MOVING TOWARDS A PARADIGM OF CORPORATE CRIMINAL RESPONSIBILITY FOR CORPORATE MANSLAUGHTER

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DEDICATION

To the late Mrs Minnie Gikonyo, whose prayers have been my bedrock.

Rest in peace Cucu.

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I would like to thank God, for His grace and mercy throughout this research period. I would also like to extend my heartfelt gratitude to my supervisor, Ms. Anne Kotonya for her constant guidance and encouragement.

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DECLARATION

I, STEPHANIE WANJIKU GIKONYO, 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 dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

ANNE KOTONYA

ABSTRACT

Corporations in Kenya have progressively been seen to commit wrongdoings to the detriment of the overall population or to specific individuals. Due to the fact that Kenyan jurisprudence is not sufficiently developed to control corporate activity with criminal elements, corporations are not sufficiently deterred from committing criminal offences and hence end up escaping criminal liability. This paper discusses the Kenyan context of corporate criminal responsibility and the enforceability of the laws regarding the same. Further, this paper studies the possibility as well as the implications of introducing the concept of corporate manslaughter into Kenyan legislation. The above is done through a comparative analysis between Kenya's legislation on corporate criminal responsibility and The U.K's Corporate Manslaughter Act with a view of analysing the lessons Kenya can learn from the U.K. In addition, research on this matter is carried out through an analysis of precedents , journals, relevant articles and relevant legislation relating to the matter in question. The findings of this paper show that the concept of corporate criminality is more effective once the focus shifts to probing the fault of the corporation as a whole. Through a jurisprudential view of the separate legal personality of a corporation, this paper shows that a corporation can itself attract criminal liability and therefore can and should be punished through a mix of sanctions which will suffice to achieve the deterrence and retributive ends of criminal punishment. This paper finally concludes by recommending that Kenya should adopt the realist model in assigning criminal responsibility to corporation itself and create the offence of corporate manslaughter to hold corporations accountable for their actions/omissions that caused the death of others.

LIST OF CASES

Kenyan case law

Centre for Justice, Governance and Environmental Action v Attorney General & 229 others [2018] eKLR

Republic v Gachoka & another [1999] eKLR

R v Rootes (Kenya) Ltd & B S Dobbs [1958] eKLR

Stephen Obiro v Republic [1962] E.A. 61

M.S Sondhi Ltd v R [1950] 17 EACA 143

Standard Chartered ltd v Intercom services ltd and four others [2003] eKLR

Nyakinyua and Kang'ei Farmers Company Ltd v Kariuki and Gatheca Resources Ltd [1984] K.L.R 110

Omondi v National Bank of Kenya [2001] 1 EA 175

East African Oil Refineries Ltd v Republic [1981] KLR 109

Mumias Sugar Company Ltd, W.S.M Adambo v R [2008] eKLR

Inter- American case law

Trustees of Dartmouth v Woodward 17 U.S (1819)

U.K case law

Leonard Carrying company ltd v Asiatic Petroleum Company ltd (1915) ,United Kingdom House of Lords

Tesco Supermarkets ltd v Nattrass (1972), United Kingdom House of Lords

P&O Ferries (Dover) Ltd (1991), The United Kingdom Central Criminal Court

Citizens Life Assurance Company v Brown (1904), The United Kingdom House of Lords

Mousell v London and North Western Railway (1917), The United Kingdom House of Lords (Unreported)

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R v ICR Haulage (1944), Queens Bench Division England

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R v Adomako (1994), The United Kingdom House of Lords

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Canadian case law

The Queen v Great North Of England Railway Co (1846), The Supreme Court of Canada

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LIST OF LEGAL INSTRUMENTS

National legislation

Judicature Act (Act No. 18 of 2018)

Constitution of Kenya (2010)

Criminal Procedure Act (Act No. 7 of 2016)

Penal Code Cap 63 Laws of Kenya

Companies Act Cap 486 Laws of Kenya

United Kingdom

Criminal Justice Act , Chapter 44

Corporate Manslaughter and Corporate Homicide Act, Chapter 19

LIST OF ABBREVIATIONS

UK- United Kingdom

DPP- Director of Public Prosecutions

AG- Attorney General

NEMA- National Environmental Management Authority

CJEA- Centre for Justice, Governance and Environmental issues

WARMA- Water Resources Management Authority

CMCHA- Corporate Manslaughter and Corporate Homicide Act

CHAPTER ONE: INTRODUCTION

1.1 Background

"…Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief and are less amenable to disgrace or punishment. They neither feel shame, remorse, gratitude nor goodwill…".[1]

The business sphere is increasingly becoming advanced, with a growing number of business owners preferring to incorporate their business undertakings into companies in order to enjoy the benefits of corporate trading. Previously, under common law, a company could not be convicted for any criminal offence.[2] However, over the years, companies have gained the status of juridical persons[3] and therefore, activities that were previously reserved for natural persons have been undertaken under the veil of incorporation.[4] This development poses new and complex challenges to criminal law as it is customarily understood[5] as there is an increasing need to call companies into account for their criminal wrong doings.

One of the main challenges towards this is the view that the corporate personality is merely fictional and that criminal liability can only arise from natural persons associated with the company[6] as stated in the case of *Leonard Carrying Company ltd v Asiatic*

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1 Hazlitt W, *Table talk*, World classics, 1821, 2 as quoted in Wells C, *Corporations and criminal responsibility*, Oxford university press, 2001, 2

2 During the 16th and 17th Century, the idea of Corporate criminal liability was rejected on the grounds of the *ultra vires* theory which provided that Corporations were artificial entities that could not do more than what they were legally empowered to do.

3 In the case of *Trustees of Dartmouth v Woodward* 17 U.S (1819), a Corporation was stated as being an artificial being existing only in contemplation of the law.

4 George O Otieno Ochich, 'The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 2

5 George O Otieno Ochich, 'The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 2

6 George O Otieno Ochich, 'The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 4

Petroleum Company Ltd where Viscounts Haldane stated that "…a corporation is an abstraction. It has no mind of its own any more than it has a body of its own, its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation."[7]

With regards to the Kenyan context, in devastating disasters attributed to huge companies where there has been a loss of life, there has been a general failure to hold these companies accountable for their actions/omissions, primarily due to the fact that no individual can be pinned down as the 'controlling mind' of the corporation. This is demonstrated where residents of Owino Uhuru slums in Jomvu area within Mombasa instituted a suit against Metal refinery EPZ for causing the death and serious illness of some of the residents within the slum as a result of lead poisoning attributed to poor waste management by the smelting factory. The Centre for Justice Governance and Environmental action (CJGEA) instituted a suit on behalf of the residents against the smelting plant and joined State agencies such as National Environment Management Authority (NEMA) and the Public Health Department in the suit, accusing them of failing in their mandate to protect the health and environmental living conditions of the Owino Uhuru community.[8] To date, neither the corporation nor its agents have been held liable for causing death as the elements of *mens rea* and *actus reus* required for the perpetration of the crime could not be pinned to a particular individual.

Another instance is that of Kenya Ferry Services Limited , a State corporation under the Ministry of transport and infrastructure, mandated with the operation of ferries in the country.[9] In 1994, the MV Mtongwe capsized 40 meters from the port resulting in the death of 272 people. There were 400 people on board against the capacity of 300 when the incident occurred.[10] The Kenya ferry services, as a result of their gross negligence

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[7] *Leonard Carrying company ltd v Asiatic Petroleum Company ltd* (1915), The United Kingdom House of Lords

[8] *Centre for Justice, Governance and Environmental Action v Attorney General & 229 others* [2018] eKLR

[9] https://www.kenyaferry.co.ke on 5th February,2019

[10] https://www.standardmedia.co.ke/article/2000200692/mtongwe-ferry-disaster-survivors-face-hurdle-over-compensation on 5th February, 2019.

caused the unfortunate death of 272 people by not taking effective measures to ensure that their ferry was not over loaded. Similarly, to the previously mentioned case, neither the corporation nor its agents have to date been held liable for causing the death of the persons aboard the MV Mtongwe.

The failure to hold State corporations liable may be attributed to the fact that they are regarded as agents of the State and are therefore not prosecuted as this would amount to the State prosecuting itself. This creates an enabling environment for parastatals not to be called to account for their actions and/or omissions. Although it is worth noting that Government officials in some jurisdictions have been charged and convicted for their actions and/or omissions, countries such as Kenya that use the identification doctrine to assign liability experience a challenge in securing such convictions. This is due to the complexity of State corporations which makes it difficult to assign criminal responsibility to one individual considered to be the 'controlling mind' of the corporation.

1.2 Statement of the problem

Although Kenyan courts have recognized that corporates may be charged for their crimes, they have often proceeded with the notion that corporate criminality is not any different from that of natural persons.[11] It would therefore appear that Kenyan legislation only contemplated instances where there is a causative link between the natural person acting as the agent of the company, the company itself and the offence committed. Further, the Kenyan Companies Act as well as the Penal Code does not contemplate that a criminal charge may be brought against the corporation or that the sanctions may be imposed on the corporation alone. This leaves Kenya with a highly fluid[12] situation with regards to principles on the criminality of corporate citizens.

The conventional approach for assigning corporate criminal responsibility has been the identification model where the directors and employees of a corporation are seen to embody the mind of the corporation and hence are held liable for criminal offences

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[11] George O Otieno Ochich, 'The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 8.

[12] https://www.collinsdictionary.com/dictionary/english/fluid on 4th September, 2019; A situation that is fluid is unstable and likely to change often.

committed by the corporate.[13] However, with the evolving complexity of corporations, assigning liability to a particular individual exhibiting both *mens rea* and *actus reus* proves to be a challenging activity.

In addition, Kenya's criminal law principles have an English background and therefore, an argument may be made that relevant English law as on the reception date are applicable in Kenya. [14] However, the laws and principles established after this date are only of persuasive value to the courts. The English principle of corporate criminality, having been established after the reception date, is thus merely persuasive to Kenyan courts.[15]

The apparent lack of efficiency in laws regarding corporate criminal liability may also be attributed to the fact that criminal law is founded on the principles of *mens rea* and *actus reus*. Establishing *mens rea* of a corporation becomes an uphill task hence enabling corporations to more often than not escape criminal liability. For an act or omission to give rise to criminal liability, such punishment has to be written down in the law and the punishment thereof prescribed. This principle exists as a fundamental constitutional right of accused persons.[16] The concept of corporate manslaughter has not been introduced into the current Kenyan legislation on corporate criminal liability thus corporations cannot be charged for a crime that is not recognised under Kenyan law. Corporations are therefore not sufficiently deterred from committing corporate manslaughter as there is no legal criminal concept that can be used to hold them accountable.

1.3 Research objectives

1. Analyse the existing legislation on corporations and their criminal liability.
2. Elucidate the concept of corporate manslaughter and analyse the possibility of its application on Kenyan law on corporate criminality.

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[13] George O Otieno Ochich, 'The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 9

[14] Section 3(1)(c) , *Judicature Act* (Act No. 18 of 2018)

[15] George O Otieno Ochich, 'The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 8.

[16] Article 49, *Constitution of Kenya* (2010)

3. Examine the concept of corporate criminal liability in the United Kingdom and the possibility of applying such legal principles into Kenya's current legislation on the same.
4. Probe the use of other models of assigning corporate criminal liability for corporate manslaughter with a view of showing that corporate liability will be more effective once the focus shifts from establishing the fault and *mens rea* of individuals to probing faults of the corporation as a whole.

1.4 Hypothesis

(i) Both the Penal Code and the Companies Act fail to sufficiently hold corporations accountable for corporate manslaughter.

(ii) It is desirable that Section 202(2) of the Penal Code be extended to creating a new offence of corporate manslaughter.

1.5 Research Questions

1. What has been the position within the Kenyan legal framework with regards to corporate criminal liability?
2. Does the current identification model sufficiently provide for corporate criminal liability in Kenya?
3. What is corporate manslaughter and what conditions must be fulfilled for a successful prosecution of the same?
4. How has the United Kingdom handled the allocation of criminal responsibility to corporates with regard to cases concerning corporate manslaughter?
5. What lessons can the Kenyan legal framework learn from the United Kingdom's model of assigning criminal liability?

1.6 Justification for research

A look at the Kenyan Penal Code will reveal that offences and their prescribed punishment were created in contemplation of such offences being committed by a natural person as opposed to a corporation. To this extent, the Penal Code, which is the principle statute for criminal offences in Kenya, suffers a great shortcoming as it does not envision

that a criminal charge may be brought against the company only and that penalties may be levied on the company as a corporate citizen.

Furthermore, with the exception of strict liability offences, in order to locate guilt for any offence, the mental element has to be proved. However, allocating the aspect of *mens rea* to a corporation remains to be an uphill task. This is despite the fact that corporations, through their acts or omissions thereof continue to perpetrate criminal wrongdoings while at the same time affording themselves the defence that a corporation lacks the mental element to commit a crime

In light of the foregoing facts, although Kenyan law has made some significant steps towards the development of laws on corporate criminal liability, it is clear that Kenyan legislation is still not adequate as there do not exist any laws on attributing criminal liability to the corporation itself. This research is therefore important due to the fact that in addition to the study seeking to introduce the concept of corporate manslaughter into Kenyan legislation on corporate criminality, it will also attempt to find a hybrid model of corporate criminal responsibility that is capable of holding both privately owned corporations as well as parastatals accountable for their criminal acts. In the instance where the current laws on criminal liability remain as they are, a large number of corporates will get away with their criminal wrongdoings. Furthermore, the families of the affected individuals will also, more often than not, not attain any form of justice as in most instances, no individual within the corporate can be pinned as embodying the mind of the corporate. However, should the offence of corporate manslaughter be introduced into Kenyan legislation, corporations will be sufficiently deterred from causing the deaths of others and the dependants of the deceased will attain justice as the fines paid by the guilty corporation are used to assist them.

1.7 Theoretical framework

Corporate theories support a particular view of the world and the way corporations fit into the world.[17] These theories, besides forming and shaping the law, aid in evaluating

[17] Michael Cody ‘,Evaluating Australia’s corporate law reform from an organisational theory perspective’ 21 (3) *Australian Journal of Corporate law* , 2008, 210

possible law reform. Scholars of corporate criminal liability have taken varied positions on the nature of corporations with one extreme being that corporations can be held criminally liable while the other extreme being that corporations are fictional beings and can therefore not be held criminally accountable. The following discussion relates to theories pertaining to the nature of criminal liability of corporations.

Some scholars argue that corporations enjoy the same powers and obligations as human beings to the extent that they have a moral personality as a human being.[18] To this end, Peter French, an American Scholar, posits that "Corporations can be fully fledged moral persons and have whatever privileges, rights and duties , in the normal course of affairs accorded to moral persons." He further claims that corporations have duties and rights that establish a moral personality. [19] On the other hand, Richard Erwin proposes that corporations have limited abilities as moral persons as corporations do not have the same privileges as human beings. For instance, corporations lack moral understanding and conscience and thus they cannot be morally responsible.[20] The discussion below pertains to theories on the nature of corporations and how their nature may or may not be used to assign criminal responsibility.

The legal theory that forms a foundation for this research paper is the realist theory as advanced by Johannes Althusias as well as Gierke. According to this theory, a legal person is a real person in both the pre-juridical and juridical sense of the word.[21] The theory assumes that the subjects of rights extend beyond human beings to also include

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[18] Peter. A. French, *Collective and Corporate Responsibility*, 1st Edition, Columbia University Press, United States, 1984, 32

[19] Peter. A. French, ' The Corporation as a moral person' 16(3), *American Philosophical Quarterly*, 1979, 207

[20] Richard. E. Erwin, ' The moral status of the corporation' 10(10), *Journal of Business ethics*, 1991, 749

[21] Vineet Sharma, Corporate laws in India, http://lawsCorporate.blogspot.com/2010/08/theories-on-Corporatepersonality-real.html on 5th February, 2019.

beings that possess a will and a life of its own. Therefore, a corporation being a juristic person and as 'alive' as a human being, is also subject to rights.[22]

Under this theory, the corporation exists independently from its members and is thus capable of acting and being held accountable for its acts or omissions. The realist model portrays a corporation as an entity with its own distinctive goals, culture and personality.[23] Therefore, the responsibility of the corporation is primary and not dependent on the responsibility of an individual. The realist framework attaches responsibility to the corporation by looking at the conduct of the organization as a whole, what the corporation itself did or did not do, what it knew or ought to have known regarding its conduct and what it did or ought to have done to prevent the harm from occurring.[24] The upshot of this theory is that is presumes that corporate bodies are real persons; as opposed to the notion by the proponents of the fiction theory as hereinunder discussed that a corporation is a legal creation. The essential point to note in the realist theory is that juristic persons result from a living force of historical or social action and are not merely a creation from the act of a legislator.[25] The realist theory therefore holds more water for regulators and policy makers seeking to hold corporations responsible for corporate manslaughter as this theory argues that for a corporation to be morally responsible, it must be considered as a legal person with its own state of mind.

To supplement this theory, the Corporate personhood theory as built by French proposes that a corporation should be viewed as a 'full corporate person'. This means that the corporation should be regarded as analogous to an individual and as a fully- fledged

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[22] Vineet Sharma, Corporate laws in India, http://lawsCorporate.blogspot.com/2010/08/theories-on-Corporatepersonality-real.html on 5th February, 2019.

[23] Jonathan Clough 'Bridging the theoretical gap: The search for a realist model of Corporate criminal liability' 18(3) *Criminal Law Forum* , 2007, 270

[24] Jonathan Clough 'Bridging the theoretical gap: The search for a realist model of Corporate criminal liability' 18(3) *Criminal Law Forum* , 2007, 276

[25] Eliezer Lederman, ' Criminal law, Perpetrator and Corporation: Rethinking a complex triangle' 76(2), *The Journal of Criminal law and Criminology*, 1985, 295

moral agent who may intend or behave independently of its members. [26] Under this theory, corporations are alleged to be rational and autonomous agents with a conscience and therefore, their rationality would be sufficient to allow ascriptions of corporate moral responsibility. To this end, Henry David Thoreau once stated that a corporation with conscientious men is a corporation with a conscience.[27] Therefore: a combination of the realist theory as well as the corporate personhood theory would be a sufficient model to hold corporations criminally accountable as both these theories suggests that the nature of corporations, their decision making processes as well as the activities carried out by their members adds weight to the argument that a corporation should be morally responsible for its actions.

Although the above theories advocate for the view that body corporates should be regarded as autonomous to the members of the corporations, this thesis is alive to the fact that there are scholars who hold an opposing view that a corporation is merely a creature of the law and can therefore not function independently. The discussion below highlights the fiction theory that supports the above view.

The concession/ fiction theory was advanced by German scholars in the nineteenth century and provides that legal entities are abstractions; they are artificial beings which are invisible and intangible. This theory argues that it is impossible for corporations to be subjected to criminal liability because they are merely artifices generated by law. [28] In addition, this theory suggests that corporations neither have a state of mind nor can they act unless the 'real' people with flesh, blood and a mind do so on its behalf. [29] It is however important to note the various criticisms that have been developed with regards to this theory. The first objection is that if a corporation is a fictitious imaginary person that only exists in the eyes of the law, then how would it be possible for them to hold

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[26] William. S. Laufer, *Corporate bodies and Criminal minds; The failure of corporate criminal responsibility*, University of Chicago Press, U.S.A, 2008, 677

[27] Henry David Thoreau, *Walden and Civil disobedience*, Penguin Classics, England, 1983, 387

[28] Michael. J. Phillips, ' Reappraising the Real Entity Theory of the Corporation' 21(4), *Florida State University Law Review*, 1994, 1064

[29] http://www.legalserviceindia.com/legal/article-20-theories-of-corporate-personalities.html on 20th March, 2020

tangible property? Secondly, if the corporation is an imaginary person, then how can they have rights (such as to sue or be sued in their own name) because rights can only be accorded to real persons?[30] Another criticism is that if corporations are merely creatures of the law of a State, then the State should be able to freely regulate the internal affairs and external actions of corporations. A corporation, in my opinion, must therefore be a real person as this basis for State regulation does not work.

Corporate criminality in Kenya is centred around establishing the criminal liability of the natural persons within the corporation. The laws on corporate criminality in Kenya therefore go against the realist theory as they fail to recognise that a corporation is capable of being held primarily responsible for its actions and/or omissions. The use of this theory was therefore appropriate because it advocates for the shifting of the focus from the fault and *mens rea* of individuals within the organization to probing the fault of the corporation as a whole.

1.8 LITERATURE REVIEW

Over time, corporations have evolved from basic structures of governance to complex hierarchical structures. Previously, corporate criminal responsibility was based on the derivative model of liability.[31] Derivative liability provides that a defendant may be held indirectly responsible for a crime committed by another and as such, his/her liability is dependent upon the criminal actions of that other person.[32] The above model of liability therefore suggests that criminal liability should be attached to the natural persons within the corporation due to the fact that they are considered to be agents of the same. However, the complexity of corporate structures raised difficult issues with regards to the allocation of criminal responsibility within the corporate hence rendering the derivative model of liability as ineffective and outdated.

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[30] http://www.legalserviceindia.com/legal/article-20-theories-of-corporate-personalities.html on 20th March, 2020

[31] Simester A.P, Spencer J.R , Sullivan G.R, Virgo G.J, *Simester and Sullivan's Criminal law Theory and Doctrine*, Hart publishing ltd, 2013, 201

[32] Simester A.P, Spencer J.R , Sullivan G.R, Virgo G.J, *Simester and Sullivan's Criminal law Theory and Doctrine*, Hart publishing ltd, 2013, 202.

Although modern models of corporate criminal responsibility have been advanced, there has been insufficient research on the efficiency of these models. The following excerpts and legal opinions shall form a basis for this study.

Some legal scholars are of the opinion that companies may be held criminally liable through the identification doctrine which provides that controlling officers of a corporation identify the corporation.[33] The identification doctrine originated from the case of *Lennard's Carrying Co. Ltd v Asiatic Petroleum Co. Ltd*[34] where it was held that those who control or manage the affairs of the corporation are regarded, in a sense, as the corporation itself. The controllers of the corporation embody the corporation through their acts as well as through their state of mind and therefore a corporation may become liable for an offence requiring *mens rea.* Where a company is liable under the identification doctrine, the directors and/or controllers will be charged as accessories to the offence.[35] Lord Diplock in the case of *Tesco Supermarkets ltd v Nattrass* ruled that only individuals at the apex of the corporate hierarchy could be identified as the controllers of the company.[36]Liability for corporate manslaughter can be imposed on a company under the principle of identification.[37] This doctrine however falls short due to the narrowness of its application as exemplified in the case of *P&O Ferries (Dover) Ltd*[38]. In this case, P&O Ferries ltd was charged with manslaughter following the Zeebrugge sinking. The ship's master, however, was ruled not to be a person who could be identified with the company.

The realist models seek to reflect the corporation as an entity with its own distinctive goals, its own distinctive culture, and its own distinctive personality rather than focusing on individual fault. This personality or culture is unique and arises from a number of

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33 Williams Glanville, *Textbook of criminal law second edition*, Steven and Sons Limited, 1983, 972

34 *Leonard carrying company ltd v Asiatic petroleum company* (1915), The United Kingdom House of Lords

35 Williams Glanville, *Textbook of criminal law second edition*, Steven and Sons Limited, 1983, 171

36 *Tesco supermarkets ltd v Nattrass* (1972), The United Kingdom House of Lords

37 Simester A.P, Spencer J.R , Sullivan G .R, Virgo G.J, *Simester and Sullivan's Criminal law Theory and Doctrine,* Hart publishing ltd, 2013, 282.

38 *P&O Ferries (Dover) ltd* (1991), The United Kingdom Central Criminal Court

identifiable characteristics[39]Thus, under the realist model, a corporation is a distinct entity capable of attracting criminal liability.

On the other hand, a number of scholars have suggested that corporations cannot be held accountable for their actions as they cannot be regarded as moral agents. Joel Bakan described corporations as 'psychopathic creatures'. This suggests that corporations are not accountable for their actions as they cannot act morally. This non -accountability is limited by laws which protect the community from corporations.[40] In line with this, Joel Bakan states that only people have moral obligations and therefore corporations cannot be said to have to have moral obligations than does a building, an organization chart or a contract.[41] William Horosz also dismisses the notion that corporations can be in a moral relationship as they lack feelings. His view is that moral responsibility is linked to the notion of guilt. [42] Therefore, because corporations cannot have the sense or belief of guilt, then they cannot be morally responsible for their actions and/or inactions.

With regards to the Kenyan perception of corporate criminal responsibility, George Ochich[43] opines that the current models of assigning liability have great limitations. For example, the identification model does not apply to state entities due to the fact that they are considered to be agents of the state and therefore, prosecuting them would amount to the State prosecuting itself. Further, the complexity of corporate structures has created great limitation with regards to the implementation of current models of assigning criminal responsibility. Due to the above factors, the author opines that there has been an

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[39] Jonathan Clough, *Bridging the theoretical gap; The search for a realist model of Corporate Criminal liability*, Criminal Law Forum , 2007, 275-276

[40] Joel Bakan, *The Corporation: The pathological pursuit of profit and power*, 2nd Edition, Free Press, U.S.A, 2005, 35

[41] Joel Bakan, *The Corporation: The pathological pursuit of profit and power*, 2nd Edition, Free Press, U.S.A, 2005, 42

[42] William Horosz, *The crisis of responsibility: Man, as the source of accountability*, 1st edition, University of Oklahoma Press, U.S.A, 1975,9.

[43]George O Otieno Ochich, ' The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 5.

increase in the search for new models of corporate criminal responsibility that assign liability directly on the corporate rather than deriving liability from individual criminal liability.

In the case of *Stephen Obiro v Republic*,[44] the learned Judge noted that even if a means was found to bring a corporate body into court, a further difficulty would arise in deciding how to plead the charge. In the case of *M.S Sondhi Ltd v R*[45] the learned magistrate while referring to section 96 of the Criminal procedure code[46] noted that there is no provision within the criminal procedure code governing the reception of a plea from a company in a criminal proceeding. The magistrate then suggested that the court should be guided by the provisions of Section 33 of the U.K's Criminal justice act.[47] In addition, in the case of *Standard Chartered ltd v Intercom services ltd and four others*[48], Githinji JA, as he was then, stated that " … It is a principle of company law of long antiquity enunciated by the House of Lords in the case of *Salomon v A. Salomon and company Ltd*[49] that a limited company has a legal existence independent of its members and that the principle of alter-ego attributes the mental state of the company's directors or other officers to the company itself in order to fix the company with either criminal or civil liability." It is however important to note that the alter-ego principle presents difficulties in dealing with modern day corporations that have evolved into more complex and dynamic structures. Therefore, in my opinion, this decision does not lay down sufficient principles to deal with corporate criminality in Kenya.

This study uses the common law criminal concept of corporate manslaughter as established in the United Kingdom under Section 1(1) of the Corporate Manslaughter and Corporate Homicide Act.[50] Corporate manslaughter is defined as a death caused by the negligent, wrongful and wilful act or omission by an individual or organization having a

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[44] *Stephen Obiro v Republic* [1962], E.A. 61

[45] *M.S Sondhi Ltd v R* [1950], 17 EACA 143

[46] Section 96, *Criminal Procedure Act*, (Act No. 7 of 2016)

[47] Section 33, *Criminal Justice Act* , Chapter 44

[48] *Standard Chartered ltd v Intercom services ltd and four others* [2003] eKLR

[49] *Salomon v A. Salomon and Company Ltd* (1897), The United Kingdom House of Lords

[50] Section 1(1), *Corporate Manslaughter and Corporate Homicide Act*, Chapter 19

duty of care over the deceased.[51] Under this principle, the dependants of the deceased may institute a suit for damages based on the negligence of the defendant, notwithstanding the death of the deceased. An organization that is guilty of corporate manslaughter is liable to a fine upon conviction.

Although negligence is a civil law concept, it takes a criminal law undertaking as the *mens rea* for the offence of corporate manslaughter. Section 1(4)(b) of the CMCHA provides that "A breach in a duty of care shall amount to gross negligence where the breach of that duty falls far below what can reasonably be expected of the corporation in the circumstances." [52] This is reiterated in the case of *R v Prentice*[53] where the court held that "...a breach of duty shall amount to gross negligence where there is an indifference to the obvious risk to injury or health, actual foresight of the risk coupled with the determination nevertheless to run it." A relevant duty of care is defined in Section 2(1) of the CMCHA [54]to mean duties as prescribed under the law of negligence. Notwithstanding the statutory definition, the court will often view the concept of gross negligence in accordance with the language used with respect to the offence of gross negligence manslaughter[55] as seen in the case of *R v Adomako* [56] where Lord McKay stated that "..an action or omission will amount to gross negligence where the conduct of the defendant was so bad in all the circumstances as to amount to a criminal act or omission." In the case of *R v Bateman*, the Court of Appeal stated that "..in order to establish criminal liability for negligence, the facts must be such that the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregards for the life and safety of others as to amount to a crime against the State and conduct deserving punishment." [57] There is a very high threshold used to determine if the defendant's negligent actions/omissions amounted to a criminal act as established in the

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[51] https://www.merriam-webster.com/dictionary/wrongful%20death on 29th July, 2019

[52] Section 1(4)(b), *Corporate Manslaughter and Corporate Homicide Act* (Chapter 19)

[53] *R v Prentice* (1993), The United Kingdom House of Lords

[54] Section 2(1), *Corporate Manslaughter and Corporate Homicide Act*, Chapter 19

[55] https://www.cps.gov.uk/legal-guidance/Corporate-manslaughter on 8th September, 2019

[56] *R v Adomako* (1994), The United Kingdom House of Lords

[57] *R v Bateman* (1925), Court of Criminal Appeal England

case of *Andrews v DPP* where Lord Atkin stated that "..for the purpose of criminal law, there are degrees of negligence and a very high degree of negligence is required to prove that the crime is established."[58]

Once a corporation is found guilty of corporate manslaughter, it is liable to pay a fine based on the turnover and size of the company. Although the payment of fines is a civil law concept, several law and economist theorists have advanced a number of reasons for assigning a civil law remedy for a criminal wrongdoing. First, although the company is considered to be a Jural person, it would practically be impossible to jail a company for its wrongdoings. Therefore, the payment of a fine would serve an efficient remedy as the assumption is that the pain of paying a fine will force the company to pull up its socks. Further, civil remedies with regards to the offence of corporate manslaughter are more effective than criminal sanctions as they yield social revenue.[59] Lastly, civil remedies also allow the dependants of the deceased to vindicate their rights against the perpetrator as the fines paid are used to assist them. For public bodies, although it may be argued that fining a taxpayer funded institution is pointless, it may also be argued that due to finite budgets within these institutions, the payment of a fine forms an incentive to obey the law.[60] In addition to paying a fine, the Court may also impose a publicity order against the corporation, requiring the corporation to publicize the details of its conviction. The publicity surrounding a corporate manslaughter conviction serves as a deterrence factor through naming and shaming the corporation for its negligent actions as the order has an untold effect on the corporation's reputation.[61]

In relation to the Kenyan context, the above excerpts and legal opinions serve to show that although Kenya has developed laws and policies with regards to corporate criminality, these laws are not effective in securing corporate convictions of modern-day

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[58] *Andrews v DPP* (1937), The United Kingdom House of Lords

[59] Richard. A. Posner, 'Optimal sentences for white collar criminals', Volume 17 *University of Chicago law school, Chicago unbound* ,1980, 410

[60] Darlene Wong, ' A more efficient alternative to fines in deterring Corporate misconduct', *Berkeley Journal of Criminal Law*, 2000, 3

[61] http://www.barristermagazine.com/publicity-order-for-corporate-offenders-read-all-about-it/ on 10th November 2019.

corporations for corporate manslaughter. This research paper therefore attempts to suggest a model of corporate criminality that fills the gaps existing within the Kenyan legislative framework regarding the same.

1.9 RESEARCH DESIGN

1.9.1 Research methodology

The primary methodology employed in this paper is desktop research. This includes library research, internet searches and desk based analysis of literature on corporate criminality as well as both national and international case law on the same. Desktop research was selected as the appropriate research methodology because a vast majority of credible information regarding corporate criminality is found within the above-mentioned sources.

This study also employs the use of a comparative analysis with the United Kingdom. This is because the United Kingdom is a world class example with regards to its laws on corporate criminality as it was one of the first countries to enact the CMCHA. Further, due to the fact that it is a more developed jurisdiction as compared to Kenya, Kenya could greatly benefit from learning lessons from them.

1.9.2 Limitation

A limitation while carrying out this research was that the use of foreign laws to inform the discrepancies in Kenyan law with regards to corporate criminality may not entirely favour Kenya's social, political and economic position at the time of research.

1.9.3 Chapter breakdown

Chapter one introduces and give a background to the research question. It further goes on to give a theoretical framework that forms the basis of this study and reviews the works of other authors relating to the specific area of study. Additionally, it goes on to list the objectives and the research questions this study seeks to answer as well as the hypothesis used in carrying out the study .

Chapter two addresses the first research question on the position of Kenyan law with regards to corporate criminal responsibility. This is done through a discussion on the historical underpinnings, development and evolution of the concept of corporate criminal

liability. Additionally, chapter two addresses the second research question on whether the identification model currently used in Kenya is sufficient in providing for criminal liability of corporates. This is done through an in-depth analysis of the existing precedence on the same with a view of seeing how the courts in Kenya have dealt with the concept of corporate criminality. Further, this has been done through an analysis of publications by Kenyan authors on the same.

Chapter three addresses the legal concept of corporate manslaughter and what conditions must be fulfilled for an act by a corporate to constitute the same. This is done through an extensive look into the development of the concept of corporate manslaughter as incorporated in The United Kingdom's legislation. Further, this chapter looks into the successful corporate manslaughter convictions in the United Kingdom with a view of analyzing the CMCHA has been applied within the U.K's legislative framework

Chapter four contains a critical analysis of the loopholes existing within the Kenyan Companies Act as well as the Penal Code with regards to corporate criminality. This chapter further contains a comparative analysis between the United Kingdom and Kenya on how both jurisdictions have dealt with the issues of corporate criminal liability as well as corporate manslaughter. This analysis gives a better understanding of the loopholes existing within Kenyan legislation on the same as well as the areas that need reform within our current legal system.

Chapter five summarises the discussion by attempting to suggest a model of corporate criminality that will encompass liability for both parastatals as well as privately owned corporations. Further, this chapter makes conclusions on the incorporation of the concept of corporate manslaughter into Kenyan law with a view of improving the issue of corporate criminal liability in Kenya.

CHAPTER TWO

2.0 A Jurisprudential discussion on the separate legal personality of a corporation

The idea that a corporation is seen as a separate and distinct legal person with distinct rights and obligations is a fundamental aspect of any corporate law model.[62] As such, the House of Lords' determination in the case of *Salomon v Salomon*[63] is instructive. Lord MacNaghten elaborates thus;

"The company is at law a different person altogether from the subscribers …; and, though it may be that after incorporation, the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers, as members liable, in any shape or form, except to the extent and in the manner provided by the Act"[64]

In addition to the above statement, Lord Halsbury stated that once a company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself.[65] The concept of a separate legal personality for a corporation as entrenched in the decision above has been considered by a number of legal theorists. Peter French contends that on a theoretical level, corporations are more than a group of persons with a purpose as they have a metaphysical-logical identity that does not reduce to a mere sum of human being members.[66] Furthermore, French expounded that recognising a corporation as separate and distinct allows the treatment of corporations as fully fledged members of the moral community; of equal standing with the traditionally acknowledged residents; human beings.[67] As a result of this distinction, the law may

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[62] David Milman, *National Corporate Law in a globalised market: The UK experience is perspective*, Edward Elgar Publications, United Kingdom, 2009, 60

[63] *Salomon v Salomon and Co Ltd* [1897] AC 22

[64] Cheng Han Tan, *Walter Woon on company law*, 3rd edition, Sweet and Maxwell/Thomson Reuters, Singapore, 2009, 14

[65] Russell Mokhiber, *Corporate Crime and Violence: Big Business Power and the Abuse of the Public Trust*, Random House Inc, United Kingdom, 1988, 89

[66] Peter A French, *Collective and Corporate Responsibility*, Columbia University Press, U.S.A, 1984, 32.

[67] Peter A French, *Collective and Corporate Responsibility*, Columbia University Press, U.S.A, 1984, 36

unravel the separate legal personality for a company to be labelled , punished and/or sanctioned as a criminal entity.[68] At least three objections on this view of corporate criminality have been raised due to the nature of criminal law. The first objection is that corporates are incapable of possessing the required *mens rea* as they are amoral and have no will of their own. The idea that corporations may be found as morally blameworthy has been a matter of debate for centuries as evinced by the views of Lord Chancellor Thurlow when he asserted that " Corporations have neither bodies to be punished, nor souls to be condemned. They, therefore, do as they like."[69] This argument is frequently used by critics of corporate criminal responsibility who argue that corporations are not real persons and are therefore incapable of having the pre-requisite *mens rea*. *Mens rea* is defined as the mental element required by the definition of the particular crime.[70] Intention, knowledge and recklessness are indicative of *mens rea*. With regards to corporate manslaughter, Article 7(1)(a) of the International Criminal Court's elements of crime stipulates that the *actus reus* for murder includes that the perpetrator killed one or more persons; and the conduct was committed as part of a widespread or systematic attack directed against a civilian population.[71] This Article goes further ahead to state that the *mens rea* for the same crime reflects the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[72] Criminal law has responded to the issue of *mens rea* for corporate criminality through the development of several corporate liability models. For the purpose of this research paper, non-derivative liability will suffice. Under this model of corporate liability, the

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[68] Aida Abdul Razak, ' Corporate manslaughter and the attempt to reduce work related deaths; A comparative study of the United Kingdom, Australia and Malaysia's legal framework', Published PhD thesis, University of Adelaide, Australia, 2018, 50

[69] Aida Abdul Razak, ' Corporate manslaughter and the attempt to reduce work related deaths; A comparative study of the United Kingdom, Australia and Malaysia's legal framework', Published PhD thesis ,University of Adelaide, Australia, 2018, 62

[70] https://www.law.cornell.edu/wex/mens_rea on 22nd March, 2020

[71] Article 7 (1)(a) of the Elements of Crimes, Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes (13–31 March and 12–30 June).

[72] Article 7 (1)(a) of the Elements of Crimes, Report of the Preparatory Commission for the International Criminal Court: Finalized Draft Text of the Elements of Crimes (13–31 March and 12–30 June).

corporation is treated as a real entity that possesses a separate legal personality in its own right and hence corporate liability is diagnosed through questions about the culpability of the corporate entity itself. This is to mean that the *mens rea* of the corporation is established through its corporate culture, policies and knowledge.

The second objection is that corporations are legal fictions and can therefore not function independently. This objection as hereabove discussed is set aside on the basis of the *Salomon v Salomon*[73] decision where a corporation was held to be a separate legal person from the natural persons within it. To this end, the corporation can function completely independently from the 'real' persons constituting its membership.

The last objection is that corporate entities *per se* cannot be punished. As an artificial legal creation, a corporation has no physical existence and can therefore not be punished in the same manner an individual is punished. It can neither be incarcerated nor receive any form of physical punishment. Peter French is however of the view that justice is not generally served through the prosecution of some natural person who works for the corporation. He further contends that justice still needs to be sought and be seen to be done by the public.[74] The usual punishment a corporation receives is a fine. However, fining a corporation would result in either the fine being absorbed and passed on to the consumer or in some cases contributed to the failure of the corporation.[75] Norm Keith argues that this fails to address the broader social objectives of public welfare as the corporation will not 'feel' the punishment in the same way an individual would.[76] Legislation has shown a continued lack of a thoughtful approach to punishing corporations as courts often use the deterrence theory in imposing varying degrees of monetary fines/ penalties. Under the deterrence theory, the effectiveness of punishment is viewed as being contingent on severity, certainty, celerity, frequency and publicity. The

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[73] *Salomon v Salomon and Co Ltd* [1897] AC 22

[74] Leonard Herschel Leigh, 'The Criminal Liability of Corporations and Other Groups' , 9 (247), *Ottawa Law Review,* 1977 , 287.

[75] Norm Keith, 'Sentencing the Corporate Offender: From Deterrence to Corporate Social Responsibility' 56(3) , *Criminal Law Quarterly,* 2010, 313.

[76] Norm Keith, 'Sentencing the Corporate Offender: From Deterrence to Corporate Social Responsibility' 56(3) , *Criminal Law Quarterly,* 2010, 320

ineffectiveness of criminal sanction in deterring offences could be the result of a sanction which is too lenient, too infrequent or too uncertain.[77] In my opinion, the need for a deterrence factor for the corporate offender means that the fine must be substantial and significant such that it is not viewed as a mere licence for illegality by other corporations. This approach encompasses ensuring that the fines go beyond the corporation to include individuals associated with the corporation who may feel the pain of the financial penalty imposed by the court. This may include, for example, shareholder loss of dividends.

There are a number of arguments by legal theorists that wrongdoing is integral to guilt and that some form of harm must have been suffered as a consequence.[78] Although corporations are regarded as artificial legal entities and are therefore not capable of having any sensation of guilt, the alternative to this is shame through publicity orders imposed by the court. It can be argued that a corporations' reputation is a key factor to its success. Therefore, its reputation is a public commodity that may be tarnished due to public shame. To this end, corporations can and should be punished for their wrongdoings. The most common method of punishing corporations is through the imposition of fines. Although fines can easily be imposed through civil liability, imposing a criminal fine does not only punish harmful corporate conduct but also attaches an undesirable stigma to the corporate that commits the wrongdoing.[79]

Taking the above into account, this research paper is of the view that a mix of sanctions such as fines in conjunction with publicity orders will suffice to achieve the deterrence and retributive ends of punishing a corporation for its wrongdoings.

2.1 Criminal law v Civil law

It is crucial to understand the contributions of civil and criminal law with regards to corporate criminality. Criminal law demands proof beyond reasonable doubt for a

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[77] Jack. P. Gibbs, ' Crime, Punishment and Deterrence', 48(4), *The Southwestern Social Science Quarterly*, 1968, 520

[78] Peter A French, *Collective and Corporate Responsibility,* Columbia University Press, U.S.A, 1984, 42

[79] Sara Sun Beale, 'Is Corporate Criminal Liability Unique', Volume 44, *American Criminal Law Review*, 2007, 1524

conviction while in comparison, civil law requires a lower level of burden of proof to establish liability. To this end, criminal law may be flawed in pursuing corporations as it exerts strict procedural requirements of establishing the guilt of a corporation beyond reasonable doubt. This is as compared to civil law where prosecutors only have to prove on a balance of probabilities that the corporation committed the wrongdoing. The difficulties in establishing this burden of proof under criminal law, when compared to regulatory law, reflects the single biggest drawback of corporate manslaughter charges.

However, the use of criminal law to prosecute corporations may be more effective than civil law as there is a deterrence factor attached to criminal law. Deterrence is important to the extent that corporations respond to the threat of adverse publicity, rather than the prospect of penal convictions. Therefore, criminal law may be more effective than civil law as penal sanctions on the corporation have stigmatising effects as compared to civil law sanctions.

2.2 Historical development of the concept of Corporate Criminal Responsibility in the UK

Criminal law is anchored in the Latin principle of *Societas delinquere non potest* which directly translates to "Society cannot commit a crime." According to this principle, a legal person cannot commit a crime due to the fact that criminal law focuses on personal guilt.[80] Offences require proof of the accused person's mental state and subsequent sanctions only address individual criminal responsibility without harming innocent third parties. [81] This principle was frequently used by lawmakers to absolve corporations from criminal responsibility. However, with globalisation and increased industrialization, this principle has been eroded. Presently, complex provisions are used to regulate the structure, nature, role and mode of functioning of corporations as well as the powers and obligations of those who play a role in the operation of the corporation. Large corporations tend to have complex structures that may be multi-layered, centralized or

[80] Weigend Thomas, '*Societas delinquere non potest* ?: A German Perspective' Volume 6 (Issue 5) *Journal of International Criminal Justice*, 2008, 928

[81] Weigend Thomas, '*Societas delinquere non potest* ?: A German Perspective' Volume 6 (Issue 5) *Journal of International Criminal Justice*, 2008, 929

decentralized and having different chains of command.[82] This complexity raises difficult questions regarding the issue of allocation of responsibility for criminal acts.

In this chapter, the author discusses the position of Kenyan law with regards to corporate criminal responsibility through an analysis of the historical underpinning, evolution and development of the concept of criminal responsibility. This is done with a view of understanding the need to have laws specifically addressing the issue of corporate criminality. This chapter concludes with a discussion on the sufficiency of the Identification model currently used in Kenya to tackle the issue of corporate criminality. This is done through an analysis of the principles behind the identification model and how it has been applied by Kenyan courts when handling cases of corporate criminal responsibility with a view of seeing the progress Kenya has made over the years on the same.

The concept of corporate criminality was first developed within common law jurisdictions out of a minor doctrine that masters were criminally liable if their servants created a public nuisance by throwing something out of the house and onto the street.[83] By the 14th century, the organizational form of corporations had been well established and could only be created by a grant from the crown or by an act of parliament. The crown endeavoured to encourage the idea that incorporation was a privilege and hence encouraged entities to be legally authorised. [84]. By the 17th century, corporations became profit oriented and new industries developed due to the growth of business and trade. These companies were largely unincorporated and hence engaged in massive business frauds and failures to perform duties as there was no governing legislation to hold them accountable for their misdeeds.[85] This lead the United Kingdom's Parliament to enact the

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[82] Cristina de Maglie, 'Models of Corporate Criminal Liability in Comparative Law' Volume 4 (Issue 3) *Washington University Global Studies Law Review*, 2005, 547

[83] Bernard Thomas J, 'The Historical Development of Corporate Criminal Liability' 22(1), *Criminology* ,2006,3.

[84] Kathleen F Brickey, 'Corporate Criminal Accountability; A brief history and an observation' 60(2), *Washington University Law Review*, 1982, 397

[85] Holdsworth W.S, ' English Corporation law in the 16th and 17th century', 31(1), *Yale law journal* , 1922, 382

Bubble Act in 1720 which effectively meant that corporations could only be established by an act of Parliament and existing companies could not act outside the scope of their Constitutions.[86] By the end of the 17th century, the idea of corporate criminal responsibility faced four main obstacles. The first obstacle was attributing acts to the corporation which was seen as a juristic body.[87] Secondly, legal thinkers during that period did not believe that companies could possess the moral blameworthiness required to commit an offence. [88]Further, the *ultra vires* doctrine presented a challenge as courts could not hold corporations accountable for acts that were not provided for in their charters. [89] The last obstacle was the Judges' literal understanding of criminal procedure. This was an obstacle due to the fact that criminal procedure required the accused to be physically brought to court whereas this was impossible for Corporations. [90]

During the 18th Century, the courts in England began to entertain the idea of imposing monetary penalties on legal persons for offences based on strict liability. [91] This idea was grounded in the doctrine of *respondeat superior* which provides that since the master acquires the benefits of the servant's work, he should also acquire the burdens.[92]Therefore, in 1842, the case of *The Queen v The Birmingham Gloucester Railway Company*[93] set the precedence that a company could be liable for failing to act in accordance with a statute. Initially, corporate criminal responsibility was limited to

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[86] William Laufer, *Corporate bodies and Guilty minds*, 1st Ed, University of Chicago Press, Chicago, 2008,11

[87] John. C. Coffee, *Corporate Criminal Responsibility*, Sanford H Kadish, London, 1983, 253

[88] L.H.Leigh, ' The Criminal liability of Corporations in English law' 28(2), *The Cambridge Law Journal* , 1970, 329

[89] L.H.Leigh, ' The Criminal liability of Corporations in English law' 28(2), *The Cambridge Law Journal* , 1970, 331

[90] L.H.Leigh, ' The Criminal liability of Corporations in English law' 28(2), *The Cambridge Law Journal* , 1970, 332

[91] Antonio Fiorella, 'Corporate Criminal Liability and compliance Programmes' 2(1), *Jovene Editore*, 2012, 56.

[92] https://www.law.cornell.edu/wex/respondeat_superior on 29th July, 2019.

[93] *The Queen v The Birmingham Gloucester Railway Company* (1842), Queens Bench Reports, England (Unreported)

crimes based on the failure to perform a duty required by law. However, during the 19th century, English courts extended this liability to crimes based on the improper performance of a legal act.[94] This is seen in the case of *The Queen v Great North Of England Railway Co*[95] where Lord Denning held the defendant criminally liable for the improper performance of a legal act due to the fact that the defendant failed to construct a bridge over a highway as was required by law. The courts however failed to extend the concept of corporate criminal responsibility to crimes requiring specific intent mainly due to the doctrine of *Ultra Vires*. This doctrine was however overruled in the landmark case of *Citizens Life Assurance Company v Brown*[96] where the Privy Council held that employers could be held liable for torts involving malice committed by their employees during the course of employment.[97] The Industrial Revolution led to an increase in the number of corporations in England which led to the realization by English courts that corporations had the potential to cause serious and substantial damage to society.[98] The courts therefore extended the doctrine of vicarious liability to criminal cases but limited these cases to regulatory offences only.[99]Further, vicarious liability only applied to offences that did not require the element of *mens rea*.

One of the first indications that the concept of corporate criminal responsibility was moving away from offences to do with vicarious liability was seen in the case of *Union Colliery Co. v The Queen* [100] where the court decided that words such as 'everyone' in criminal matters could include corporations and thus corporations could be punished with common law fines for offences where the only specified penalty was imprisonment.

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94 Mark Pieth and Radha Ivory, *Corporate Criminal Liability; Emergence, Convergence and Risk*, Springer, Netherlands, 2011, 66.

95 *The Queen v Great North Of England Railway Co* (1846), EngR803, England.

96 *Citizens Life Assurance Company v Brown* (1904) UKPC 20 (NSW), England.

97 This ruling was later extended to Corporate Criminal law

98 Mark Pieth and Radha Ivory, *Corporate Criminal Liability; Emergence, Convergence and Risk*, Springer, Netherlands, 2011, 7

99 Mark Pieth and Radha Ivory, *Corporate Criminal Liability; Emergence, Convergence and Risk*, Springer, Netherlands, 2011, 8

100 *Union Colliery Co. v The Queen* (1900), 331 S.C.R 81, England.

Further, in the case of *Mousell v London and North Western Railway*,[101] a company was held vicariously liable for an offence requiring *mens rea.* By the mid 1940's the idea that a corporation could be held criminally liable for its action was formulating hence leading to the English courts developing the identification theory for offences requiring *mens rea*. This was exemplified by Lord Denning in the case of *HL Boulton (Engineering) Co Ltd v TJ Graham and Sons Ltd* [102] where he likened a Corporation to a human body stating thus;

"It has a brain and a nerve center which controls what it does. It also has hands which hold the tools and act in accordance with directions from the center. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such. "

2.3 The identification model

Most jurisdictions require some element of fault; either by way of an intention to commit the offence or by recklessness resulting in the offence or by knowledge of the relevant circumstances, in order to secure a conviction against a corporation.[103] This is usually achieved through the identification model which associates the corporation with certain key officers who are seen to act on its behalf. These officers are seen to be acting as the corporation rather than acting for the corporation[104]. Therefore, a corporation can be held criminally liable for the acts and/or omissions of these officers as their conduct and state of mind is attributed to the company. In deciding who the key officers of a corporation are, those who are considered to control or manage the affairs of the Corporation are considered to be the embodiment of the Corporation as established in the case of

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[101] *Mousell v London and North Western Railway* (1917), 2 K.B 588, England.

[102] *HL Boulton (Engineering) Co Ltd v TJ Graham and Sons Ltd*, (1957) 1 Queens Bench Reports 159 at 172, England

[103] Amrit Mahal,' Challenges to the doctrine of identification in complex corporate structures; The way ahead?' , 3(3), *International journal of law and legal jurisprudence studies* (2010), at 95

[104] George O Otieno Ochich, ' The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 8.

Essendon Engineering Co Ltd v Maile[105]. English courts discredited the notion that corporate bodies could not be held liable for offences requiring proof of a guilty mind as seen in the case of *DPP v Kent and Sussex Contractors*[106],where the manager's intent to deceive was regarded as the intent of the company.

In theory, the identification model is meant to apply to both privately owned corporations as well as State corporations. However, there has been a difficulty in assigning criminal responsibility to State corporations due to the misconception that State corporations as well as corporations that exists as agents of the State are exempt from criminal culpability when they are acting on behalf of the State. This misconception, in my opinion, has been the cause of numerous parastatals within the country escaping liability for gross negligence not only leading to numerous deaths but also serious and substantial damage.

Where a company is found to be liable under the Identification theory, the controlling officers are jointly charged as accessories to the offence. It is important to note that in instances where the offence is of strict liability, the company will be held liable for the acts of its controlling officers where such acts are attributable to the Corporation and committed within the ordinary course of business. However, where the offence requires an element of *mens rea*, the corporation will not be held liable unless the element of *mens rea* is possessed by all controlling officers involved in the offence. The Identification model is therefore more efficient in assigning criminal responsibility as it limits the scope of people who are considered to make the corporation liable. Further, the identification model may also be used to impute personal negligence on the corporation for offences requiring *mens rea* even in instances where the human employee is not at fault.[107]

The identification model has however been criticized due to its restrictive nature when determining who is considered to be the mind of the corporation as seen in the case of *Tesco supermarkets ltd v Nattrass*. In this case, the question of whether the branch manager can be seen to be a controlling officer for an enterprise that has numerous

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[105] *Engineering Co Ltd v Maile* (1982), LR 510, England.

[106] *DPP v Kent and Sussex Contractors* (1944) ,KB 146, England.

[107] George O Otieno Ochich, ' The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 9.

branches arose. The House of Lords held that only the members of the Board of Directors or the Chief Executive Officer could be seen as the controlling officers of the plaintiff hence setting the standard too high. The precedence set by the ruling negatively impacts cases dealing with negligence as it insulates the company from negligent/criminal decisions made by other employees who are not considered to embody the mind of the corporation. Furthermore, the identification model does not reflect the realities of present-day multinational and complex corporations. The functionality of the identification model begins to break in the above kind of corporations as there is a broad range of controlling officers and there is no clear line drawn between the top officials of the corporation and other employees.

2.4 Corporate Criminality; A reflection of Kenya's legislative framework

Kenyan jurisprudence on corporate criminality began developing from the recognition that a corporation may be considered as a legal citizen of Kenya. This is seen in Article 65(3)(a) of the Constitution which provides that "a body corporate will be regarded as a citizen only where it is owned by one or more citizens."[108] Corporations in Kenya are therefore seen as ' jural persons' although ideally, they do not enjoy citizenship rights. This position is reiterated in the case of *Nyakinyua and Kang'ei Farmers Company Ltd v Kariuki and Gatheca Resources Ltd (No 2)*[109] where the court held that "...a company registered under the Companies Act is a person whether the company is publicly or privately owned." Further, Kenyan legislative provisions have recognized the concept of the separate entity of a corporation as seen in the case of *Caneland Ltd v Dolphin holdings Ltd and another* [110]where the High court stated that "..upon incorporation of a company, it becomes a legal entity separate from its members with only a few instances where the court is allowed to lift the veil of incorporation." In the case of *Omondi v National Bank of Kenya*[111], the concept of the personhood of a corporation was applied as the court held that the plaintiffs who had instituted the suit in their capacity as directors and shareholders of Lake Victoria Fish Ltd (not enjoined as parties to the suit) could only

[108] Article 65(3)(a), *Constitution of Kenya* (2010)

[109] *Nyakinyua and Kang'ei Farmers Company Ltd v Kariuki and Gatheca Resources Ltd* (1984) K.L.R 110

[110] *Caneland Ltd v Dolphin holdings Ltd and another* (1999) 1 EA 29.

[111] *Omondi v National Bank of Kenya* (2001) 1 EA 175.

institute proceedings regarding the alleged wrongs against the company in the capacity of the company. To this effect, the learned judge noted that a company is a distinct and separate entity from its shareholders and directors even when such directors are the sole shareholders. Therefore, only the company has the capacity to take action to enforce its legal right .

The concern with the concept of corporate criminality in Kenya lies in the fact that legislative provisions such as the Companies Act as well as the Penal Code did not envision a scenario where charges are brought against a company itself. It would therefore appear that the Kenyan legislative system is structured such a way that the company may only be prosecuted in conjunction with the natural persons within the company who were privy to the offence; there needs to be a causative link between the natural persons, the offence and the corporation. Consequently, entering a guilty verdict for the corporation immediately extends the same verdict to the natural persons within the corporation unless the individual can argue a recognized defense.[112] Therefore, by placing liability on every person concerned with the control and/or management of the corporation, the law casts the net so wide that it may end up enjoining all other officers who are concerned with the activities of the corporation. [113] Although there is a general absence of clear legal principles around the concept of corporate criminality, some rulings have formed clear indicators that Kenyan courts have, to some extent, recognized that charges may be brought against the corporation itself. This may be seen , for example, in the case of *Standard Chartered Bank Ltd v Intercom Services Ltd and Four others*[114] where the learned Judge noted that the identification model attributes the mental state of the controlling officers of a corporation to the corporation itself for the purposes of fixing the company with either civil or criminal liability. With regards to negligence offences, the court, in *East African Oil Refineries Ltd v Republic*,[115] held that the test is

[112] George O Otieno Ochich, ' The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 9

[113] George O Otieno Ochich, ' The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 10

[114] *Standard Chartered Bank Ltd v Intercom serviced Ltd and four others* (2004) 2 KLR 183

[115] *East African Oil Refineries Ltd v Republic* (1981) KLR 109

that of foreseeability. This principle has however not been elaborately developed, for example, to include instances where charges are brought against the corporation itself for its negligent actions or omissions that eventually lead to the death of its employee(s) or members of the public. This is a major shortfall in the law that leads to a highly fluid situation within Kenya's legislative provisions.

In light of the above, it is imperative to therefore conclude that although the concept of corporate criminality exists in Kenya, it is yet to be developed to the standards in developed democracies such as the United Kingdom's. To this effect, Justice J.B Ojwang' therefore notes thus;

" … It is well known that no judicial officer is allowed as a matter of firmly established law is allowed to decline to resolve a dispute within his or her jurisdiction on the ground that the issues are too difficult, or do not lend themselves to a correct answer. It follows from this principle that even where parliament has not made a law regulating a specific matter in detail, it does not follow that the relevant question therefore lies outside the purview of the law; it is the mandatory obligation of the court to *interpret the incomplete law* of Parliament and declare a complete scenario of law on the question. Therefore, when a judicial officer comes face to face with the ill-defined contents touching on the [criminal liability of Corporations], he or she must *still decide on the question…* [upon]… a careful and deliberate attention to the facts… [and]…the evidence…The evidence must then be applied to a correct appreciation of the governing *law …*"[116].

The development of laws regarding corporate criminality in Kenya is therefore dependent on the willingness and effort of the judicial system

[116] Justice J.B Ojwang', 'The role of the Judiciary in promoting environmental compliance and sustainable development' Volume II *Kenya law review* (2007), at 24.

CHAPTER THREE

3.0 Development of Corporate Manslaughter in the United Kingdom

The case of *Tesco v Nattrass*[117] had a significant influence on the subsequent prosecution of companies and corporations and consequently became the primary precedent for the identification doctrine. One of the consequences of using the identification doctrine for assigning criminal liability was that it introduced a tow tier justice system; large corporations would effectively be immune from prosecution for manslaughter while smaller corporations would easily be prosecuted for manslaughter due to the fact that the senior management was closer to the day to day decision making process.[118] Further, due to the narrowness of the identification doctrine, there was a high level of uncertainty and ambiguity in respect of liability of corporations for deaths that occurred due to their activities.[119] This led to the general opinion that while a corporation could be charged for manslaughter, there were a number of barriers that hindered such prosecution from being successful.[120] As a result of the large number of unsuccessful prosecution of corporations, a reform was both desirable and necessary as is discussed in this chapter. The first part of this chapter considers the events necessitating the development of the Corporate Manslaughter and Corporate Homicide Act of 2007. This is with a view of showing how the United Kingdom dealt with the actual or perceived inability of the law to punish

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117 *Tesco Supermarkets Ltd v Nattrass* (1972), United Kingdom House of Lords

118 Stuart Allan, 'The Corporate Manslaughter and Corporate Homicide Act 2007 or the Health and Safety (offences) Act 2008; Corporate Killing and the law', Published PhD thesis, University of Glasgow, Glasgow, 2016, 141.

119 Stuart Allan, 'The Corporate Manslaughter and Corporate Homicide Act 2007 or the Health and Safety (offences) Act 2008; Corporate Killing and the law', Published PhD thesis, University of Glasgow, Glasgow, 2016, 142

120 Stuart Allan, 'The Corporate Manslaughter and Corporate Homicide Act 2007 or the Health and Safety (offences) Act 2008; Corporate Killing and the law', Published PhD thesis, University of Glasgow, Glasgow, 2016,141

corporations for their failures that resulted in major loss of life.[121] The second part of this chapter analyses the offence of corporate manslaughter by discussing the conditions that must be met in order to secure a successful prosecution of corporations charged with corporate manslaughter. Lastly, this chapter looks into the successful corporate manslaughter conviction in the UK with a view of analysing the application of the CMCHA within this jurisdiction.

The Bradford City Stadium fire that occurred in May 1985 resulted in the death of over fifty-six people and was the first disaster where the conduct of the organisation responsible for the operation of the stadium was questioned.[122] Investigators concluded that the cause of the fire was discarded smoking materials falling through the stand onto a pile of combustible waste.[123]The fire spread rapidly through the stand but escape was difficult due to the inadequate fire exits to the rear of the stand. The stadium did not meet the relevant standards and there had been previous warnings with regards to the accumulation of combustible materials under the stands. [124] Surprisingly, there was no prosecution of the stadium owners for corporate manslaughter. This signalled the start of concern over the accountability of corporations in the event of major accidents.[125]

The next major disaster was the Herald of free enterprise ferry disaster that occurred in 1987. The ferry, which was operated by Townsend Car Ferries Limited, capsized shortly after it had set sail resulting in the death of one hundred and eighty individuals. The report of the court indicated a number of failures in the operation of the vessel as well as

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[121] Stuart Allan, 'The Corporate Manslaughter and Corporate Homicide Act 2007 or the Health and Safety (offences) Act 2008; Corporate Killing and the law', Published PhD thesis, University of Glasgow, Glasgow, 2016, 158

[122]https://www.independent.co.uk/news/uk/crime/bradford-city-stadium-fire-claims-the-disaster-was-started-deliberately-nonsense-according-to-high-10183156.html on 8th October 2019.

[123] Building research establishment report, *Fire safety In buildings*, 1986, 289

[124] Building research establishment report, *Fire safety In buildings*, 1986, 290

[125]Andrew David Hopwood, Francis Edum-Fotwe, Francis Adams, 'The impact of the Corporate Manslaughter and Corporate Homicide Act 2007 on the construction industry in the UK', 6th April, 2008, http://ascpro0.ascweb.org/archives/cd/2010/paper/CPRT240002010.pdf on 8th October, 2019

significant failings of the management of the company. [126] The report went further ahead to state that the body corporate was infected with the disease of sloppiness.[127] This was a clear indication that the company had failed in its mandate to protect the safety of its employees as well as the passengers. The Herald of Free Enterprise disaster led to extensive legal discussions with the general consensus being that corporations could be charged with manslaughter but due to the narrow application of the identification doctrine, a successful prosecution would be highly unlikely. [128] This is because the identification doctrine prevented corporate manslaughter prosecutions against any but small organisations. [129]

Although the general consensus was that a prosecution for corporate manslaughter was highly unlikely, the case of *R v Kite, Stoddard and OLL ltd*[130] showed that that was not necessarily true. Following the death of four teenagers who were on a canoeing trip organized by OLL ltd, the company made legal history by becoming the first company in the United Kingdom to be found guilty of corporate manslaughter. The main difference between the case against OLL Ltd and the cases discussed above was that OLL ltd was a very small company and therefore it was significantly straightforward to find the company guilty of manslaughter as the 'controlling mind' of the corporation could easily be identified.[131] It therefore follows that the successful prosecution of OLL Ltd was

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[126] Andrew Hale, ' Herald Free Enterprise accident Zeebrugge', 5th March, 2018, http://xapi.juicyads.com on 8th October, 2019.

[127] Stuart Allan, 'The Corporate Manslaughter and Corporate Homicide Act 2007 or the Health and Safety (offences) Act 2008; Corporate Killing and the law', Published PhD thesis, University of Glasgow, Glasgow, 2016, 144

[128] Stuart Allan, 'The Corporate Manslaughter and Corporate Homicide Act 2007 or the Health and Safety (offences) Act 2008; Corporate Killing and the law', Published PhD thesis, University of Glasgow, Glasgow, 2016, 147

[129] Stuart Allan, 'The Corporate Manslaughter and Corporate Homicide Act 2007 or the Health and Safety (offences) Act 2008; Corporate Killing and the law', Published PhD thesis, University of Glasgow, Glasgow, 2016, 146

[130] *R v Kite, Stoddard and OLL Ltd* (1994),Winchester Crown Courts, Unreported

[131] Stuart Allan, 'The Corporate Manslaughter and Corporate Homicide Act 2007 or the Health and Safety (offences) Act 2008; Corporate Killing and the law', Published PhD thesis, University of Glasgow, Glasgow, 2016, 166

symbolic rather than substantive in that the guilty verdict confirmed a well-established legal principle that in some circumstances, a corporation could be held guilty of manslaughter.

The decision in *R v Kite, Stoddard and OLL Ltd* raised questions on the inherent immunity of large corporations from corporate manslaughter due to the difficulty in identifying the 'controlling mind'. Further, questions on the benefit of prosecuting small `corporations were raised. This is due to the fact that the prosecution of small corporations was of insignificant impact to the culture and attitude of large corporations.[132] This state of affairs led to the increased pressure for the formulation of a law that would address the apparent inefficiency of the legislation to find corporations, regardless of the size, culpable for manslaughter for their activities that resulted in fatalities. This resulted in the landmark law; The Corporate Manslaughter and Corporate Homicide Act of 2007 whose main objective was to abolish the offence of gross negligence manslaughter in respect of corporations and create the new offence of corporate manslaughter which would enable courts to escape the identification doctrine and impose direct personal liability on a corporation where there has been a gross management failure leading to a person's death.[133]

3.1 Corporate manslaughter

The statutory offence of corporate manslaughter was introduced by Section 1 of the CMCHA[134].The offence was brought in to ensure that there were effective laws in place to prosecute corporations that have paid little regard to management, health and safety with fatal results.[135] The effect of the introduction of corporate manslaughter was that it widened the scope of the offence so that the focus was now on the overall management of the organisation's activities rather than the actions of particular individuals within the

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[132] Stuart Allan, 'The Corporate Manslaughter and Corporate Homicide Act 2007 or the Health and Safety (offences) Act 2008; Corporate Killing and the law', Published PhD thesis, University of Glasgow, Glasgow, 2016, 150

[133] Simon Parsons, 'The Corporate Manslaughter and Corporate Homicide Act 2007 Ten years on; Fit for purpose?'82(4) *The Journal of Criminal Law*, 2018,305

[134] Section 1, *Corporate Manslaughter and Corporate Homicide Act*, Chapter 19

[135] https://www.cps.gov.uk/legal-guidance/Corporate-manslaughter on 8th October, 2019

organisation. Although the failings of senior management must have formed a substantial element in the breach, liability is assessed by looking at the failings of the organisation as a whole. The offence only applies to certain organisations such as private bodies, public bodies provided they are incorporated by statute and some government departments.[136]

In order to understand the application of manslaughter to corporations, it is important to outline the offence of manslaughter and how it applies to individuals. There are two types of manslaughter; voluntary and involuntary.[137] For the purpose of this dissertation, the focus will be on involuntary manslaughter. The offence of manslaughter is subject to the court's interpretation and has therefore changed and evolved over time. [138] This may be seen where the House of Lords in the case of *R v Seymoure*[139] stated that there is a form of involuntary manslaughter based upon Caldwell type reckless. In defining what Caldwell type reckless it, Lord Diplock in the case of *R v Caldwell,*[140] stated that "..a person is Caldwell type reckless if the risk is obvious and either that person has not given any thought to the possibility of there being such risk or that the individual has acknowledged that there is some risk involved but has carried on with his conduct. "

The law was however restated in the case of *R v Adomako*[141] which is considered to be the leading judgment for the offence of corporate manslaughter. Lord Mackay stated that there are four elements that must be proved for the offence to be complete. Below is a brief analysis of the four elements to be determined when dealing with the offence of corporate manslaughter.

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[136] Section 1(2), *Corporate Manslaughter and Corporate Homicide Act*, Chapter 19

[137] Haigh Benjamin Edward,' An analysis of the Corporate Manslaughter and Corporate Homicide Act (2007): A badly flawed reform?', Published Master of Jurisprudence thesis, Durham University, Durham, 2011, 50

[138] Haigh Benjamin Edward,' An analysis of the Corporate Manslaughter and Corporate Homicide Act (2007): A badly flawed reform?', Published Master of Jurisprudence thesis, Durham University, Durham, 2011, 53

[139] *R v Seymoure* (1983), United Kingdom House of Lords

[140] *R v Caldwell* (1982), United Kingdom House of Lords

[141] *R v Adomako* (1994),United Kingdom House of Lords

3.1.1 A duty of care

A relevant duty of care is defined as a legal obligation owed from one person to the other if it is foreseeable that they may suffer harm or injury due to an act or omission.[142] This is provided for under Section 2(1) of the Act[143]. Lord Mackay in *R v Adomako* considered the issue of a duty of care and held that it should be given the same meaning as in the law of negligence.[144] It is important to note that contributory fault on the part of the deceased is not a bar to prosecution.[145] Further, as established in the case of *R v Willoughby*[146], the fact that the deceased knowingly engaged in an illegal activity is also not a defence.

In many cases, a duty of care will be obvious from the relationship that existed between the deceased and the defendant. However. In other cases, it would be necessary to analyse the facts to establish that under the law of negligence, the defendant owed the deceased a duty of care as established in the case of *Caparo industries plc v Dickman*,[147] where Lord Bridge stated that "..the relationship existing between the party owing the duty and the party to whom the duty is owed should be characterized by law as one of proximity." Section 2(5) of the Act[148] further states that the judge should make the determination as to the question on whether a particular organisation owes a duty of care to a particular individual.

3.1.2 The breach of that duty of care

Section 1(4)(b) provides that "an act amounts to a gross breach where the conduct alleged falls far below what can reasonably be expected by the organisation in the circumstance."[149] However, as a matter of practice, the court will often look at the alleged breach with regards to the language used with respect to the offence of gross negligence

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142 *Donoghue v Stevenson* (1932), United Kingdom House of Lords

143 Section 2(1), *Corporate Manslaughter and Corporate Homicide Act*, Chapter 19

144 *R v Wacker* (2002), United Kingdom Court of Appeal

145 https://www.cps.gov.uk/legal-guidance/Corporate-manslaughter on 8th October, 2019

146 *R v Willoughby* (2004), United Kingdom Court of Appeal

147 *Caparo industries plc v Dickman*(1990), United Kingdom House of Lords

148 Section 2(1), *Corporate Manslaughter and Corporate Homicide Act*, Chapter 19

149 Section 1(4)(b), *Corporate Manslaughter and Corporate Homicide Act*, Chapter 19

manslaughter.[150] Therefore, when looking at the extent of the breach of duty, the court may assess whether the breach was 'truly, exceptionally bad' or ' so bad that is amounts to a crime deserving of punishment'[151]. Section 8[152] further sets out a non- exhaustive list of the factors that the court must consider in determining whether there was a breach of duty of care.

It is important to note that it is not necessary to prove that there was a serious and obvious risk of death. This is because a corporation is an inanimate body which does not have the capacity to foresee risk.[153] Evidence that the risk was or should have been obvious to members within the organisation should be considered by the court in determining whether there was a breach of duty.[154] The Court of Appeal in the case of *R v Misra and Srivastrava* [155] held that this is a question of fact and should be determined on a case to case basis.

3.1.3 The death of the deceased was due to the breach in duty

The prosecution must show that the deceased died as a result of the breach of duty owed by the defendant. The breach of duty must be the operating cause which made more than a minimal contribution to the death.[156] The usual rules of causation apply as explained by Herring whereby he stated that "..the simplest way for the court to decide on this question is to ask; "If the defendant would have acted reasonably, would the victim have been killed?"[157]

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150 https://www.cps.gov.uk/legal-guidance/corporate-manslaughter on 8th October, 2019

151 Established in the case of *R v Adomako*

152 Section 8, *Corporate Manslaughter and Corporate Homicide Act*, Chapter 19

153https://www.lawcom.gov.uk/app/uploads/2015/03/lc237_Legislating_the_Criminal_Code_Involuntary_Manslaughter.pdf on 8th October 2019

154 https://www.cps.gov.uk/legal-guidance/corporate-manslaughter on 8th October, 2019

155 *R v Misra and Srivastrava* (2005), United Kingdom Court of Appeal

156 *R v Hennigan* (1971), United Kingdom House of Lords

157 Herring J, *Criminal Law- Texts, cases and materials*, 4th Edition, Oxford University Press, England, 2010,276

3.1.4 The failure was so gross that it would substantiate a criminal conviction

It is a question for the court to determine whether the breach was so gross as to warrant a criminal conviction. In determining this question, the court may refer to the statement made by Lord Hewart in the case of *R v Bateman*[158] where he stated that "..the negligence has to go beyond a mere matter of compensation between subjects and show such a disregard for the life and safety of others as to amount to a crime against the State and therefore deserving of criminal punishment."

3.2 Successful Corporate manslaughter convictions in the UK

The first corporation in English legal history to be convicted of corporate manslaughter was OLL Ltd. During trial, it was determined that the managing director and the company had failed to ensure that the teenagers were safe hence resulting in their drowning.[159] The company was found guilty of manslaughter and was fined 60,000 pounds. The trial judge, Ognall J, stated that the managing director and the company 'stand or fall together'.[160]A crucial aspect of this case was that the managing director had personal knowledge of the safety failures. The second successful prosecution for corporate manslaughter occurred in 1996 in the case of *R v Jackson Transport (Ossett) Ltd*[161] where the company was fined 22,000 pounds. The main similarity between this case and OLL Ltd is that both companies were small and therefore it was relatively easy to identify the senior management who have a hand in the day to day running of the company.

CAV Aerospace Ltd was in 2015 convicted of corporate manslaughter for causing the death of one of its employees after a stack of metal sheets collapsed on top of him and crushed him. Prior to this unfortunate incident, the senior management of the

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158 *R v Bateman* (1925),United Kingdom House of Lords

159 Haigh Benjamin Edward,' An analysis of the Corporate Manslaughter and Corporate Homicide Act (2007): A badly flawed reform?', Published Master of Jurisprudence thesis, Durham University, Durham, 2011, 71

160 Clarkson C.M.V, 'Kicking Corporate bodies and damning their souls' 59(4) *The Modern Law Review*, 1996, 561

161 *R v Jackson Transport (Ossett) Ltd* (1996), Unreported case

corporations received clear and repeated warnings over a number of years of the potential consequences of stacking the metal sheets too high. The court directed the corporation to pay a fine of 600,000 Pounds.[162] In 2016, Linley developments was convicted of corporate manslaughter for the death of a worker who was crushed when a structurally unsound retaining wall collapsed. The company was found to be in gross breach of their duty of care by failing to sufficiently prepare a risk assessment for the excavation works and failing to monitor the stability of the wall. The court directed the company to pay a fine of 200,000 Pounds and publicize their conviction by taking out an advertisement in the trade press detailing their conviction.[163] Further, Huntley Mount Engineering was convicted of corporate manslaughter for the death of an apprentice who was allowed to work without meaningful supervision on dangerous and defective equipment. The Court subsequently ordered the corporation to pay a fine of 150,000 Pounds.[164]

[162] https://cqms-ltd.co.uk/landmark-corporate-manslaughter-case/ on 10th October, 2019

[163] https://cqms-ltd.co.uk/landmark-corporate-manslaughter-case/ on 10th October, 2019

[164] https://cqms-ltd.co.uk/landmark-corporate-manslaughter-case/ on 10th October, 2019

CHAPTER FOUR

Given the massive risk posed by unaddressed criminal consequences for corporate manslaughter, the development of clear judicial principles and statutory rules regarding the same is a matter of urgency in Kenya. In order to elucidate this position, the first part of this chapter analyses the Kenyan Penal Code as well the Companies Act with a view of analysing the gaps existing with regards to provisions for corporate manslaughter. The second part of this chapter discusses a number of disasters that were caused by the gross negligence of corporations in Kenya. The last part of this chapter conducts a comparative analysis on how the courts in Kenya and the United Kingdom have dealt with the issue of corporate manslaughter with a view of highlighting the shortcomings of Kenyan law regarding the same.

4.0 A look into the Kenyan Penal Code and Companies Act

Although developed democracies are increasingly being seen to grapple with the complex topic of corporate criminality for corporate manslaughter, younger democracies in developing countries have not given the matter the attention it deserves.[165] This is exemplified by the position in Kenya where there is a clear absence of judicial principles regarding the same. In the following section, the author looks into two key Kenyan legislations, the Penal Code and the Companies Act, to analyse the void within the legislative framework in providing for corporate criminality for deaths resulting from a corporation's grossly negligent actions.

The Companies Act[166] is the principle statue that provides for the incorporation, regulation and winding up of companies and other associations. Of particular importance to this research paper is Section 16(2)[167] which provides that "upon incorporation, a company becomes a body corporate and is *inter alia* capable of suing or being sued in its own name." Further, upon incorporation, a body corporate become a legal person separate and distinct from the natural persons who comprise of it. It can therefore be

[165] George O Otieno Ochich, ' The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 16

[166] Cap 486, *Laws of Kenya*

[167] Section 16(2), *Companies Act* (Act No. 8 of 2008)

inferred that a company can be brought before a court in its own name for criminal liability without co-accusing the natural persons who make up the company. This however is not the position in Kenya as hereinunder discussed.

The Penal Code[168] is the principle statute of criminal law in Kenya. It creates offences and prescribes their punishment thereof. The Penal Code, to a certain extent, recognises the concept of corporate criminality due to the fact that the act anticipates that a corporation/Juristic person may commit an offence. To this end, Section 23 of the Act[169] provides that "where an offence is committed by a body corporate, all persons concerned with the control or management of the affairs of such body corporate shall be guilty of that offence and liable to be punished accordingly unless such person can prove that the commission of the crime was not as a result of any fault on his/her part." From this provision, it would appear that Kenyan legislation does not contemplate that a charge and its subsequent criminal penalty may be imposed against a corporation alone. On the contrary, it suggests that a corporation may only be prosecuted alongside the natural persons who control or manage the affairs of the corporation. Therefore, returning a guilty verdict against the corporation automatically extends the same verdict to the natural persons, who are the corporation's co-accused. This provision further shows that Kenyan law requires a causative link between the natural persons co-accused with the corporation and the offence in order to secure a conviction against the corporation.[170] There must be some fault on the part of the natural person either through an act, omission or negligence. The absence of fault therefore operates as a total defence.[171]

Section 202(1) of the Penal Code[172] provides that "a person who causes the death of another through an unlawful act or omission shall be guilty of manslaughter." Article 260

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168 Cap 63, *Laws of Kenya*

169 Section 23, *Penal Code* (Act No. 12 of 2012)

170 George O Otieno Ochich, ' The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), 12

171 George O Otieno Ochich, ' The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 14

172 Section 202(1), *Penal Code* (Act No. 12 of 2012)

of the Constitution[173] provides that "a person includes a company or association whether incorporated or unincorporated." The general parameters envisioned in the Penal code for the offence of manslaughter are not sufficient to cover corporations due to the inherent difference between natural and juristic persons. The Penal Code therefore fails to go into detail regarding the parameters within which the offence of manslaughter may be extended to corporations. Further, Section 205 of the Penal Code[174] provides that the punishment for manslaughter is life imprisonment. It is however impossible to give the same punishment to corporations as they cannot be jailed. The author is therefore drawn to the conclusion that while writing the Penal Code, Kenyan legislators did not envision a circumstance where the offence of manslaughter is brought against a corporation.

4.1 A case of utmost negligence and untamed impunity

From the gruesome litany of deaths that have occurred over the years in Kenya due to the gross negligence of corporations, a reasonable observer would have expected the criminal justice system to have been active in trying to combat such corporate violence. [175]When for instance a doctor kills through gross negligence, a prosecution for manslaughter usually follows. However, when companies kill and injure, the practice is different.[176] The following section sheds light on this mind -boggling reality in Kenya.

The Solai Dam tragedy

In what turned out to be the most glaring case of corporate negligence and impunity, an illegally and irregularly constructed man-made dam within the vast Patel coffee estates in Nakuru broke it banks on 9th May 2018 leaving in its wake an unprecedented account of gruesome deaths, horrible physical and mental injuries, destruction of property and mass

[173] Article 260, *Constitution of Kenya* (2010)

[174]Section 205, *Penal Code* (Act No. 12 of 2012)

[175] C. M. V Clarkson 'Kicking Corporate bodies and damning their souls', 59(4) *The Modern Law Review* , 1996, 558

[176] C. M. V Clarkson 'Kicking Corporate bodies and damning their souls', 59(4) *The Modern Law Review* , 1996, 558

displacement of people.[177] A fact finding mission report by the Kenya Human Rights Commission reveals blatant negligence and a lack of compliance by Patel Coffee Limited as well as the National Environmental Management Authority (NEMA) and the Water Resources management Authority (WARMA). NEMA and WARMA's liability in this matter lies in their failure to assess the viability and worthiness of the dam even after the residents had previously complained about the visible cracks on the dam. Further, despite the fact that the dam had been in existence for more than 15 years, NEMA had not conducted an environmental impact assessment audit on the viability of the dam. Patel Coffee Limited's liability lies in their construction and maintenance of dams without adherence to relevant laws. More than a year later, the victims of the tragedy have not received any form of compensation for the trauma they went through. Further, none of the corporations involved in this tragic sequence of events has been criminally charged for causing death due to their gross negligence.

Mukuru-Sinai fire tragedy

On September 12th 2011 a spillage occurred from a pipeline, owned by the Kenya Pipeline Company, that ran through the Mukuru-Sinai informal settlements. As a result of a failed gasket, rivers of petrol flowing through the storm drains in the slum exploded resulting in one of the worst fire disasters in the Country that lead to the death of around 120 people as well as severe injuries.[178] A Kenya Pipeline Company investigation report indicated that the failure of the gasket could have been as a result of poor installation. [179] In May 2012, more than 300 affected individuals brought a suit against Kenya Pipeline Company seeking compensation. The Plaintiffs claimed that the defendants acted negligently in constructing an oil pipeline in the middle of the slum, without putting

[177] https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/653-solai-dam-tragedy.html on 10th November, 2019.

[178] https://www.business-humanrights.org/en/kenya-pipeline-company-lawsuit-re-explosion-fire-in-nairobi on 10th November

[179] https://mobile.nation.co.ke/news/Sinai-fire-victims-search-for-justice-going-cold/1950946-5227352-format-xhtml-12cvo4h/index.html on 10th November, 2019.

adequate fire equipment in place.[180] The Defendants however argued that they were not directly liable for the fire and that the victims failed to show that they had breached their statutory obligations. [181] The High Court declined to award the 25 billion compensation to the victims and instead directed them to file a suit in negligence where each claimant would have to prove their individual loss in addition to establishing the test of liability with regards to the breach of duty, causation and damages.[182] As of this year, Kenya Pipeline Company has not been held liable for their gross negligence despite the circumstantial evidence surrounding the incident and the investigation report indicating that they did not have a system designed to contain leaks.

Kenya Ferry Services; A tale of corporate sloppiness

Kenya Ferry Services Limited , a State corporation under the Ministry of transport and infrastructure, is mandated with the operation of ferries in the country. In 1994, the MV Mtongwe capsized 40 meters from the port resulting in the death of 272 people. There were 400 people on board against the capacity of 300 when the incident occurred.[183] The Kenya ferry services, as a result of their gross negligence caused the unfortunate death of 272 people by not taking effective measures to ensure that their ship was not over boarded. The dependants of the deceased have to date not received any compensation for the loss of their loved ones. In October 2019, an occupied vehicle slipped off the Likoni Ferry and plunged into the Indian Ocean. The Kenya Ferry Services was soon on the spot over its role in the accident and its clear lack of preparedness. First, three of the five ferries plying the channel operate without clear safety measures. They do not have divers and a well -trained rescue team on board. Further, the ferry's ramps dangle in water without a barrier attached at the back and front to prevent cars or other items on board

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[180] https://www.business-humanrights.org/en/kenya-pipeline-company-lawsuit-re-explosion-fire-in-nairobi on 10th November, 2019

[181] https://www.business-humanrights.org/en/kenya-pipeline-company-lawsuit-re-explosion-fire-in-nairobi on 10th November.

[182] https://citizentv.co.ke/news/blow-to-sinai-fire-victims-as-court-declines-to-award-them-compensation-156992/ on 10th November, 2019

[183] https://www.standardmedia.co.ke/article/2001344035/is-the-kenyan-ferry-built-for-disaster on10th November, 2019

from sliding into the ocean.[184] An audit report shows that the three vessels do not match up to globally set standards by the International Safety Management. [185] Secondly, retrieving the vehicle and the two bodies should have been done swiftly but instead, South African divers had to be engaged to carry out the duties that Kenya Ferry Services should have provided in the first place. The finger pointing and blame game then started with no official taking responsibility for the incident and the corporation going scot- free despite its grossly negligent actions.

The above Kenyan case studies serve to show the stark difference between how courts in Kenya and those in the UK deal with the issue of corporate criminal liability for corporate manslaughter. Whereas the court in the UK assign direct liability on the corporation itself for its misdeeds ; thereby attaining some form of justice for those affected by its gross negligence , courts in Kenya more often than not fail to find corporations directly liable for their actions. This in turn leads to unacceptable levels of corporate impunity in the Country and a general lack of justice for the unfortunate victims of corporate misdeeds. Another significant difference between the two jurisdictions is that the UK addresses the issue of corporate manslaughter through a specific act that extensively defines the offence and gives the punishment thereof. In Kenya however, the approach to corporate criminality is rather simplistic and unsatisfactory[186]as the law has not established a specific legislation that is able to hold corporations liable for negligently causing the death of others. Lastly, in the UK, there are corporate sentencing guidelines that regulate the fine a convicted corporation should pay based on its turnover. A look at the relevant case law in Kenya however shows that even where a corporation is convicted, the fine imposed by the court is quite insignificant

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[184] https://www.businessdailyafrica.com/corporate/shipping/dire-state-of-marine-safety-rules/4003122-5303824-5hf1o4z/index.html on 10th November, 2019.

[185] https://www.businessdailyafrica.com/corporate/shipping/dire-state-of-marine-safety-rules/4003122-5303824-5hf1o4z/index.html on 10th November, 2019.

[186] George O Otieno Ochich, ' The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 35

considering the financial muscle of some of these corporations.[187] There is therefore a general lack of a deterrence factor within Kenya's legislative framework.

[187] *Mumias Sugar Company Ltd, W.S.M Adambo v R* (2008) eKLR

CHAPTER FIVE

5.0 Conclusion

The Kenyan position on corporate criminality as hereinbefore discussed shows that Kenya is still tied to the identification doctrine which has proved to be unsatisfactory owing to the rapid growth of corporations in the global market. Further, a study of Kenya in chapter three and four reveals that although Kenya recognises the concept of a separate legal entity for corporations and criminal liability of corporations, criminal laws only contain minimalist provisions with regards to corporate criminality. Although corporations in Kenya face criminal charges, the Prosecution more often than not fails to establish the required *mens rea* hence resulting in the acquittal of a number of corporations. Further, due to the challenge of prosecuting corporations, most corporate convictions in Kenyan courts are brought under various statutory provisions other than the Penal Code, which is the principle statute for criminal offences in Kenya. A worthy observation with regards to the Kenyan context is that criminal prosecutions have traditionally been under the domain of the Kenya Police. However, the 2010 Constitution establishes the offices of the Director of Public Prosecutions[188] as well as the Attorney general[189] who were empowered to exercise State powers of prosecution. An average police officer capable of carrying out a criminal investigation is a nine-month ill trained graduate while the corporation on the other hand often has the financial muscle to hire the best legal representatives who are often able to absolve the corporation from liability. Until the office of the DPP as well as the AG take the issue of corporate criminality seriously, the above shall remain to be the position within Kenya's legislative framework. The fact that corporations are increasingly becoming large complex institutions means that their criminal actions are capable of affecting a large number of people. As exemplified by the case studies in chapter four, there is an increasing, urgent and insistent need for Kenyan legislators to introduce the crime of corporate manslaughter and establish a specific legislation providing for the same. This is in the interest of curbing

[188] Article 156, *Constitution of Kenya* (2010)

[189] Article 157, *Constitution of Kenya* (2010)

corporate impunity in the Country and safeguarding the rights and interests of Kenyan citizens.

5.1 Recommendations

An effective model of corporate criminality needs to strike a balance between justice and social utility.[190] Therefore, having highlighted the loopholes exiting within Kenya's legislative framework ,the author submits that a possible solution is the adaptation of the realist model of assigning criminal responsibility to corporations. This theory asserts that the criminal responsibility of corporations is primary and not dependent on the liability of natural persons within the corporation. The realist model attaches liability to a corporation by looking at its culture and policies; thereby ensuring that an offence attributable to a corporation does not go unpunished especially where no individual within the corporation can be pinned down for the offence. The author further submits that the realist theory should be extended to Parastatals to also hold them criminally liable for their actions/omissions. This ensures that no corporation in Kenya is immune from a criminal conviction. In addition to the above, the author suggests that for criminal liability of corporations, the burden of proof should shift from the individuals within the corporation to the corporation itself that has *prima facie* committed the offence. Although this approach may, at first instance, seem questionable as it involves holding all offences committed by a corporation as strict liability offences, an argument is made that due to the enormous power of corporations as well as their operation in spheres of potential danger, there is no injustice in holding them to a higher standard of criminal liability.[191] Kenyan laws should therefore put the onus on the corporation to prove that it exercised due diligence to prevent the commission of the offence. Further, the author suggests that Kenya should adopt a model of corporate criminal responsibility that makes a distinction between subjective fault elements and negligence. This ensures that corporations may face

[190] George O Otieno Ochich, ' The company as a criminal; Comparative examination of some trends and challenges relating to criminal liability of Corporate persons', Volume II *Kenya law review* (2008), at 42

[191] Ashworth Andrew, *Principles of Criminal Law*, 2ed, Oxford University Press, New York,1995,113

criminal charges involving intention, knowledge, recklessness and negligence.[192] In addition, this study suggests the strengthening of corporate penalties through the introduction payment of fines based on the turnover of the corporation and publicity orders in order to ensure corporations are sufficiently deterred from committing unlawful acts/omissions. Lastly, this study suggests that departments be created within the office of the DPP and AG to specifically deal with the issue of corporate crimes.

The author further seeks to suggest that the offence of corporate manslaughter should be introduced in Kenya. In addition to the creation of the offence, a specific act containing sentencing guidelines should be created on the same. The necessity to create the offence of corporate manslaughter stems from the rationale that from the general perspective of homicide offences, when a death is caused; be it by an individual or a corporation, the society demands that the perpetrators, whether living or artificial, suffer the requisite punishment.[193] The introduction of corporate manslaughter would ensure convictions for corporations where there has been gross negligence leading to the death of individuals. Within the proposed legal framework of corporate manslaughter, the sole punishment of a fine should be dismissed and other sanctions included. For corporate manslaughter a corporation may be subject to adverse publicity orders[194], corporate probation[195],

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[192] Clarkson C.M.V, 'Kicking Corporate bodies and damning their souls' 59(4) *The Modern Law Review*, 1996, 563.

[193] Aida Abdul Razak, ' Corporate manslaughter and the attempt to reduce work related deaths; A comparative study of the United Kingdom, Australia and Malaysia's legal framework', Published PhD thesis, University of Adelaide, Australia, 2018, 192

[194] An adverse publicity order is an order made by a Court requiring the convicted company to make public the details of the offence, the details of the fine and the terms of remedy at the expense of the company https://www.healthandsafetytips.co.uk/forums/viewtopic.php?t=32784 on 16th April, 2020

[195] Corporate probation is a supervision order imposed by a Court to a convicted company requiring the company and its officers and directors to alter their conduct in a particular way https://www.thompsonstradeunion.law/news/briefings-and-responses/corporate-probation on 16th April 2020

community service, and the corporate death penalty[196] in addition to the court- imposed fines.

An argument may be made that although the introduction of corporate manslaughter will make it easier to secure a conviction against a corporation for causing death, the offence would have no effect on other offences committed by a corporation.[197] The author however suggests that the adoption of the realist model of assigning corporate liability covers all crimes committed by a corporation.The author further suggests that while the concept of corporate criminality is being introduced, Kenyan legislators should also be alive to the fact that a corporation's rules, policies and operational procedures can establish the required degree of *mens rea* for the offence. This position is supported by Brent Fisse when he states that "corporate policy is the corporate equivalent of intention. Therefore, a corporation that conducts itself with an express or implied policy on non-compliance with a criminal prohibition exhibits corporate criminal culpability."[198] Although these recommendations cannot be adopted in a day, the author strongly believes that the adoption of the above recommendations will steer Kenya's legislative framework on corporate criminality in the right direction.

[196] Corporate death penalty (also known as Judicial dissolution) is a legal procedure in which a corporation is forced to dissolve or cease to exist https://www.corporatecrimereporter.com/news/200/markoffthemythcorporatedeathpenalty08272012/ on 16th April 2020

[197] Clarkson C.M.V, 'Kicking Corporate bodies and damning their souls' 59(4) *The Modern Law Review*, 1996, 569

[198] Clarkson C.M.V, 'Kicking Corporate bodies and damning their souls' 59(4) *The Modern Law Review*, 1996, 570

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