

**REFORMING THE CURRENT LEGAL FRAMEWORK TO ENHANCE THE
PRESERVATION OF ENDANGERED SPECIES**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School

By

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December 2019

Word count : 10,900

DECLARATION

I, FAHEEMA GATWIRI JAFFER, do hereby declare that this research 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 research proposal has been submitted for examination with my approval as University Supervisor.

Signed: _____

Patricia Achieng Ouma

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ACKNOWLEDGEMENTS

I would like to express my gratitude towards my supervisor, Ms Patricia Achieng Ouma, my family and friends for their overwhelming support, guidance and insight throughout the process of writing my dissertation.

LIST OF ABBREVIATIONS

1. CITES - Convention on International Trade in Endangered Species of Wild Fauna and Flora.
2. ESA -Endangered Species Act.
3. FWS - Fish and Wildlife Service.
4. GDP – Gross domestic product.
5. IUCN - International Union for the Conservation of Nature.
6. KWS- Kenya Wildlife Service.
7. NMFS - National Marine Fisheries Service.
8. PLC- Pre – listing conservation.
9. SGR- Standard Gauge Railway.
10. USA- United States of America.
11. WMCA - Wildlife Conservation and Management Act.

LIST OF CASES

1. *Defenders of wildlife vs. Babbitt* (1997) 958 F. Supp. 670.
2. *Defenders of Wildlife v. Salazar* (2011) 877 F. Supp. 2d 1271.
3. *Martin v. Waddell* (1842) 41 U.S. 16 Pet. 367 367.
4. *Tennessee Valley Authority v. Hill* (1978) 437 U.S. 153.
5. *Wildlife director (Kenya) v. Kenya Wildlife Services & 4 others* (2020) ELC Petition No.3 of 2020.

LIST OF STATUTES, POLICY DOCUMENTS AND INTERNATIONAL INSTRUMENTS

1. Constitution of Kenya (2010)
2. Endangered Species Act of 1973 (United States of America).
3. IUCN red list categories and criteria, 2nd edition, IUCN Gland, Switzerland, 2008.
4. National Park Ordinance (Act No 9 of 1945).
5. National Parks of Kenya Act of 1962 (Cap 376).
6. National Wildlife Strategy 2030, (2018).
7. The National Wildlife Conservation and Management Policy, Ministry of Forest and Wildlife, (2012).
8. Wild Animals Protection Ordinance (No 18 of 1951).
9. Wild Animals Protection Act of 1962 (Cap 377).
10. Wildlife Conservation and Management Act, 2013.

ABSTRACT

The tourism industry is without a doubt a huge revenue earner for Kenya. Wildlife is a major tourist attraction and constitutes a large percentage of the tourism industry in Kenya. Therefore, Kenya has a responsibility to ensure protection of wildlife, being a national treasure that goes a long way in promoting the economy of the country, in addition to balancing the ecosystem. Efforts put in place by Kenya for the conservation and management of wildlife cannot go unnoticed. However, wildlife and specifically endangered species are still facing threats to date. The objectives of the research are to analyse the current legal framework with the aim of finding whether it is sufficient for the protection of endangered species and how it can be supplemented to enhance their preservation. It has critiqued a few sections in the Wildlife Conservation and Management Act that apply to the preservation of endangered species while identifying gaps in the provisions. The research has also identified the threats that endangered species face as a result to these gaps such as habitat loss and inadequate financing of conservation activities. Finally, through comparative analysis, the research has given recommendations that could reform the laws to enhance the preservation of endangered species. These include improving the identification and listing process and reconciling development projects with the preservation of endangered species.

CHAPTER ONE: INTRODUCTION TO THE RESEARCH

Background of the problem

There has been an increase of threats facing endangered species in Kenya, putting them at the risk of extinction and raises the question whether the laws put in place to protect them are doing so effectively.

Laws protecting wildlife in Kenya were introduced during the colonial times when the British imported wildlife conservation and management methods. National parks were introduced to preserve wildlife through the National Parks Ordinance of 1945¹ which together with the Wild Animals Protection Ordinance of 1951² were renamed the National Parks of Kenya Act of 1962³ and the Wild Animals Protection Act of 1962⁴ respectively.

Post - independence, a wildlife policy was used as a standard for wildlife law making. The policy was integrated into Sessional Paper No. 3 of 1975, 'A Statement on Future Wildlife Management Policy in Kenya,' which consolidated roles played by both the National Parks Authority and the Game Department forming the Wildlife Conservation and Management Department.⁵

Later, the Wildlife Conservation and Management Act which is still in force today merged the wildlife and conservation department into one body to form the Kenya Wildlife Service (KWS).⁶ The (KWS) has a mandate to conserve and manage wildlife in Kenya and to enforce related laws and regulations.⁷

In spite there being laws and organisations aimed at protecting wildlife by providing for wildlife crimes and their punishments, wildlife is still facing threats and challenges including poaching, pollution, diseases, habitat loss, drought, fires, invasive species and human

¹ *National Park Ordinance* (Act No 9 of 1945)

² *Wild Animals Protection Ordinance* (No 18 of 1951)

³ *National Parks of Kenya Act* of 1962 (Cap 376)

⁴ *Wild Animals Protection Act* of 1962 (Cap 377)

⁵ Kinyua Benson, 'The Wildlife Conservation and Management in Kenya Implementing the Framework Law, 2013,5, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2353319> on November 12 2013.

⁶ Kinyua Benson, 'The Wildlife Conservation and Management in Kenya Implementing the Framework Law, 2013,5, < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2353319> on November 12 2013.

⁷ Organisational structure, Kenya wildlife service, 2019 <http://www.kws.go.ke/about-us/about-us> on 2 December 2019.

population pressure.⁸ In addition, building of the standard gauge railway (SGR) was an important step by the government towards improving the transport system and the country's economy in general. However, the SGR has posed great risks to the wildlife. For instance, trains have killed elephants on the old railway or trucks on the adjacent Mombasa Nairobi highway. Such cases have increased since the construction of the SGR.⁹ These threats could in the long run lead to the extinction of endangered species.

With focus on endangered species, elephants and rhinos are still being killed for their tusks and horns respectively, while giraffes are hunted for their meat, skin and tails.¹⁰ In addition, the Grevy's zebra are now only a twelfth of their population a few decades ago and the giraffe population has declined by 40% over the last three decades.¹¹

Kenya is currently trying to prevent the extinction of the Northern white rhino, which will be done through IVF. However, the process is expensive and has pushed Kenya through the Ol Pejeta conservancy and in partnership with Dvůr Králové Zoo to try and raise funds for the process to happen.¹²

One of the countries that have been successful in the protection of endangered species is the United States of America (USA). Through their Endangered Species Act, 99% of species under its protection have been saved from extinction and a 90% recovery rate has been observed.¹³ According to scientists, if the act did not exist, close to 227 species would have been extinct in the USA.¹⁴ The Act has key features such as a citizen unit that acts as a check on the government, enabling individuals to sue the government and ensure it heeds to the

⁸National wildlife conservation status report 2015 – 2017, Kenya wildlife service, 14 December 2018
<https://www.kws.go.ke/content/national-wildlife-conservation-status-report-2015-2017> on 2 December 2019.

⁹Ben Okita Ouma, 'Likely negative consequences of SGR construction for wildlife,' 1 June 2017,
<https://www.nation.co.ke/oped/opinion/ouma-likely-negative-consequences-sgr-construction-wildlife/440808-3952294-7ymbfy/index.html> on 2 December 2019.

¹⁰ Africa wildlife foundation <https://www.awf.org/country/kenya> on 2 December 2019.

¹¹ Africa wildlife foundation <https://www.awf.org/country/kenya> on 2 December 2019.

¹²Northern white rhinos, Ol Pejeta conservancy , 2019
<https://www.olpejetaconservancy.org/wildlife/rhinos/northern-white-rhinos/> on 2 December 2019.

¹³ The endangered species act: a wild success, Centre for biological diversity,
https://www.biologicaldiversity.org/campaigns/esa_wild_success/ on 2 December 2019.

¹⁴ The endangered species act: a wild success, Centre for biological diversity,
https://www.biologicaldiversity.org/campaigns/esa_wild_success/ on 2 December 2019.

Act.¹⁵ The success of the Act is evident from the fact that USA has been able to reduce the number of endangered species from 1,000 to 200.¹⁶

Kenya's efforts in protecting wildlife and specifically endangered species cannot go unnoticed. However, there is a lack of adequate provisions that focus on endangered species. Given the threats that they still face, it is evident that new methods aimed at reducing and eventually eradicating this problem need to be sought and implemented.

The study will aim at critiquing the legislation that has previously and currently been enacted for the conservation of wildlife. This will be done with the aim of highlighting the gaps in the law in relation to protection of endangered species. Finally, the study will give recommendations, based on the critique, on the factors that Kenya should consider while drafting laws that will enhance the preservation of endangered species.

Statement of the problem

The laws that apply to the protection of wildlife in Kenya do not seem to cater comprehensively for endangered species, some of which are at the brink of extinction.

Tourism is a major revenue earner in Kenya and consequently the source of many jobs in the country.¹⁷ Extinction of endangered species which are a major tourist attraction, will therefore not only affect the economy but will cause an imbalance in the ecosystem seeing as they contribute to the maintenance and proper functioning of the ecosystem.¹⁸

A critique of the laws, which will establish the gaps and downfalls, is necessary to come up with a detailed framework focusing solely on endangered species that will supplement the current laws. This will strengthen the current laws aimed at preventing the extinction of these animals eventually benefitting the country.

Purpose of the study

The objective of the study is to show that the current legal framework in Kenya relating to protection of wildlife does not comprehensively cater for endangered species. It will include

¹⁵ The endangered species act: a wild success, Centre for biological diversity,

https://www.biologicaldiversity.org/campaigns/esa_wild_success/ on 2 December 2019.

¹⁶ The endangered species act: a wild success, Centre for biological diversity,

https://www.biologicaldiversity.org/campaigns/esa_wild_success/ on 2 December 2019.

¹⁷ Joe Baker, 'Why does it matter if a Species becomes extinct' African wildlife foundation,

<<https://www.awf.org/blog/why-does-it-matter-if-species-becomes-extinct>> on 11th October 2011.

¹⁸ Joe Baker, 'Why does it matter if a Species becomes extinct' African wildlife foundation,

<<https://www.awf.org/blog/why-does-it-matter-if-species-becomes-extinct>> on 11th October 2011.

analysing a few of the provisions relevant to the protection of endangered species while identifying gaps. It shall then propose recommendations that will enhance the preservation of endangered species.

Hypothesis

The hypothesis is that, despite the country's efforts to protect its wildlife, endangered species are not sufficiently catered for in the current legal framework. There are gaps in the laws that provide for their preservation, which contributes to the increase of the threats they face.

Research questions

1. Whether the current legal framework providing for preservation of endangered species in Kenya is sufficient.
2. How the current legal framework can be supplemented to enhance the preservation of endangered species.

Literature review

The IUCN defines endangered species as organisms in danger of becoming extinct due to loss of habitat, increase in deaths or alterations in the environment.¹⁹ To prevent extinction of endangered species, Adia ad Gundu discuss effective methods of conserving them and their habitats. These could either be; ex- situ or in – situ.²⁰

Ex – situ conservation preserves endangered species outside their natural habitat. which might be at risk.²¹ This can be done by translocating the species to a safer habitat.²² Zoos, botanical gardens and aquaria could be used for ex- situ conservation.²³

On the other hand, in – situ conservation concerns preserving endangered species where they exist naturally. ²⁴ It follows that, this technique preserves the whole ecosystem which includes both the species that are endangered, those that are not and their habitats.²⁵ National parks and game reserves could be used for in – situ conservation.²⁶

¹⁹ Gundu E. G., Adia J.E, 'Conservation methods of endangered species' 6 *Journal of research in forestry, wildlife and environmental* 2, 2014, 76.

²⁰ Gundu E. G., Adia J.E, 'Conservation methods of endangered species,' 77.

²¹ Gundu E. G., Adia J.E, 'Conservation methods of endangered species,' 77.

²² Gundu E. G., Adia J.E, 'Conservation methods of endangered species,' 77.

²³ Gundu E. G., Adia J.E, 'Conservation methods of endangered species,' 77

²⁴ Gundu E. G., Adia J.E, 'Conservation methods of endangered species,' 77.

²⁵ Gundu E. G., Adia J.E, 'Conservation methods of endangered species,' 77.

²⁶ Gundu E. G., Adia J.E, 'Conservation methods of endangered species,' 77.

The research focuses on in- situ conservation which aims to preserve both the endangered species and their natural habitats. As opposed to ex- situ conservation, which is not only costly but may expose the species to risks given the challenges they might face when trying to survive in a new environment.²⁷

Archie Carr describes the process of saving wildlife as having two aspects: prevention of the extinction of species and maintenance of wild landscapes. ²⁸ If an animal's habitat is preserved, the animal will survive.²⁹ Conversely, degradation of a habitat can endanger the survival of its occupants, which is normally proportional to the degree of specialization of the species.³⁰ This means that for a species whose habitat is specialized and highly restricted, a change in the landscape will affect it more.³¹

In addition, Archie Carr gives recommendations on how to preserve the remnants of an endangered species and prevent its extinction, which include rigidly protecting the species natural habitat³² .

The research identifies interference with the species habitats as one of the risks that expose them to risks. It in turn gives recommendations as to the measures the government can consider to ensure preservation of habitats that endangered species rely on.

In his book, Josh Donlan identifies the importance of establishing conservation methods for species at risk before they are listed in the act.³³ This will ensure that the act is less compound, less controversial and more effective.³⁴ Prior to a species being listed as endangered, it would additionally require less resources for its conservation in addition to having a lesser effect on decisions that affect development and land use. ³⁵

Programs can be developed to aid in conservation of such species, known as pre – listing conservation (PLC).³⁶ These would have benefits such as; early conservation efforts which

²⁷ Gundu E. G., Adia J.E, 'Conservation methods of endangered species,' 77.

²⁸ Archie Carr, *The land and wildlife of Africa*, Time life books, New York, 1964, 172.

²⁹ Archie Carr, *The land and wildlife of Africa*, 172.

³⁰ Archie Carr, *The land and wildlife of Africa*, 172.

³¹ Archie Carr, *The land and wildlife of Africa*, 172.

³² Archie Carr, *The land and wildlife of Africa*, 172.

³³ C. Josh Donlan, *Proactive Strategies for Protecting Species*, University of California Press, California, 2015, 22.

³⁴ C. Josh Donlan, *Proactive Strategies for Protecting Species*,22.

³⁵ C. Josh Donlan, *Proactive Strategies for Protecting Species*, 22.

³⁶ C. Josh Donlan, *Proactive Strategies for Protecting Species*, 24.

would lessen the expense and strain of species recovery and encourage habitat conservation.

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In addition, pre- listing conservation would benefit government agencies and stakeholders involved in the conservation of species as it would allow continued management of the species in the future in case it is listed in the endangered species act.³⁸ This would ensure saving of time and resources if the species is listed as endangered.³⁹

While giving recommendations on how to improve listing of endangered species, the research suggests conservation of threatened species prior to them being listed as endangered. This means ensures effectiveness as they target their recovery before they get to a critical stage. This will in turn be less costly to the government and other stakeholders involved as it will require less resources.

Importance of the study

The tourism industry in Kenya is the second largest sector of Kenya's economy.⁴⁰It contributes to both foreign exchange earnings and the gross domestic product (GDP).⁴¹ It also amounts to about 73.68 billion of Kenya's revenue which makes it the third largest contributor to Kenya's economy.⁴²

Endangered species such as rhinos, elephants, zebra and giraffes amongst others are one of the most important, if not the most important tourist attractions in Kenya. Therefore, the efforts being made by Kenya to protect wildlife might turn out to be futile if these endangered species are not sufficiently provided for in the legal framework aimed at protecting wildlife.

This will affect tourism eventually affect revenue earning in addition to causing an imbalance in the ecosystem. Therefore, it is necessary to study the current laws which will assist in establishing a detailed endangered species Act. The Act will supplement the

³⁷ C. Josh Donlan, *Proactive Strategies for Protecting Species*, 24.

³⁸ C. Josh Donlan, *Proactive Strategies for Protecting Species*, 24.

³⁹ C. Josh Donlan, *Proactive Strategies for Protecting Species*, 24.

⁴⁰ The George wright forum 'wildlife as a lifeline to Kenya's economy: making memorable visitor experiences' 2012, 53.

⁴¹ Office of the auditor general, *effectiveness of measures put in place by Kenya wildlife service in protecting wildlife*, June 2018, 1.

⁴² The George wright forum 'wildlife as a lifeline to Kenya's economy: making memorable visitor experiences' 2012, 53.

Wildlife Conservation and Management Act, strengthen the preservation of endangered species in Kenya.

Scope and limitations of the study

Most of the available information on endangered species is not up to date and hence some of the information used in the research is not the most recent.

Definition of terms

1. Endangered species – Using the term ‘taxon’ to refer to any species, the IUCN red list categories and criteria states that, ‘A taxon is Endangered when the best available evidence indicates that it is considered to be facing a very high risk of extinction in the wild as it meets certain criterion including but not limited to⁴³: reduction in population size and quantitative analysis showing the probability of extinction in the wild is at least 20% within 20 years or five generations, whichever is the longer (up to a maximum of 100 years).⁴⁴

Outline of the dissertation and its flow of argument

The dissertation will analyse the current legal framework on wildlife protection in Kenya and specifically provisions that cater for endangered species, while seeking to determine whether they are sufficient. It will then discuss the findings and provide recommendations. Chapter one of the dissertation will introduce the research problem. This will be done by discussing the background to the problem and stating the purpose of the study. In addition, it will outline the research questions which the study seeks to answer and eventually justify the study by stating its importance.

Chapter two will discuss the theories that will give the outlook through which the research problem will be tackled. The theories will also provide a basis for answering the research questions. In addition, this chapter will provide the research methods that will be used to obtain data that will be used to answer the research problem.

Chapter three will be the onset of discussing the research questions. This will be done by analysing the legal framework that provides for endangered species in Kenya, from historical times to date. It will then discuss the situation on the ground with regard to the findings made.

⁴³ IUCN red list categories and criteria, 2nd edition, IUCN Gland, Switzerland, 2008, 14.

⁴⁴ IUCN red list categories and criteria, 2nd edition, IUCN Gland, Switzerland, 2008, 18.

Chapter four will carry out a comparative analysis between Kenya and the United states of America (USA). This will be done after discussing the laws that apply to endangered species in the USA and the success that has been as a result of these laws.

Chapter five will be the final chapter and will provide recommendations based on the information discussed in the preceding chapters.

Summary of overall results and overall conclusion

When it comes to wildlife protection, Kenya does have a legal framework. However, despite their importance to the country, the laws that focus on endangered species are few and have gaps. This increases the threats they face and moves them closer to extinction. Therefore, it is necessary to study these laws so as to identify the gaps and consequently offer recommendations that can be considered when enacting an Endangered Species Act.

CHAPTER TWO: THEORETICAL FRAMEWORK AND RESEARCH METHODOLOGY

Specialization theory

‘The greatest improvement in the productive powers of labour and the greater part of the skill, dexterity and judgement with which it is anywhere directed, or applied, seem to have been the effects of the division of labour,’ states Adam Smith in his book, the wealth of nations.⁴⁵

Adam Smith gives an example to explain the specialization theory. A workman who knows nothing about the trade of pin making and has not used machines before could make at the most, one pin in a day.⁴⁶ However, today the trade of pin making involves more than one person as it has been divided into several branches. Right from drawing out the wire, to straightening it, to cutting it, to making it pointed, all the way to making the head has been divided into around eighteen different steps, carried out by different people.⁴⁷

This means that almost fifty thousand pins can be made in a day compared to the one pin made by one man who is not educated in the skill and does not use any machinery.⁴⁸ Hence division of labour by making one person focus on one thing and making it their speciality and sole employment has increased productivity as their attention and skill is drawn to one object.

This concept can be applied in other fields such as philosophy. Today, philosophy is subdivided into smaller branches each of which a specific class of philosophers is accustomed to.⁴⁹ Consequently, just as in any other trade, each philosopher becomes an expert in a certain field of philosophy, meaning more productivity in that branch and the quantity of science is eventually increased.⁵⁰

The principal behind the specialization theory and division of labour is derived from the fact that it is through trade that people are able to get from the other what they as individuals stand in need of.⁵¹ For example, in a community, hunters would be more experienced and

⁴⁵ Smith A, Cannan E, *Wealth of nations*, 18th ed, Bantam Classic, New York, 2003, 4.

⁴⁶ Smith A, Cannan E, *Wealth of nations*, 4.

⁴⁷ Smith A, Cannan E, *Wealth of nations*, 4.

⁴⁸ Smith A, Cannan E, *Wealth of nations*, 4.

⁴⁹ Smith A, Cannan E, *Wealth of nations*, 7.

⁵⁰ Smith A, Cannan E, *Wealth of nations*, 7.

⁵¹ Smith A, Cannan E, *Wealth of nations*, 9.

skilled in making bows and arrows.⁵² They would then trade the bows and arrows with the farmers in the community to gain cattle or food, which would be easier than the hunter going out to the field to obtain produce.⁵³ This allows different groups of people in a community to become experts in what they have experience and skill in doing while bringing it to perfection and still be able to trade to obtain their needs.⁵⁴

In the same spirit, the specialization theory and division of labour can be used for the preservation of endangered species in Kenya. By supplementing the current legal framework and focusing on endangered species, the 'labour' will be divided into smaller subdivisions. These will in turn require high levels of expertise and skill and will give endangered species the attention they require, consequently protecting them from extinction. This will not only be favourable for the environment but will in turn attract more tourists who will boost the tourist industry and eventually the economy and well-being of the country.

The social contract theory

The social contract came up as a result of the *Pactum Unionis* and *Pactum Subjectionis* agreements.⁵⁵ *Pactum Unionis* aimed at protecting lives and property. Consequently, a society came up where everyone lived in peace and harmony and people respected each other.⁵⁶ *Pactum Subjectionis* required obedience of and surrendering of rights and freedoms to the sovereign.⁵⁷ In return, people would be assured the protection of their lives, property and liberty. This would mean that a society would agree to live peacefully amongst themselves and obey laws that would come from a person or group of people who they would give authority, to protect them and enforce these laws and the first contract (*Pactum Unionis*).⁵⁸

According to John Locke, by creating an authority, man gained the law, judges to adjudge and implementation of the laws.⁵⁹ In addition, that the Government is required to protect the

⁵² Smith A, Cannan E, *Wealth of nations*, 9.

⁵³ Smith A, Cannan E, *Wealth of nations*, 9.

⁵⁴ Smith A, Cannan E, *Wealth of nations*, 9.

⁵⁵Manzoor E, 'Summary of Social Contract Theory by Hobbes, Locke and Rousseau, 2013, 1 - <https://www.researchgate.net/publication/261181816_Summary_of_Social_Contract_Theory_by_Hobbes_Locke_and_Rousseau> on 3rd August 2019.

⁵⁶ Manzoor E, 'Summary of Social Contract Theory by Hobbes, Locke and Rousseau, 1.

⁵⁷ Manzoor E, 'Summary of Social Contract Theory by Hobbes, Locke and Rousseau, 1.

⁵⁸ Manzoor E, 'Summary of Social Contract Theory by Hobbes, Locke and Rousseau, 1.

⁵⁹ Manzoor E, 'Summary of Social Contract Theory by Hobbes, Locke and Rousseau, 3.

rights of its people and this would then validate the laws that the government makes and enforces.⁶⁰ This would mean that the government would not have absolute sovereignty and referred to this as a constitutionally limited government.⁶¹

Similarly, Kenya is ruled by individuals who consist a government that derives its authority from the Constitution. It grants the citizens rights and freedoms that it has a duty to protect and in return the citizens obey the laws put in place.

Article 42 of the Constitution of Kenya states that, ‘ every person has the right to a clean and healthy environment which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69.’⁶² Article 69 provides, ‘the state has an obligation to ensure sustainable exploitation, utilisation management and conservation of the environment and to eliminate processes and activities that are likely to endanger the environment.’⁶³

The above therefore demonstrates that government has an obligation to protect the environment and ensure that the present and future generations benefit from it. This in turn requires the citizens to obey the laws that the government puts in place to do so. Supplementing the current legal framework with an Endangered Species Act will require the citizens of Kenya to obey these laws and by complementing each other, the state and the citizens will be able to work towards reducing and eventually eliminating the chances of extinction of these species.

Research methodology

Desktop research

The research used to obtain data for this dissertation is desktop research. This involved analysing available data that was either on the internet or published on different prints. Both primary and secondary data were analysed while researching. Examples of primary data analysed included mainly legal instruments such as the constitution of Kenya (2010), and statutes. Secondary data was analysed from various papers, journals, reports, dissertations and also articles that had content related to the problem in the research paper.

⁶⁰ Manzoor E, ‘Summary of Social Contract Theory by Hobbes, Locke and Rousseau, 3.

⁶¹ Manzoor E, ‘Summary of Social Contract Theory by Hobbes, Locke and Rousseau, 3.

⁶² Article 42, *constitution of Kenya* (2010).

⁶³ Article 69, *constitution of Kenya* (2010).

The limitations of this method of research included limited access to some internet sources and some publications including books were not readily available in libraries or in pdf format.

Comparative analysis

This method of research when applied to the legal field can be referred to as comparative law as it has law as its object and uses the process of comparison.⁶⁴ Comparative law can be used to address gaps in the law, establish laws and improve laws.⁶⁵ Learning and comparison of one's own legal rules with external ones can result in intellectual interactivity and acquisitions with regard to the development of the law.⁶⁶

Comparison can achieve the improvement of laws in various ways. Firstly, it can enhance the law technically, which means comparing legal systems that have laws aimed at achieving the same result and picking the best one.⁶⁷ Secondly, it may improve the law socially, for example solving a societal issue.⁶⁸ Thirdly, the comparison may result in changes in the law such as improving policies.⁶⁹

Therefore, through comparison, the research will study the legal framework in Kenya and compare it to that of the USA, to improve the laws that apply to the conservation of endangered species.

The chosen research methods were the most suitable, given the time limit.

⁶⁴ Marie Luce Paris, 'The comparative method in legal research : the art of justifying choices' Clarus Press, 2016 <https://researchrepository.ucd.ie/rest/bitstreams/22767/retrieve> on 20 November 2019.

⁶⁵ Marie Luce Paris, 'The comparative method in legal research : the art of justifying choices' Clarus Press, 2016 <https://researchrepository.ucd.ie/rest/bitstreams/22767/retrieve> on 20 November 2019.

⁶⁶ Marie Luce Paris, 'The comparative method in legal research : the art of justifying choices' Clarus Press, 2016 <https://researchrepository.ucd.ie/rest/bitstreams/22767/retrieve> on 20 November 2019.

⁶⁷ Marie Luce Paris, 'The comparative method in legal research : the art of justifying choices' Clarus Press, 2016 <https://researchrepository.ucd.ie/rest/bitstreams/22767/retrieve> on 20 November 2019.

⁶⁸ Marie Luce Paris, 'The comparative method in legal research : the art of justifying choices' Clarus Press, 2016 <https://researchrepository.ucd.ie/rest/bitstreams/22767/retrieve> on 20 November 2019.

⁶⁹ Marie Luce Paris, 'The comparative method in legal research : the art of justifying choices' Clarus Press, 2016 <https://researchrepository.ucd.ie/rest/bitstreams/22767/retrieve> on 20 November 2019.

CHAPTER 3: DEVELOPMENT OF THE LEGAL FRAMEWORK RELATING TO WILDLIFE PROTECTION IN KENYA AND CHALLENGES FACED IN THEIR PRESERVATION

Introduction

The chapter will highlight the laws that apply to the protection of endangered species in Kenya. It will investigate the historical development of these laws leading up to the current laws. In addition, it will probe into a few but relevant cases that discuss the challenges faced in the preservation of endangered species. It will therefore answer the question whether the current legal framework providing for preservation of endangered species in Kenya is sufficient.

Pre- colonial era

During the pre- colonial times, formal laws relating to wildlife protection did not exist. Protection and conservation of wildlife was therefore in the form of customary acts and ethnic ties.⁷⁰ Nevertheless, communities still killed wildlife for various reasons. For instance, traditional leaders took part in ivory trade with the Arab ivory traders.⁷¹ Explorers exposed the wildlife heritage to other parts of the world, increasing ivory trade along the Eastern Coast of Africa.⁷²

Ivory trade was not seen as a threat to the animals and consequently it was not prohibited. East Africa ranked first as a source of ivory globally, beating competitors such as slaves in trade value.⁷³ The absence of formal laws relating to wildlife protection enabled the increase of these activities which gradually led to the decrease in population of these animals over the years.

Colonial era

During the colonial period, wildlife conservation laws were introduced for the first time, to manage the hunting of animals including the means used to hunt and trade.⁷⁴ The Game Department was founded in 1907 to enforce the hunting regulations and protecting the game

⁷⁰ The National Wildlife Conservation and Management Policy, Ministry of Forest and Wildlife, (2012) 2.

⁷¹ Deisser, Njuguna, 'Conservation of Natural and Cultural Heritage in Kenya,' UCL Press, (2019)

⁷² Deisser, Njuguna, 'Conservation of Natural and Cultural Heritage in Kenya,' UCL Press, (2019)

⁷³ Beachey R.W, 'The East African Ivory trade in the nineteenth century,' 8 *Journal of African history*, 2, 1967, 269.

⁷⁴ The National Wildlife Conservation and Management Policy, Ministry of Forest and Wildlife, (2012) 2.

reserves.⁷⁵ The Proclamation Order of 1917⁷⁶ permitted hunting and issued licenses.⁷⁷ In 1921, The Game Ordinance introduced stricter laws that applied to hunting and it also increased wildlife reserves.⁷⁸

Nevertheless, by mid-1930's, wildlife faced threats from settlers.⁷⁹ For instance, 996 rhinos were killed in Makueni for the purpose of preserving settlements.⁸⁰ In 1932 The British government introduced national parks and reserves which were protected areas. Even so, the British still used these for big game hunting that also served as recreation for settlers.⁸¹

The introduction of various laws aimed at the protection of wildlife, made it hard for Africans to interact with or interfere with wildlife without breaking the law.⁸²

However, wildlife greatly supported and sustained the lives of freedom fighters in Kenya especially during the struggle of independence.⁸³ For instance, they would set traps so as to get game meat for food and would use hides and skins for wildlife as clothing and for beddings.⁸⁴

It therefore seems that despite laws and organisations aimed at the protection of wildlife being introduced during the colonial area, they were not being implemented as activities such as hunting still continued.

Post-independence

Sessional Paper No. 3 of 1975, was the first wildlife policy in Kenya and in 1976, the Wildlife Conservation and Management Act was passed, which executed the Sessional Paper.⁸⁵ It was the very first legislation passed in Kenya that particularly addressed Wildlife

⁷⁵ The National Wildlife Conservation and Management Policy, Ministry of Forest and Wildlife, (2012) 2.

⁷⁶ The National Wildlife Conservation and Management Policy, Ministry of Forest and Wildlife, (2012) 10.

⁷⁷ Mackenzie J M, *The Empire of Nature: Hunting, Conservation and British Imperialism*, Manchester University Press, 1997, 312.

⁷⁸ Annual Colonial Reports for 1921, Colony and Protectorate of Kenya, His Majesty's Stationery Office, 1923, 28.

⁷⁹ Deisser, Njuguna, 'Conservation of Natural and Cultural Heritage in Kenya,' UCL Press, (2019)

⁸⁰ Deisser, Njuguna, 'Conservation of Natural and Cultural Heritage in Kenya,' UCL Press, (2019)

⁸¹ Deisser, Njuguna, 'Conservation of Natural and Cultural Heritage in Kenya,' UCL Press, (2019)

⁸² Deisser, Njuguna, 'Conservation of Natural and Cultural Heritage in Kenya,' UCL Press, (2019)

⁸³ Deisser, Njuguna, 'Conservation of Natural and Cultural Heritage in Kenya,' UCL Press, (2019)

⁸⁴ Deisser, Njuguna, 'Conservation of Natural and Cultural Heritage in Kenya,' UCL Press, (2019)

⁸⁵ The National Wildlife Conservation and Management Policy, Ministry of Forest and Wildlife, (2012) 2.

conservation and management and provide both legal and institutional provisions to be used to realize the 1975 policy.⁸⁶

Despite laws and protected areas aimed at increasing the protection of wildlife having increased after independence, Kenya still suffered a great depletion of wildlife. For instance, the number of elephants reduced by more than 60% between 1970 and 1977.⁸⁷ By 1973, more than 130,000 elephants had been lost and today they are less than 50,000.⁸⁸

Jomo Kenyatta announced a ban on hunting that due to corruption and failure in enforcement, was not effective in protecting wildlife from the crime.⁸⁹ In addition, during the era of Daniel Arap Moi, (1978-2001), the elephant population declined by 70%.⁹⁰ Today, due to the increased collaborations with China in economic activities and agreements, elephant and rhino poaching is still on the rise given that China has one of the largest markets for ivory trade globally.⁹¹

It is clear that wildlife has been facing threats since the colonial period. However, despite introduction of laws to protect them, they still faced threats that greatly reduced their population, leading to the affected species such as rhinos and elephants being declared endangered today.

Current Laws

The 2010 constitution of Kenya acknowledges the importance of wildlife to Kenya, through the preamble which provides that, ‘the people of Kenya should be respectful of the environment, which is our heritage , and that we should be determined to sustain it for the benefit of future generations.’⁹²

In addition, article 42 of the Constitution of Kenya provides that, ‘ Every person has the right to a clean and healthy environment’, which includes the right to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69.⁹³

⁸⁶ The National Wildlife Conservation and Management Policy, Ministry of Forest and Wildlife, (2012) 2.

⁸⁷ Deisser, Njuguna, ‘Conservation of Natural and Cultural Heritage in Kenya,’ UCL Press, (2019)

⁸⁸ Deisser, Njuguna, ‘Conservation of Natural and Cultural Heritage in Kenya,’ UCL Press, (2019)

⁸⁹ Deisser, Njuguna, ‘Conservation of Natural and Cultural Heritage in Kenya,’ UCL Press, (2019)

⁹⁰ Deisser, Njuguna, ‘Conservation of Natural and Cultural Heritage in Kenya,’ UCL Press, (2019)

⁹¹ Deisser, Njuguna, ‘Conservation of Natural and Cultural Heritage in Kenya,’ UCL Press, (2019)

⁹² *Preamble*, Constitution of Kenya, 2010.

⁹³ *Article 40*, Constitution of Kenya, 2010.

Article 69 provides for the state's obligations in respect to the environment. These include; ensuring sustainable exploitation, utilisation, management and conservation of the environment, encouraging public participation in the management, protection and conservation of the environment and eliminating processes and activities that are likely to endanger the environment.⁹⁴

Kenya ratified the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in 1987.⁹⁵ It guarantees that the trade of wildlife resources between states is not detrimental to their survival.⁹⁶ In addition, the Wildlife Conservation and Management Act (WMCA) of 2013 is in force to date and provides for the preservation, sustained use and administration of wildlife in Kenya.⁹⁷

Analysis of the insufficiencies in the current legal framework (WMCA) and the situation on the ground

The focus on the WMCA is because it is the principal legislation in Kenya that particularly addresses Wildlife conservation and management. The analysis will be done through the identification of a few sections of the WMCA which are relevant to the research as they have either not been complied with or have not been implemented, consequently posing a threat to endangered species.

1. Identification and listing of endangered species.

The first and important step in the preservation of endangered species, would be to list the species which are threatened and endangered. The Cabinet Secretary is tasked with formulating and publishing in the Gazette a wildlife conservation and management strategy at least once every five years.⁹⁸ It is required to prescribe a criterion for listing endangered species and measures for their protection and management.⁹⁹ This is with the aim of enhancing species preservation. In addition, the KWS is also tasked with amending the sixth schedule that should provide a national red list of endangered species from time to time.¹⁰⁰

⁹⁴ Article 69, Constitution of Kenya, 2010.

⁹⁵ CITES List of Contracting Parties, -><https://cites.org/eng/disc/parties/chronol0.php><- last accessed on 23rd December 2016.

⁹⁶ CITES List of Contracting Parties,-><https://cites.org/eng/disc/what.php><- last accessed on 23rd December 2016.

⁹⁷ Wildlife Conservation and Management Act, 2013.

⁹⁸ Section 5 (2) (j), The Wildlife Conservation and Management Act, 2013.

⁹⁹ Section 5 (2) (j), The Wildlife Conservation and Management Act, 2013.

¹⁰⁰ Section 47 (2), The Wildlife Conservation and Management Act, 2013.

A red list, can be defined as a record of the population of plants and animals worldwide so as to track which ones are threatened, endangered or have become extinct.¹⁰¹ The IUCN red list of threatened species is the world's most extensive globally and it provides for the status in addition to evaluating the extinction rate of species.

However, the strategy does not provide for a criterion as required and the national list under the sixth schedule of the WMCA, providing for species inclusive of endangered species has not been updated since the Act was enacted to date.¹⁰²

The white rhino is listed as endangered under the WMCA.¹⁰³ In 2009, Ol Pejeta conservancy in Kenya received the world's last four remaining northern white rhinos; Najin, Fatu, Sudan and Suni.¹⁰⁴ In October 2014, Suni died and in March 2018, Sudan died leaving behind only two female northern white rhinos, meaning that the species is at the brink of extinction¹⁰⁵ This poses the question, should the white rhino species be identified as endangered or critically endangered?

Not updating the list poses the risk of not knowing most recent the status of species some of which might need more attention than they did before. In addition, it does not give the true representation of the state of endangered species to users such as the government, wildlife departments, conservation non-governmental organisations, students and citizens.¹⁰⁶

2. The Kenya Wildlife Service fund (Endowment Fund)

There is established a Wildlife Endowment Fund under the act that is to be vested in the Board of Trustees and one of its functions is to protect endangered species, habitats and ecosystems.¹⁰⁷ This is done by shielding against variations in tourism income, unpredictable national politics effects, or the fluctuations of international economics.¹⁰⁸ However, there is

¹⁰¹ Macmillan English dictionary, 2 ed.

¹⁰² *Sixth schedule*, The Wildlife Conservation and Management Act, 2013.

¹⁰³ *Sixth schedule*, The Wildlife Conservation and Management Act, 2013.

¹⁰⁴ Northern white rhinos, Ol Pejeta conservancy , 2019

<https://www.olpejetaconservancy.org/wildlife/rhinos/northern-white-rhinos/> on 7th September 2019.

¹⁰⁵ Northern white rhinos, Ol Pejeta conservancy , 2019

<https://www.olpejetaconservancy.org/wildlife/rhinos/northern-white-rhinos/> on 7th September 2019

¹⁰⁶ IUCN Red List of Threatened Species, IUCN , 2019, https://www.iucn.org/resources/conservation-tools/iucn-red-list-threatened-species#RL_importance on 6th November 2019.

¹⁰⁷ *Section 23 (3) (c)*, The Wildlife Conservation and Management Act, 2013.

¹⁰⁸ Wanyonyi E.W , 'Mobilizing resources for wildlife conservation in Kenya beyond the 21st century' The George Wright Forum , -<<http://www.georgewright.org/291wanyonyi.pdf>>- accessed on 14th September 2019

no board of trustees to manage it as required and 3.8 billion Kenyan shillings lies idle in the bank, that is inaccessible as it is locked .¹⁰⁹

This has affected the preservation of species; for example, the rollout of plans put in place to enhance security of wildlife in protected areas has not been possible due to the fact that funds allocated for this purpose are inadequate.¹¹⁰ In addition, surveillance equipment, tools and technology required for the investigation of wildlife crimes are inadequate, with the major contributing factor being budgetary allocation.¹¹¹

The above shows that the provision is incomplete. A legal requirement for appointing trustees to manage the fund will ensure that funds flow and consequently no hitches will be faced in terms of conservation measures that face difficulties due to budgetary allocations. This can be done through establishing a law which will provide for the composition of the board of trustees, their functions and sanctions that may hold them reliable in the instance that they fail in fulfilling their duties

Challenges faced while preserving endangered species.

Preserving endangered species and the economic environment.

1. The Standard Gauge Railway (SGR)

Section 34 of the Act provides that, ‘any proposal to vary the boundaries of a national park shall only be published, provided that the variation shall not endanger any endangered species.’¹¹² However, this section has not been complied with as there have been variations to the boundaries of the Nairobi national park that have the possibility of exposing endangered species to threats. An example is the building of the (SGR), that has affected the endangered species in the park which include the black rhinos, elephants and giraffes.

The project received protests, both from the public and abroad. The concerns raised included: the park is a protected area and allowing the construction will set bad precedent that may affect reserved areas in the future, construction would go against Kenya’s requests for international support in the conservation of wildlife and the environment and the

¹⁰⁹ Mutai E, ‘KWS sh. 3.8 bn lies idle on lack of board,’ Business daily, -

<<https://www.businessdailyafrica.com/economy/KWS-Sh3-8bn-lies-idle-on-lack-of-board/3946234-5204900-wtpi16/index.html>> on Sunday, July 21, 2019.

¹¹⁰ Office of the Attorney General, *Effectiveness of measures put in place by Kenya wildlife services in protecting wildlife*,’ June 2018, 21.

¹¹¹ Office of the Attorney General, *Effectiveness of measures put in place by Kenya wildlife services in protecting wildlife*,’ June 2018, 23.

¹¹² Section 34, The Wildlife Conservation and Management Act, 2013.

probability of the wildlife population decreasing and the chance of extinction would affect tourism in the country.¹¹³

The railway was nevertheless constructed despite the confirmation by the report from the environmental and social impact assessment of the risk that the wildlife inclusive of endangered species would face as a result.¹¹⁴ In addition, none of the alternative routes that would avoid passage through the park were considered.¹¹⁵

Construction of the railway has resulted in 87.29 hectares of the park being lost, which reduced the wildlife's natural habitat by 0.75%.¹¹⁶ Fragmentation of habitat has been identified as one of the major threats that endangered species face globally.¹¹⁷ The developments that go through the park can also lead to an increase in poaching and hunting.¹¹⁸ In addition, resources will be affected such as rivers, dams, and vegetation, which form part of the food used by the endangered species in the park.¹¹⁹

¹¹³ Mwanza, Chumo, 'Standard Gauge Railway (SGR) through Nairobi National Park: Will the iconic park survive?' Africa Network for animal welfare, Issue no.32, 5 -

https://wedocs.unep.org/bitstream/handle/20.500.11822/27524/SGR_Perspective_32_web.pdf?sequence=2&isAllowed=y on 6th November 2019.

¹¹⁴ Mwanza, Chumo, 'Standard Gauge Railway (SGR) through Nairobi National Park: Will the iconic park survive?' Africa Network for animal welfare, Issue no.32, 5 -

https://wedocs.unep.org/bitstream/handle/20.500.11822/27524/SGR_Perspective_32_web.pdf?sequence=2&isAllowed=y on 6th November 2019.

¹¹⁵ Mwanza, Chumo, 'Standard Gauge Railway (SGR) through Nairobi National Park: Will the iconic park survive?' Africa Network for animal welfare, Issue no.32, 5 -

https://wedocs.unep.org/bitstream/handle/20.500.11822/27524/SGR_Perspective_32_web.pdf?sequence=2&isAllowed=y on 6th November 2019.

¹¹⁶ Ambani M, 'GIS Assessment of Environmental Footprints of the Standard Gauge Railway (SGR) on Nairobi National Park, Kenya,' University of Nairobi, Nairobi, 2017, 38.

¹¹⁷ Mwanza, Chumo, 'Standard Gauge Railway (SGR) through Nairobi National Park: Will the iconic park survive?' Africa Network for animal welfare, Issue no.32, 7 -

https://wedocs.unep.org/bitstream/handle/20.500.11822/27524/SGR_Perspective_32_web.pdf?sequence=2&isAllowed=y on 6th November 2019.

¹¹⁸ Mwanza, Chumo, 'Standard Gauge Railway (SGR) through Nairobi National Park: Will the iconic park survive?' Africa Network for animal welfare, Issue no.32, 8 -

https://wedocs.unep.org/bitstream/handle/20.500.11822/27524/SGR_Perspective_32_web.pdf?sequence=2&isAllowed=y on 6th November 2019.

¹¹⁹ Ambani M, 'GIS Assessment of Environmental Footprints of the Standard Gauge Railway (SGR) on Nairobi National Park, Kenya,' University of Nairobi, Nairobi, 2017, 38.

In addition, the migration routes have been affected and this will lead to animals disappearing from the park, not to mention foreign species that will be introduced in the park and affect the resident species.¹²⁰

The above is also a clear violation of section 34 of the WMCA which consequently resulted in the increase of threats facing endangered species. The provision can be amended to cater for instances when development projects and conservation of endangered species clash, so as to ensure their protection remains a priority. This will in addition ensure that in the cases where the development projects proceed, steps are taken to ensure the existence of endangered species is not threatened.

2. Wildlife director (Kenya) v. Kenya Wildlife Services & 4 others

The petitioner in this case filed for a conservatory order and injunction restraining the respondents from holding the 29th Koroga Festival – Naivasha Love edition in Hell’s Gate National Park and for the approval granted to the respondents to hold the festival to be withdrawn.

The above was based on the following reasons.

1. Failure to come up with a management plan for the Hell’s Gate National Park by the Wildlife Conservation and Management Act. The management plan as required under section 44 of the Wildlife Conservation and Management Act would be used to consider whether the festival can be approved.
2. Failure to carry out public consultations and participation prior to granting approval for the festival.
3. Failure to carry out an environmental impact assessment of the festival as required by the environmental management and coordination act.
4. That Hell’s Gate is a sensitive ecosystem, home to vulnerable, threatened and endangered species hence deserves a maximum level of protection from detrimental activities such as the festival.

These could result in significant and irreversible damage and can result in the wildlife being driven away. The excessive lighting and noise that would result from the event would result in the degradation of the environment and have a detrimental effect on conservation efforts. Consequently, running counter to the doctrine of sustainability.

¹²⁰ Ambani M, ‘GIS Assessment of Environmental Footprints of the Standard Gauge Railway (SGR) on Nairobi National Park, Kenya,’ University of Nairobi, Nairobi, 2017, 39.

Hence, the courts should invoke the precautionary principle, to prevent the potential threat to the wildlife and the environment.

The petitioners argued that despite the respondents arguing that the festival would be held in a part which would not affect the park, Hell's Gate National Park should be viewed as one ecosystem that would be affected regardless of which part the festival takes place in.

The respondents argued that similar events such as the Safaricom jazz festival had been held in the Hell's Gate National Park without facing any opposition. In addition, that the conservation and management of National Parks included marketing of the respective parks and that the festival would meet that purpose and generate revenue that would contribute towards conservation efforts.

The courts decided in favour of the respondents due to reasons such as lack of jurisdiction to hear the matter, the petitioner's failure to establish a prima facie case with a probability of success and absence of empirical evidence to back the petitioner's case. The courts also highlighted that notwithstanding the above, the petition would nevertheless have failed as previous events with a similar character as the Koroga festival had been held in the national park and there had not been any recorded evidence of negative impacts or effects.

Just like the SGR case, the Koroga festival case is a clear manifestation of a clash between preservation of wildlife inclusive of vulnerable, threatened and endangered species and economic development in the country.

The Koroga festival case is a perfect and clear illustration of the consequences that such precedence can have and its contribution to the detrimental effect on the conservation of endangered species. This is evident from the fact that in making its decision, the courts relied on the fact that there had been similar events held in the National Park without resulting in detrimental effects on the wildlife and the park.

This brings the concerns brought up in the SGR case to life, one of them being that in allowing the construction of the railway through the park, potentially affecting wildlife within, the country set bad precedence for future generations. Borrowing from this, what would stop a similar development in the future from being pursued, which could affect endangered species on the basis that the construction of the SGR was allowed despite the potential risks?

Lastly, the mentality that previous events or developments have been carried out in protected or conservation areas without any detrimental effects should be done away with. This is based on the precautionary principle which emphasizes on caution before pursuing developments that may later be disastrous.

On that account, the courts and the government of Kenya should refrain from seeing how far economic and recreational developments can push mother nature before it rises to the bait, the ramification being loss of endangered species and the detriment of the environment in totality.

Chapter summary and conclusion

The above analysis has proven that while there are a few provisions relating to endangered species in the WMCA, a few of them are not being implemented. Therefore, as expected, the result is that the endangered species are still facing threats due to various challenges, consequently pushing them closer to extinction.

In addition, there are several policies and action plans that apply to the preservation of endangered species. However, these need to be translated into laws which will be enforced and will probably give better results in the bid to increase protection of endangered species and prevent their extinction.

A possible solution would be to take steps to expeditiously enact an endangered species Act as recommended by the 2030 strategy.¹²¹ This act would specialize in the preservation of endangered species. To achieve this, insufficiencies of the current WMCA should be taken into consideration, in addition to laws and methods being used by different jurisdictions that have been successful in the recovery of the population of their endangered species and prevention of these species from extinction.

¹²¹ National Wildlife Strategy 2030, (2018).

CHAPTER 4: PROTECTION OF ENDANGERED SPECIES IN THE UNITED STATES OF AMERICA (USA)

Introduction

The chapter will give a brief summary of the success story in relation to protection of endangered species in the USA. This will be achieved by giving highlights of the Endangered Species Act (ESA), relevant to challenges facing protection of endangered species in Kenya and explaining how those sections work.

The purpose of developing an endangered species Act for Kenya is to improve the conservation of endangered species and protect them from extinction. Similarly, the purpose of the ESA of the USA is to prevent the extinction of the endangered plants and animals, enlarge their numbers and achieve their full recovery.¹²²

Wildlife conservation in the USA began with the attention drawn by animals that were almost driven to extinction, like the bison and those that became extinct, like the passenger pigeon.¹²³ Some of the threats that animals faced were, killing for trade, for the purpose of studying wildlife and for storage in museums.¹²⁴ In addition, as population increased, loss of habitat also affected wildlife.

Prior to the ESA of the USA, efforts had been made to conserve endangered species, however these were not effective. For instance, a National Wildlife Refuge was established in 1903 to preserve water birds whose population was reducing.¹²⁵ However, some of the most plentiful birds, such as the passenger pigeon still became extinct.¹²⁶ In 1916, there was an attempt to protect migratory birds between USA and Great Britain through a Migration Bird Treaty Act but nevertheless, by 1944 some of the birds such as the whooping crane had reached their lowest population.

¹²²The endangered species act: a wild success, Centre for biological diversity,

https://www.biologicaldiversity.org/campaigns/esa_wild_success/index.html on 9 November 2019.

¹²³ Nell Greenfield, 'Why did the passenger pigeon go extinct? The answer might lie in their toes,' on 16 November 2017 <https://www.npr.org/sections/thetwo-way/2017/11/16/564597936/why-did-the-passenger-pigeon-go-extinct-the-answer-might-lie-in-their-toes> on 4 December 2019.

¹²⁴ Weidensaul Scott, 'Of a feather: A brief history of American birding,' Houghton Mifflin Harcourt, Boston, 2007, 135.

¹²⁵ Endangered species act: a history of the endangered species act of 1973, U.S. Fish & wildlife service. 15 July 2013, <https://www.fws.gov/endangered/laws-policies/timeline.html> on 11 November 2019.

¹²⁶ Endangered species act: a history of the endangered species act of 1973, U.S. Fish & wildlife service. 15 July 2013, <https://www.fws.gov/endangered/laws-policies/timeline.html> on 11 November 2019.

Therefore, despite conservation efforts made by the USA, the species still faced threats with some of them reducing in number while others became extinct. As illustrated in the previous chapter, this is similar to Kenya in that, despite efforts to conserve wildlife since the pre-colonial period, species such as elephants and rhinos still faced threats over the years which contributed to the population of those species dwindling and resulting in them being declared endangered today.

Therefore, the ESA of USA is suitable as a comparator as it aims to achieve the same purpose the intended Endangered Species Act for Kenya is meant to serve, and most importantly, it has been successful in achieving its purpose which is evident from the recovery stories.

The Endangered Species Act of USA (ESA)

The first Act to be passed that gave attention to endangered species was the Endangered Species Preservation Act of 1966.¹²⁷ It required the identification as well as acquisition of land for the preservation and restoration of species threatened with extinction.¹²⁸ However, the Act allowed activities such as hunting and fishing of endangered species.¹²⁹ Congress identified hunting and destruction of habitats as the primary origin of extinction of endangered species.¹³⁰

Richard Milhous Nixon, the 37th president of the USA made a proclamation in the year 1972 that the USA's attempts in preventing the extinction of endangered species were insufficient.¹³¹ He then asked the congress to enact a comprehensive legislation for endangered species.¹³² The ESA of 1973 was passed after a realization that the nation's native animals and plants were at the brink of extinction.¹³³ As stated in the case of *Defenders of wildlife vs. Babbitt*, 'the ESA has been considered the most thorough legislation for the conservation of endangered species ever passed by any nation.'¹³⁴

¹²⁷ Sonia S. Waisman, Pamela D. Frasch and Bruce A. Wagman, *Animal Law*, 5 ed, Carolina Academic Press, North Carolina, 2014, 611.

¹²⁸ Sonia S. Waisman *et al*, *Animal Law*, 611.

¹²⁹ Sonia S. Waisman *et al*, *Animal Law*, 612.

¹³⁰ Sonia S. Waisman *et al*, *Animal Law*, 612.

¹³¹ Endangered Species Act : overview, U.S. Fish & Wildlife Service, 11 December 2018, <https://www.fws.gov/endangered/laws-policies/> on 11 November 2019.

¹³² Endangered Species Act : overview, U.S. Fish & Wildlife Service, 11 December 2018, <https://www.fws.gov/endangered/laws-policies/> on 11 11 November 2019.

¹³³ Endangered Species Act : overview, U.S. Fish & Wildlife Service, 11 December 2018, <https://www.fws.gov/endangered/laws-policies/> on 11 November 2019.

¹³⁴ *Defenders of wildlife vs. Babbitt* (1997), United States District Court, District of Columbia.

The objective of the ESA is to recuperate species so that they no longer require safeguarding by the Act.¹³⁵ The Act not only lists which species are endangered, but also places a positive responsibility on the government and the concerned agencies for their recuperation.¹³⁶ This in turn means that not only should the government avoid actions that may place the endangered species at a higher risk, but they should also make effort by acting towards their recovery.¹³⁷

The ESA is administered by the U.S.A Fish and Wildlife Service (FWS) and the Commerce Department's National Marine Fisheries Service (NMFS).¹³⁸ The two are federal agencies which are tasked with the responsibility of actualizing the provisions in the ESA.¹³⁹ The FWS is in charge of terrestrial and freshwater animals while the NMFS looks after marine organisms.¹⁴⁰ In *Defenders of Wildlife v. Salazar*, the courts recognize the function of the FWS by stating that, 'it should use all methods and procedures necessary to bring any listed species to the point at which the measures provided pursuant to the ESA are no longer necessary.'¹⁴¹

The ESA of 1973 brought solutions to a couple of problems that existed before the enactment of the Act. For instance, there had been questions over which species should be protected by the Act, as these had not been specified by the previous Acts.¹⁴² The ESA of 1973, under section 3 clarified that, 'species includes any subspecies of fish or wildlife or plants.'¹⁴³ In

¹³⁵ESA Basics: 40 years of conserving endangered species, U.S. Fish & Wildlife Service, January 2013, https://www.fws.gov/endangered/esa-library/pdf/ESA_basics.pdf on 11 November 2019.

¹³⁶ David Favre, 'Overview of the U.S Endangered Species Act' Animal Legal & Historic Center, 2003 <https://www.animallaw.info/article/overview-us-endangered-species-act> on 13 November 2019.

¹³⁷ David Favre, 'Overview of the U.S Endangered Species Act' Animal Legal & Historic Center, 2003 <https://www.animallaw.info/article/overview-us-endangered-species-act> on 13 November 2019.

¹³⁸ Endangered Species Act : overview, U.S. Fish & Wildlife Service, 11 December 2018, <https://www.fws.gov/endangered/laws-policies/> on 11 November 2019.

¹³⁹Protecting The Endangered Species Act, Endangered Species Coalition, <https://www.endangered.org/campaigns/protecting-the-endangered-species-act/> on 11 November 2019.

¹⁴⁰ Endangered Species Act : overview, U.S. Fish & Wildlife Service, 11 December 2018, <https://www.fws.gov/endangered/laws-policies/> on 11 November 2019.

¹⁴¹ *Defenders of Wildlife v. Salazar* (2011), United States District Court, District of Montana.

¹⁴² Brian Czech and Paul R. Krausman, *The Endangered Species Act*, The Johns Hopkins University Press, Maryland, 2001, 23.

¹⁴³ Section 3, *Endangered Species Act*, (United States of America).

addition, prior to the ESA of 1973, prohibition of harmful activities only applied to national wildlife refuges. Currently, the act prohibits such activities on all lands in the nation.¹⁴⁴

Also, congress desired a procedure which would ensure the preservation of endangered species before they reached a critical status.¹⁴⁵ Hence the ESA of 1973 included ‘threatened species’ in the definition of species under section 3.¹⁴⁶

There were some significant amendments made to the Act since its enactment. In 1978, it was a requirement that a critical habitat be appointed while listing species as endangered.¹⁴⁷ In addition, the most significant modification by the same amendment was the establishment of an Endangered Species Committee, (God Squad), due to the fundamental gravity of its determinations.¹⁴⁸ The committee is authorized to absolve projects from observing section 7 provisions that aim at preventing detrimental effects on endangered species or their habitats due to the execution of projects.¹⁴⁹

In 1988, the Act required the progress of both candidate and recovered species to be observed and in the event of significant risk, to be listed as endangered through emergency listing, without being subjected to the usual process of listing.¹⁵⁰ It was a requirement for Recovery plans to be subjected to public scrutiny and reports were required to be given on implementation of those plans.¹⁵¹

Analysis of the Endangered Species Act

While explaining how the Act functions to conserve endangered species, the analysis will highlight the sections which are relevant to the challenges being faced in Kenya regarding preservation of the species.

¹⁴⁴ Section 9, *Endangered Species Act*, (United States of America).

¹⁴⁵ Brian Czech and Paul R. Krausman, *The Endangered Species Act*, The Johns Hopkins University Press, Maryland, 2001, 24.

¹⁴⁶ Section 3, *Endangered Species Act*, (United States of America).

¹⁴⁷ A history of the endangered species act of 1973, US. Fish & Wildlife Service, August 2011, https://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf on 12 November 2019.

¹⁴⁸ Stromberg B, ‘The Endangered Species Act Amendments of 1978: A Step Backwards?’ 7 *Boston College Environmental Affairs Law Review* 1, 1978, 37.

¹⁴⁹ Stromberg B, ‘The Endangered Species Act Amendments of 1978: A Step Backwards?’ 7 *Boston College Environmental Affairs Law Review* 1, 1978, 36.

¹⁵⁰ A history of the endangered species act of 1973, US. Fish & Wildlife Service, August 2011, https://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf on 12 November 2019.

¹⁵¹ A history of the endangered species act of 1973, US. Fish & Wildlife Service, August 2011, https://www.fws.gov/endangered/esa-library/pdf/history_ESA.pdf on 12 November 2019.

1. Listing of endangered species

This is a key element of the ESA. It lists species under two categories; endangered, meaning those at the risk of extinction and threatened, meaning those expected to be endangered in a little while.¹⁵² Listing of the species relies on scientific data only and economic or social factors are only examined when establishing a recovery plan for the species.¹⁵³

Prior to listing a species, the following factors are considered: harm/demolition of the species' habitat, overexploitation of the species and insufficiency of existing protection of the species.¹⁵⁴ At times, there may be a need to list other species that are considered a priority, which would leave the rest as candidates and would receive a limited amount of protection.¹⁵⁵ Members of the public or state agencies may also bring forward a petition to list a species.¹⁵⁶

A habitat shall then be assigned to the listed species; a critical habitat.¹⁵⁷ It could either be the land being occupied by the endangered species which is essential for their survival or land that would be needed as the species recover and increase in population.¹⁵⁸

2. Acts that expose endangered species to risk

Section 7 of the ESA executes the procedure for listing endangered species. It requires, 'the service to ensure that no actions are permitted that would threaten the ongoing existence of endangered species or damage any critical habitat.'¹⁵⁹

This is done through a consultation process that seeks to find out whether there are endangered species where such an activity will take place.¹⁶⁰ If present, a biological

¹⁵² Endangered Species Act : overview, U.S. Fish & Wildlife Service, 11 December 2018, <https://www.fws.gov/endangered/laws-policies/> on 11 November 2019.

¹⁵³ David Favre, 'Overview of the U.S Endangered Species Act' Animal Legal & Historic Center, 2003 <https://www.animallaw.info/article/overview-us-endangered-species-act> on 13 November 2019.

¹⁵⁴ Section 4, *Endangered Species Act*, (United States of America).

¹⁵⁵ Substantive Requirements of the Endangered Species Act <https://www.endangered.org/campaigns/protecting-the-endangered-species-act/> on 11 November 2019.

¹⁵⁶ Substantive Requirements of the Endangered Species Act <https://www.endangered.org/campaigns/protecting-the-endangered-species-act/> on 11 November 2019.

¹⁵⁷ Section 3(5), *Endangered Species Act*, (United States of America).

¹⁵⁸ David Favre, 'Overview of the U.S Endangered Species Act' Animal Legal & Historic Center, 2003 <https://www.animallaw.info/article/overview-us-endangered-species-act> on 13 November 2019.

¹⁵⁹ Section 7(2), *Endangered Species Act*, (United States of America).

¹⁶⁰ Substantive Requirements of the Endangered Species Act <https://www.sheppardmullin.com/publications-articles-14.html> on 15 November 2019.

assessment is then done to determine whether the species will be affected.¹⁶¹ The biological assessment results in a biological opinion as to whether there exists endangered species that are likely to be affected which would be a ‘jeopardy opinion.’¹⁶² In that case, alternatives should then be proposed by the service to prevent the unfavourable effects on the endangered species.¹⁶³ If there are none, then the activity should not go ahead, unless an exception is granted by the Endangered Species Committee.¹⁶⁴ An agency may decide to not comply with the alternatives proposed by the service, provided it takes the initiative to guarantee the preservation of the endangered species.¹⁶⁵

In the case of *Tennessee Valley Authority (TVA) v. Hill*, The Tennessee Valley Authority proposed the establishment of a dam on the Little Tennessee River.¹⁶⁶ Local interests were against the project, but the construction began, nevertheless.¹⁶⁷ A claim was filed by the respondents concerning the construction of the Tellico Dam, that would affect the continued existence of a fish known as the snail darter.¹⁶⁸

The fish was listed as an endangered under the Act and as it was found to live in the river where the development of the dam was taking place, the river was consequently proclaimed a critical habitat.¹⁶⁹

The Respondents therefore filed the suit seeking to prohibit the construction as it would affect the snail darter’s habitat and eventually cause its extinction.¹⁷⁰ The courts held in favour of the respondents despite millions of dollars having been used in the project.¹⁷¹ It ordered a permanent ban on the completion of the project until the project is excepted or the

¹⁶¹ Substantive Requirements of the Endangered Species Act <https://www.sheppardmullin.com/publications-articles-14.html> on 15 November 2019.

¹⁶² Section 7, *Endangered Species Act*, (United States of America).

¹⁶³ Section 7, *Endangered Species Act*, (United States of America).

¹⁶⁴ Substantive Requirements of the Endangered Species Act <https://www.sheppardmullin.com/publications-articles-14.html> on 15 November 2019.

¹⁶⁵ Substantive Requirements of the Endangered Species Act <https://www.sheppardmullin.com/publications-articles-14.html> on 15 November 2019.

¹⁶⁶ *Tennessee Valley Authority v. Hill* (1978), Supreme Court of the United States of America.

¹⁶⁷ *Tennessee Valley Authority v. Hill* (1978), Supreme Court of the United States of America.

¹⁶⁸ *Tennessee Valley Authority v. Hill* (1978), Supreme Court of the United States of America.

¹⁶⁹ *Tennessee Valley Authority v. Hill* (1978), Supreme Court of the United States of America.

¹⁷⁰ *Tennessee Valley Authority v. Hill* (1978), Supreme Court of the United States of America.

¹⁷¹ *Tennessee Valley Authority v. Hill* (1978), Supreme Court of the United States of America.

snail darter is deleted from the endangered species list.¹⁷² The courts stated that the conservation of endangered species was more significant than construction or completion of the dam.¹⁷³

The case led to the establishment of the Endangered Species Committee, that would allow actions that could potentially threaten species and their habitats.¹⁷⁴ This would only be in instances where no alternatives exist and the benefits of the action would exceed the benefits of the available alternatives.¹⁷⁵

3. Financing protection of endangered species

The secretary allocates finances to states aimed at developing programmes for the preservation of endangered species or to aid in observing candidate or recovering species.¹⁷⁶ This is done while considering: the international commitments of USA to protect endangered and threatened species, readiness of a state to take up such a programme, potential of recovering endangered or threatened species in the respective state, urgency to initiate such a programme with regard to the survival of the species and the value of observing candidate species or recovered species within a state.¹⁷⁷

These funds are allocated based on agreements which could be management agreements, that would be for the sake of administration and management for any conservation area for endangered species.¹⁷⁸ The secretary is also mandated to enter into agreements with states which initiate and sustain programmes for the preservation of endangered species, known as cooperative agreements.¹⁷⁹

For a cooperative agreement to be approved, it shall first be confirmed that the state agency; is authorized to set up such programmes, it has the mandate to conserve endangered species, is allowed to look into the status and necessities for the endangered species to survive, is authorized to acquire of habitats for the preservation of endangered species, that it allows

¹⁷² *Tennessee Valley Authority v. Hill* (1978), Supreme Court of the United States of America.

¹⁷³ *Tennessee Valley Authority v. Hill* (1978), Supreme Court of the United States of America.

¹⁷⁴ Substantive Requirements of the Endangered Species Act <https://www.sheppardmullin.com/publications-articles-14.html> on 15 November 2019.

¹⁷⁵ Substantive Requirements of the Endangered Species Act <https://www.sheppardmullin.com/publications-articles-14.html> on 15 November 2019.

¹⁷⁶ Section 6(d), *Endangered Species Act*, (United States of America).

¹⁷⁷ Section 6(d), *Endangered Species Act*, (United States of America).

¹⁷⁸ Section 6 (b), *Endangered Species Act*, (United States of America).

¹⁷⁹ Section 6 (c)(1), *Endangered Species Act*, (United States of America).

for public contribution to the programme and that the programme is compatible with the strategies and motives of the ESA.¹⁸⁰

Enforcement of the endangered species act

It is without a doubt that for the underlying objectives of the endangered species act to be met, enforcement of the act must be given high priority.¹⁸¹ This was emphasized in *Tennessee Valley Authority v. Hill*, where the courts stated that , ‘ in the absence of effective enforcement, whether through the government or citizen suits, the ability to achieve the laudable goals of the statute would be compromised, if not lost altogether.’¹⁸²

Criminal and civil enforcement

Criminal enforcement includes sanctions which apply to violations against the Act, any permits or certificates issued under the Act.¹⁸³ As was held in the case of *United States v. Billie*, for one to be convicted under the Act, it is upon the government to prove that the Act was ‘knowingly’ violated.¹⁸⁴ In this case, the prosecution only required evidence that chief Billie, the accused had intended to shoot his gun and not that he knew that he was shooting at a Florida panther protected by the Act.¹⁸⁵

Criminal prosecutions are carried out by the department of justice through attorneys in the various states, while investigations and state referrals are made by the FWS and the NMFS, both of which are tasked with implementation of the Act.¹⁸⁶ Offense levels are influenced by the market value of the fish or the wildlife involved in the crime and the criminal history of the defendant.¹⁸⁷

The ESA provides for civil remedies to ensure compliance with the Act.¹⁸⁸ These are substantial and often compare favourably with criminal fines.¹⁸⁹ Accused persons have a

¹⁸⁰ Section 6 (c)(1), *Endangered Species Act*, (United States of America).

¹⁸¹ Sobeck E, ‘Enforcement of the Endangered Species Act’ American Bar Association, 1993, 30.

¹⁸² Sobeck E, ‘Enforcement of the Endangered Species Act’ American Bar Association, 1993, 35.

¹⁸³ Section 11 (b), *Endangered Species Act*, (United States of America).

¹⁸⁴ Sobeck E, ‘Enforcement of the Endangered Species Act’ American Bar Association, 1993, 31.

¹⁸⁵ Sobeck E, ‘Enforcement of the Endangered Species Act’ American Bar Association, 1993, 31.

¹⁸⁶ Sobeck E, ‘Enforcement of the Endangered Species Act’ American Bar Association, 1993, 31.

¹⁸⁷ Sobeck E, ‘Enforcement of the Endangered Species Act’ American Bar Association, 1993, 31.

¹⁸⁸ Section 11 (a), *Endangered Species Act*, (United States of America).

¹⁸⁹ Sobeck E, ‘Enforcement of the Endangered Species Act’ American Bar Association, 1993, 31.

right to a hearing before being subjected to any civil penalty.¹⁹⁰ In addition, they also have a right to appeal the assessment of penalties before the courts. The standard of proof to be met for a civil penalty to be upheld is, if there exists substantial evidence as opposed to requiring a case to be proven beyond reasonable doubt.¹⁹¹

Public participation.

To motivate the preservation of endangered or threatened species amongst citizens, rewards are given to anyone who provides information that may lead to the arrest or conviction, with regard to any breach of the Act.¹⁹² In addition to ensure implementation of the laws, citizens may bring civil suits on their own to the courts against any person alleged to have violated any provisions of the ESA, or for failing to perform their duties.¹⁹³

In addition, the FWS and NMFS conduct undercover investigations which are used to penetrate and disband strategies involving the sale, trade, import, export and illegal hunting of endangered species.¹⁹⁴ Nevertheless, these investigations face challenges such as limited resources and personnel, which further brings out the importance of citizen suits as an additional enforcement mechanism.¹⁹⁵

Success stories

The third Friday of May each year marks the Endangered Species Day in the USA, which is a day to celebrate the success in the recovery and conservation of endangered species.¹⁹⁶ This is justified from the 99% success rate of the species that have avoided extinction as a result of the enactment of the ESA, which has been the most successful law in preserving

¹⁹⁰ Sobeck E, 'Enforcement of the Endangered Species Act' American Bar Association, 1993, 31.

¹⁹¹ Sobeck E, 'Enforcement of the Endangered Species Act' American Bar Association, 1993, 32

¹⁹² Section 6 (c)(1), *Endangered Species Act*, (United States of America).

¹⁹³ Section 11(g), *Endangered Species Act*, (United States of America).

¹⁹⁴ Sobeck E, 'Enforcement of the Endangered Species Act' American Bar Association, 1993, 33.

¹⁹⁵ Sobeck E, 'Enforcement of the Endangered Species Act' American Bar Association, 1993, 33.

¹⁹⁶ Endangered Species, National Wildlife Federation, <https://www.nwf.org/Educational-Resources/Wildlife-Guide/Understanding-Conservation/Endangered-Species> on 11 November 2019.

the species.¹⁹⁷ Scientists have found that were it not for the Act, more than 227 species would have currently been extinct.¹⁹⁸ The following are a few success stories:¹⁹⁹

1. Bald Eagles

The ESA listed the eagle, which is the national symbol, as endangered in 1976 as it was at the brink of extinction due to reasons such as habitat loss and pesticides. It was later listed as threatened in 1995 and eventually de-listed entirely in 2007. As per the IUCN, the eagle is currently under the ‘least’ concern’ risk level. The population of the eagles has grown from around 500 in the 1960’s to more than 7,000 today. The tremendous recovery is thanks to the protection given by the ESA in addition to the efforts made by the American citizens, scientists and the government of USA.²⁰⁰

The IUCN Red List of Threatened Species is the most comprehensive record of the preservation ranking of animal and plant species globally.²⁰¹ Quantitatively, it is able to assess the extinction likelihood of numerous species.²⁰² The IUCN Red List uses categories to identify the extinction risk of the evaluated species.²⁰³ Species which are categorized as critically endangered, endangered and vulnerable are regarded as threatened with extinction.²⁰⁴

2. Grizzly Bear

¹⁹⁷ The US Endangered Species Act: Protecting at-risk animals and plants from extinction, World wildlife fund, 2019, <https://www.worldwildlife.org/pages/the-us-endangered-species-act> on 11 November 2019.

¹⁹⁸ The endangered species act: a wild success, Centre for biological diversity, https://www.biologicaldiversity.org/campaigns/esa_wild_success/ on 11 November 2019.

¹⁹⁹ Protecting The Endangered Species Act, Endangered Species Coalition, <https://www.nwf.org/Educational-Resources/Wildlife-Guide/Understanding-Conservation/Endangered-Species> on 11 November 2019.

²⁰⁰ Protecting The Endangered Species Act, Endangered Species Coalition, <https://www.nwf.org/Educational-Resources/Wildlife-Guide/Understanding-Conservation/Endangered-Species> on 11 November 2019.

²⁰¹ IUCN Red List of Threatened Species, IUCN , 2019, <https://www.iucn.org/resources/conservation-tools/iucn-red-list-threatened-species> on 12 November 2019.

²⁰² IUCN Red List of Threatened Species, IUCN , 2019, <https://www.iucn.org/resources/conservation-tools/iucn-red-list-threatened-species> on 12 November 2019.

²⁰³ IUCN Red List of Threatened Species, IUCN , 2019, <https://www.iucn.org/resources/conservation-tools/iucn-red-list-threatened-species> on 12 November 2019.

²⁰⁴ IUCN Red List of Threatened Species, IUCN , 2019, <https://www.iucn.org/resources/conservation-tools/iucn-red-list-threatened-species> on 12 November 2019.

The population of the Grizzly Bear had come down to a mere 2% of their former number. This was due to extensive hunting, conservation and fragmentation of habitat for various uses. Once listed as endangered in 1975, the Grizzly Bears received protection from the state, federal agencies, conservation organizations and even citizens. Their population is currently over 1200 throughout the nation.²⁰⁵

Chapter Summary and conclusion

This chapter gives a brief insight into the Endangered Species Act of the United State of America. It purposefully looks at sections that apply to the challenges facing endangered species as highlighted in the previous chapter. These include: Listing of endangered species, financing their protection and activities that might affect their habitats. In addition, it provides for mechanisms that can improve implementation of the provisions in the Act such as public participation and the reporting of any laxity seen from the officials tasked with the preservation of endangered species.

This then necessitates the recommendation of steps Kenya can borrow from the USA while specializing in the protection, conservation and management of endangered species, to prevent extinction of these species, by drafting its own Endangered Species Act with the hope of achieving similar success stories.

²⁰⁵ Protecting The Endangered Species Act, Endangered Species Coalition, <https://www.nwf.org/Educational-Resources/Wildlife-Guide/Understanding-Conservation/Endangered-Species> on 11 November 2019.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

Introduction

The chapter will highlight and discuss the findings of the research and then offer recommendations while briefly discussing the issues identified in chapter 3. This will involve a brief discussion of chapter four and how the matters discussed therein are possible solutions to the problems pointed out in chapter 3.

Conclusion

The laws protecting wildlife in Kenya have existed since the colonial period. However, they still faced threats. Endangered species were recognized and protected by the WCMA. This being the first legislation in Kenya that particularly addressed wildlife conservation and management.²⁰⁶

Even so, the WCMA has not been sufficient. Not only are the laws few, they have gaps and are not being properly executed therefore, resulting to the endangered species and their habitats being exposed to risks that may cause the species' extinction.

For instance, the inadequate identification and listing of endangered species seen from the lack of a criterion for listing the species and updating the list as required, the ineffectiveness of the endowment fund that hinders conservation measures that rely on it and activities that expose endangered species and their habitat to threats such as development projects. These downfalls have resulted in the continued existence of endangered species being threatened. This has given rise to the proposal of the enactment of an endangered species act by the national wildlife strategy of 2030.²⁰⁷ The act should consolidate and supplement the current laws providing for the preservation of endangered species to ensure their recovery and protection from extinction.

However, there have not been any steps taken to begin the enactment of the Act despite the continued and arising risks that endangered species continue to face today. The research therefore aimed at analysing and identifying the existing insufficiencies in the current legal framework that specifically relates to endangered species. This is so as to recommend the issues that the proposed endangered species act should seek to resolve and some suggestions of some of the matters that the act should provide for.

²⁰⁶ The National Wildlife Conservation and Management Policy, Ministry of Forest and Wildlife, (2012) 2.

²⁰⁷ National Wildlife Strategy 2030, (2018).

Recommendations

1. The government should promptly adopt the Endangered Species Act as suggested by the 2030 wildlife strategy. The Act should consolidate the current provisions and policies relating to conservation and protection of endangered species and should be done as soon as possible so that it can start taking effect.
2. The first issue identified in chapter three is the identification and listing of endangered species. Preservation of endangered species begins with their identification. This can be done by keeping a record of the species and their status. Such a record should be updated so as to keep track of the species' progress, which would help in identifying those that need more attention and also those that have required and should be delisted. As seen in chapter three, despite it being a requirement for the establishment of a criterion to be used to list endangered species and for the list to be updated from time to time, the criterion does not exist, and neither is the list being updated.

The ESA of USA provides for a comprehensive process of listing endangered species as discussed in chapter 4.²⁰⁸ The Endangered Species Act that is yet to be established in Kenya, should have an improved method of identifying, listing and updating the list of endangered species. This should include providing an opportunity for the public to participate in the process and comment or challenge any proposal made for the listing of a species.²⁰⁹ A critical habitat should also be assigned to the listed species which would be useful in their recovery.²¹⁰

The government should also develop pre- listing programmes that would improve the conservation of threatened species so as to eliminate the need for them being listed as endangered.²¹¹ This will help in that, it will avoid giving attention to a species only when it is endangered and at the brink of extinction, a point at which only so much can be done.

3. With regard to actions that may expose endangered species and their habitats to risk, such as invasion and habitat loss, the proposed Endangered Species Act should have

²⁰⁸ Section 4, *Endangered Species Act*, (United States of America).

²⁰⁹ Section 4, *Endangered Species Act*, (United States of America).

²¹⁰ Section 4, *Endangered Species Act*, (United States of America).

²¹¹ Henson P, White R and Thompson S, 'Improving implementation of the Endangered Species Act:

Finding common ground through common sense, *Bioscience*, 11 November 2018

<https://academic.oup.com/bioscience/article/68/11/861/5078556> on 18 November 2019.

more stringent consequences in the case of violations. As discussed in chapter three, despite there being alternative routes for the construction of the SGR that would have avoided passage through the national park, it was nevertheless constructed through the park, exposing endangered species to risk as it not only reduced their habitat but interfered with migration routes and affected the resources that the endangered species rely on for their survival.

The construction can therefore be seen as a violation of section 34 of the WMCA that requires variations of national parks to only be done once satisfied that they would not put endangered species at risk, interfere with their habitat or migration.²¹² Consequently, a possible solution is as discussed in chapter four in case of *Tennessee Valley Authority (TVA) v. Hill* which illustrates how the government should set good precedence to be applied in the future by ensuring the protection of endangered species remains a priority even when actualizing development projects. This means that, when the preservation of endangered species and development projects conflict, protection of endangered species should not be sacrificed at the expense of driving them to extinction.

Such can be avoided by adhering strictly to provisions in the proposed Act which should require development projects to have alternative means of achieving their objectives while protecting endangered species from exposure to risks as stated in the ESA of USA.²¹³ As seen in the ESA of USA, a committee of experts could be established that would address cases of development projects clashing with preservation of endangered species and especially where no alternatives exists. The committee can also be given the authority to allow such projects to proceed, given that there is evidence of steps taken to ensure the continued and safe existence of endangered species and their critical habitats.

Hence in the case of the construction of the SGR for example, the alternative routes though expensive, should've been used so as to avoid the detrimental effects that were and are still being felt by the endangered species present in the affected habitats. Therefore, the government should have been guided by the precautionary principle which states that; if an activity will potentially be detrimental to the environment,

²¹² Section 34, *Wildlife Conservation and Management Act* (Act No 47 of 2013).

²¹³ Section 7, *Endangered Species Act*, (United States of America).

then it should be controlled from the beginning and not wait to see evidence of its harm as its effects would be too costly or impossible to prevent.²¹⁴

The government should've avoided constructing such a significant railway through a National Park that would cause the fragmentation of the species' habitat and affect their movement.²¹⁵ In addition, if construction on the park would have been unavoidable, then alternative routes would have been used and instead of constructing the railway through the park, it would have been done around the edges of the park.²¹⁶ Such measures would have ensured that the objectives of the government were achieved while avoiding negative impacts on the endangered species present in the park.

4. Another problem discussed in chapter three is the lack of funds needed for various activities and equipment needed for the preservation of endangered species. This has not only resulted in increased threats facing the endangered species but has also affected the implementation of laws.²¹⁷

When it comes to the funding of projects aimed at improving the conservation of endangered species and their habitats, besides appointing trustees to administer the endowment fund so as to make it effective, the government should put in measures to ensure accountability and transparency of the process.

Chapter four discusses how this can be achieved, through the proposed endangered species act having provisions that require the establishment of agreements between

²¹⁴ 'Guidelines for applying the precautionary principle to biodiversity conservation and natural resource management' IUCN council, 14-16 May 2007

https://www.iucn.org/sites/dev/files/import/downloads/ln250507_ppguidelines.pdf on 25 November 2019.

²¹⁵ Mwanza, Chumo, 'Standard Gauge Railway (SGR) through Nairobi National Park: Will the iconic park survive?' Africa Network for animal welfare, Issue no.32, 7 -

https://wedocs.unep.org/bitstream/handle/20.500.11822/27524/SGR_Perspective_32_web.pdf?sequence=2&isAllowed=y on 25 November 2019.

²¹⁶ Mwanza, Chumo, 'Standard Gauge Railway (SGR) through Nairobi National Park: Will the iconic park survive?' Africa Network for animal welfare, Issue no.32, 8 -

https://wedocs.unep.org/bitstream/handle/20.500.11822/27524/SGR_Perspective_32_web.pdf?sequence=2&isAllowed=y on 25 November 2019.

²¹⁷ 'Improving Effectiveness of Environmental Law: A meeting of experts' IUCN, 10 July 2015

<https://www.iucn.org/content/improving-effectiveness-environmental-law-meeting-experts> on 19 November 2019.

the government and organizations that have a mandate to preserve endangered species and their habitats.

As seen in the ESA of the USA, these agreements should then lead to the development of programmes that can be twofold: those aimed at conserving endangered species and those aimed at conserving their habitats or conserved areas.²¹⁸ This will ensure that enough attention is given to each category, yielding better results.

The act should also have conditions that have to be fulfilled for any such agreement to be approved. For instance, confirmation of authority to preserve endangered species, their habitats or conserved areas, permission to obtain land for the preservation of the species and that the affected communities were consulted or participated in the agreement.

Once approved, the funds could now be released to fund these programmes. To ensure that the objectives are met, reports should be submitted of how the funds were allocated, how they were used and the progress as a result. The act should also include severe punishments that would apply in the case of noncompliance.

5. The endangered species act should also have provisions to cater for enforcement of the act. Borrowing from the ESA of USA, the proposed act can have sanctions for criminal enforcement, in addition to establishing a criteria to be met for one to be convicted for violating the act.

Once convicted, the sanctions should be based on the value of the affected endangered species and the criminal history of the offender. For civil enforcement, the remedies should compare to the criminal fines and should give the accused persons a chance to be heard and to appeal the penalties.

To promote public participation and add onto enforcement measures, the proposed act should also allow citizens to sue the government, officials or organizations tasked with a role in the conservation of endangered species and their habitats who fail to do so.²¹⁹

²¹⁸ Section 6, *Endangered Species Act*, (United States of America).

²¹⁹ Section 11, *Endangered Species Act*, (United States of America).

This will ensure accountability and transparency in the processes involved in the conservation of endangered species and their habitats and greatly improve implementation of the law.²²⁰

Prior to the act being passed, the government should ensure that the citizens are educated in depth about the act. It can also publish a draft of the act to allow the citizens to consult, comment and make input to be considered. The above will contribute to the implementation of the laws.²²¹

6. Lastly, there are several reasons why it would be important to consolidate the endangered species laws and policies that already exists into a single act. Firstly, as opposed to other laws and policies whose focal point is discrete, such as elephants or rhinos only, the endangered species act would be applicable to all endangered species and their critical habitats. This will ease accessibility which is made difficult when laws and policies are numerous and scattered.²²² Easy access will eventually result in efficacy, which means that the outcome it achieves, realizes the goals behind its enactment.²²³

Secondly, consolidation will reduce the volumes of laws and policies that one has to go through, which decreases access.²²⁴ Hence, the scattered laws and policies will be integrated into one, reducing the volume of legislation and improving accessibility which is key in classifying a legal system as credible.²²⁵

Thirdly and lastly, consolidation while ensuring clarity and simplicity, will guarantee that the laws will be easier to understand and therefore easier to implement. In

²²⁰ ‘Improving Effectiveness of Environmental Law: A meeting of experts’ IUCN, 10 July 2015 <https://www.iucn.org/content/improving-effectiveness-environmental-law-meeting-experts> on 19 November 2019.

²²¹ ‘Improving Effectiveness of Environmental Law: A meeting of experts’ IUCN, 10 July 2015 <https://www.iucn.org/content/improving-effectiveness-environmental-law-meeting-experts> on 19 November 2019.

²²² ‘Achieving Accessibility of legislation via consolidation’ unpublished, School of advanced study University of London, London, 2013, 3.

²²³ ‘Achieving Accessibility of legislation via consolidation’ unpublished, School of advanced study University of London, London, 2013, 3.

²²⁴ ‘Achieving Accessibility of legislation via consolidation’ unpublished, School of advanced study University of London, London, 2013, 4.

²²⁵ ‘Achieving Accessibility of legislation via consolidation’ unpublished, School of advanced study University of London, London, 2013, 4.

addition, amendments will only be done on one document, ensuring that the laws applying to endangered species would always be up to date and complete.²²⁶

²²⁶ ‘Achieving Accessibility of legislation via consolidation’ unpublished, School of advanced study University of London, London, 2013, 30.

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