

**Show me the money: A Look into the Electoral Offence of Voter
Bribery**

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Table of Contents

Table of Contents	i
Declaration	iv
Acknowledgement	v
Abstract	vi
List of Abbreviations	vii
List of Authorities	viii
Kenyan Case Law.....	viii
Foreign Case Law.....	viii
Chapter 1	1
1.0. Introduction	1
1.1. Background to the Study	1
1.2. Statement of the problem	2
1.3. Objectives of the Study	2
1.4. Research questions	3
1.5. Hypothesis.....	3
1.6. Justification of the study	3
1.7. Literature Review	3
1.8. Research Methodology.....	5
1.9. Scope and Limitations of the Study	5
1.10. Chapter Breakdown	5
Chapter 2	7
2.0. Theoretical Framework	7
2.1. Introduction	7
2.2. Social Contract Theory.....	7
2.3. Economic Theory on Punishment	9
2.4. Conclusion.....	11

Chapter 3	12
3.0. Democracy, Elections and Voter Bribery	12
3.1. Introduction	12
3.2. Democracy and Elections.....	12
3.2. The nature of voter bribery.....	13
3.4. Conclusion.....	15
Chapter 4	16
4.0. The Legal and Regulatory Framework of Voter Bribery	16
4.1. Introduction	16
4.2. Before 2010.....	16
4.2.1. Election Courts.....	17
4.2.2. The Attorney General	18
4.3. After 2010	19
4.3.1. Election Courts.....	20
4.3.2. Director of Public Prosecution.....	23
4.4. Conclusion.....	24
Chapter 5	25
5.0. Conclusions and Recommendations.....	25
5.1. Introduction	25
5.2. Conclusion.....	25
5.3. Recommendations	26
5.3.1. Capacity Building	26
5.3.2. Proper Enforcement	26
5.3.3. Culture.....	27
5.3.4. Campaign Finance Reform.....	27
Bibliography	28
Legal Statutes	28

Journal Articles	28
Books.....	29
Thesis and Dissertations.....	30
Articles and Newspapers	30
Reports	31
Seminar Papers or Conference Papers	31
Internet Sources.....	31

Declaration

I, CHEGE ERIC KARANJA, do hereby declare that this dissertation is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: _____

Date: _____

This dissertation is submitted for examination with my approval as University Supervisor

Signed: _____

Date: _____

MR. JOSEPHAT KILONZO

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Abstract

The Constitution of Kenya Review Commission in its final draft stated the essence of elections. It declared that, *“The cornerstone of participatory governance is to hold free, fair and periodic elections. Elections serve not only to choose people’s representatives, but also to elect or determine government election or appointment. They demonstrate the people’s sovereignty and accountability by politicians. They lend legitimacy to governments.”* In order to protect this crucial process that demonstrates the sovereignty of the people and lends legitimacy to governments, the Election Offences Act provides for among others, the offence of voter bribery. Voter bribery is occasioned by giving bribes in order to influence voters. Election courts and the Director of Public Prosecutions are vested with the jurisdiction to hear and determine election disputes occasioned by voter bribery and to prosecute voter bribery respectively. This paper seeks to highlight the nature of voter bribery and its effects on democracy and also to highlight the performance of these institutions with regard to the offence.

List of Abbreviations

CDF	Constituency Development Fund
DP	Democratic Party
DPP	Director of Public Prosecution
ECK	Electoral Commission of Kenya
IEBC	Independent Electoral and Boundaries Commission
KANU	Kenya African National Union

List of Authorities

Kenyan Case Law

1. *Emma d/o Mwaluko v Republic* (1976) LRT 197.
2. *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR.
3. *Julius Makau Malombe v Charity Kaluki Ngilu & 2 others* [2018] eKLR.
4. *Kenneth Stanley Njindo Matiba v. Daniel Toroitich Arap Moi* (1993) (Unreported).
5. *Mohammed and three others v Republic* (2005) 1 KLR 722.
6. *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* [2015] Eklr.
7. *Mwai Kibaki v. Daniel Toroitich Arap Moi* (1999).
8. *Paul Gitenyi Mochorwa v Timothy Mosei E. Bosire & 2 others* [2013] eKLR.
9. *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017].
10. *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others* [2013] eKLR.
11. *Wavinya Ndeti v Independent Electoral and Boundaries Commission (Iebc) & 4 others* [2013] Eklr.
12. *William Kinyanyi Onyango v. Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR.

Foreign Case Law

1. *United States v Cordoba-Hincapie* (1993), United States District Court for the Eastern District of New York.

Chapter 1

1.0. Introduction

1.1. Background to the Study

Cancer is the description of a group of diseases that result in rapid creation of abnormal cells that grow beyond their usual boundaries and that can affect any part of the body.¹ According to the number staging system, there are four stages of cancer.² Stage 1, where the cancer is relatively small and contained within the organ it started in. Stage 2, the cancer has not started to spread into the surrounding tissues though it has grown. Stage 3, it may have started to spread into surrounding tissues and there are cancer cells in the lymph nodes in the area. Stage 4 (metastatic), means the cancer has spread from where it started to another body organ. At the final stage, it is most difficult to treat this cancer though not impossible.³

Corruption is Kenya's cancer at its fourth stage. It has become conventional in today's Kenyan culture, as it has spread to all levels of government from the county governments⁴ to the national government.⁵ Kenya's ranking on the issue has always been in the bottom quarter of the global rankings.⁶ However, unlike the various forms of cancer that have no likelihood of regression, corruption does. Every 5 years Kenyans go to the ballot to elect their leaders.⁷ They are afforded an opportunity to select leaders based on their character and merits. The election, therefore, serves as an instrument of accountability.⁸

However, this opportunity is normally muddled by several transgressions one of which is voter bribery. Voter bribery is the distribution of particularistic or private material benefits with the expectation of political support.⁹ Under the Election Offences Act, 2016, voter

¹ <https://www.who.int/en/news-room/fact-sheets/detail/cancer> on 4 February 2019.

² <https://www.cancerresearchuk.org/about-cancer/what-is-cancer/stages-of-cancer> on 4 February 2019.

³ <https://thetruthaboutcancer.com/understanding-four-stages-cancer/> on 4 February 2019.

⁴ See Office of the Auditor General, *County Government Reports 2017/2018*, at http://oagkenya.oagkenya.go.ke/index.php/reports/cat_view/2-reports/11-county-governments/308-county-government-reports-2017-2018 on 3 February 2019.

⁵ See Office of the Auditor General, *Report of the Auditor General on the Financial Statements for the National Government for the year 2016/2017, 2017*.

⁶ See Transparency International, *Corruption Perception Index 2018* at <https://www.transparency.org/cpi2018> on 5 February 2019, where Kenya is ranked 144/180 and Heritage Foundation, *2019 Index of Economic Freedom* at <https://www.heritage.org/index/country/kenya> on 5 February 2019, where Kenya is ranked 130/180.

⁷ Article 38, *Constitution of Kenya* (2010).

⁸ Adamu Abdulrahman, Ocheni Danladi and Ibrahim Umar Sani, 'Money Politics and Analysis of Voting Behaviour in Nigeria: Challenges and Prospects for Free and Fair Elections', *3 International Journal of Public Administration and Management Research* 3, 2016, 90.

⁹ Kramon Eric, *Ethnic group institutions and electoral clientelism*, 2017, 4

bribery is characterised by the provision of bribes to induce the voter to vote for a particular candidate or to refrain from voting for a particular candidate.¹⁰ The offenders once found culpable are liable to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.¹¹

The election court is vested with the jurisdiction to determine matters pertaining to election disputes arising out of election offences including voter bribery.¹² Furthermore, the Director of Public Prosecution (DPP) is empowered to prosecute all electoral offences.¹³ This creates room for two proceedings, first at the election court and secondly at a criminal court due to the possible intervention of the Director of Public Prosecution. Given the mandate entrusted to the two institutions, the question remains as to the exact enforcement by each towards curbing voter bribery.

1.2. Statement of the problem

Voter bribery is an impediment to a free and fair election which is the right of all citizens. As such, it has damning effects not only to a single isolated election but also to the Kenyan democracy generally. It then follows that a proper prosecution system be in place for proper punishment to be meted out to the perpetrators of such an offence.

1.3. Objectives of the Study

The general objective of the study is to assess the effectiveness of the institutions mandated to prosecute voter bribery as an electoral offence. The specific objectives of this study include:

- 1) to assess the nature of voter bribery as an electoral offence;
- 2) to assess the role of the electoral court in dealing with voter bribery;
- 3) to assess the role of the Office of the Director of Public Prosecution in dealing with voter bribery;
- 4) to propose a clear and definitive answer as to sanctions each tribunal can mete out with regards to voter bribery as an election offence.

¹⁰ Section 9, *Election Offences Act* (2016).

¹¹ Section 9(3), *Election Offences Act* (2016).

¹² *William Kinyanyi Onyango v. Independent Electoral and Boundaries Commission & 2 Others* [2013] eKLR, para 29.

¹³ Section 21, *Election Offences Act* (2016).

1.4. Research questions

This study seeks to answer the following questions:

- 1) What is the nature of voter bribery and what are its effects on elections?
- 2) Is there a nexus between voter bribery and administrative corruption?
- 3) In the current legal framework what specific sanctions are the tribunals empowered to deal with voter bribery as an election offence?
- 4) Are these tribunals actuating their mandates?

1.5. Hypothesis

The study is anchored on the following hypotheses:

- 1) Voter bribery is pervasive in the electoral system as a result of ineffectiveness in its prosecution and;
- 2) The consequences of voter bribery reverberate between successive regimes

1.6. Justification of the study

Corruption in Kenya is systemic. It pervades every sphere of the Kenyan body to the extent that the country has been accustomed to it. However, the buck stops with the people, the onus is upon them more so than the government to fight this scourge. There is no better way to achieve this than by electing leaders of integrity and who have the people's interest at heart. This can only be realised through elections that are free and fair. One of the ways to ensure that elections are free and fair is by having a proper mechanism for prosecuting election offences.

The Election Offences Act provides for at least 16 election offences. This study zeroes in into the election offence of voter bribery which in addition to threatening the character of a free and fair election, it is very pervasive in the election cycle.¹⁴

1.7. Literature Review

There is dearth of literature that specifically delves into the study and thus the research relies on the literature that touches on key aspects of the topic.

¹⁴ See National Crimes Research Centre, *Election Crimes and Offences in Kenya*, 2016, 24 and 26 on the 2013 General Elections.

Francis Fukuyama,¹⁵ an American political scientist in his book gives a comprehensive state of the art type of governance that would ensure the application of the rule of law, accountability and transparency. He cites the importance of political will and citizen support in the fight against various vices in the society including corruption in order to ensure good governance.

Sakariyau Rauf Tunde, Aliu Fatima Lawal and Adamu Muhammed¹⁶ highlight that poverty and illiteracy are key enablers of voter bribery. They posit that poor people are vulnerable and due to the low level of political awareness in the country, intimidation and manipulation become easy tools amidst the people. Majority of the poor are ready to submit their voting mandate for monetary benefit. They become blind – folded with token amount realized from business of politics (selling of votes).

Eric Kramon¹⁷ observes that voter bribery or election clientelism as he calls it, is not prevalent in all low-income democracies or communities within low income democracies. He argues that ethnic group institutional structure helps promote the vice. According to him, where groups are structured hierarchically with centralized leadership, the expectation is that politicians will pursue more wholesale electoral strategies, either working through group leaders or seeking to trade collective goods for blocs of votes. In the absence of such structure, politicians are more likely to target their efforts directly to voters themselves, which results in larger investments in electoral clientelism.

Paul Collier and Pedro C. Vicente¹⁸ note that candidates both incumbents and their opponents are often willing to employ illicit strategies which are likely to dominate conventional attempts to please voters. The introduction of illicit strategies in effect usurps the political process, nullifying elections as means of achieving accountability. Furthermore, in the absence of effective constraints on candidates' electioneering tactics, legitimacy and accountability are unlikely to be achieved.

¹⁵ Fukuyama Francis, *State Building, Governance and World Order*, Cornell Press, 2004, 23.

¹⁶ Sakariyau Rauf Tunde, Aliu Fatima Lawal and Adamu Muhammed, 'The Phenomenon of Money Politics and Nigeria's Democratization: An Exploration of The Fourth Republic, *Journal of Social Economics Research*, 2015, 8.

¹⁷ Kramon Eric, *Ethnic group institutions and electoral clientelism*, 2017, 11.

¹⁸ Collier Paul and Vicente C Pedro, 'Violence, bribery, and fraud: the political economy of elections in Sub-Saharan Africa' 153 *Public Choice* ½, 2012, 146.

Lord Bingham¹⁹ states that for a punishment to be effective to the reform of a criminal, the punishment should not only fit the crime but also proportionate to the crime. This basically supports the idea that for voter bribery punishment to be effective, it should aim to do more than just apply what goes by the law as the appropriate sentence for an offender but look into other factors that could help reform the offender.

In light of the foregoing literature, the necessity of this study is brought forth. While the highlighted literature define themes of good governance and voter bribery, this study takes into account the Kenyan context. It reviews the current legal and regulatory framework and seeks to argue for a stricter prosecutorial regime that resolutely curbs the offence.

1.8. Research Methodology

This study is based on desktop research relying on both primary and secondary resources. The study uses the current Kenyan legislative and regulatory framework that is specific to the topic. Furthermore, case law is incorporated to illuminate on the court's jurisprudence about the topic.

In addition to this, the study employs the usage of secondary sources such as online articles, journals, working papers and reports, newspapers and other scholarly writings to fortify the justifications for the study.

1.9. Scope and Limitations of the Study

The scope of the study is voter bribery as an election offence as espoused by the Elections Offences Act, 2016. The study is limited to findings made through qualitative research about voter bribery.

1.10. Chapter Breakdown

Chapter One introduces the study, sets out the statement of the problem, the objectives, the hypothesis, research questions, justifications, the research methodology and the scope and limitations of the study.

Chapter Two addresses the theoretical framework that underpins the study

¹⁹ Bingham T, 'Crime and Punishment' in *The Business of judging: Selected Essays and Speeches*, Oxford University Press, Oxford, 2000.

Chapter Three addresses the principles of democracy, elections and the nature of voter bribery.

Chapter Four discusses the legal and regulatory framework orbiting the offence. This enables their ineffectiveness or effectiveness to be illuminated.

Chapter Five takes a holistic view of the topic by summarising the research and conclusions drawn within the context of the problem statement and research questions that informed the topic. Finally, recommendations are prescribed.

Chapter 2

2.0. Theoretical Framework

2.1. Introduction

This chapter expounds on the theoretical framework that underpins the prosecution of voter bribery. The theories detail on the necessity of laws in a society and the necessity of punishing any deviation from the law.

2.2. Social Contract Theory

Articulated by John Locke,²⁰ Thomas Hobbes,²¹ Jean-Jacques Rousseau,²² Thomas Paine²³ amongst others, it is hewed on the premise that society is a necessary compromise as a result of man's state of nature. Thus, once people become a part of the society, they give up their individual freedom for protection and if one breaks the social contract by transgressing the rights of others, the society has the right to punish by inflicting such punishment in proportion to their crime.²⁴

Thomas Hobbes, John Locke and Jean-Jacques Rousseau, the leading proponents of this theory advanced it in different perspectives. Thomas Hobbes viewed the life of man in a state of nature as solitary, poor, nasty, brutish and short.²⁵ This state was as a result of man's selfishness. Therefore, man being rational, seeks to secure their self-protection and self-preservation by voluntarily surrendering his rights and freedoms to a government.²⁶ The government thus has the authority to enforce laws and agreements. This forms the social contract. Each person agrees to follow the laws of the state on the condition that everyone else does the same. In doing so, everyone is relatively safe from each other and benefit from the other social goods will result.²⁷ The state exists to enforce the rules necessary for social living. The government is given the duty to ensure the safety and provision of social goods of the people by enacting laws.

²⁰ Locke John, *Second treatise on civil government*, 1690.

²¹ Hobbes Thomas, *The leviathan*, 1651.

²² Rousseau Jean-Jacques, *The social contract or principles of political right*, 1762.

²³ Paine Thomas, *The common sense*, 1776.

²⁴ Joycelyn M, *Prisons today and tomorrow*, 3ed, Jones and Barlett, New York, 2014, 5.

²⁵ Internet Encyclopaedia of Philosophy, *Social Contract Theory* at <https://www.iep.utm.edu/soc-cont/#SH2a> on 1 December 2019.

²⁶ Kothari Vardhman Singh, 'Thomas Hobbes: Social Contract' Unpublished LL. B Project, Hidayatullah National Law University, Naya Raipur, India, 2018, 5.

²⁷ Kothari Vardhman Singh, 'Thomas Hobbes: Social Contract' Unpublished LL. B Project, Hidayatullah National Law University, Naya Raipur, India, 2018, 5.

John Locke on the other hand has a contrary view about the state of nature. He does not view the state of nature as miserable as Hobbes does.²⁸ According to him, the state of nature was reasonably good and enjoyable, in which man is free to conduct himself as he likes without any interference.²⁹ Despite this, private property was not secure as conflicts would arise as to ownership of property.³⁰ This was because of the absence of established law; the absence of an impartial Judge; and the absence of natural power to execute natural laws.³¹ This necessitated the development of government to secure property rights and through law uphold the rights of life, liberty and property.

Jean-Jacques Rousseau like Locke viewed man's state of nature as one of happiness and equality among men. As time passed, however, humanity faced certain changes in their means of interaction.³² Families cropped up and so did small communities with certain rules concerning labour.³³ This led to the development of private property which necessitated the creation of government to assure and guarantee the rights they had willingly sacrificed.³⁴ However, unlike Locke who viewed government as a source of liberty, Rousseau viewed government as the product of the general will.³⁵

Despite these varied perspectives on the origin of the social contract, they share the similarity that the result of this contract is that government is a guardian of man's rights and liberties. This is by virtue of law which is enacted to ensure social order. Under this theory, punishment is seen as a form of vengeance whereby offenders should suffer because they have caused others to suffer.³⁶

The government, therefore, is the product of the citizen's will. It obtains its mandate to ensure law and order from the citizenry who cede their rights for this to happen. From time to time,

²⁸ Internet Encyclopaedia of Philosophy, *Social Contract Theory* at <https://www.iep.utm.edu/soc-cont/#SH2a> on 1 December 2019.

²⁹ Internet Encyclopaedia of Philosophy, *Social Contract Theory* at <https://www.iep.utm.edu/soc-cont/#SH2a> on 1 December 2019.

³⁰ Internet Encyclopaedia of Philosophy, *Social Contract Theory* at <https://www.iep.utm.edu/soc-cont/#SH2a> on 1 December 2019.

³¹ Kothari Vardhman Singh, 'Thomas Hobbes: Social Contract' Unpublished LL. B Project, Hidayatullah National Law University, Naya Raipur, India, 2018, 6.

³² Internet Encyclopaedia of Philosophy, *Social Contract Theory* at <https://www.iep.utm.edu/soc-cont/#SH2a> on 1 December 2019.

³³ Internet Encyclopaedia of Philosophy, *Social Contract Theory* at <https://www.iep.utm.edu/soc-cont/#SH2a> on 1 December 2019.

³⁴ Internet Encyclopaedia of Philosophy, *Social Contract Theory* at <https://www.iep.utm.edu/soc-cont/#SH2a> on 1 December 2019.

³⁵ Kothari Vardhman Singh, 'Thomas Hobbes: Social Contract' Unpublished LL. B Project, Hidayatullah National Law University, Naya Raipur, India, 2018, 7.

³⁶ Mickunas A, 'Philosophical issues related to prison reform,' in Joycelyn M, 3ed, *Prisons today and tomorrow*, Jones and Barlett, New York, 2014.

the citizenry agrees to shape government by determining those who are to constitute that government. This is the election process which should be an open and fair process by which the citizenry can air out their opinions concerning the government.

The electoral process itself is also regulated by laws to protect its integrity. Voter bribery is an offence that threatens the formation of government thereby going against the general will of the citizenry. Furthermore, it violates election laws that are meant to protect elections and therefore injures the public. Therefore, it goes without saying that this injury should be punished.

2.3. Economic Theory on Punishment

This theory mainly stems from two other theories: the utilitarian theory and the deterrence theory advanced by Cesare Beccaria and Jeremy Bentham. With regards to the utilitarian theory Jeremy Bentham posited that an offender usually weighs out the benefit that would arise from committing a crime against the weight of the punishment he is meant to suffer.³⁷ He argued as such since, “*pain and pleasure are the great spring of human action and in matters of importance every one calculates.*”³⁸ Under the deterrence theory, a crime will not be committed if there is no profit foreseeable.³⁹ Both theories are based on the calculus between benefit and cost of crime. They both view crime from the conscious, rational considerations of an individual.⁴⁰

Robert Cooter and Thomas Ulen, pioneers of the economic theory of punishment espoused that theory is an account of the deliberations of a rational, amoral person when deciding in advance whether to commit a crime.⁴¹ Under this theory, a criminal is not just simply cognisant of the costs and benefits of crime, they weigh the probabilities associated with the crime.⁴² Therefore, the costs of crime acts as deterrents to an individual committing the said crime.

³⁷ Carlsmith K and Darley J 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment',83 *Robinson Journal of Personality and Social Psychology*, 2002, 284.

³⁸ Bentham J, *An Introduction to the Principles of Morals and Legislation*, 1843.

³⁹ Carlsmith K and Darley J 'Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment', 285.

⁴⁰ Andenaes J, 'The General Preventive Effects of Punishment' *114 University of Pennsylvania Law Review*, 1966.

⁴¹ Cooter Robert and Ulen Thomas, *Law and Economics*, 6ed, Berkeley Law Books, 2016, 469.

⁴² Cooter and Ulen, *Law and Economics*, 469.

The deterrence of crime can either be specific or general.⁴³ The specific deterrence is to the criminal themselves due to the fear of incurring more costs such as imprisonment⁴⁴ while the general deterrence is the impact that punishing a criminal offender has on other people within society, and as a result members of the society shall refrain from in criminal behaviour as a result.⁴⁵ General deterrence rests on the premise that execution of the law is a public act and also the prosecution of its offenders.⁴⁶

However, the costs of crime should be certain and severe enough for any form of deterrence to materialise. Certainty refers to the perceived likelihood that an offender will be arrested and punished for their criminal act. Individuals who recognize their chances of arrest and punishment as high are more deterred from committing an offence than individuals who believe that they are unlikely to be apprehended or punished. Severity dictates the degree of punishment. As the severity of punishment increases, the likelihood of an individual committing that offence decreases.

Therefore, taking into account the discussion, punishment of crimes acts as a cost to the offender of any given crime. The offender being rational, is bound to assess the viability of a certain crime by gauging as to whether the benefit or the payoff of the crime is greater than the cost of the crime which is its punishment. If the benefit of the crime is greater than the cost of the crime, the offender is predisposed to committing the crime and if the cost of the crime is greater than the benefit of the crime, the offender is deterred from committing the crime. Furthermore, the cost of the crime is defined by the certainty and severity of punishment attached to the crime. The more certain and severe the scheme of punishment is, the higher the cost of the crime.

From the perspective of the perpetrator of voter bribery, the benefits of such are the political rewards obtained from an election marred by voter bribery such as winning a political seat. However, the costs of arrest and imprisonment should act as a deterrent mechanism for the offender. Such costs for them to truly bear upon the offender should be certain in their arrest and punishment while also severe enough. This means that there should be clear and certain

⁴³ Beyleveld D, 'Deterrence Research as A Basis for Deterrence Policies' 18 *The Howard Journal of Criminal Justice*, 1979.

⁴⁴ Low P W, Jeffries J C and Bonnie R J, *Criminal Law*, Foundation Press, 1986, 7.

⁴⁵ Hirsch A V and others, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research*, Hart Publishing, 1999

⁴⁶ Oppenheimer H, *The Rationale of Punishment*, Patterson Smith, 1975.

laws to deter such actions and furthermore institutions mandated to handle these offences should always fulfil their mandates.

2.4. Conclusion

The aim of this chapter is to highlight the theories that speak to the overall aim of the study which was to assess the prosecution of voter bribery. Through the Social Contract Theory, the place of law such as the election laws is that which promotes social order. Voter bribery denies this social order the chance to become reality. Finally, through the Economic Theory of Punishment, laws that are geared to effectively punish offenders should be clear and severe enough. An offender of voter bribery calculates the benefits and costs of the crime and clear laws with severe punishments make the crime less viable due to the high costs.

Chapter 3

3.0. Democracy, Elections and Voter Bribery

3.1. Introduction

The aim of this chapter is to first revisit the relationship between democracy and elections. This paints a portrait of the necessity of elections within democracy. Secondly, this chapter assesses as to whether there are parallels between voter bribery and criminal offences. Through such an assessment, voter bribery bears a greater weight to other election offences and a more serious, a more coherent means of punishment is argued for.

3.2. Democracy and Elections

There has never been a concrete definition of democracy. Hoffman appropriately pointed out that democracy is the most discussed and contested notion of political theory.⁴⁷ Nwabueze has stressed the fact that no word is more susceptible to a variety of tendentious interpretations than democracy.⁴⁸ However, Robert Dahl's conceptualization of the four characteristics of democracy is particularly useful in trying to define democracy. First, is effective participation.⁴⁹ This means that democracy should be responsive to the people's will. Second, is that democracy mandates voting equality at the decisive stage and thus each citizen should have an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other citizen.⁵⁰ Third, democracy requires enlightened understanding in which people are knowledgeable of its wants and needs.⁵¹ The fourth attribute is that the people must be sovereign and be able to control the agenda.⁵²

Given the foregoing, the central role that elections play in a democracy cannot be overemphasized. However, the question as to whether an election is synonymous to democracy abounds. While elections and democracy are so inextricably intertwined, the causal relationship between the two is not straightforward. An election is one of the most important elements of democracy, but a country's democratic credentials cannot be measured simply by the frequency or regularity of elections.

⁴⁷ Hoffman J, *State, Power and Democracy: Contentious Concepts in Practical Political Theory*, St Martin's Press, New York, 1988.

⁴⁸ Nwabueze B O, *Constitutionalism in the Emergent States*, C. Hurst & Co, London, 1973.

⁴⁹ Dahl R A, *Democracy and its Critics*, Yale University Press, New Haven, 1983, 109.

⁵⁰ Dahl, *Democracy and its Critics*, 109.

⁵¹ Dahl, *Democracy and its Critics*, 109.

⁵² Dahl, *Democracy and its Critics*, 109.

Kenya has had several elections even before its independence. Since 1992, when multi-partism was reintroduced, there have been at least six general elections and several by-elections that have been conducted within the country. These are what Khadiagala points out as democratic experiments.⁵³ Experiments because it has never been a guarantee that democracy would be sustained simply because of elections as there have been consistent challenges to Kenya's democracy that still persist today. Therefore, in spite of elections democracy can still falter. However, it does not mean that elections are to be neglected rather they should be upheld to the best of standards and practices to foresee a blossoming democracy.

3.2. The nature of voter bribery

In criminal law, the cardinal principle of *actus non facit reum, nisi mens sit rea*⁵⁴ declares that, there are two constituent elements of a criminal offence: the *actus reus* and the *mens rea*.⁵⁵ This means that a person may not be convicted of a crime unless, first it is proved beyond reasonable doubt that he had caused a certain event or that responsibility is to be attributed to him for the existence of a certain state of affairs which is forbidden by criminal law.⁵⁶ Second, that he had a definite state of mind in relation to the causing of the event or the existence of the state of affairs.⁵⁷

The *actus reus* element constitutes an act or deed or commission or omission,⁵⁸ that is forbidden by criminal law.⁵⁹ Voter bribery involves distribution of monetary favours in exchange for votes. It involves the commission of a positive act. Furthermore, it is an act that is prohibited by law.⁶⁰ However, the Election Offences Act is not strictly a source of criminal law rather it provides for election offences that may or may not contain criminal elements. The Anti-Corruption and Economic Crimes Act creates the criminal offence of bribery,⁶¹ but does so from the perspective of public officers already bestowed with administrative power.

⁵³ Gilbert K, 'Reflections on the Causes, Courses and Consequences of Election Violence in Africa' in Khabele M, Gilbert K and Shale V (eds), *When Elephants Fight: Preventing and Resolving Election-Related Conflicts in Africa*, Election Institute for the Sustainability of Democracy in Africa, Johannesburg, 2010, 21.

⁵⁴ An act does not make anyone guilty unless there is a criminal intent or a guilty mind.

⁵⁵ Musyoka William, *Criminal Law*, LawAfrica Publishing (K) Ltd, Nairobi, Kenya, 2016, 27.

⁵⁶ *Mohammed and three others v Republic* (2005) 1 KLR 722.

⁵⁷ *Mohammed and three others v Republic* (2005) 1 KLR 722.

⁵⁸ Musyoka, *Criminal Law*, 27.

⁵⁹ *Emma d/o Mwaluko v Republic* (1976) LRT 197.

⁶⁰ Section 9, *Election Offences Act*.

⁶¹ Section 2(1), *Anti-Corruption and Economic Crimes Act*.

The *mens rea* is the mental element, mental attitude, state of mind, or criminal intent.⁶² It is used to determine both the propriety and the grading of punishment⁶³ in addition to the act itself. There are various forms of culpability: intention, recklessness, negligence, knowledge, etc⁶⁴ which differ from offence to offence. With regard to voter bribery, the mental element is that of having the intention to bribe so as to threaten the legitimacy of an election.

In a criminal trial, the main parties are the republic and the accused.⁶⁵ However, in election petitions arising out of voter bribery the parties are individual petitioners.⁶⁶ Furthermore, an election court that is mandated to adjudicate on an election petition does not act as a criminal court.⁶⁷

This is because election petitions do not necessarily fall as either criminal offences or civil offences. They are of a *sui generis* character. As opined by the Supreme Court of Kenya,

*“The description of election petitions as causes sui generis, is in every respect apposite. An election petition is a suit instituted for the purpose of contesting the validity of an election, or disputing the return of a candidate, or claiming that the return of a candidate is vitiated on the grounds of lack of qualification, corrupt practices, irregularity or other factor. Such petitions rest on private political or other motivations, coalescing with broad public and local interests; they teeter in their regulatory framework from the civil to the criminal mechanisms; and they cut across a plurality of dispute-settlement typologies.”*⁶⁸

Despite this unique character of an election petition, it has been acknowledged that it poses the trappings of criminal offences such as voter bribery.⁶⁹ The Elections Offences Act envisions the criminal character of election offences such as voter bribery by criminal providing for its prosecution the office of Director of Public Prosecutions to investigate such offences as voter bribery.⁷⁰ Furthermore, despite election petitions enjoying a special standard of proof that is beyond a balance of probabilities but not above beyond reasonable doubt.⁷¹ Voter bribery is subjected to the same standard as that of a criminal offence which is

⁶² Samaha Joel, *Criminal Law*, 10ed, Linda Schreiber-Ganster, Wadsworth, 2011, 106.

⁶³ *United States v Cordoba-Hincapie* (1993), United States District Court for the Eastern District of New York.

⁶⁴ Nyasani J M, *Legal Philosophy*, Consolata Institute of Philosophy Press, Nairobi, 1995, 49-55.

⁶⁵ Kiage Patrick, *Essentials of Criminal Procedure*, 2

⁶⁶ Part VII, *Elections Act*.

⁶⁷ *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* [2015] eKLR, para 113.

⁶⁸ *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* [2015] eKLR, para 107.

⁶⁹ *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR, para 108.

⁷⁰ Section 21, *Election Offences Act*.

⁷¹ *Raila Odinga & 5 Others v Independent Electoral and Boundaries commission & 3 others* [2013] eKLR, para 203.

of beyond reasonable doubt.⁷² Voter bribery hence in spite of being an election offence is a criminal offence.

3.4. Conclusion

This chapter revisits the link between elections and democracy and illustrates that though elections are not equal to democracy they are of fundamental importance as they speak to the central tenant of democracy which is the responsiveness of the people's will. Voter bribery is a criminal and electoral offence that seeks to deter this responsiveness.

⁷² *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR, para 109.

Chapter 4

4.0. The Legal and Regulatory Framework of Voter Bribery

4.1. Introduction

This chapter zeroes on the legal and regulatory framework of voter bribery. In particular, it reviews the mechanisms deployed by the law to address the offence of voter bribery. The Constitution of Kenya, 2010 is the point of departure. Thus, a review of the legal and regulatory framework before 2010 and after 2010 is undertaken.

4.2. Before 2010

Prior to Kenya's independence, there were several elections dating back to 1920 elections to the Legislative Council. However, this paper delves into elections carried forth since independence. Prior to the 2013 general elections, that were the first under the Constitution of Kenya 2010, there were ten general election in which half (1963, 1992, 1997,2002,2007) were under the multi-party system while the rest (1969, 1974, 1979, 1983, 1988) were under a single-party system of the Kenya African National Union (KANU).⁷³ The Repealed Constitution indeed provided for the right to vote⁷⁴ but principally as a means of determining members of the National Assembly and the President as it was excluded from the then Bill of Rights in the constitution.⁷⁵ Hansungule was probably apt in stating that the Bill of Rights was not exactly human rights friendly, but in practice the Bill, far from protecting the interests of ordinary Kenyans, represents the parochial interests of the ruling class.⁷⁶

Though not expressly dictated, it was implied that the elections were to be conducted in a free and fair manner as that was the principal mandate of the Electoral Commission of Kenya (ECK)⁷⁷ and the objective of the subsequent statutory provisions.⁷⁸ The repealed Elections Offences Act amplified this by providing for electoral offences including voter bribery.⁷⁹ The penalty for voter bribery was to be an imprisonment for a term not exceeding five years.⁸⁰

⁷³ African Elections Database, *Elections in Kenya*, at <http://africanelections.tripod.com/ke.html> on 15 November 2019.

⁷⁴ Article 32(2), *Constitution of Kenya* (1963) (Repealed).

⁷⁵ In the Repealed Constitution, voting was not provided for under Chapter V - Protection of Fundamental Rights and Freedoms of the Individual but under Chapter III – Parliament.

⁷⁶ Hansungule M, 'Kenya's unsteady march towards the lane of constitutionalism' 1 *University of Nairobi Law Journal* 43, 2003.

⁷⁷ Article 42A, *Constitution of Kenya* (1963) (Repealed).

⁷⁸ Fourth Schedule, *National Assembly and Presidential Elections Act* (Repealed).

⁷⁹ Section 10, *Elections Offences Act* (Repealed).

⁸⁰ Section 11(1), *Election Offences Act* (Repealed).

Furthermore, its prosecution was to be instituted by the sanction of the Attorney General.⁸¹ The offence itself was to be a cognizable offence:⁸² one by which a person could be arrested without a warrant. Therefore, the legal framework provided for voter bribery to be dealt with by two institutions: the elections courts under the Judiciary and the Attorney General.

4.2.1. Election Courts

Election courts are courts vested with the mandate of securing the integrity of elections. The High Court was the principal election court as it had the jurisdiction to entertain matters pertaining the validity of presidential elections and that of members of the National Assembly.⁸³ However, despite the legal provisions providing for an electoral dispute resolution mechanism through election courts, efforts to address the offence of voter bribery failed were principally stymied by what Nwabueze termed as the ‘African Presidency’ that emerged in most African States after their independence, that had a clear disregard for any checks to its authority.⁸⁴ This was the case in Kenya where laws meant to check the Executive were consistently amended on a whimsical basis. Under President Jomo Kenyatta’s regime, for example the Fifteenth Amendment to the Independence Constitution was introduced vide the Constitution of Kenya (Amendment) Act No 14 of 1975. The intent was clearly political as the President’s prerogative of mercy was extended to pardon a person found guilty of election offences.⁸⁵ This amendment benefit President Kenyatta’s friend Paul Ngei who had been found guilty of an election offence.⁸⁶ Therefore, even when election courts attempted to address voter bribery, judgments were easily quashed by the President especially if they were against his political allies.

Furthermore, the Judiciary itself became less independent and was more subservient to the Executive especially during President’s Moi regime. It became an instructed agency of the Presidency.⁸⁷ The President wielded enormous power over the independence of the Judiciary as seen in 1988 when the security of tenure of judges was removed.⁸⁸ This situation was made worse by the fact that the Judiciary hamstrung itself by grand corruption that enveloped

⁸¹ Sections 11(1) & 11(3), *Elections Offences Act* (Repealed).

⁸² Section 11(4), *Elections Offences Act* (Repealed).

⁸³ Article 10 and 44, *Constitution of Kenya* (1963) (Repealed) and Section 2, *National Assembly and Presidential Elections Act* (Repealed).

⁸⁴ Nwabueze B O, *Presidentialism in Commonwealth Africa*, C Hurst & Co Publishers Ltd, 1974, Chapter 1.

⁸⁵ Lumumba P L O and Francescshi L, *The Constitution of Kenya, 2010; An Introductory Commentary*, 1 ed, Strathmore University Press, Nairobi, 2014, 37.

⁸⁶ Lumumba and Franceschi, *The Constitution of Kenya, 2010; An Introductory Commentary*, 37.

⁸⁷ Makau M, ‘The Rule of Law and Judicial Subservience in Kenya’ 23 *Human Rights Quarterly* 1, 2003, 118.

⁸⁸ *Constitution of Kenya* (Amendment) (Act No 4 of 1988).

it.⁸⁹ These factors nullified its ability to effectively settle disputes of political nature such as electoral disputes involving electoral offences.

During the selected moments when election courts looked into electoral disputes, the election courts were more willing to look into election disputes of Members of Parliament rather than the presidential election disputes due to the centralised power of the Presidency as he was normally not challenged until the 1992 general elections.⁹⁰ However, even then, the courts primarily struck out most cases because of technicalities thereby defeating the overall ends of justice.⁹¹

This approach was best highlighted during the few times when the presidential election could be challenged in two presidential petitions. Firstly, was *Kenneth Stanley Matiba vs Daniel Arap Toroitich Moi (1993) (Unreported)* where the petitioner, Kenneth Matiba of Ford-Asili had become physically incapacitated some time prior to the elections and had given his wife the power of attorney. She subsequently signed the petition. The petition was struck out by the court on the basis that it was not signed by the petitioner in person.

In the second presidential petition,⁹² the notice of the petition filed by Mwai Kibaki of the Democratic Party (DP) against the incumbent President Moi of the Kenya African National Union (KANU), the incumbent was published by the petitioner in the *Kenya Gazette* which ordinarily the latter was expected to have read. However, the High Court struck out the petition for the reason that there was no personal service on Moi. This was subsequently upheld on appeal to the Court of Appeal.

4.2.2. The Attorney General

Prosecution of any electoral offences by the Attorney General was also barely existent due to several factors. First, the Attorney General had multiple overlapping roles⁹³ as the chief legal adviser to the Government, an ex-officio member of Parliament and head of public prosecution.⁹⁴ This hampered any attempts to effectuate prosecution especially during

⁸⁹ Mbondeni M K and Ambani J O, *The New Constitution of Kenya: Principles, Government and Human Rights*, LawAfrica Publishing, Kenya, 2013, 144.

⁹⁰ Hornsby Charles, 'The Member of Parliament in Kenya, 1969–1983', Unpublished Degree of Philosophy Dissertation, St Antony's College, Oxford, 1985, 94.

⁹¹ Sihanya Ben, 'Constitutionalism, the Rule of Law and Human Rights in Kenya's Electoral Process' in Musila G D, *Handbook on Election Disputes in Kenya Context, Legal Framework, Institutions and Jurisprudence*, Law Society of Kenya, Nairobi, 2013, 38.

⁹² *Mwai Kibaki v. Daniel Toroitich Arap Moi* (1999).

⁹³ Lumumba and Francescshi, *The Constitution of Kenya, 2010; An Introductory Commentary*, 461.

⁹⁴ Article 26(5), *Constitution of Kenya* (1963) (Repealed).

political tense moments. Secondly, the Attorney General abused the prosecutorial powers regularly.⁹⁵ The Attorney General consistently leaned towards the Executive and avoided instituting any investigations against high ranking officials. This lack of impartiality was because his appointment was purely political.⁹⁶ The extent of this biasness was best captured in 1991 when then Attorney General Amos Wako remarked 1991 that "a characteristic of the rule of law, is that no man save for the president is above the law."⁹⁷ Therefore prosecuting the ruling political class on electoral offences including voter bribery almost never occurred.

During the pre-2010 era, the political class continuously challenged and threatened the independence of institutions mandated to address the offence of voter bribery. The advent of the single-party system established voter bribery as the principal means by which persons especially in rural areas could attain elected positions.⁹⁸ This left the electorate to become a beggary class of clients⁹⁹ and thus entrenched elections as a patron-client enterprise. Multi-partism did little to change this situation.¹⁰⁰ Election courts continuously manipulated substantive, procedural or evidentiary election laws while the Attorney General was barely willing to address voter bribery especially when it involved the political ruling class. The failure of these institutions eroded public confidence in them. As a result, in the 2007 general elections where several electoral offences such voter bribery were rampant,¹⁰¹ there was little faith in these institutions and the country was ensnared in Post-Election Violence.

4.3. After 2010

The aftermath of the 2007 general elections illustrated the need of a credible electoral system and an effective election dispute resolution system. The Constitution of Kenya, 2010 sought to fulfil this need. The Constitution declares proudly that sovereignty belongs to the people.¹⁰² The right to vote is recognised in the Bill of Rights¹⁰³ and this right is to be realised

⁹⁵ Aketch M, *Administrative Law*, Strathmore University Press, Nairobi, 2016, 297.

⁹⁶ Ndegwa S N, 'The Incomplete Transition: The Constitutional and Electoral Context in Kenya' 45 *Africa Today* 2, 1998, 202.

⁹⁷ Makau M, 'The Rule of Law and Judicial Subsistence in Kenya', 100.

⁹⁸ Katete O, 'Political recruitment in Mbita constituency: A study in electoral politics', University of Nairobi, Seminar paper 3, 1984, 30.

⁹⁹ Katete O, 'Political recruitment in Mbita constituency: A study in electoral politics', 35.

¹⁰⁰ See Institute for Education in Democracy, Catholic Justice and Peace Commission and National Council of Churches of Kenya, *Report on the 1997 General Elections*, 76 and Hornsby C, *Kenya: A History Since Independence*, I B Tauris & Co Ltd, New York, 2012, 686, 756.

¹⁰¹ 'Results of a voter bribery survey' Daily Nation, 29 November 2007.

¹⁰² Article 1, *Constitution Kenya* (2010).

¹⁰³ Article 39, *Constitution of Kenya* (2010).

in an electoral system that is free and fair.¹⁰⁴ The Election Offences Act substantiates the notion of a free and fair electoral system by providing for electoral offences such as voter bribery. Voter bribery is recognised as a cognizable offence¹⁰⁵ which attracts a penalty of two million shillings or six years of imprisonment or both.¹⁰⁶

Similar to the pre-2010 era, election courts are granted the jurisdiction to settle electoral disputes that would involve electoral offences. Furthermore, the Director of Public Prosecutions instead of the Attorney General is empowered to initiate investigations into such offences.¹⁰⁷ Therefore, with regards to voter bribery, the legal framework currently provides for the two institutions: the election courts, the DPP to handle matters concerning voter bribery.

4.3.1. Election Courts

One of the main gripes concerning the Judiciary was its lack of independence from the Executive. This fettered its ability to adjudicate on matters especially those of a political nature such as election disputes. The Constitution of Kenya, 2010 addresses this by bolstering judicial independence on an institutional level and a decisional level.¹⁰⁸

When adjudicating electoral disputes involving voter bribery, election courts have done so from the post-election perspective where the elections have already been held and a winner declared. Thereafter an election petition is lodged to the requisite court and the matter is determined. In election petitions involving voter bribery, election courts have been stringent in upholding voter bribery as a criminal offence with the high standard of proof beyond reasonable doubt as highlighted in the following cases.

In the Supreme Court case of *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* [2015] eKLR, the Appellant was found guilty of voter bribery during the general elections held on 4th March 2013. Both the appellant and the 1st Respondent (Petitioner), Musikari Kombo were among candidates who contested for the Bungoma senatorial election. The Appellant was declared the winner after tallying. However, the 1st Respondent was dissatisfied with the conduct of the elections and filed a petition in the High Court at Bungoma, seeking to nullify the appellant's election. The High Court allowed the petition

¹⁰⁴ Article 81, *Constitution of Kenya* (2010).

¹⁰⁵ Section 19, *Election Offences Act* (2016).

¹⁰⁶ Section 9(3), *Election Offences Act* (2016).

¹⁰⁷ Section 21, *Election Offences Act* (2016).

¹⁰⁸ Article 160, *Constitution of Kenya* (2010).

and nullified the election of the Appellant. Aggrieved by the judgment by the High Court, the Appellant lodged an Appeal at the Court of Appeal in Kisumu which judged that the Appellant had committed the offence of voter bribery and thus upheld the High Court's judgment nullifying the election.

In the Appeal at the Supreme Court, with regards to voter bribery the Supreme Court reiterated that voter bribery is a criminal offence whose standard of proof is beyond reasonable doubt and of which a Petitioner in an election petition bears the burden of proving.¹⁰⁹ It was observed that the standard had been met and that the 1st Respondent had convincingly discharged his burden. As a result, the Court of Appeal's judgment was upheld, and he was found guilty by the Supreme Court.¹¹⁰

The Supreme Court case of *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR determined on whether the issuance of Constituency Development Fund (CDF) cheques by an incumbent during the election period amounted to voter bribery. The case concerned the parliamentary election of Nyando Constituency of which the Appellant and the 1st Respondent (Petitioner), Jared Okello were contestants. The Appellant was declared the winner of the said election of which the 1st Respondent disputed in his petition to the High Court. The High Court upheld the election as it held that the irregularities by the 1st Respondent were unfounded. The Petitioner lodged an appeal at the Court of Appeal which allowed the appeal and nullified the election of the Appellant as Member of the National Assembly for Nyando Constituency, upon finding that the Appellant had committed the election offence of voter bribery. The Appellant lodged an appeal to the Supreme Court challenging the judgment.

In determining the offence of voter bribery, the Supreme Court had to address whether CDF cheques issued to the public amounted to voter bribery. It held that first, the Court of Appeal had erred in finding the appellant guilty as evidence tendered was never convincing.¹¹¹ Second, that the use of CDF cheques was in line with performance of the official duties of officials within the prescribed laws and regulations and it is upon the Petitioner to rebut this presumption of which in the case was never done.¹¹² The Supreme Court thus overturned the judgment by the Court of Appeal and held that the appellant was validly elected.

¹⁰⁹ *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* [2015] eKLR, para 119.

¹¹⁰ *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* [2015] eKLR, para 170.

¹¹¹ *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR, para 122.

¹¹² *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR, para 122.

In *Wavinya Ndeti v Independent Electoral and Boundaries Commission (Iebc) & 4 others* [2013] eKLR, the Petitioner, Wavinya Ndeti who was an aspirant for Governor of Machakos County alleged that the 2013 general elections for the gubernatorial seat of Machakos County were not conducted in a free and fair manner in accordance with electoral laws and regulations. With regards to voter bribery, it was alleged that the offence was committed by the 4th Respondent and eventual declared winner Alfred Mutua. The High Court at Machakos observed that voter bribery is a criminal offence and therefore the petitioner had to provide unequivocal evidence that could prove the offence.¹¹³ None of the petitioner's witnesses could link the occurrences of voter bribery to the 4th Respondent and that their testimonies were based on hearsay. Therefore, the court held that the offence was not proved.

In the election petition of *Paul Gitenyi Mochorwa v Timothy Moseti E. Bosire & 2 others* [2013] eKLR, the Petitioner Paul Gitenyi Mochorwa challenged the validity of the parliamentary election of Timothy Moseti of Kitutu Masaba Constituency. The petitioner who was not a candidate in the parliamentary election alleged that there were incidences of voter bribery, voter fraud and undue influence that tipped the scales for the 1st Respondent, Timothy Moseti. With regards to voter bribery, the Petitioner's witnesses testified that they had witnessed incidences of voter bribery in several parts of the constituency. However, the High Court of Kisii held that the offence was not proved against the 1st Respondent as none of the petitioner's witnesses were actually present when the offence was allegedly committed and there were no efforts taken to report this to the police since voter bribery is a cognizable offence that would have resulted in an automatic arrest of its perpetrators.¹¹⁴

As seen in the highlighted cases above, election courts have taken a more substantive approach to voter bribery. The threshold of proving voter bribery is very high and from court practice it must be met. However, it has been acknowledged that proving the offence beyond reasonable doubt is difficult especially if done in secrecy¹¹⁵ which is mostly the case in Kenya. Therefore, election courts are hamstrung by their reactive nature by which they only handle matters specified in an election petition while petitioners have to provide specific,

¹¹³ *Wavinya Ndeti v Independent Electoral and Boundaries Commission (Iebc) & 4 others* [2013] eKLR, para 40.

¹¹⁴ *Paul Gitenyi Mochorwa v Timothy Moseti E. Bosire & 2 others* [2013] eKLR, para 76-79.

¹¹⁵ *Paul Gitenyi Mochorwa v Timothy Moseti E. Bosire & 2 others* [2013] eKLR, para 68.

cogent and certain testimony for the offence to be proved.¹¹⁶ Furthermore, the courts have been clear in stating that evidence of mere malpractice does not nullify an election.¹¹⁷

4.3.2. Director of Public Prosecution

With regards to voter bribery, the DPP is empowered to initiate prosecution in two ways. First if an election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.¹¹⁸ Second, the DPP can initiate proceedings by himself.¹¹⁹ Initially, election courts could determine the guilt of a person in relation to an election offence. However, the Election Laws (Amendment) Act, 2017 took away the power of election courts to find a person guilty of an election offence. Instead, election court are only empowered to make a finding that an electoral malpractice of a criminal nature may have occurred and report the matter to the DPP.¹²⁰

In the two election cycles of 2013 and 2017, the DPP's prosecution actions have been chequered. In the 2013 General election cycle, the DPP together with the Independent Electoral and Boundaries Commission (IEBC) handled a total of 86 cases of election offences.¹²¹ However, a majority of cases were dismissed based on insufficient evidence. The failure of prosecution was due to poor investigations that yielded inadmissible evidence for prosecution.¹²²

In *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* [2015] eKLR, the Supreme Court upon finding the Bungoma senatorial election marred in voter bribery ordered the DPP to investigate him.¹²³ The DPP duly complied and ordered for investigations to proceed.¹²⁴ However, the outcome of this investigation has never been made public. Furthermore, Moses Wetangula was cleared by the IEBC to vie for the by-election that was occasioned by voter bribery on his part which he won.

¹¹⁶ *Frederick Otieno Outa v Jared Odoyo Okello & 4 others* [2014] eKLR, para 107.

¹¹⁷ *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, para 373.

¹¹⁸ Section 87, *Elections Act*.

¹¹⁹ Section 21, *Election Offences Act* (2016).

¹²⁰ *Julius Makau Malombe v Charity Kaluki Ngilu & 2 others* [2018] eKLR, para 166.

¹²¹ National Crimes Research Centre, *Election Crimes and Offences in Kenya*, 2016, 32.

¹²² Independent Electoral and Boundaries Commission, *Post-Election Evaluation Report on The March 4th, 2013 General Elections*, 2014, 40.

¹²³ *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* [2015] eKLR, para 170.

¹²⁴ Pamela Chepkemei, 'DPP wants voter bribery allegations against Wetangula investigated' Standard Digital 11 October 2013 at <https://www.standardmedia.co.ke/lifestyle/article/2000095343/dpp-ants-voter-bribery-allegations-against-wetang-ula-investigated> on 27 November 2019.

In the lead up to the 2017 General Elections, the DPP deployed prosecutors all around the country and even had a hot line number¹²⁵ by which the electorate can report of voter bribery and other offences if spotted. Again, there was little in the way of conviction as a result of these prosecutions. This stems from the fact that there are no reports by the DPP on ongoing investigations and their conclusions. The DPP simply initiates investigations but there is little to show on them.

4.4. Conclusion

Kenya has come a long way in ensuring elections are held in a manner that ensures its citizenry have a say in. In the pre-2010 era, despite the legal framework that trumpeted ideals of free and fair elections, institutions required to handle this were neutered by the political class and as a result, offences such as voter bribery pervaded the political system. The 2010 Constitution and the subsequent legislations have sought to prioritise these ideals once more and the current institutions have tried to uphold them to varying successes. Election courts have ruled based on sound rationales but there is little evidence of prosecution by the DPP. Therefore, though, there is a leap forward, it is no secret that voter bribery is still ingrained in the electoral process as seen in the 2013¹²⁶ and 2017¹²⁷ general elections and that there is much to be done.

¹²⁵ Office of the Director of Public Prosecution Kenya, *Manning the 24-hour call centre for electoral offences* at <http://www.odpp.go.ke/manning-the-24-hour-call-centre-for-election-offences/> on 1 December 2019.

¹²⁶ National Crimes Research Centre, *Election Crimes and Offences in Kenya*, 2016, 29.

¹²⁷ International Commission of Jurists (Kenya), 'Reflections on the 2017 Elections in Kenya: Paper Series on Emerging Judicial Philosophy in Kenya' International Commission of Jurists (Kenya), Election Working Paper Series, 2018,141.

Chapter 5

5.0. Conclusions and Recommendations

5.1. Introduction

The bulwark of democracy is the free will of the citizenry. There are various avenues through which this free will is expressed and the most important one of these is through elections. Though carried out after every five years, they are fertile grounds on which the citizenry can voice their approval or disapproval of their leaders. The electoral offence of voter bribery obscures the free will of the citizenry. The aim of this paper was to assess as to its prosecution. As earlier established, Kenya's electoral process has been bedevilled by this malaise due to failure by institutions to prosecute and adjudicate on the offence. The Constitution of Kenya 2010 sought to challenge this situation and election dispute resolution mechanisms have partially succeeded in addressing the offence. However, the general elections of 2013 and 2017 have shown that indeed more effort is required for that free will of the citizenry blossoms.

5.2. Conclusion

Chapter 1 introduced the study by setting out what legal issue would be addressed by this study. The legal issue to be studied was voter bribery and its prosecution as set out in the Election Offences Act, 2016. The aim was to

Chapter 2 laid out the theoretical framework underpinning the study. It was based on the Social Contract Theory and the Economic Theory of Punishment. Under the Social Contract theory, it was established that laws were a necessary construct of government and that voter bribery upsets this. The Economic Theory of Punishment highlights the deterrence effect of punishments based on the cost benefit analysis done by a perpetrator.

Under Chapter 3, the principles of democracy and elections were laid out. The chapter sought to highlight the nexus between elections and democracy. It established that elections are not equal to democracy rather they form part of the building blocks of a vibrant democracy. Furthermore, the chapter sought to explain the link between voter bribery and criminal offences. It established that voter bribery requires the two elements of criminal offences. Furthermore, the standard of proof for voter bribery is equal to that of criminal offences, that is, beyond reasonable doubt.

Under Chapter 4, the legal framework for voter bribery was assessed. The study found that the framework is sufficient in addressing the offence. This is because first, the principle of independence of election dispute resolution mechanisms is enunciated. Secondly, the framework delineates the institutions' mandate with regard to voter bribery.

Regardless of the competency in the electoral laws, there have been mixed results to their enforcements. Election courts have adopted sound jurisprudence with regard to election disputes concerning voter bribery. They have declared that unequivocal proof is required to fulfil the burden and standard of proof needed in such cases. With regards to the DPP vested with prosecutorial powers there has been failure to conduct serious investigations resulting to sentencing. Though investigations have been called for, their conclusion is rarely made public therefore measuring the enforcement by the DPP is unclear.

5.3. Recommendations

5.3.1. Capacity Building

As earlier indicated, the DPP has been hampered by its weak capacity to effectively investigate and prosecute voter bribery. It therefore, acquires the character of a toothless dogs as if and when cases are prosecuted they easily dismissed by the courts. There is therefore, the need to improve the investigative capacity by deploying more personnel on the ground who have requisite training and experience in investigations and prosecutions. Furthermore, the DPP in conjunction with the IEBC could establish a database that indicates on ongoing investigations on voter bribery and other electoral offences to.

5.3.2. Proper Enforcement

The health of any legal framework is not simply based on the framing of the law, but it is also based on the enforcement of the law. With regard to voter bribery, the DPP should conduct better investigations on voter bribery. It should co-ordinate with other investigative agencies to carry out proper investigations. Furthermore, as seen in many election disputes, petitioners hardly ever discharge the standard of proof for voter bribery because of its hushed nature. This is something that the DPP could address through the proper gathering of evidence and arrests. Finally, prosecution should not solely be geared towards the briber but also to the those receiving bribes. The Election Offences Act provides for this.¹²⁸ This would prevent the

¹²⁸ Section 9, *Election Offences Act* (2016).

electorate from receiving these bribes as they too could incur punishments for receiving bribes.

5.3.3. Culture

At the core of democracy is the people's will. As such the people should jealously guard its integrity. As such, there should be a zero- tolerance policy with regards to voter bribery ingrained in the electorate. The electorate has to be sensitized so that there are aware of their obligation towards building and sustaining that robust democracy. This is especially true in rural areas where voter bribery is more prevalent.

5.3.4. Campaign Finance Reform

In 2013, the Election Campaign Finance Bill was enacted into law. Its purpose was to provide for the regulation, management, expenditure, and accountability of election campaign funds during election and referendum campaigns; and, for connected purposes. It proposed caps on how much money could be raised by individual political parties during the election cycle. However, as seen in the 2017 General Elections, these proposals were simply proposals as an estimated 1 billion US Dollars was spent in the election cycle. Voter bribery has gift giving especially in the form of money as one of its key components. As such, a complete overhaul and restructuring of campaign finance laws needs to be effectuated so that they are realistic and implementable and that candidates can only raise what is strictly necessary i.e. for advertisements etc and not have so much for them to afford giving bribes.

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