

# **Compensation for wrongful conviction and imprisonment: A review of Ghana's criminal law in the case of *Daniel Ayareba v Attorney General***

**BY: Oswald K. Azumah\***

## **ABSTRACT**

A person charged with a criminal offence is presumed innocent until proven guilty and no person shall be made to suffer punishment unless they have committed a crime. These are salient principles of criminal law. Based on these, criminal law developed to grant compensation to persons wrongfully convicted and who have suffered punishment where they should not have suffered same. The compensation is an acknowledgement that the state owes damages for interfering with the liberty of the individual. And just like a civil case where a defendant would pay damages if they violated the rights of another, the state would merely be paying what is due to an applicant in this scenario. However, in *Daniel Ayareba v Attorney General*, the court refused to grant the application for compensation, asserting that the discharged applicant was not "completely innocent". This paper reviews the position of the court, arguing that in arriving at this conclusion with the so-called "complete innocence" formula, the court departed from multiple principles of law, including the presumption of innocence, the principle of legality and hierarchy of laws.

## **DEDICATION**

This article is dedicated to the memory of ***Asare Kwabena Israel***. A brother, critic and friend. Rest well, brother. Aluta continua! "I have seen something else under the sun: The race is not to the swift or the battle to the strong, nor does food come to the wise or wealth to the brilliant or favor to the learned; but time and chance happen to them all". - Ecclesiastes 9:11

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## INTRODUCTION

An inseverable part of the criminal justice system is the presumption of innocence until the guilt of an accused person is proven by the prosecution beyond all reasonable doubt.<sup>2</sup> This cannon is so fundamental that the entire justice system would crumble like a house of cards if it were waned. Imagine a justice system where the state accuses an individual of a crime and proceeds to imprison the said individual until he or she purges himself of the accusations; and the state carries no burden for its accusations.

Scary!

And so, to avoid a catastrophic breakdown of the criminal justice system, Lord Sankey, speaking for the House of Lords, famously noted in **DPP v Woolmington**<sup>3</sup> that "...the principle that the prosecution must prove the guilt of the prisoner is part of the Common Law of England and no attempt to whittle it down can be entertained." Sadly, this cornerstone of the law has been watered down in the case under review—Daniel Ayareba v Attorney General—and unless arrested, the atrophy will continue.

A fundamental human right that is intrinsically linked to the presumption of innocence is the right to personal liberty. Every person, by their very human nature, is entitled to go about their everyday life to the extent that they respect the rights of others in the community. And so, when the state interferes with this right and at the end of the said interference, it is proven that the interference was unwarranted, the individual is naturally entitled to compensation from the state as they would be if another individual had interfered with their rights. Thus, multiple international charters and the 1992 Constitution of Ghana make provision for compensation for wrongful conviction where the individual served part or whole of the sentence

The Constitution states:

*Where a person who has served the whole or a part of his sentence is acquitted on appeal by a court, other than the Supreme Court, the court may certify to the Supreme Court that the person acquitted be paid compensation; and the Supreme Court may, upon examination of all the facts and the certificate of the court concerned, award such compensation as it may think fit; or, where the acquittal is*

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<sup>2</sup> See: Section 13 of the Evidence Act of Ghana, 1975 (NRCD 323)

<sup>3</sup> [1935] AC 462

*by the Supreme Court, it may order compensation to be paid to the person acquitted.<sup>4</sup>*

More so, the Constitution acknowledges the presumption of innocence until guilt is proven<sup>5</sup> and yet again, entrenches the right to liberty.<sup>6</sup>

It is therefore shocking that the Court of Appeal would make a ruling jettisoning all these principles of the criminal justice system while purporting to apply a principle laid down by the Supreme Court. The case in question is ***Daniel Ayareba v Attorney General<sup>7</sup>*** where the court denied the applicant compensation despite his acquittal with the excuse that the acquittal did not mean he was "completely innocent". In the paragraphs that follow, the paper outlines the facts of the case, the decision of the court and the reasoning that backed it. The next part of the paper examines the legal regime and principles that played out in the case. These include: compensation, the right to liberty and the principle of legality, among others. The subsequent section makes a comparative analysis by looking at the regime in England; the mother of the Common Law Tradition and the penultimate section tests the correctness or otherwise of the decision of the court and the final part concludes the essay.

## **FACTS OF THE CASE**

The applicant, Daniel Ayareba (*hereafter referred to as the applicant*) and five others were arraigned before the High Court for conspiracy to commit robbery and robbery contrary to Section 23(1) and Section 149 of the Criminal Offences Act, 1960 (Act 29). The jury returned a guilty verdict on both counts and the trial judge convicted and sentenced them accordingly to 45 years imprisonment each in 2011. Dissatisfied with the decision of the trial High Court, the applicant appealed against his conviction and sentence. In 2015, the Court of Appeal allowed the appeal, and set aside the conviction and sentence, thereby, acquitting and discharging him. Pursuant to the applicant's successful appeal, he applied by way of a motion to the Court of Appeal (*differently constituted*), praying for a certificate to the Supreme Court recommending payment of compensation to him under Article 14 (7) of the Constitution.<sup>8</sup> Arguing the application, counsel for the applicant submitted that the applicant's appeal succeeded after he had spent almost nine years in prison custody. Counsel argued that the applicant had suffered gravely and made copious references to the time he spent in confinement (a loss of his personal liberty), the loss of his livelihood and wife's consortium while in custody, and

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<sup>4</sup> See: Article 14 (7) of the 1992 Constitution of Ghana

<sup>5</sup> See: Article 19 (2) (c) of the 1992 Constitution of Ghana

<sup>6</sup> See: Article 14 of the 1992 Constitution of Ghana

<sup>7</sup> Criminal Appeal/ Motion No. H3/6/2017

<sup>8</sup> See note 4 supra

the general stigma attached to his conviction, among others. Based on these considerations, counsel asked the court to grant the prayer for compensation.

The state fiercely opposed the application; arguing chiefly that the grant of compensation was not automatic upon acquittal and that the discretion was the court's after the applicant proved that he was completely innocent and not simply acquitted on technical grounds. Counsel for the state insisted that the applicant "***was not innocent of the charges preferred against him.***" ***(Emphasis added)***.

The prosecution had failed to call a material witness—this was fatal to their case and led to the applicant's acquittal on appeal whereupon the instant application for compensation for wrongful conviction and subsequent imprisonment was filed.

## **DECISION OF THE COURT**

The following considerations went into the court's decision:

- a. *Was the prosecution of the applicant at the trial court based on a reasonable and probable cause but was acquitted on merely technical grounds?*
- b. *Was the applicant completely innocent of the charge(s) preferred against him?*
- c. *Was the prosecution of applicant malicious that is, motivated by ill-will, mere hatred, spite, political consideration or rather than a desire to contribute towards bringing an offender to book? If it was malicious, then the applicant is entitled to compensation under article 14(7)*

Based on the above, the Court of Appeal, speaking through Kusi-Appiah JA delivered the following ruling:

*It is patently clear that ***the applicant was acquitted on merely technical grounds and not based on his complete innocence.*** It follows that the instant case is distinguishable from Dordzie (sic) Sabbah's case where the applicant therein was completely innocent of the charge as he was not at the scene of the crime. And as was held in Dordzie (sic) Sabbah's case supra, ***an acquittal based on technical grounds will not pass the test for an award of compensation. For these reasons, the applicant's application for an award of compensation fails and the same is hereby dismissed.*** ***(Emphasis added)****

## **THE DODZIE SUPREME COURT CASE**

Before the case under review, the Supreme Court was faced with a similar question in ***Dodzie Sabbah v The Republic***<sup>9</sup> where it laid down the considerations a court should make in deciding whether or not to grant an application for compensation for wrongful conviction leading to unjust imprisonment. The brief facts of the Dodzie case were that

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<sup>9</sup> (2015) 88 G.M.L.R.

the applicant and another were convicted of conspiracy to commit murder and murder. The appellant therein successfully appealed his conviction where the court found that he was not guilty of the charges as he was not present at the scene of the alleged crime. Wood CJ in her leading opinion wrote:

*"A completely innocent man was wrongly and unjustly convicted. Not only was the prosecution oppressive, as indeed there was not a scintilla of evidence to connect him to the grave charge of murder, but he was nevertheless convicted, sentenced to death by hanging, left to languish in condemned cells, with the death sentence hanging round his neck, until his eventual exoneration."<sup>10</sup>*

In his concurring opinion, Benin JSC, setting out the considerations a court should make in deciding whether or not to grant the prayer for compensation elucidated as follows:

- i. *In particular the court may consider whether the acquittal was based on the **complete innocence** of the applicant, without any shadow of doubt. In that regard an acquittal based on a technical ground will not pass the test. (Emphasis added)*
- ii. *The court may also take into account, what I may consider to be a reckless prosecution of the applicant. Let us consider the case of an applicant who pleaded alibi and filed the required notice and provided all witnesses and made them available but the investigating authorities did not investigate it and the prosecutor also ignored it and the applicant was convicted and sentenced. Then subsequent events go to exonerate the applicant on ground that the alibi was true. This will be a case of a reckless prosecution resulting in a miscarriage of justice. Here too the complete innocence of the applicant will have been established without any doubt. Thus the State must have a reasonable cause to embark on a prosecution.<sup>11</sup>*

His Lordship continued that:

*"The category of cases in which compensation may be awarded under Article 14(7) cannot be exhausted so each case will depend on its own peculiar facts and circumstances, but certainly the bare fact that a convicted person has succeeded on appeal would not suffice."<sup>12</sup>*

The soundness or otherwise of the *ratio decidendi* in the case under review, informed by this earlier decision of the Supreme Court will be brought to fore shortly.

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<sup>10</sup> Ibid, See: Note 8 at page 23

<sup>11</sup> See: Note 9 at page 93 to 94

<sup>12</sup> See: Note 8 at page 94

## WRONGFUL CONVICTION AND THE RELEVANT LEGAL REGIME

### What is Wrongful Conviction?

The term wrongful conviction lends itself to multiple meanings depending on the jurisdiction.<sup>13</sup> In simple terms as observed from multiple legal systems, it refers to convicting an accused person based on a wrong principle of law, inadequate evidence, prosecutorial misconduct or procedural error and the list goes on.<sup>14</sup> This means for wrongful conviction to exist, there must have been a grave inaccuracy with the trial at first instance, leading to a substantial miscarriage of justice which makes the appellate court absolve the accused. Duce and Findley, writing in their paper '*Wrongful convictions and prosecutions: an introductory overview*' indicate that these wrongful convictions happen more often than prosecutorial agencies or even the courts are willing to acknowledge.

### What then accounts for it?

Accused persons are wrongfully convicted because of a negligent or deliberate act; there is no whitewashing it. Be it mistaken eyewitness identifications which are relied upon without further proof; flawed expert and forensic evidence; false confessions which include false, induced or cajoled guilty-plea; unreliable or untruthful witnesses or complainants; misconduct of prosecutorial agents and agencies, including malicious prosecutions and refusal to call material witnesses to permit cross-examination; inadequate legal representation of those convicted or a total lack of it thereof and mistakes from the court which includes relying on or applying a wrong principle of law to determine the case—as well as a judgement or verdict which cannot be supported by the entire admissible evidence on record.<sup>15</sup>

Whichever of the above instances served as the catalyst for a wrongful conviction, the effect is unchanged. For this reason, courts are expected to be the beacon of justice and must not convict until they are convinced that the accused person did in fact, commit the offence for which he stands trial. Jurists refer to this as the prosecution proving its case beyond all reasonable doubt.

For this, William Blackstone in his popular doctrine, *Blackstone Ratio*, proposed that "*it is better that ten guilty persons escape than that one innocent individual suffers*". Jurists have since cited Blackstone in arguing for due process in criminal prosecutions. This, proponents say, would prevent abuse of power or inconsistent practices in criminal justice

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<sup>13</sup> Jiwan Kumar Acharya, Rasmi Regmi, and Sandhya Bista, 'Compensation for the Wrongfully Convicted: A Pressing Need for Statutory Arrangements in Nepal' (2021) 9 & 10 Kathmandu School of Law Review 90.

<sup>14</sup> Ronald Huff and Martin Killias, 'Cross-National Perspectives and Issues - Introduction' in C Ronald Huff and Martin Killias (Eds), *Wrongful Conviction: International Perspectives on Miscarriages of Justice* (Temple University Press 2008).

<sup>15</sup> Mauricio Duce and Keith A Findley, 'Wrongful Convictions and Prosecutions: An Introductory Overview' (2022) 8 Revista Brasileira de Direito Processual Penal 523.

which lead to wrongful convictions. A strict adherence to due process would no doubt eliminate all doubt in the minds of both the trial and appellate courts. This is not to say every iota of doubt, including ridiculous "what-ifs" must be entertained. **See: Lord Denning in Miller v Minister of Pensions.**<sup>16</sup>

If the above elements and stated reasons for wrongful convictions lead to unjust incarcerations and its attended losses, why do courts refuse a prayer for compensation from some of the applicants as did the Court of Appeal in the case under review?

### **Factual Innocence**

Firstly, it should be noted that a person applying for compensation after his acquittal on appeal after serving part or whole of the sentence imposed on him is merely saying he did not commit the offence for which he was punished. It is not for the court hearing the application to say he may or may not have committed same. The pleas available in Ghana are *guilty and not guilty*.<sup>17</sup> In essence, a person who pleaded not guilty but was convicted at first instance only to be discharged on appeal is claiming injustice at the first instance. Jurists have however separated the claims into factual or actual innocence and legal or procedural innocence. Nonetheless, both acceptably are a manifestation of miscarriage of justice<sup>18</sup>

Factual innocence refers to where a defendant simplicita claims that he did not commit the offence for which he is accused or for which he was convicted.<sup>19</sup> In his paper on actual innocence, Jay Nelson explained, assessing the United States' jurisprudence that:

*"Claims of actual innocence arise [when] prisoners assert substantive innocence under the Fifth, Eighth, and Fourteenth Amendments. In these petitions, prisoners argue that because they are factually innocent of the crimes for which they were convicted, their incarcerations violate due process and the ban on cruel and unusual punishment."*<sup>20</sup>

The Supreme Court, in the *Dodzie case* terms this complete innocence of the accused when they decried the conviction of the appellant in that case. Per Wood CJ:

*"...a primary consideration for example would be whether or not the acquittal was based on mere technicalities or on substantial grounds that has led to a gross miscarriage of justice. Did the evidence clearly show that the applicant was completely innocent? Were the charges trumped up, and was the evidence led at*

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<sup>16</sup> [1947] 2 All E.R. 372

<sup>17</sup> See: Section 171 of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30)

<sup>18</sup> Kathryn M Campbell, 'Exoneration and Compensation for Wrongly Convicted: Enhancing Procedural Justice?' (2019) 42:3 Manitoba Law Journal 249.

<sup>19</sup> Matthew Aglialoro, 'Case for Actual Innocence' (2014) 23 Cornell Journal of Law and Public Policy 4.

<sup>20</sup> Jay Nelson, 'Facing up to Wrongful Convictions: Broadly Defining "New" Evidence at the Actual Innocence Gateway' (2008) 59 Hastings L.J. 711.

*the trial falsely procured, are all relevant matters a court may take into consideration.*<sup>21</sup>

### **Legal or procedural innocence**

In the quote above, the Supreme Court mentions acquittal on “mere technicalities”. What the apex court was in fact alluding to is legal or procedural innocence. This includes where the trial fails to meet the required constitutional, statutory and other legal requirements thereby, violating the right to a fair trial and leading to a miscarriage of justice on the accused person.

In explaining the relevance of establishing procedure to support even a claim of factual innocence, the Supreme Court of the United States in the classical case of ***Herrera v Collins***<sup>22</sup> clarified that: *“the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.”* The actual innocence claim must be complemented by another claim asserting an independent constitutional violation;<sup>23</sup> Aglialoro *supra*, writes.

Speaking with one voice through Dotse JSC, the Supreme Court of Ghana also underscored the need for following procedure to sustain the guilt of an accused when it said: *“The Supreme Court would affirm as good law, the principles of law regarding the need for a party to call a material witness in support of its case.”*<sup>24</sup> The court held so because the duty of the prosecution, in proving the accused is not innocent but guilty of the crime for which he stands trial, includes the duty to call all material witnesses as held in a number of cases.<sup>25</sup> Failure to follow the laid down procedure and actual facts of the case which were disregarded and or not available at trial can lead to the conviction being set aside for being wrongful.

In both cases—factual or procedural innocence—it would mean that the prosecution has failed to prove the guilt of the accused beyond a reasonable doubt; thus, the doctrine of presumption of innocence leaves the Supreme Court’s “*complete innocence*” mantra wanting of feet on which to stand. It is the submission of this writer that it is no derogation of innocence by referring to the grounds on which it is established as “merely technical”.

This is why.

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<sup>21</sup> See Note 9 at page 19

<sup>22</sup> 506 U.S. 390, 398 (1993)

<sup>23</sup> See Aglialoro, Note 19

<sup>24</sup> Gligah & Another v the Republic [2010] SCGLR 870

<sup>25</sup> Aning v The Republic [1972] 1 GLR 354; Abadoo v Awotwi [1973] 1 GLR 393; Gyamfi v Badu [1963] 2 GLR 596

## THE APPLICABLE LAW

### Presumption of innocence

"The presumption of innocence...seeks to maintain the status of individuals, protecting their innocence until guilt is proved [beyond reasonable doubt] or pleaded," writes Yale-trained lawyer Frederick Agaaya Adongo.<sup>26</sup> This proposition echoes the entrenched protection given to accused persons in the 1992 Constitution of Ghana which reads: "*a person charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.*"<sup>27</sup> Thus, when a purported conviction is set aside on appeal and the accused person discharged, he or she is restored to the position of innocence.

This provision is relevant to the context for two reasons, the first being the general rule regarding the liberty of the individual which is disturbed when the state institutes criminal trials against them. It is the unwarranted disturbance of this liberty that entitles the acquitted individual to compensation when they are discharged after having served part or whole of their sentence.

And secondly, it is important as a rebuttal to the Supreme Court's suggestion that a person can be acquitted of an offence yet is not completely innocent of the offence. The submission of this writer is that the Constitution in Article 19 (2) (c) quoted above did not envisage a person being held out as 'probably guilty' or 'incompletely innocent' as the "complete innocence" coinage of the Supreme Court advances. The law is that a person is presumed innocent until otherwise proven. It is no excuse to say that the trial can be reinstated after acquittal to determine the actual facts. This is because unless on appeal, no individual is permitted to face a court again after his discharge in relation to the same crime or for another crime for which they could have been charged on the first instance.<sup>28</sup>

A person acquitted whether at first instance or on appeal is thus, innocent!

The Committee of Experts on proposals for a draft constitution of Ghana in 1991 captured this at paragraph 159 of their report:

*"Against several odds, our Courts have, to a great extent, striven to safeguard the liberty of the individual, especially where that liberty has been threatened by the Executive. Our system of justice emphasizes the innocence of an arrested person until his or her guilt is proven beyond all reasonable doubts. We,*

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<sup>26</sup> Frederick Agaaya Adongo, 'Whispers of an Errant Gavel: Unravelling the Denial of Justice in Edmund Addo v The Republic' (2023) Ghana School of Law Student Journal 104.

<sup>27</sup> See: Article 19 (2) (c) of the 1992 Constitution of Ghana

<sup>28</sup> The right against double jeopardy. See Article 19 (7) of the 1992 Constitution of Ghana: "*No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted, shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for the offence, except on the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.*"

*accordingly, propose the retention of this time-honored practice. We further propose that whenever charged with a criminal offence, person is unless the charge is withdrawn, the fair hearing should be given within a reasonable time by a Court.*<sup>29</sup> (Emphasis added)

From the foregoing, and as urged in the introductory part of this paper, the presumption of innocence is an inseverable element of the justice system and had the Supreme Court averted its mind to this constitutional presumption, it would not have laid down the impugned process on which the Ayareba case under review was decided (i.e.) that an applicant for compensation for wrongful conviction should show he was completely innocent.

### **The principle of legality**

Another bizarre incidence of the reasoning of the court, the so called *complete innocence doctrine*, is that it sins against the principle of legality. The principle of legality prevents a court from inflicting punishment on an individual who has committed no crime.<sup>30</sup> Or contextually placed, it prevents courts from holding an individual as not innocent of a crime where the prosecution is unable to prove guilt beyond reasonable doubt. The principle is captured in the Latin maxim *nullum crimen, nulla poena sine lege praevia lege poenali*, meaning simply: no punishment without law.

In the Constitution 1992, the principle is reflected in Articles 19 (5) and 19 (11). Which provide that:

*(5) A person shall not be charged with or held to be guilty of a criminal offence which is founded on an act or omission that did not at the time it took place constitute an offence.*

*(11) No person shall be convicted of a criminal offence unless the defined and the penalty for it is prescribed in a written law*

From the explanation above, it cannot be doubted that refusing compensation to an applicant who has been wrongfully punished by the court **only on the basis** that his acquittal was based on "technicality" is in fact upholding the impugned conviction and punishment and same cannot be supported in light of the discussion so far.

### **Binding precedent; to follow or not to follow?**

The Court of Appeal dismissed the application for compensation on the above-stated basis. The court was in fact in error. But since it purported to apply a *binding* decision of the Supreme Court on the basis of *Stare Decisis*, a bedrock of our legal system, the next few paragraphs address how courts are to treat binding precedent.

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<sup>29</sup> Report of the Committee of Experts on Proposals for a draft constitution of Ghana. (1991) at Page 73

<sup>30</sup> Hogan, B, 'The Principle of Legality' (1986) 136 NLJ 267.

*Stare Decisis* refers to the legal doctrine stating that lower courts should apply the *ratio decidendi*—the reasoning or binding part of cases—based on similar facts before them as they were decided by (superior) higher courts in the hierarchy. Generally, they may only depart if they can distinguish the facts from that which was decided by the higher court.

Be that as it may, courts are not bound to follow decisions or reasoning which leads to a miscarriage of justice or reasoning which are inherently unconstitutional for being against the constitution itself or statute.<sup>31</sup>

In support of this, Burns writes: “*the general rule as laid down by the authorities is as follows: Precedents and rules must be followed unless flatly absurd or unjust.*”<sup>32</sup>

And thus, in ***Awutu Ellis Kaati and Others v The Republic***<sup>33</sup>, the Court of Appeal, speaking through Dennis Adjei JA, declined the invitation to follow the precedent of the Supreme Court in an earlier case, explaining that they were not bound by that impugned decision.

Dennis Adjei JA wrote:

*“The 1st appellant’s lawyer submitted that the independent witness was a policeman and therefore not competent to act as an independent witness. In the case of Frimpong alias Iboman v The Republic [2012] 1 SCGLR 297, the Supreme Court held that a policeman cannot act as an independent witness. Under the original Evidence Decree, 1975 (NRCD 323) a police officer or a member of the Armed Forces was prohibited from acting as independent witness. All other people serving as independent witnesses were to be approved by the suspect. This position was amended by the Evidence and Criminal Procedure (Amendment) Decree, 1979 (SMCD237). It took away or deleted the words (other than a Police Officer or member of the Armed Forces approved by the accused). SMCD 237 has not been amended and Police officers and members of the Armed Forces could act as independent witness. The law is now settled that Police Officers and members of the Armed Forces may act as independent witness. We are of the opinion that by Article 11 of the Constitution 1992, the existing law is superior to judgments and even though we are bound by the decision of the Supreme Court, we have no doubt in our mind that where a decision given is contrary to statute, we are bound by the statute. In respect of the holding that a police officer cannot act as an independent witness, we are bound by section 120 of the Evidence Act, NRCD 323 and not the holding in the case of Frimpong alias Iboman v Republic (supra) and we hold that Police and Military officers can act as independent witness.” (Emphasis added).*

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<sup>31</sup> Thomas Burns, 'The Doctrine of Stare Decisis' (1893) Historical Theses and Dissertations Collection Paper 270.

<sup>32</sup> Ibid at page 2

<sup>33</sup> Unreported. Civil Appeal No. F22/40/2009; Judgment delivered on January 15, 2014

From the above, it is the submission of this writer that the Court of Appeal in the case under review, was not bound by the reasoning of the Supreme Court in the earlier Dodzie case but was bound by Articles 1, 11, 14 and 19 of the Constitution which speak to supremacy of the constitution, hierarchy of laws, compensation for a wrongfully convicted person and presumption of innocence respectively.

## A LOOK AT THE MOTHER OF COMMON LAW

### England and Wales

Compensation for wrongful convictions has always been granted under a stringent, unpredictable and inconsistent regime, writes Hannah Quirk while appraising the mother of the common law tradition, England.<sup>34</sup>

England provided in Section 133 of the Criminal Justice Act 1988 (CJA 1988) that:

*"when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted."*

One of the first challenges to the statutory scheme was brought by Nicholas Mullen, Quirk *supra*, indicates, adding that: *"his convictions for terrorism-related offences were quashed based on the security services having arranged his illegal removal from Zimbabwe to the UK to stand trial but his application for compensation was rejected."*

The House of Lords unanimously dismissed his prayer for compensation but their reasoning differed. Lord Steyn proposed a narrow scope that favoured factual innocence discussed above but on the contrary, Lord Bingham adopted a wider approach that takes into consideration defects in the trial process. This reasoning would admit serious breaches of criminal procedure trials as seen in the Ayareba case.

Furthermore, in ***Queen (Adams) v Secretary of State for Justice***<sup>35</sup> the Supreme Court proposed the criteria to be considered in determining if an applicant is entitled to compensation. The categories per Lord Phillips are:

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<sup>34</sup> Hannah Quirk, *Compensation for Wrongful Convictions in England and Wales* (Informa 22 February 2023) Routledge eBooks.

<sup>35</sup>[2009] EWCA CIV 1291, para.19

*Category 1: Where the fresh evidence [on which the appeal was based] shows clearly that the defendant is innocent of the crime of which he has been convicted.*

*Category 2: Where the fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant.*

*Category 3: Where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant.*

***Category 4: Where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted. (Emphasis added).***

Category four in the persuasive authority above exposes the decision in *Daniel Ayareba v Attorney General* which suggests that only acquittals based on a strict finding of fact rather than procedural error can entitle an applicant to compensation.

## CONCLUSION

### **Highlighting the key errors in the Ayareba case**

The Court of Appeal in the Ayareba case makes three key errors as the paper has discussed. These are:

1. Disregard for the presumption of innocence: To highlight Kusi-Appiah JA's decision, I quote:

"I must add that by this failure, the applicant lost the chance or opportunity of cross-examining the said material witnesses to establish the veracity or otherwise of their allegation against him. In effect, the guilt or innocence of the applicant was not established notwithstanding his acquittal...***From the foregoing, it is patently clear that the applicant was acquitted on merely technical grounds and not based on his complete innocence.***" (Emphasis added)

The paper reveals that, had the court averted its mind to the presumption of innocence until guilt is proven, it would have arrived at a different conclusion or reasoning.

2. The court erred in its disregard for the principle of legality:

By refusing compensation to a wrongfully convicted person who served part of his sentence with the impugned excuse of not being "*completely innocent*," the court was essentially punishing a person against whom the prosecution has not been able to sustain a conviction.

The case thus slaughters the maxim of “no punishment without crime” which has been entrenched in the Constitution 1992.

3. Lastly, the court erred by applying a wrong proposition of law from the Supreme Court:

In failing to depart from the Supreme Court’s mistake in laying down the guidelines for determining compensation as the Court of Appeal—differently constituted—and led by Dennis Adjei JA did in the Ellis Kaati case, the court fell in serious error.

The Ellis Kaati case serves as a hallmark for the proposition that where the Supreme Court makes a directive or decision which is contrary to the constitution or statute, the courts beneath it are not bound to follow the decision.

Kusi-Appiah’s Court underdid itself when it followed the Supreme Court’s position.

### **Final thoughts**

This paper does not strictly suggest that in all cases where a convicted person serves part or whole of his sentence, he is automatically entitled to compensation where the conviction is overturned on appeal. However, the proposition of “complete innocence” urged by the Supreme Court and followed by the Court of Appeal in *Daniel Ayareba* fails the legal test and ought to be revised. Literature is replete with other Common Law territories and even outside the Common Law which may serve as a guide to review the impugned procedure for determining compensation for wrongful conviction.

Humbly submitted.