather than within the grand crypts of St. Peter's Basilica where most of his predecessors lie. This final act was not incidental; it was a deliberate and eloquent testimony to the message he had preached throughout his life—that greatness is not found in earthly glory but in the embrace of humility, service, and total dependence on the mercy of God. Even in his last act, Francis rejected the allure of privilege, reminding the Church and the world that

true leadership lies in poverty of spirit, not in honors or monuments.

III. Moral Leadership in a Time of Crisis

Pope Francis's papacy coincided with an era of profound crises: the refugee catastrophe, rising nationalism, climate collapse, sexual abuse scandals within the Church, and a deepening global inequality. His response to each was marked by a consistent ethical compass centered on human dignity. Perhaps nowhere was this more visible than in his approach to the migration crisis. While many Western leaders closed their borders, Francis opened his arms. His 2016 visit to the Greek island of Lesbos, where he took twelve Muslim refugees back to Rome aboard the papal plane, was among the most radical gestures of solidarity by a global leader. In homilies and speeches, he condemned what he called the "globalization of indifference." For Francis, the stranger was not a threat, but Christ himself.

Francis also brought the environment into the heart of Catholic teaching with *Laudato Si'* (2015). More than just a document about nature, it framed ecological degradation as a moral failure — a sin against the poor and future generations. He used theological, scientific, and social arguments to emphasize "integral ecology," connecting environmental harm to economic and social injustice. No previous pope had gone so far in presenting climate change as a moral crisis, and Francis succeeded in making it an issue that Catholics — and indeed all people of goodwill — had to grapple with. In the Laudato Si' , Francis addressed the earth itself—*"Sister Earth, who now cries out to us because of the harm we have inflicted on her*

by our irresponsible use." The encyclical was a tour de force: blending theology, science, economics, and ethics. He did not merely urge recycling or greener technologies; he attacked the very economic paradigms of consumerism and profit-at-all-costs capitalism. "*There can be no renewal of our relationship with nature without a renewal of humanity itself,*" he warned.

Environmentalists worldwide hailed the encyclical. Naomi Klein, a secular Jewish climate activist, called it "*one of the most important documents of our time*." World leaders—from France's François Hollande to Barack Obama—cited it during the critical Paris Climate Accords negotiations. In Fratelli Tutti, issued amid a raging pandemic, Francis expanded his vision. He condemned populism, nationalism, racism, and economic exclusion. True peace, he argued, could only come through "*social friendship*"—a radical commitment to care for strangers as for kin.

At the same time, Francis faced internal storms. The sexual abuse crisis, which predated his papacy, demanded immediate and painful action. His initial responses were inconsistent, leading to accusations of negligence, particularly regarding clerical abuse in Chile. Yet over time, he shifted, acknowledging systemic failures in Church leadership and implementing measures like the abolition of the "pontifical secret" for abuse cases and creating global guidelines for bishops' accountability. In 2019, following revelations of episcopal misconduct, Francis convened a landmark summit on child protection at the Vatican, gathering bishops from around the world. The summit culminated in the issuance of *Vos Estis Lux Mundi*, a motu proprio establishing procedural norms for investigating accusations against bishops and religious superiors. The document introduced mandatory reporting requirements and created mechanisms for holding ecclesiastical authorities accountable.

Francis understood that credibility comes not from perfection but from repentance. His approach to these crises — humble, faltering at times, yet ultimately courageous — will likely define his moral legacy: not as a pope who solved every problem, but one who dared to face them with honesty and perseverance.

IV. A Church That Listens

One of Pope Francis's most transformative contributions has been his push for synodality — a term that might sound technical but under Francis became deeply pastoral. He envisioned a Church that listens, walks together, and involves all its members in discerning God's will. Rather than reinforcing a top-down model of governance, Francis opened wide the gates of consultation. Under his leadership, synods — especially on the family, youth, and the Amazon — were no longer mere formalities. They became arenas for real debate, disagreement, and discernment. The 2019 Synod on the Amazon, for example, brought indigenous leaders into the Vatican, something unthinkable under previous pontificates.

Francis's vision of the Church includes women, laypeople, and the marginalized as vital participants. Although he stopped short of ordaining women priests — staying within the traditional bounds — he opened roles to women in Vatican offices previously reserved for clergy and instituted the role of "catechist" and "lector" as ministries open to laypeople by right, not exception.

In terms of LGBTQ+ issues, Francis's impact is more nuanced. His famous phrase "*Who am I to judge?*" in 2013, referring to gay priests, reverberated globally. While he maintained the Church's teachings on marriage, he consistently called for pastoral sensitivity and respect for LGBTQ+ individuals. In some ways, he shifted the conversation from condemnation to accompaniment. His endorsement of

civil unions for same-sex couples, albeit as a personal opinion rather than official doctrine, marked a dramatic pastoral pivot.

Yet Francis's push for inclusion was not universally applauded. Conservative factions within the Church accused him of doctrinal ambiguity and even heresy. Figures like Cardinal Raymond Burke became vocal critics. Still, Francis did not retreat. He often quoted the Church Fathers: "Realities are greater than ideas." His focus was on meeting people where they are, not fitting them into abstract categories.

In the long arc of history, this commitment to a "field hospital" Church — bruised, messy, open — will be seen as a radical recalibration. Francis will be remembered as the pope who dared to reimagine Catholicism not as a fortress, but as an open door.

V. A Legacy Beyond the Church

Pope Francis's influence extended far beyond Catholicism. He became a global moral authority in a world increasingly skeptical of institutions. His speeches to the U.S. Congress, the European Parliament, the United Nations, and interfaith gatherings were marked by a consistent defense of human rights, social justice, and peace.

His document *Fratelli Tutti* (2020) was a profound call for universal fraternity at a time of growing tribalism and division. Rooted in the parable of the Good Samaritan, it challenged the notion of walls, xenophobia, and nationalist self-interest. Francis proposed a world where politics serves the common good, where the poor are not afterthoughts, and where dialogue, not weapons, settles disputes.

Francis also made unprecedented moves in interreligious dialogue. His meeting with the Grand Imam of Al-Azhar, Ahmed el-Tayeb, in Abu Dhabi in 2019 culminated in the *Document on Human Fraternity*, advocating peace between religions and cultures. His journey to Iraq in 2021, defying security risks, symbolized his commitment to reconciliation even in war-torn lands.

Significantly, Francis redefined papal diplomacy. He engaged quietly but persistently in backchannel diplomacy in situations like the thaw between the United States and Cuba. He promoted dialogue in places like Venezuela, Myanmar, and South Sudan, embodying a diplomacy not rooted in state power but in the language of humanity.

His critics accused him of being too political, too leftist. But Francis would likely see such criticism as evidence that he was preaching the Gospel authentically — challenging both comfortable elites and ideologues alike.

VI. Conclusion

Ultimately, Francis's legacy will not be one of doctrine or institutional restructuring alone. It will be that of a spiritual leader who brought the Gospel into the mess and fractures of the 21st century. His memory will be of a pope who insisted — through tears, embraces, visits, and unguarded words — that the Church exists for the world's brokenness, not for its own preservation.

In the centuries to come, when historians write about this era, Pope Francis will not merely be remembered as the 266th successor of Peter. He will be remembered as a prophet who called the world back to its humanity.

Eternal rest grant unto him, O Lord,
And let perpetual light shine upon him.
May he rest in peace.

Amen.

Ayaga Max Liambilah is a third-year law student at the University of Nairobi and an Altar Server in the Roman Catholic church.

A VOICE FOR THE VOICELESS

I was a child soldier – here's what it'll take to protect young lives in conflict zones

PHOTO BY STEFANIE GLINSKI/AFP VIA GETTY IMAGES

11-year-old former child soldier poses with his handmade rifle during a release ceremony in South Sudan, 2018.

By Charles Wratto

The use of child soldiers is a profound human tragedy that continues to scar generations across the world. According to the United Nations, over the years, thousands of children, some as young as six years old, have been manipulated, indoctrinated and coerced into joining armed groups.

Many of these children have fought against peacekeeping troops in Liberia, Rwanda, Sierra Leone, the Democratic Republic of Congo and US-led coalition soldiers in Afghanistan, Iraq and Somalia. The devastating effect of this grave, yet persistent, tragedy extends beyond the individual child. It tears communities and families apart and leaves generations scarred with the trauma of war long after the guns fall silent.

International agreements like the Optional protocol on the involvement of children in armed conflict, the Paris principles and commitments, the Rome statute and the Cape Town principles have condemned the practice. They provided legal and practical pathways to stop the use of child soldiers.

Intervention campaigns like Child Soldiers International, the Children, Not Soldiers campaign, and the Kony 2012 campaign were launched to combat unlawful recruitment. They also raise awareness to protect child combatants in conflict regions.

The International Criminal Court has held trials and convicted warlords responsible for

the abduction and arming of children.

The United Nations has published a list to "shame" governments and non-state actors that enlist minors in their armies.

Despite these efforts, the problem persists as governments and insurgent groups recruit minors in various regions of the world.

One of the reasons may be that children's presence on the battlefield throws the training and ethics of professional soldiers off balance. Children are widely considered innocent, harmless, and deserving of care and protection. Harming them can cause severe emotional and psychological distress that conventional soldiers are ill-equipped to handle. Armed groups who use children can get a strategic advantage if they make adult soldiers feel guilt, terror, shame and cowardism.

As a researcher in peace, politics and conflict studies and a former child soldier in the Liberian civil war, I have centred my studies on children in armed conflict and how states respond to crises and conflict.

I am passionate about protecting children in conflict zones because I know what it means to experience violence at a very young age.

I also understand, from my own experience, what it means to return to a society that saw me as a dangerous and irredeemable person and to find purpose in a world that labelled people like me as a "lost generation".

Based on my personal experiences and interaction with child soldiers, I identify six ways society can help protect children in conflict zones. They are: cutting off arms sales to conflict regions; providing continuous education during conflict; providing life-saving essentials; working with local communities; listening to children's voices; and involving child soldiers in the implementation of disarmament and reintegration programmes.

Six ways to protect children in conflict zones

Cut arm sales to conflict regions

Armed groups often rely on the constant flow of small arms and light weapons to maintain their operations.

The availability of these weapons enables groups to enlarge their forces, often using vulnerable children. Stopping weapons sales would undermine the effectiveness of these groups.

If there are fewer arms, warlords will find it harder to lure children with false promises of protection and power. Warlords might have to create pathways for peace talks, and children could be demobilised.

Under Charles Taylor, Liberia was a regional hub for illicit weapons trade and child soldier recruitment. The UN arms embargo in 2001 limited Taylor's ability to resupply his troops, leading to his eventual exile and an end to the war in 2003. While an effective arms embargo may not end a war or child recruitment immediately, it can erode armed groups' combat ability, pressuring them to negotiate, collapse, or lose their grip over vulnerable children.

Provide life-saving essentials

In war-torn places, poverty and starvation sometimes push families to hand over their children to armed groups in exchange for food.

Given life-saving essentials such as food, shelter and medical care, families can be shielded from poverty. This will reduce voluntary enlistment.

Microfinance initiatives that support small businesses, and provision of vocational training programmes, can also lift families from poverty.

Continuous education during conflict

Governments and multilateral institutions must provide emergency education and train teachers and caregivers in camps for internally displaced people.

Being able to carry on with schooling in a safe environment can curb child recruitment and empower young people for the post-war reconstruction of their nations. Such sanctuaries should also include mobile counselling and trauma therapy centres where children can process their grief and experiences to rebuild trust.

Work with local communities and leaders

Governments, NGOs and policymakers must address existing grievances and empower local communities to assist in reintegrating former child soldiers. Reintegration involves not only children returning home but also ensuring communities are better prepared and equipped to welcome them.

Partnering with local communities can also strengthen awareness about the dangers of child (re) recruitment.

Ex-child soldiers as part of disarmament and reintegration

Governments and humanitarian agencies must include former child soldiers in the design and implementation of disarmament, demobilisation, and reintegration programmes.

Their firsthand knowledge of the conscription process, combat realities, fears, nightmares and reintegration struggle offers unique insights. They can help create programmes that meet real needs. Although the current disarmament, demobilisation and reintegration guidelines emphasise children's rights to disarm, they do not mention children's inclusion in the development of effective life changing programmes.

Listen to children's voices

Educational institutions, governments and peacebuilding agencies must take children's contributions to peacebuilding seriously.

Children bear the wounds of war. They have seen the destruction firsthand and have experienced various forms of loss and pain. This makes them not only observers of violence but also powerful advocates for peace.

Why the world must act

My experiences have taught me that no child is beyond redemption, particularly when given the right support and care they need.

Child soldiers, though shaped by unfortunate circumstances, are not inherently violent. They should not be feared or stigmatised. They are victims who deserve healing, love and education.

I was not given a gun because I was strong. I was handed one because I was weak, because children, stripped of alternatives, can be manipulated and turned into weapons of war.

I survived not because I was better than others, I survived because someone, a Nigerian, refused to reduce me to the war I was forced into. This is why I believe everyone can play a role to protect children in conflict zones. Those who can, but refuse to, are no different from the warlords who enlisted the children.

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