

**THE RIGHT TO A FAIR HEARING IN TRADITIONAL DISPUTE
RESOLUTION MECHANISMS IN KENYA**

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

By:

Name: DAVID KACZEDA

Registration Number: 067943

Prepared under the supervision of
FRANCIS KARIUKI

Date of Submission: February 2018.

Declaration

I, [DAVID KACZEDA], 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:.....

[FRANCIS KARIUKI]

TABLE OF CONTENTS

Declaration	ii
Acknowledgement.....	vi
Abstract.....	vii
List of Abbreviations	viii
List of Statutes.....	ix
List of International Instruments.....	ix
List of National Instruments	x
List of Cases.....	xi
Chapter One	12
Introduction to the Study.....	12
1.0 Introduction.....	12
1.1 Background to the problem.....	12
1.2 Statement of the Problem	13
1.3 Justification of the Study	14
1.4 Objective of the Study	15
1.5 Literature Review.....	15
1.51 The recognition of TDRMS.....	15
1.52 The Nature of TDRMs	16
1.53 The Right to A Fair Hearing.....	17
1.54 Conclusion of the Study.....	17
1.6 Theoretical Framework.....	18
1.61 Natural justice theory.....	18
1.7 Hypothesis.....	19
1.8 Research Design & Methodology.....	19
1.9 Chapter Breakdown	19
Chapter 1: Introduction.....	19
Chapter2: The right to a fair hearing in Kenya.	20
Chapter 3: The nature of TDRMs in Kenya	20
Chapter 4: To What Extent do TDRMs in Kenya Enshrine the Right to A Fair Hearing.	20
Chapter 5: Conclusions, Findings and Recommendations.	20
1.90 Timeline/Duration.....	20

Chapter Two.....	21
The Right to a Fair Hearing in Kenya.....	21
2.1 Introduction.....	21
2.2 The Right to a Fair Hearing under the Constitution of Kenya.....	21
2.3 The Right to a Fair Hearing as Explained by Case Law.	22
2.4 The Right to a Fair Hearing under International Instruments	23
2.41 The Universal Declaration of Human Rights.	24
2.42 The African Charter on Human and Peoples Rights.....	25
2.43 Right to a Fair Hearing under the African Commission on Human and Peoples’ Rights.....	27
2.44 Right to A Fair Hearing under International Covenant on Civil and Political Rights.....	28
2.45 Right to A Fair Hearing explained by the Human Rights Committee.....	29
2.46 Right to A Fair Hearing under European Convention on Human Rights	29
2.47 Right to A Fair Hearing under the Universal Declaration of Human Rights.....	32
Chapter Three.....	34
The Nature of Traditional Dispute Resolution Mechanisms in Kenya.....	34
3.1 Introduction.....	34
3.2 The Legal Framework in Kenya on TDRMS.....	34
3.21. Statutory Provisions.....	34
3.22 Case Law Demonstrating the Application of Statutory Provisions Regulating TDRMS ...	37
3.3 The Nature of TDRMs in Kenya.....	38
3.31 TDRMs in the Somali Community	39
3.32 TDRMs in the Agikuyu Community.....	39
3.33 TDRMs in the Pokot Community.....	41
Chapter Four.....	43
The Extent to which TDRMs in Kenya Enshrine the Right to A Fair Hearing.....	43
4.1 Introduction.....	43
4.2 Examining the Incorporation of the Right to A Fair Hearing in TDRMs.....	43
a.) The right to have the trial begin and conclude without unreasonable delay.....	43
b.) The right to appeal	43
c.) The right to be heard and equality before the law.....	44
d.) The right to a public trial	44
e.) The right to representation and to remain silent and not testify during proceedings.....	45
f.) The Right to have adequate time to prepare a defence.....	45

g.) The right to be presumed innocent until proven guilty.....	46
h.) The right to be heard before a fair and impartial tribunal	46
Chapter Five.....	48
Findings Recommendations and Conclusion.....	48
5.0 Introduction.....	48
5.1 Findings.....	48
a.) What is entailed in the right to a fair hearing?	48
b.) The nature of TDRMs	48
c.) The need for TDRMs in dispute resolution in Kenya.	48
Bibliography	52

Acknowledgement

I would like to express my gratitude to all the persons who have been a part of this study.

First and foremost, I express my deepest gratitude to the Almighty God for it is by his grace that I have managed to do and complete this study.

My greatest intellectual indebtedness is to Mr Francis Kariuki of Strathmore Law School whose wide-ranging legal thoughtfulness and expertise has contributed to this work beyond measure.

I thank my family, especially my mother, Sophie for giving me moral and financial support throughout the course of this study.

Abstract

The objective of this study is to establish whether TDRMs in Kenya engender the right to a fair hearing in the adjudication of disputes Chapter 1 lays the background, it states the objectives and explains the theoretical framework of this study. Chapter 2 looks into the nature of the right to a fair hearing, chapter 3 examines the nature of TDRMs including the perspective provided by the courts. Chapter 4 seeks to address the question of the extent to which TDRMs engender the right to a fair hearing in the adjudication of disputes. Chapter 5 explains the findings of this study then goes ahead to make the conclusions and recommendations.

List of Abbreviations

ACHPR	African Charter on Human and Peoples Rights
ACmHPR	African Commission on Human and Peoples Rights
ADR	Alternative Dispute Resolution
CoK	Constitution of Kenya
ECHR	European Commission on Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights.
ICJ	International Court of Justice
ILM	International Legal Materials
LJQB	London Judgements Queens Bench Division
KELIN	Kenya Legal & Ethical Issues Network on HIV and AIDS
KLR	Kenya Law Reports
eKLR	Electronic Kenya Law Reports
NLC	National Land Commission
No	Number
TDRMs	Traditional Dispute Resolution Mechanisms
TJS	Traditional Justice Systems
UDHR	Universal Declaration of Human Rights
UNC	United Nations Charter
UTS	United Nations Treaty Series

List of Statutes

List of International Instruments

- African Charter on Human and Peoples Rights, 21 October 1986, CAB/LEG/67/3.
- European Convention on Human Rights, 3 September 1953, 1999-II.
- International Covenant on Civil and Political Rights, 23 March 1976, 999 UNTS171.
- Universal Declaration of Human Rights, UN General Assembly, 10 December 1948, 217 A (III).
- United Nations Charter, 24 October 1945, 1 UNTS xvi.
- Vienna Convention on Diplomatic Relations, 24 April 1964, 1155 UNTS 331, 8 ILM 679.

List of National Instruments

- Environment and Land Court Act (Act No. 19 of 2011).
- Judicature Act Chapter [No.8 of 2016].
- Marriage Act (Act No.4 of 2014).
- National Land Commission Act (No. 5 of 2012).

List of Cases

- *David Njoroge Macharia v Republic* [2011] eKLR.
- *Germany v Italy*, ICJ Reports 2012, 434.
- *Joseph Ndungu Kagiri v Republic of Kenya criminal appeal* [2012] eKLR.
- *International PEN et al (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria*, ACmHPR Comm.137/94, 139/94, 154/96, 161/97, 12 Activity Report (1998), 96.
- *Karen Njeri Kandie v Alssane Ba and Shelter Afrique* [2012] eKLR.
- *Lubaru M'imanyara v Daniel Murungi*, [2013] eKLR.
- *Ndeto Kimomo v Kavoi Musumba* [1977] KLR 170.
- *Nganga v Republic* [1985] eKLR.
- *Perterer v Austria Comm No. 1015/2001 (30 July 2004)*.
- *R v Adan Kenyan Wehliye* [2003] eKLR.
- *Republic and The Subordinate Court of the 1st Class Magistrate At City Hall and The Attorney General Exparte Yougindard Pall Sennik C.G. Retreat Limited*, Misc Application [2005] eKLR.
- *Republic v Mohamed Abdow Mohamed* [2013] eKLR.
- *Rono v Rono* [2005] eKLR.
- *Seth Michael Kaseme v Selina K. Ade*, [2012] eKLR.
- *Saunders v the United Kingdom*, ECtHR Judgement of 7 December 1996.
- *The Judicial Service Commission and Hon. Mr. Justice Mbalu Mutava and The Attorney Genreal, Civil Appeal* [2014] eKLR.
- *The Matter of African Commission on Human and Peoples Rights v The Republic of Kenya*, [2012] eKLR.
- *Vionet v Barret* [1885] 55 LJQB 39.
- *Zimmerman and Steiner v Switzerland* ECtHR Judgement of 13 July 1983.

Chapter One

Introduction to the Study

1.0 Introduction

This chapter provides an introduction to the study with a view to provide information on the basis of the study. The chapter endeavours to provide information on the background to the study with the aim of explaining the need for carrying out the research. This part of the study details the statement of the problem, a justification for the study, the theoretical framework, the objectives and hypothesis of the study. Finally, the chapter explains the research methodology, the chapter breakdown and provides a timeline in which the study was conducted. Chapter one acts as a guide for the research and provides a framework through which the research was done.

1.1 Background to the problem

Traditional Dispute Resolution Mechanisms (TDRMs) synonymous with Traditional Justice Systems (TJS),¹ are a form of out of court dispute resolution system based on customs and traditions of communities. The Constitution of Kenya 2010,² provides a legal basis for the application of TDRMs. The legal framework affords courts and tribunals the opportunity to apply the mechanism (TDRMs) in settling various disputes, and now criminal cases following the decision in *Republic v Mohamed Abdow Mohamed*.³ Communities use TDRMs to settle disputes making them useful in enhancing access to justice, promoting social justice and fostering peaceful co-existence.⁴ The right to a fair hearing is a fundamental right as provided in Article 50 of the constitution. The right, is to the extent that; every person is afforded the opportunity to have any dispute resolved by application of law decided in a fair and public hearing before a court or independent and impartial tribunal or body.⁵ Article 50(2) further specifies the nature of the right to include rudimental ingredients namely⁶;

¹ Kariuki M & Kariuki F, 'Alternative Dispute Resolution Access to Justice and Development in Kenya' 1 (1) *Strathmore Law Journal*, (2015), 4.

² Article 159, *Constitution of Kenya* (2010).

³ *Republic v Mohamed Abdow Mohamed* [2011] eKLR.

⁴ Kariuki M, Kariuki F, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya', 4.

⁵ Article 50 (1), *Constitution of Kenya* (2010).

⁶ Article 50 (2), *Constitution of Kenya* (2010)

- a. the right to be presumed innocent until proven guilty,
- b. the right to be informed of the charge, with sufficient detail to answer,
- c. to have adequate time to prepare a defence,
- d. to a public trial,
- e. the right to begin and conclude without unreasonable delay,
- f. to be present when being tried, to choose and be represented by an advocate and to be informed of the right promptly,
- g. to remain silent and not to testify during proceedings, to be informed in advance of the evidence the prosecution seeks to rely on and have reasonable access to evidence,
- h. to remain silent and not testify during proceedings,
- i. to adduce and challenge evidence,
- j. to refuse to give self-incriminating evidence,
- k. to have the assistance of an interpreter without payment if the person does not understand the language being used at trial,
- l. not to be convicted for a crime that was not an offence in Kenya, or under international law,
- m. not to be convicted of a crime to which they have been acquitted or convicted,
- n. if convicted to appeal to, or apply review by, a higher court as prescribed by law .

Looking at the nature of traditional dispute resolution mechanisms, rules and procedures to ensure that the right to a fair hearing is protected are not set in place. In *Ndeto Kimomo v Kavoi Musumba*⁷ the applicant's request to have the case turned to TDRM was dismissed. The reason for the decision was that TDRMS lack mechanisms in upholding a fair hearing. It is therefore the intention of this paper to examine the nature of Traditional Dispute Resolution Mechanisms in light of the right to a fair hearing and elicit information as to the need for a legal framework to regulate the application of the same.

1.2 Statement of the Problem

Looking at the nature of TJS in relation to constitutional provisions on the right to a fair hearing, it is evident that the application of TJS in dispute resolution in particular criminal matters, does not meet the threshold set for the protection of the right to a fair hearing. On the onset, the right to prepare a defence as well as the right to choose and be represented by an advocate and to be informed of the right promptly is absent seeing that TJS are an out of court

⁷ *Ndeto Kimomo v Kavoi Musumba* [1977] eKLR.

settlement process. Further, the right to have the trial begin and conclude without unreasonable delay is challenging to achieve where the presiding elder(s) die and the community has to adhere to strict lengthy customs in choosing a replacement elder. The right to adduce and challenge evidence also lacks owing to the informal nature of TJS, in which rules of evidence are not present. The right to *autrefois acquit and autrefois convict* as envisioned by Article 50 (2)(o) is absent given the informal/illiterate nature of TDRMs in which accused persons could still stand trial where an aggrieved party seeks to maliciously avenge themselves. The right to challenge evidence is not present in communities that uphold customs prejudicial to women to the effect that women are not allowed to challenge men, who form the council of elders. Thus for example, the Bukusu society upholds a patriarchal leadership structure. Men dominate the leadership roles and are regarded as superior, to rule over women. Women in the Bukusu society on the other hand are considered weaker vessels, whose pride is derived from and dependent on men and are thus barred from challenging any man, especially presiding elders.⁸ The nature of TDRMs also deprive the parties the right to appeal whereas the decision of the council of elders is held to be final and binding on the parties as they are considered supreme and wise in the making of decisions.

1.3 Justification of the Study

Looking at the promulgation of the 2010 constitution and more so its provisions in Article 159 on TDRMs, it is evident that Kenya's judicial system is taking a turn for the better in enhancing the access to justice to all people. This presents a foreseeable increase in the use of alternative dispute resolution including TDRM, to provide dispute resolution for persons who cannot access courts for financial constraints or geographical and language barriers. It is upon this premise that the study is important to point out the need for the right to a fair hearing in TDRM as well as recommend the establishment of a concrete legal framework. Also, looking at the precedent set in *R v Mohamed Abdow Mohammed*⁹ it is evident that TDRM may very well plunge into adjudicating criminal matters and it is thus essential that the right to a fair hearing be integrated in TDRMs.

⁸ Wanjala W, 'Spotlight on Harmful Traditional Practices and Customs in Kenya' *Wordpress*, 4 August 2013 <https://wanjalawafula.wordpress.com/2013/08/04/spotlight-on-harmful-traditional-practices-and-customs-in-kenya/> on 5 October 2017.

⁹ *Republic v Mohamed Abdow Mohamed* [2013] eKLR.

1.4 Objective of the Study

The overarching objective of this study is to investigate the nature of TDRMs as well as the principles of the right to a fair hearing. In achieving the objectives, the research answers the following queries;

1. What is entailed in the right to a fair hearing?
2. What is the nature of Traditional Dispute Resolution Mechanisms?
3. Do TDRMs engender the right to a fair hearing in the proceedings?

1.5 Literature Review

The subject Traditional Justice Systems in Kenya, has been studied by various scholars who have approached the matter from different angles.

1.51 The recognition of TDRMS

Kariuki Muigua & Kariuki Francis, in the work; ‘ADR, Access to Justice and Development in Kenya’, talk about Alternative Dispute Resolution and Traditional Dispute Resolution Mechanisms. In the work, they point out the need for these two forms of dispute resolution in order to enhance access to justice by all and especially the poor. The article also points out the fact that alternative forms of dispute resolution also promotes the Rule of Law, and are important to foster development. The article thus advocates for the recognition of TDRMs within the legal framework of Kenya in order to foster development. The article in light of this study is useful as it propagates the need for TDRMs in settling matters as well as its allusion to the nature of the mechanism, however it falls short of providing a rationale for the need for the application of the right to a fair hearing. The article does not go deep into the matters of the legal framework of TDRMs in so far as the right to a fair hearing is concerned.

Kariuki Muigua in the write up ‘Traditional Dispute Resolution Mechanisms under Article 159 of The Constitution of Kenya 2010’, outlines the recognition of TDRMs under the 2010 constitution. The article focuses TDRMs under Article 159 of the Kenyan Constitution, and advocates for it owing to its effectiveness in managing conflicts. The article further points out the importance of TDRMs to the effect that their role is recognised globally (they not only exist in Africa but also in Sardinia an Island in the Mediterranean Sea) and they lighten the burden of the courts. The author alludes to the need for the TDRMs to be modified to conform to international human rights standards thus enumerating the fact that TDRMs are yet to conform to human rights standards, a part of it being the right to a fair hearing. The article in this light is instrumental in demonstrating the recognition of TDRMs in the Kenyan legal

system as a mode of dispute resolution, by its allusion to the fact that they need to conform to international human rights standards it demonstrates the gap sought to be addressed by this study, but however does not talk much about the right to a fair hearing in TDRMs.

The case in *Republic v Mohamed Abdow Mohamed*, sets precedence on the use of TDRMs in litigation and especially in criminal matters. The case provides reason to foresee circumstances in which TDRMs will be incrementally used to settle matters in the coming future more so criminal matters. The learned judges' decision however fails to give a guideline on the missing factor essential to adjudication in TDRMs; the right to a fair hearing. As such, the case is instrumental in justifying the need for the study and furthermore in a bid to recommend the crafting and inclusion of the right to a Fair Hearing in TDRMs legal framework.

1.52 The Nature of TDRMs

The book; 'Human Rights and Traditional Justice Systems in Africa'¹⁰, is highly instrumental to the study as it explains the nature of TDRMs. The book explains the salient features to include the adjudicating parties namely; chiefs or sub-chiefs, headmen, or a group of elders or the community at large in form of a general assembly.¹¹ Further, the book states that the authority of the leader derives from their status as a respected member of the community, including inheritance of the position.¹² The leaders are set in place specifically to hear and resolve disputes in a sense performing judicial/quasi-judicial roles as the work explains.¹³ In explaining the nature of TDRMs, the book further points out the shortcomings of the mechanism to include the fact that since the presiding leaders are powerful members of the community, a risk exists to the nature that their decisions are impartial where they take into account their own interests in maintaining power.¹⁴ Moreover, their decisions may be

¹⁰ United Nations Human Rights Office of the High Commissioner, *Human Rights and Traditional Justice Systems in Africa*, United Nations Publication, New York, 2016, 16.

¹¹ United Nations Human Rights Office of the High Commissioner, *Human Rights and Traditional Justice Systems in Africa*, 23.

¹² United Nations Human Rights Office of the High Commissioner, *Human Rights and Traditional Justice Systems in Africa*, 23.

¹³ United Nations Human Rights Office of the High Commissioner, *Human Rights and Traditional Justice Systems in Africa*, 23.

¹⁴ United Nations Human Rights Office of the High Commissioner, *Human Rights and Traditional Justice Systems in Africa*, 27.

susceptible to politicization where elected political leaders may influence the elders.¹⁵ The book is therefore useful to the study in that it provides a framework on TJSs to the extent that it also demonstrates how TJSs do not fully protect the right to a fair hearing.

1.53 The Right to A Fair Hearing

The book; ‘Human Rights and Traditional Justice Systems in Africa’ is still highly instrumental to this portion of the study. In addition to providing knowledge on the nature of TDRMs, the book goes deeper into providing salient aspects of human rights more so in relation to TJSs to the extent that it also talks of the right to a fair trial. The book being a creation of an international body gives a broad perspective on the right to a fair hearing as it also gives an international law perspective. As such, the book is instrumental in reinforcing the need for the study to ensure the right to a fair trial is upheld in TJSs seeing that the right is universal.

The case of *Ndeto Kimomo v Kavoi Musumba*¹⁶ is instrumental in the study as the decision made to deny the parties to refer their matter to TDRMs for the lack of mechanisms protecting the right to a fair hearing is key in explaining the importance of the right to a fair hearing. The case is also instrumental in justifying the hypothesis of the study as it demonstrates the extent to which TDRMs fall short in protecting the right to a fair hearing.

1.54 Conclusion of the Study.

FIDA KENYA’s work on Traditional Justice Systems in Kenya, focuses on the use of TJS in coastal communities in Kenya¹⁷. The work studies traditional Justice Systems in selected communities in a bid to recommend reforms in the legal arena which would result in the promotion of access to justice by vulnerable groups for example women. The work similar to the study, first acknowledges the legal existence of TDRMs in Kenya and also points out the need for reforms, in TDRMs. FIDA KENYA’s research is instrumental to the study in that it provides information on the nature of TDRMs in Kenyan communities. The study eliminates the need for a field study, in conducting this research. Most importantly however, the authors demonstrate how TDRMs fall short of protecting the sanctity of the access to justice in Kenya.

¹⁵ United Nations Human Rights Office of the High Commissioner, *Human Rights and Traditional Justice Systems in Africa*, 49.

¹⁶ *Ndeto Kimomo v Kavoi Musumba* [1977] eKLR.

¹⁷ FIDA KENYA, ‘Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya’ *Repository*, 14 April 2016 <http://repository.mua.ac.ke/414/1/Traditional-Justicefinal.pdf> on 5 October 2017.

The work however focuses on the rights of the vulnerable especially women and in this light it says little about the right to a fair hearing in itself, but is very instrumental to the work as it provides a basis for the statement of the problem in TJS.

1.6 Theoretical Framework

1.61 Natural justice theory

Natural justice has been coined to mean the natural sense of what is right or wrong as stated by Lord Esther in *Vionet v Barrett*.¹⁸ Though simply put, it entails more than just the sense of right or wrong. The theory bears the term justice and as put by Aristotle, justice is lawfulness or fairness as injustice brings about a state of lawlessness and unfairness.¹⁹ Taking the two perspectives, the term natural has been provided to mean a sense in man, while the term justice has been explained to mean fairness which brings about the state of lawfulness and fairness. Combining the two terms bringing about the term natural justice, however gives it a deeper meaning applicable in the execution of justice. Thus the theory; natural justice goes deeper in setting rules governing adjudication of matters. The theory was developed by courts of equity to control decisions of lower courts and further developed to govern administrative bodies and it serves to ensure procedural fairness and fair decision making is achieved by judicial authorities. In turn it enables the achievement of public confidence in a judicial system. The principle encompasses two maxims; *audi alteram partem* (the right to be heard) and *nemo iudex in parte sua* (no person may judge their own case). As a result of the theory, common law²⁰ rules have been formulated to include;

- a) The hearing rule; a person ought to be given adequate time to present their case, especially where their interests and rights may be negatively affected by an adjudicator. The rule goes to the extent of allowing a person adequate opportunity to prepare and adduce evidence as well as challenge evidence produced by the adverse party and to challenge rebuttals against them. The alleged wrongdoer also ought to be afforded the chance to be informed of the allegations before them.
- b) The bias rule; no one ought to be judge in their trial, the rule requires that an adjudicator be completely impartial in adjudicating the matters before him. The rule extends to investigators who should guard against conflict of interest, in conducting investigations

¹⁸ *Vionet v Barret* [1885] 55 LJQB 39, 41.

¹⁹ Ross W.D, *Arisotle Nicomachean Ethics book V*, Batoche Books, Kitchener, 1999.

²⁰ <https://gaurlaw.wordpress.com/2015/05/01/natural-justice-rule-of-fair-hearing/>, on 13 October 2017.

and collecting evidence. The rule also extends to any appearance of actual or apparent bias, in which if found to exist on the part of a decision maker, deprives them of the credibility to adjudicate the matter.

- c) The evidence rule; investigators should not base their findings on speculation or suspicion rather it should be clear that their findings are based on logical proof or material evidence. Evidence obtained by one party is also subject to scrutiny by a party against whom it is adduced.

1.7 Hypothesis

The use of TDRMS does not engender the right to a fair hearing in dispute resolution.

1.8 Research Design & Methodology

Based on the subject of study, the viable data collection method would have been qualitative method. The method involves the collection of data from a sample of items drawn from a population through the utilisation of questionnaires. The method is best as it provides fast hand information on the situation on the ground. However, owing to time and financial constraints, a desk study was the most preferred method of data collection for the study.

The research therefore adopted a multidisciplinary approach in which data was collected using the black letter approach as well as comparative analysis approach. The black letter approach entails the use of both primary sources and secondary sources of data. The primary sources included; a study of case law and statutes to which the law regulating the subject matter was obtained. The material was sourced from legal sources such as the Kenya Law Reports and case books as located in the legal section of the Strathmore University Library and online. The secondary sources on the other hand included; articles, journals, books and dissertations written on the topic in a bid to providing a clear understanding of the disciplines studied. The secondary sources were obtained from online sources among them being Strathmore University's depository site in which dissertations are availed.

1.9 Chapter Breakdown

Chapter 1: Introduction.

The chapter provides a concise background to the problem. It also includes a brief statement of the research problem, a justification for the study as well as the objectives of the study and including the hypothesis and the literature review. Furthermore, the chapter provides a theoretical framework of the study a window through which the literature on the study will be analysed. The chapter finally records the research design and methodology providing a guide in the conduct of the research.

Chapter2: The right to a fair hearing in Kenya.

The main focus of the chapter is to examine the nature of the right to a fair hearing in Kenya, in light of the legal framework applicable in Kenya as well as the international instruments providing for the right. The chapter will go further to provide the importance of the right in adjudication over matters.

Chapter 3: The nature of TDRMs in Kenya.

The chapter endeavors to provide an explanation as to the nature of TDRMs. The nature of TDRMs is explained in reference to statutes regulating TJSs, case law and a case study on TJS in communities in Kenya, namely; the Somali, Agikuyu and Pokot communities representing a sample of TJS in Kenya.

Chapter 4: To What Extent do TDRMs in Kenya Enshrine the Right to A Fair Hearing.

This portion of the study endeavors to demonstrate to the reader in light of the findings in chapter three, the extent to which the application of the right to a fair hearing is provided for in TDRMs and or the extent to which it falls short of the legally set standard, depending on the findings of the research.

Chapter 5: Conclusions, Findings and Recommendations.

This portion of the study provides for the findings of the study in a bid to form the conclusion of the study. The findings are in relation to the, objectives of the study, and the hypothesis of the study. This chapter draws the reader to recommendations based on the findings of the study.

1.90 Timeline/Duration

The research was carried over a span of 10 months.

Chapter Two

The Right to a Fair Hearing in Kenya

2.1 Introduction

This chapter examines the nature of the right to a fair hearing. It seeks to outline what the right to a fair hearing entails as provided by statutes and case law. The statutes to be considered include the Constitution of Kenya and international instruments explaining the right. Case law includes Kenyan cases and international cases demonstrating the application of the right to a fair hearing.

2.2 The Right to a Fair Hearing under the Constitution of Kenya

In Kenya, the nature of the right to a fair hearing is explained under Article 50 of the Constitution. The right, is to the extent that; every person is afforded the opportunity to have any dispute resolved by application of law decided in a fair and public hearing before a court or independent and impartial tribunal or body.²¹ The ingredients of the right to a fair hearing include the right;

- a. to be presumed innocent until proven guilty;
- b. to be informed of the charge, with sufficient detail to answer;
- c. to have adequate time to prepare a defence;
- d. to a public trial;
- e. to have the trial begin and conclude without unreasonable delay;
- f. to be present when being tried, to choose and be represented by an advocate and to be informed of the right promptly;
- g. to remain silent and not to testify during proceedings, to be informed in advance of the evidence the prosecution seeks to rely on and have reasonable access to evidence;
- h. to remain silent and not testify during proceedings;
- i. to adduce and challenge evidence;
- j. to refuse to give self-incriminating evidence;
- k. to have the assistance of an interpreter without payment if the person does not understand the language being used at trial;

²¹ Article 50 (1), *Constitution of Kenya* (2010).

- l. not to be convicted for a crime that was not an offence in Kenya, or under international law;
- m. not to be convicted of a crime to which they have been acquitted or convicted and
- n. to appeal to, or apply for review by, a higher court if convicted, as prescribed by law.

2.3 The Right to a Fair Hearing as Explained by Case Law.

Case law has clearly demonstrated the operation of this provision. The importance of the right to a fair hearing was stated in *Joseph Ndungu Kagiri v Republic of Kenya*²² as one of the cornerstones of a just society. In *Joseph Ndungu Kagiri v Republic of Kenya*,²³ the appellant and the co-accused were charged with the offence of stealing contrary to Section 275 of the Penal Code and handling stolen property contrary to Section 322(2) of the Penal Code respectively. The Judge in allowing the appeal stated that the Trial Court in entering a verdict of guilty occasioned a miscarriage of justice as the accused rights to fair hearing were not upheld. The right to choose and be represented by an advocate, the right to have an advocate assigned by the State at the expense of the State and subsequently the right to have adequate time and facilities to prepare a defence as under Article 50(g), 50(h) and 50(c) of the Constitution respectively were contravened. Consequently, the Judge allowed the appeal stating strongly that;

“...I find that the appellant and his co-accused were not afforded a fair trial and that the entire proceedings were a sham and gross violation of constitutional provisions safeguarding a fair trial... In fact I hold the view that the trial was conducted in a manner that was prejudicial to the accused persons and caused injustice and grave prejudice to the appellant and his co-accused. Such proceedings cannot be allowed to stand.”²⁴

In a fairly recent case, *The Judicial Service Commission and Hon. Mr. Justice Mbalu Mutava and The Attorney General*,²⁵ the court explained fair hearing under Article 50(1) to apply where any dispute can be resolved by the application of the law and applies to

²² *Joseph Ndungu Kagiri v Republic of Kenya criminal appeal* [2012] eKLR.

²³ *Joseph Ndungu Kagiri v Republic of Kenya criminal appeal* [2012] eKLR.

²⁴ *Joseph Ndungu Kagiri v Republic of Kenya criminal appeal* [2012] eKLR.

²⁵ *The Judicial Service Commission and Hon. Mr Justice Mbalu Mutava and The Attorney General, Civil Appeal* [2014] eKLR.

proceedings before a court or, if appropriate, another independent and impartial tribunal or body and further stated that the right cannot be limited by law or otherwise as under Article 25(c) of the Constitution.

The right to a fair hearing and in particular the presumption of innocence and the right to trial without undue delay, created under Article 50(2)(a) and 50(2)(e) has been read to be compatible with the right to bail as under Article 49 (h) of the Constitution. In *Nganga v Republic*²⁶ the Judge stated that;

“Admittedly, admission to bail is a Constitutional right of an accused person if he is not going to be tried reasonably soon, but before the right is granted to the Accused there are a number of matters to be considered even without the Constitutional provisions. Generally in principle, and because of the presumption that a person charged with a criminal offence is innocent until his guilt is proven, an Accused person who has not been tried should be granted bail unless it is shown by the prosecution that there are substantial grounds for believing that:

- (a) The Accused will fail to turn up at his trial or to surrender to custody, or
- (b) The Accused may commit further offences, or
- (c) He will obstruct the course of Justice.”

In addition to explaining the conditions precluding grant of bail, the above case²⁷ provides a circumstance for the derogation of the right to a fair hearing, but only in so far as the right to bail is concerned. This derogation is not at all fatal to an accused’s right to a fair hearing as first under Article 49(h), grant of bail is left to the court’s discretion and as in the aforementioned case, the judge explained that the refusal to grant bail does not necessarily mean that the court has made a decision that the accused is guilty as charged. The decision can only be made after a full hearing and determination.²⁸

2.4 The Right to a Fair Hearing under International Instruments

In addition to the constitutional provisions, international instruments have provided principles on the right to a fair hearing. Under Article 2(5) and 2(6) of the Constitution, the

²⁶ *Nganga v Republic* [1985] eKLR.

²⁷ *Nganga v Republic* [1985] eKLR.

²⁸ *Nganga v Republic* [1985] eKLR.

general rules of international law and customs form part of the laws of Kenya thus warranting the study of the right as explained in the international instruments. The case of *David Njoroge Macharia v Republic*²⁹ confirms this position as the court acknowledged the radical shift the 2010 constitution provided in recognising international law. The Judge stated that;

“Kenya is traditionally a dualist system, thus treaty provisions do not have immediate effect in domestic law nor do they provide a basis upon which an action may be commenced in domestic courts. For international law to become part and parcel of national law, incorporation is necessary, either by new legislation, amended legislation or existing legislation. However, this position may have changed after the coming into force of our new Constitution”.

And in *Rono v Rono*,³⁰ the case endorsed the provisions of the former case. The Judge stated that;

“Even though Kenya subscribes to the common law view that international law is only part of domestic law where it has been specifically incorporated, current thinking in the common law theory is that both international customary law and treaty law can be applied by state courts where there is no conflict with existing state law, even in the absence of implementing legislation”.

2.41 The Universal Declaration of Human Rights.

Under the Universal Declaration of Human Rights (UDHR), the right to a fair hearing is provided under Articles 7, 9, 10, and 11. Under these provisions, equality before the law without discrimination is protected, arbitrary arrests,³¹ detentions and exile are listed as actions illegal against persons.³² The right to a fair hearing is also expressly provided by the instrument to the extent that persons are accorded equality in a fair and public hearing by an independent and impartial tribunal in the determination of any criminal trial,³³ and the presumption of innocence as well as the right not to be charged guilty for a crime that did not exist as well as

²⁹ *David Njoroge Macharia v Republic* [2011] eKLR.

³⁰ *Rono v Rono* [2005] eKLR.

³¹ Article 7, *Universal Declaration of Human Rights*, UN General Assembly, 10 December 1948, 217 A (III).

³² Article 9, *Universal Declaration of Human Rights*.

³³ Article 10, *Universal Declaration of Human Rights*.

the imposition of a punishment that is disproportionate to the offence committed³⁴ is listed as a fair trial right.

2.42 The African Charter on Human and Peoples Rights

The African Charter on Human and Peoples Rights (ACHPR) under Article 7 speaks of the right to a fair hearing as follows:

1. Every individual shall have the right to have his cause heard. This comprises:
 - (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulation and customs in force;
 - (b) the right to be presumed innocent until proved guilty by a competent court or tribunal;
 - (c) the right to defence, including the right to be defended by counsel of his choice and;
 - (d) the right to be tried within a reasonable time by an impartial court or tribunal.
2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

On the face of it, the ACHPR describes the right in the same manner as the Constitution however, it further includes the requirement that punishment ought to be meted out on the convicted offender alone.³⁵ This in effect further enhances the right to a fair hearing by ensuring that only an offender suffers punishment and not an innocent person. The instrument's elaborate provisions are important to the study as they also apply in Kenya. This was demonstrated in

The Matter of African Commission on Human and Peoples Rights v The Republic of Kenya,³⁶ where in accepting that the court had jurisdiction to hear the matter, the Judge enumerated that

“... However, before ordering provisional measures, the Court need not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, prima facie, that it has jurisdiction. The Court notes that Article 3(1) of the

³⁴ Article 11, *Universal Declaration of Human Rights*.

³⁵ Article 7 *African Charter on Human and Peoples Rights*, 21 October 1986, CAB/LEG/67/3.

³⁶ *The Matter of African Commission on Human and Peoples Rights v The Republic of Kenya*, [2012] eKLR.

Protocol provides that “the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation of the Charter, this Protocol and any other relevant human rights instrument ratified by the States concerned. The Court further notes that the Respondent ratified the Charter, which came into force on the 21st of October 1986, on the 23rd of January 1992 and deposited its instruments of ratification on 10 February 1992, and further that Respondent ratified the Protocol, which came into force on the 25th of January 2004, on the 4th of February 2004 and deposited its instruments of ratification on 18 February 2005 and is therefore a party to both instruments...”

In this regard, the application of the ACHPR provisions may be shown to apply as in the case of *Republic and The Subordinate Court of the 1st Class Magistrate At City Hall and The Attorney General Exparte Yougindard Pall Sennik C.G. Retreat Limited*.³⁷ Justice J.G. Nyamu, in exterminating the charges against the defendant and granting the orders of *certiorari* as well as barring further criminal proceedings against the accused, considered the meaning and application of the right to a fair hearing in light of the ACHPR. In his words;

“Article 7 of the African Charter imposes a legal duty on state parties to provide competent or impartial court or tribunal. At the same time Article 26 of the African Charter requires state parties to guarantee the independence of the courts.”³⁸ Furthermore the judge emphasised that,

“...So important is the right to a fair trial that the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception. Thus Article 7 of the African Charter on Human and People’s Rights does not allow derogation in respect of this right even in situations of public emergencies.”³⁹

In the same case, the Judge further provided a second International Instrument necessary in defining the right to a fair hearing. The judge stated;

³⁷*Republic and The Subordinate Court of the 1st Class Magistrate At City Hall and The Attorney General Exparte Yougindard Pall Sennik C.G. Retreat Limited*, Misc Application [2005] eKLR.

³⁸*Republic and The Subordinate Court of the 1st Class Magistrate At City Hall and The Attorney General Exparte Yougindard Pall Sennik C.G. Retreat Limited*, Misc Application [2005] eKLR.

³⁹*Republic and The Subordinate Court of the 1st Class Magistrate At City Hall and The Attorney General Exparte Yougindard Pall Sennik C.G. Retreat Limited*, Misc Application [2005] eKLR.

“...Article 60 of the Charter permits the African Commission on Human and Peoples Rights to draw inspiration from other international instruments and for this reason Article 14 of the ICCPR does apply to Charter parties.”⁴⁰

2.43 Right to a Fair Hearing under the African Commission on Human and Peoples’ Rights

The African Commission on Human and Peoples’ Rights (ACmHPR) provides soft law on the interpretation of the provisions of the African Charter on Human and Peoples Rights. The ACmHPR explains the provisions of Article 7 of the ACHPR protecting the right to a fair hearing in a similar manner.⁴¹ However, the ACmHPR further explains the right to a fair hearing to include a fair and public hearing before an independent and impartial tribunal. In regard to a public hearing, the ACmHPR describes such a hearing to be conducted before a legally constituted, competent and impartial judicial body and this extends to both criminal and civil proceedings.

The provisions of the ACmHPR were interpreted in the case of *Constitutional Rights Project and Others v Nigeria*.⁴² The Nigerian government promulgated some military decrees proscribing over thirteen newspapers and magazines published by three media houses. The decrees prohibited media houses from publishing and circulating any content for six months, with a possible extension period. At the time the law was passed, the media houses had pending suits in court concerning illegal invasion and closure of their premises. The African Commission held the act to be a violation of the right to a fair hearing namely the right to be heard as under Article 7 (1) of the ACHPR. The ACmHPR held that the executive decree infringed on the media houses right of hearing as it was enacted in the process of litigation. The legislation as enacted, denied the national courts any jurisdiction to hear matters relating to the media houses. This in effect meant that the media houses could not have their civil proceedings concluded, and their rights fully determined. The ACmHPR also examined the background of the matter and found that though it related to a military tribunal affair, military tribunals were not exempted from the provisions of the right to a fair hearing under the ACHPR. The ACmHPR held that there was a violation of the right to a fair hearing and stated that every

⁴⁰ *Republic and The Subordinate Court of the 1st Class Magistrate At City Hall and The Attorney General Ex parte Yougindard Pall Sennik C.G. Retreat Limited*, Misc Application [2005] eKLR.

⁴¹ Preamble, *African Commission on Human & Peoples’ Rights*, May 2014.

⁴² *Constitutional Rights Project and Others v Nigeria*, ACmHPR Comm.140/94,141/94,145/95, Activity Report (1999), 227.

adjudicatory body is subjected to requirements of fairness, openness, justice, independence, and due process as proper to the right to a fair hearing.

Further, in *Courson v Equatorial Guinea*,⁴³ the ACmHPR interpreted the provisions of Article 7 of the ACHR on the right to prepare defence. The ACmHPR held that the protection of the right does not extend to situations where an accused is unable to prepare a defence by reason of their defence counsel failing to fulfil their duties. In this case, the defence counsel failed to raise objections, call in witnesses and adduce sufficient evidence owing to a lack of due diligence on his part. It was held that there was no violation of the right to prepare a defence.

Where an accused's evidence is confiscated unlawfully by the police prior to trial, this constitutes a violation of the right to prepare a defence as under Article 7(1) (c) of the ACHR.⁴⁴ In *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria*,⁴⁵ files and documents required by the accused persons for their defence were removed from their residences and offices when security forces searched them during the trial. The ACmHPR interpreted Article 7(1) (c) of the ACHR in favour of the accused.

2.44 Right to A Fair Hearing under International Covenant on Civil and Political Rights

Under the International Covenant on Civil and Political Rights (ICCPR), the right to a fair hearing is provided in Article 14. The statute explains the nature of the right in similar terms as Article 50 of the Constitution of Kenya. However, the instrument provides an extra element; the element of equality before the courts or any tribunal.⁴⁶ The effect of this provision was demonstrated in *R v Adan Kenyan Wehliye Criminal*⁴⁷ where a constitutional court quashed a *nolle prosequere* entered by the Attorney General after 11 witnesses out of a possible 40 witnesses had testified. The court held that the entry of the *nolle prosequere* at that stage in order to re-charge the accused with other accomplices was prejudicial to the trial rights of the accused as it had breached the right of equality before the tribunal.

⁴³ *Courson v Equatorial Guinea*, ACmHPR Comm 144/95, 11 Activity Report (1997), 22.

⁴⁴ Article 7 (1) (c), *African Charter on Human and Peoples Rights*.

⁴⁵ *International PEN et al (on behalf of Ken Saro-Wiwa Jnr.) v Nigeria*, ACmHPR Comm.137/94, 139/94, 154/96, 161/97, 12 Activity Report (1998), 96.

⁴⁶ Article 14(1), *International Covenant on Civil and Political Rights*, 23 March 1976, 999 UNTS171.

⁴⁷ *R v Adan Kenyan Wehliye* [2003] eKLR.

2.45 Right to A Fair Hearing explained by the Human Rights Committee

The Human Rights Committee, provides for the right to a fair hearing under Article 14 of the Human Rights Committee General Comment No. 32 (the General Comment).⁴⁸ The General Comment explains that the right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. This ensures the proper administration of justice, and further guarantees a series of specific rights.⁴⁹ The general comment explains the right the same way as other international instruments. However, the general comment further elaborates the right of equality before courts and tribunals. The general comment provides that the right to equality before courts and tribunals not only applies to courts and tribunals but it must also be respected whenever domestic laws entrust a judicial body with a judicial task.⁵⁰ This interpretation was held in *Perterer v Austria*.⁵¹ In this case, the applicant had been dismissed from his work on allegations of professional shortcomings and the complaint filed with Disciplinary Commission for Employees of Municipalities of the Province of Salzburg. The applicant sought to challenge the composition of the trial senate. He argued that the two members nominated by the municipality of Saalfelden lacked independence and impartiality due to their status as municipal officials or employees. The challenge was dismissed and held not to apply against the chairperson of the Senate. The Human Rights Committee however applied the provisions of the general comment and found that the challenge was valid. The Senate was exercising a judicial task and thus the provisions on the right to a fair hearing still applied.

2.46 Right to A Fair Hearing under European Convention on Human Rights

The European Convention on Human Rights (ECHR) under Article 6 provides for the right to a fair Trial in the following respect;

1. That in the determination of a person's civil rights and obligations or any criminal charge against the accused, one is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic

⁴⁸ CCPR, General Comment No. 32, Right to equality before courts and tribunals and to a fair trial, 27 July 2007.

⁴⁹ CCPR, General Comment 32, 2.

⁵⁰ CCPR, General Comment 32, 2.

⁵¹ *Perterer v Austria* Comm No. 1015/2001 (30 July 2004).

society, where the interest of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights: To be informed promptly in a language which he understands and in detail, of the nature and cause of accusation against him;
4. To have adequate time and facilities for the preparation of his defence;
5. To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of Justice so require;
6. To examine or have examined witnesses against him and to obtain the attendance examination of witnesses on his behalf under the same conditions as witnesses against him;
7. To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The above provisions are similar to Kenya's Constitutional provisions. The provisions however, explain the requirements of a public trial detailing the exception of circumstances where media and the general public may be excluded because of prejudice caused to the interests of justice or where it would contravene public morals or jeopardize national security.⁵² A further perspective to the circumstance limiting the application of the right would be as under the Vienna Convention⁵³ granting diplomats and heads of states immunity from the trial jurisdiction of states. The principle stems from the doctrine of equality of states as under the United Nations Charter.⁵⁴ This principle, in its application implies that the right to a fair hearing as under article 1 of the ECHR would not be breached where a matter is barred from proceeding because the other party to the matter is protected by diplomatic immunity.⁵⁵ In fact, the contrary would prove to be a breach of international

⁵² Article 6 (1), *European Convention on Human Rights*, 3 September 1953, 1999-II.

⁵³ Article 31, *Vienna Convention on Diplomatic Relations*, 24 April 1964, 1155 UNTS 331, 8 ILM 679.

⁵⁴ Article 2, *United Nations Charter*, 24 October 1945, 1 UNTS xvi.

⁵⁵ Article 2, *United Nations Charter*.

law principles and would lead to state responsibility as was the case in *Germany v Italy*.⁵⁶ This standpoint has also been confirmed in the case of *Karen Njeri Kandie v Alssane Ba and Shelter Afrique*⁵⁷ where the Appellant was unable to seek redress for alleged assault perpetrated by the first respondent; the Managing Director to the second Respondent. In denying the Appellant redress, the Court of Appeal stated that its rationale rested on the fact that the court lacked jurisdiction on the matter as the first respondent was protected under diplomatic immunity, being a diplomat of the Somali Government. The court further turned down the appellant's plea; that terminating the case would lead to an infringement of her right to a fair hearing as under the Constitution and Article 6 of the ECHR as relied upon by her council. The Court stated that;

“...the conclusion is inescapable that the immunity that attaches to the 2nd respondent and to its officers such as the 1st respondent finds recognition and legitimacy from international treaties entered into by Kenya including the Vienna Convention which had express validation by the clear constitutional text found in Article 2(6) of the 2010 Constitution. In so far as they impact and implicate Article 48 of the right to access to justice, they constitute a legitimate limitation to the right. Moreover, they are not, in all the circumstances of the case, disproportionate to the legitimate aims of conferment of state immunity. As regards the 1st respondent, we find and hold that whatever doubts, restrictions, qualifications and erosion may have attended State Immunity from its former hallowed perch of absolute sway, he remains invested with diplomatic immunity which is wider and has not suffered any diminution since the coming into force of the Vienna Convention. He is therefore quite completely immunized from criminal or civil proceedings before Kenyan Courts no matter how desirable or expedient such proceedings may seem. These holdings suffice to dispose of this appeal with the result that it fails in entirety.”⁵⁸

The European Court of Human Rights (ECtHR) has also provided interpretation on the right to a fair hearing under Article 6 of the ECHR. In *Zimmerman and Steiner v Switzerland*⁵⁹ the right to have a trial within a reasonable time, was stated as a significant right to be protected.

⁵⁶ *Germany v Italy*, ICJ Reports 2012, 434.

⁵⁷ *Karen Njeri Kandie v Alssane Ba and Shelter Afrique* [2012] eKLR.

⁵⁸ *Karen Njeri Kandie v Alssane Ba and Shelter Afrique* [2012] eKLR.

⁵⁹ *Zimmerman and Steiner v Switzerland* ECtHR Judgement of 13 July 1983, para.20.

The ECtHR stated the duty lies on the contracting state to organise its legal system to allow the courts to comply with this requirement. In this case, the trial delayed owing to backlog in the work of Switzerland's court system. The ECtHR found that there was a violation of Article 6(1) of the ECHR as the state had not taken adequate measures to cope with the situation. The ECtHR explained adequate measures to include; appointment of additional judges, however an exception to a violation of the right exists where the backlog is temporary and exceptional and the state has taken necessary measures to remedy the situation. The ECtHR also considered the political and social conditions⁶⁰ at the time and found that Switzerland was well capable to deal with the backlog. The aggrieved party was awarded damages to remedy the denial of the right to have the trial conducted with reasonable time.

In *Saunders v the United Kingdom*,⁶¹ the ECtHR held that though Article 6 of the ECHR did not expressly mention the right to silence as well as the right not to incriminate oneself, the right is generally recognised by international standards. This right was explained as a significant part of a fair trial as under Article 6. The court further explained that the right protects the accused against improper compulsion by the authorities thus guarding against miscarriages of justice. The rationale given was that the prosecution should rely on legally obtained evidence and the accused should not be oppressed to give evidence to his detriment, the right further protects the presumption of innocence.

2.47 Right to A Fair Hearing under the Universal Declaration of Human Rights

Finally, the right to a fair Hearing may be explained by the provisions in the Universal Declaration of Human Rights (UDHR). The instrument under Articles 8, 9, 10 and 11 provide the right to a fair hearing as follows:

1. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.
2. No one shall be subjected to arbitrary arrest, detention or exile.
3. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

⁶⁰ *Zimmerman and Steiner v Switzerland*, 29.

⁶¹ *Saunders v the United Kingdom*, ECtHR Judgement of 7 December 1996, para.20.

4. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
5. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

In explaining the nature of the right to a fair hearing, being similar to the Constitutional provisions, the UDHR under Article 8 provides a rubber stamp on the binding authority of national laws in effect the Constitution.

Chapter Three

The Nature of Traditional Dispute Resolution Mechanisms in Kenya.

3.1 Introduction

This chapter examines the nature of TDRMs. In achieving this objective, the nature of TDRMs is explained in reference to statutes regulating TJSs, case law and a desk study on TJS in communities in Kenya. The chapter serves as a precursor to chapter four which examines the extent to which of the right to a fair hearing in TDRMs is incorporated. Three communities have been selected for this purpose as a representative sample of TDRMS in Kenya; the Somali, Agikuyu and Pokot communities.

3.2 The Legal Framework in Kenya on TDRMS

3.21. Statutory Provisions.

a.) TDRMS under the Constitution of Kenya

Under Article 159 of the Constitution of Kenya (CoK), TDRMs are recognised as a form of alternative dispute resolution mechanism.⁶² Under Article 159 (3) of the CoK, restrictions on the use of TDRMs are set out to the effect that TDRMs are not to be used in a manner that contravenes the Bill of Rights, are repugnant to justice and morality and inconsistent with the Constitution or any written law.⁶³

Article 48 of the Constitution provides a basis for the justification of the existence of TDRMs. The provision directs the State to ensure access to justice for all persons, and where a fee is required, it shall be reasonable and not impeding to access to justice.⁶⁴ TDRMs enhance the right to access to justice for the marginalised and poor people⁶⁵ who may otherwise not have access to the formal courts owing to the expenses involved or the low literacy levels that

⁶² Article 159 (c), *Constitution of Kenya* (2010).

⁶³ Article 159 (3) *Constitution of Kenya* (2010).

⁶⁴ Article 48 *Constitution of Kenya* (2010).

⁶⁵ Muigua K & Kariuki F, 'ADR, Access to Justice and Development in Kenya', Strathmore Annual Law Conference 2014 on 3 & 4 July 2014 at Strathmore University Law School, 1.

impede people from understanding the formalities applied in the court system.

Under Chapter four of the CoK on the Bill of Rights, a key provision applicable to TDRMs is Article 21. The article,⁶⁶ charges all state organs and all public officers with the duty to address the needs of vulnerable groups within society, this is defined to include women, children, persons with disability, youth, members of minority or marginalised groups, different religious, ethnic and cultural communities. The provision is relevant in the sense that the adjudicators in TDRMs execute public functions and for the sole reason of enhancing harmony in society.

Article 56 provides for the protection of minorities and marginalised groups.⁶⁷ Article 56(d) directs the state to put in place affirmative action programmes designed to ensure that minorities and marginalised groups develop their cultural values, languages and practices.⁶⁸ This in relation to TDRMs may be construed to further legitimise the existence of TDRMs institutions and their applicability in dispute resolution.

Under Chapter five on Land and Environment, the use of TDRMs in Kenya is held to be applicable. Article 60(1) (g) encourages communities to settle land disputes through local community initiatives consistent with the Constitution.⁶⁹ When read with Article 159, the provision may be construed to include TDRMs.

From the provisions of Article 44, persons' rights to use language and participate in cultural life of their choice are protected.⁷⁰ The provision, under Article 44(3) stipulates that a person shall not compel another person to perform, observe or undergo any cultural practise or rite.⁷¹ In the case where one of the parties does not consent to resolving their matter through TDRMs, this provision protects such a party's interest and thus it stands as a limitation to the application of TDRMs in such instances.

⁶⁶ Article 21 (3), *Constitution of Kenya* (2010).

⁶⁷ Article 56, *Constitution of Kenya* (2010).

⁶⁸ Article 56 (d), *Constitution of Kenya* (2010).

⁶⁹ Article 60(1) (g), *Constitution of Kenya* (2010).

⁷⁰ Article 44(1), *Constitution of Kenya* (2010).

⁷¹ Article 44(3), *Constitution of Kenya* (2010).

b.) TDRMS under the Judicature Act

Under Section 3 (2) of the Judicature Act, The High Court, the Court of Appeal and all subordinate courts are required to be guided by African customary law in civil cases in so far as it is applicable and not repugnant to justice and morality.⁷² Though the wordings of the Act do not expressly refer to TDRMs, they provide a basis for the operation of the laws governing TDRMs being customary law as well as limiting the jurisdiction of TDRMs to civil matters.⁷³

c.) TDRMs under the Marriage Act.

Section 68 of the Marriage Act empowers TDRMs to apply conciliatory measures in marital disputes relating to customary marriages, before the court can determine the petition for the dissolution of the marriage.⁷⁴ The provision gives the inference that TDRMs are under the court's supervision in relation to marital disputes as there is a requirement for the preparation of a report of the process for the court.⁷⁵ Section 69 further legitimises TDRMs where grounds for divorce under customary laws which originate from TDRMs, are recognised as valid grounds to grant dissolution of a customary marriage.⁷⁶

d.) TDRMs under the Environment and Land Court Act

The Environment and Land Court Act (the Act) recognises TDRMs as a valid dispute resolution method. Under section 18 of the Act, the court is guided to apply traditional cultural and social principles applied by any community in Kenya in the management of the environment or natural resources where relevant and consistent with other written laws.⁷⁷ Given that the customary principles are derived from TDRMs, the provision impliedly recognises the application of TDRMs in land and environment conservation matters. An express provision as to the applicability of TDRMs in resolving environmental disputes is provided under section 20 of the Act. The provision provides courts the discretion to refer

⁷² Section 3(2), *Judicature Act* (Act No 8 of 2016).

⁷³ Section 3(2), *Judicature Act* (Act No 8 of 2016).

⁷⁴ Section 68, *Marriage Act* (Act No.4 of 2014).

⁷⁵ Section 68 (3), *Marriage Act* (Act No.4 of 2014).

⁷⁶ Section 69, *Marriage Act* (Act No.4 of 2014).

⁷⁷ Section 18, *Environment and Land Court Act* (Act No. 19 of 2011).

matters to alternative dispute resolution (ADR) methods in which TDRMs are categorised as amongst the legitimate ADR methods.⁷⁸

e.) TDRMs under the National Land Commission Act

The National Land Commission Act (the Act) establishes the National Land Commission (NLC) for the purpose of management and administration of land according to the provisions of Article 60 of the CoK.⁷⁹ Under section 5 of the Act, the NLC is charged with the function to encourage the application of TDRMs in land conflicts.⁸⁰ This provision thus provides TDRMs the jurisdiction to adjudicate over land related disputes.

3.22 Case Law Demonstrating the Application of Statutory Provisions Regulating TDRMS

In *Joseph Kalenyan Cheboi & Others v William Suter and Samuel Biwott*,⁸¹ the dispute arose from an issue of land encroachment contrary to the *Marakwet* customs and the plaintiff applied to have the matter settled through TDRMs. The court, relying on the provisions of Article 159 of the CoK allowed the matter to be determined by the clan elders (the *Osis*) of the clan to which the parties belonged.

The extent to which TDRMs can be applicable in resolving disputes was demonstrated in *Erastus Gitonga Mutuma v Mutia Kanuno and Others*.⁸² In this case, the Judge issued an injunction against the defendants from instituting proceedings against the plaintiff through TDRMs. The plaintiff proved that the council of elders breached the constitutional requirements.⁸³ The plaintiff successfully demonstrated the uncouth and unfair nature of the *Njuri Ncheke* trial, amounting to repugnancy to justice and morality.

In the case of *Lubaru M'imanyara v Daniel Murungi*,⁸⁴ the court provided an interpretation of Articles 60(1) (g) and 159(2) (c) of the Constitution. The parties had filed a

⁷⁸ Section 20, *Environment and Land Court Act* (Act No. 19 of 2011).

⁷⁹ Section 3, *National Land Commission Act* (No. 5 of 2012).

⁸⁰ Section 5 (1) (f), *National Land Commission Act* (No. 5 of 2012).

⁸¹ *Joseph Kalenyan Cheboi & Others v William Suter and Samuel Biwott* [2012] eKLR.

⁸² *Erastus Gitonga Mutuma v Mutia Kanuno and Others* [2011] eKLR.

⁸³ Article 159 (3), *Constitution of Kenya* (2010).

⁸⁴ *Lubaru M'imanyara v Daniel Murungi*, [2013] eKLR.

consent seeking to have a land dispute resolved by the *Njuri Ncheke* Council of elders of the Meru community. The court granted the application stating that the constitutional provisions legitimized the application of TDRMs in resolving land issues.

In *Seth Michael Kaseme v Selina K. Ade*,⁸⁵ the Court of Appeal recognised the role of the *Gasa* Council of Elders of Northern Kenya to arbitrate a land dispute. The land dispute was referred to adjudication by TDRMs. Similarly, in *Japheth Kipkemboi Magut v National Land Commission and 2 others*,⁸⁶ one of the issues for determination was whether the NLC was a legitimate regulatory body and whether it had powers to refer land disputes to TDRMs. The court recognised the NLC as a creation of the CoK and further confirmed its mandate to encourage the application of TDRMs in land conflicts.

TDRMs are conciliatory in nature as they apply principles of restorative justice. In *Republic v Mohamed Abdow Mohamed*,⁸⁷ the court discharged and allowed the matter to be marked as settled where the defence proved that the parties had settled the matter according to the Somali TJS. According to Somali customs, once compensation in the form of camels, goats and other traditional ornaments were paid to the aggrieved family, the matter was rendered settled. Thus, the parties to the case were restored and were unwilling to continue with the matter. The conduct of witnesses in this case, guided by the Somali customs; not to testify in a matter already settled, persuaded the court to drop the matter due to lack of evidence as well as the proof that the ends of justice had been met and the parties were restored in the absence of a court proceedings.

3.3 The Nature of TDRMs in Kenya

TDRMs are informal dispute resolution methods based on traditions and customs of people in a community.⁸⁸ TDRMs are usually ethnic centered functioning among a particular community sharing the same ethnic language and whose rules are enforced through moral and

⁸⁵ *Seth Michael Kaseme v Selina K. Ade*, [2012] eKLR.

⁸⁶ *Japheth Kipkemboi Magut v National Land Commission and 2 Others* [2017] eKLR.

⁸⁷ *Republic v Mohamed Abdow Mohamed* [2013] eKLR.

⁸⁸ Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya' 2 *Law Society of Kenya Journal* (2015), 9.

customary sanctions.⁸⁹ The nature of TDRMs in Kenya may be explained based on the Somali community, and Agikuyu community as a representative of the application of TDRMs.

3.31 TDRMs in the Somali Community

In the Somali community,⁹⁰ disputes are resolved through a customary court known as the *Maslah*.⁹¹ During *Maslah* hearings, the elders sit under trees in designated spaces or in mosques and places of worship in the villages to listen to the disputing parties and arrive at a solution. The elders listen to the disputants only after their emotions have cooled down and after customary ceremonies have been conducted. For example, in conflicts that have resulted in death, parties can only be heard after the lapse of the set mourning period and fulfilment of burial rituals.⁹² The parties to a dispute are heard and at the end of the hearing, the party at fault is required to pay compensation to the injured family or clan. The compensation may be in the form of an animal or blood money, calculated on the basis of the severity of the wrong done.⁹³

3.32 TDRMs in the Agikuyu Community

The Agikuyu community has an elaborate structure of conflict resolution. In this community, disputes are first resolved at the family level where the father is endorsed by the community's custom to act as a judge in settling minor disputes between members of his family.⁹⁴ Where the dispute in question is deemed more complex, the heads of families within a kinsfolk (*mbari*) are called together and act in their capacity as elders of the council of elders (*kiama*) in the community.⁹⁵ The disputes are heard and determined within the precincts of the

⁸⁹ Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya', 9.

⁹⁰ Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya', 9.

⁹¹ Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya', 9.

⁹² Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya', 9.

⁹³ Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya', 9.

⁹⁴ Kenyatta J, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, Clays Ltd, St Ives PLC Great Britain, 1974, 214.

⁹⁵ Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, 214.

family homesteads as the family council (*ndundu ya mocie*) being privileged to treat the matter as a family concern.⁹⁶ The presiding elders act in an arbitrator's capacity as their mandate is to point out the recognised tradition and custom of the family to be followed, including finding means by which disputing parties can reach a mutual agreement without resulting to vengeance that could result in a breakup of the family group.⁹⁷ The next level of dispute resolution is the public court of elders (*the kiama*) which can only hear a matter after it has been heard at the family level. The *kiama* is constituted of male elders who have met the requirements of the community's rites of passage. The *kiama* meets in open air spaces or under a tree (*keharo*) to adjudicate over disputes. The procedure set in determining the dispute is that the offended party has to inform the members of the *kiama* of the dispute the night before the matter is to be heard and on the following day, present himself to the court together with the offender. On the day of dispute determination, the elders have to be served with a brew in the form of fermented sugar cane which is for the sole purpose of fulfilling a ritual oath taking ceremony (*rohea rwa goitanga*). The ceremony involves invoking the ancestral spirits to assist in adjudicating the matter as well as administering an oath which binds the parties to strictly adhere to the decision of the elders lest a curse befalls them.⁹⁸ The trial then commences with each party stating their case and defence after which their witnesses can attest to the same, afterwards, the elders appoint a committee (*ndundu*) which then deliberates on the issues and formulate a verdict. The *ndundu* comprises of members of the community except relatives of the disputing parties.⁹⁹ The senior elder then announces the decision of *ndundu* after which parties may be asked whether they want leave to appeal if not, the decision stands binding and the dispute deemed resolved. The appeal however, lies in the same court level (*the kiama*) only that a new committee (*ndundu*) is selected to hear the trial a fresh. The grounds of appeal are however not light and one has to satisfy the elders that they were serious, lest they face punishment in the form of a dismissal and a curse.¹⁰⁰ The mode of restitution includes compensation in the case of theft, a curse upon a person, and solitary confinement or being ostracised.¹⁰¹

⁹⁶ Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, 214.

⁹⁷ Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, 214.

⁹⁸ Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, 215.

⁹⁹ Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, 216.

¹⁰⁰ Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, 223.

¹⁰¹ Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, 230.

3.33 TDRMs in the Pokot Community.

The Pokot community dispute resolution mechanism is based on its community structure. The family being the basic unit, the clan and the council of elders (*kokwo*) form the main institutions of conflict management.¹⁰² Where conflicts exist within the family unit, the father is deemed the head of conflict resolution and is the administrator of all family matters including property, bride price, inheritance and land issues. The clan consists of a collection of the extended families and it serves as an appeal court in which disputes determined in the family level may be heard a fresh.¹⁰³ At this level, at times neighbours (*porror*) may be called to hear and arbitrate family disputes.¹⁰⁴ The council of elders (*kokwo*) stands as the highest conflict resolution institution. The *kokwo* is made up of respected old men who are considered knowledgeable in community matters including the culture and history. The *kokwo* are good orators, and use proverbs and wisdom phrases in resolving disputes. The members of the *kokwo* come from every village in the community to ensure full representation. A unique feature of the Pokot TJS is that the *kokwo* also includes women in the dispute resolution process, as the community is matriarchal in nature. The women seated in the *kokwo* are selected based on seniority in age and contribute to the proceedings while seated.¹⁰⁵ The women participate as documentalists so as to provide reference for future meetings. They are allowed to advise the council based on occurrence or cultural beliefs, and they voice their opinions prior to the making of a verdict.¹⁰⁶ The *kokwo* observes the rules of natural justice as disputing parties are allowed to narrate their case and they are given representation in the process; an equivalent of lawyers in the formal court process.¹⁰⁷ The punishments imposed by the *kokwo* include fines, death, punishing the whole family or clan where one member commits an offence and public ridicule and excommunication of the community. The *kokwo* considers theft within the community a serious offence punishable by a range of fines including death, however theft

¹⁰² Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, Intermediary Technology Development Group Eastern Africa, January 2004, 23.

¹⁰³ Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 23.

¹⁰⁴ Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 23.

¹⁰⁵ Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 23.

¹⁰⁶ Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 23.

¹⁰⁷ Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 23.

from other communities is not considered an offence but a cultural practice of restocking.¹⁰⁸
The *kokwo* is deemed the highest institution and whose verdict is final.

¹⁰⁸ Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 26.

Chapter Four

The Extent to which TDRMs in Kenya Enshrine the Right to A Fair Hearing

4.1 Introduction

This chapter examines the nature of Traditional Dispute Resolution Mechanisms as explained in chapter three with a view to establish whether the right to a fair hearing as explained in chapter two is incorporated in TJs. The chapter identifies the rights to a fair hearing and examines whether the right is engendered in TDRMs in regard to the nature of the TDRMs of the communities (Somali, Agikuyu and Pokot), as explained in chapter three.

4.2 Examining the Incorporation of the Right to A Fair Hearing in TDRMs

a.) The right to have the trial begin and conclude without unreasonable delay

Looking at the nature of TDRMs, this right is not enshrined. The Somali community's dispute resolution mechanism as described in chapter three, demonstrates this. The Somali customs require the elders to only listen to matters once Somali rituals have taken place according to their customs.¹⁰⁹ Thus where a burial is to take place, no matter is heard until the lengthy customary process has taken place. This in turn delays the execution of justice to an accused person.

b.) The right to appeal

In the Somali TJS, members of the community highly esteem their TJS, such that they consider the formal court processes untrustworthy as such decisions made by the *Maslah* Court as in the Somali community stand binding on the parties.¹¹⁰ The parties have no other option but to comply with the decision, this denies an aggrieved party the right to appeal.¹¹¹ Similarly, looking at the Agikuyu TJS, though there seems to be an appellate structure, the community

¹⁰⁹ Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya', 9.

¹¹⁰ Traditional Dispute Resolution Unit Ministry of Justice and Constitutional Affairs Federal Government of Somalia, 'Policy Paper on the Somali Customary Justice System', 23 November 2014, 15.

¹¹¹ Article 50(2) (q), *Constitution of Kenya* (2010).

places high regard to the elders and the oaths taken during the trial process such that an appeal would be unheard of for fear of invoking curses upon the individual or the entire community. This in turn intimidates a person from exercising their right to appeal. Further, in the Pokot community, the right to appeal is also not incorporated as the Pokot just as with the Somali and Agikuyu communities, highly esteem their elders. An appeal would be deemed as looking down upon the decision making skills of the elders and is taken a sign of a bad omen attracting a curse on an aggrieved individual.¹¹² This still stands as though the Pokot seem to have an appeal structure, serious crimes such as theft and murder are only heard at the *kokwo* level in which disputes may not be appealed thus an accused's right to appeal for such serious offences is not upheld.¹¹³

c.) The right to be heard and equality before the law.

Owing to the paternalistic nature of the customs followed in TDRMs, women are denied the right to be heard and the right to equality before the law. In the Somali community for instance, women are perceived not to have a voice in the TJS leave alone appear during the proceedings for fear of provoking disharmony during the trial process.¹¹⁴ This in effect denies women the right to be present at trial.¹¹⁵

Upon examining the Pokot community, the community's TDRM seems to protect the right to equality before the law by the fact that women are given a chance to participate in the dispute resolution process. However, this does not fully incorporate the right to equality as the men in the community highly dominate the proceedings and the final decision is left to them, this in turn jeopardises accused women's right to a fair hearing.

d.) The right to a public trial

On the other hand, TDRMs are only limited to adjudicating matters in the community, at the family or clan level. Consequently, as in the Pokot community, where there are inter-

¹¹² Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 23.

¹¹³ Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 23.

¹¹⁴ Traditional Dispute Resolution Unit Ministry of Justice and Constitutional Affairs Federal Government of Somalia, 'Policy Paper on the Somali Customary Justice System'.
23 November 2014, 16.

¹¹⁵ Article 50(2) (f), *Constitution of Kenya* (2010).

community conflicts, the matters are not heard as there is no dispute resolution mechanism for such matters. In such instances, justice is not served as parties fall in the hands of jungle law in which the right to be heard is not applicable.¹¹⁶ This consequently goes against the very precepts of natural justice in particular the maxim; *audi alteram partem* (the right to be heard) and *nemo judex in parte sua* (no person may judge their own case).¹¹⁷

Given the customary practices allowing early childhood marriages,¹¹⁸ and strong beliefs that regard children as inferior in society and people who lack a voice, TDRMs deny children the right to a public trial. This situation is aggravated in defilement cases where children are forced to marry the perpetrator in order to avert shame upon the family instead of the perpetrator being publicly tried,¹¹⁹ and the child being given a chance to publicly testify during trial and the offender being punished accordingly.

e.) The right to representation and to remain silent and not testify during proceedings.

A characteristic of TDRMs as brought out by the TJS in the Pokot community is giving a chance to the accused to speak during the proceedings, in a sense providing the right to be heard. This fact however, turns out to infringe on the accused's right to a fair hearing as they are not represented by a council of their own choice, and their right to stay silent is not present. Indeed an accused responding in silence to a question asked by an elder is deemed highly disrespectful and the accused has no option but to speak.¹²⁰

f. The Right to have adequate time to prepare a defence.

In addition to denying an accused the right to representation as explained above, an accused is denied the chance to adequately prepare a defence. This is evidenced by TDRMs in the Agikuyu community as examined under chapter three. In the community, the aggrieved

¹¹⁶ Kalya P, Adan M, Masinde I, '*Indigenous Democracy Traditional Conflict Resolution Mechanisms*', 24.

¹¹⁷ <https://gaurlaw.wordpress.com/2015/05/01/natural-justice-rule-of-fair-hearing/>, on 18 Jan 2018.

¹¹⁸ Kinama E, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' 1 *Strathmore Law Journal*, (2015), 32.

¹¹⁹ Kinama E, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010', 32.

¹²⁰ Kalya P, Adan M, Masinde I, '*Indigenous Democracy Traditional Conflict Resolution Mechanisms*', 24.

party summons the elders presiding over the dispute a night prior to the date of hearing. The accused, is then expected to appear for trial and ready to answer any questions and charges levelled against them.¹²¹ This practise out rightly denies the accused a chance to adduce and challenge any evidence procured by the aggrieved party. Further, the denial of time to choose a counsel of one's choice also deprives the accused the right to prepare their defence, this proves detrimental to an accused especially in allegations of felonious crimes.¹²²

g.) The right to be presumed innocent until proven guilty.

TDRMs are adjudicated based on customary laws which do not incorporate the presumption of innocence or the aspect of criminal culpability mainly *mens rea*. The elders in determining criminal matters run the process as if the accused is guilty and usually it is the accused's task to discharge the heavy burden of proving their innocence.¹²³ Further, the elders do not look at the intention of the accused (*mens rea*) in deciding the matter as they are devoid of the concept. This deprives an accused of their right to a fair hearing as they are perceived guilty from the onset without taking into account mitigating factors.¹²⁴ Thus for example where an accused commits a crime out of self-defence, the elders owing to a lack of legal knowledge,¹²⁵ do not take into account the *mens rea* element in determining the guilt conscience of an accused person.

h.) The right to be heard before a fair and impartial tribunal

The rules of natural justice, in particular the bias rule¹²⁶ requiring an adjudicator to be completely impartial in adjudicating the matters before him, are not upheld in TDRMs. Owing to the paternalistic nature of TDRMs, apparent bias is seen in cases where the accused are women standing trial presided over by male elders and as in the Somali community, they are not allowed to speak. This hinders the execution of justice. On the other hand, where one of

¹²¹ Kenyatta, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, 223.

¹²² United Nations, *Human Rights and Traditional Justice Systems in Africa*, 37.

¹²³ Kinyanjui S, 'Restorative Justice in Traditional Pre-Colonial "Criminal Justice Systems" In Kenya', 14. <https://pdfs.semanticscholar.org/0680/786dcb4246f1c1b1034a68a802de21c13500.pdf>, on 16 January 2018.

¹²⁴ Kinyanjui S, 'Restorative Justice in Traditional Pre-Colonial 'Criminal Justice Systems' In Kenya' *tribal law journal* (2010),5.

¹²⁵ United Nations Human Rights Office of the High Commissioner, *Human Rights and Traditional Justice Systems in Africa*, 70.

¹²⁶ <https://gaurlaw.wordpress.com/2015/05/01/natural-justice-rule-of-fair-hearing/>, on 18 Jan 2018.

the parties to a dispute has blood or family ties to an elder presiding over the matter, actual bias appears as the TDRMs do not afford an elder the luxury to recuse themselves. Indeed one of the recommendations set for TDRMS by KELIN Kenya conference paper,¹²⁷ in enhancing access to justice for women's property rights in TDRMs was the need for elders to recuse themselves in the event where one of the parties is a relative.¹²⁸ In sum, the above demonstrates the loop holes in TDRMs regarding the incorporation of the right to a fair hearing in the TDRM proceedings.

¹²⁷ KELIN Kenya, Capacity Building Workshop on Women Property Rights for Widows Affected or Infected by HIV, Kisumu County, 25–27August 2014, <http://kelinkenya.org/wp-content/uploads/2010/10/Widows-Training-1.pdf>, on 18 Jan 2018.

¹²⁸ KELIN Kenya, Capacity Building Workshop on Women Property Rights for Widows Affected or Infected by HIV, 12.

Chapter Five

Findings Recommendations and Conclusion.

5.0 Introduction

This chapter provides for the findings of the study based on the objectives set out in chapter one, recommendations as a result of the findings and a conclusion of the study. The study was conducted with the aim of establishing whether TDRMs engender the right to a fair hearing in the dispute resolution processes.

5.1 Findings

a.) What is entailed in the right to a fair hearing?

The study finds that the right to a fair hearing in Kenya is extensively provided by the constitution which also includes provisions of international instruments as detailed in chapter two of this study. The right to a fair hearing as explained in chapter two stands to protect an accused from the institution of allegations to the end of the trial process. The study also finds that the right to a fair hearing is an important right based on the principles of natural justice as explained in chapter one under the theoretical framework of the study and hence the need for its inclusion in TDRM dispute resolution processes.

b.) The nature of TDRMs

Traditional Dispute Resolution mechanisms are based on customary practices and principles as explained in chapter three. TDRMs however do not engender legal principles; in particular the right to a fair hearing as examined under chapter four owing to the low literacy levels¹²⁹ of the adjudicators. This in turn hinders the execution of justice according to natural justice principles.

c.) The need for TDRMs in dispute resolution in Kenya.

The CoK recognises TDRMs as an official alternative dispute resolution mechanism¹³⁰ which enhances the access to justice for the marginalized and the poor.¹³¹ This recognition protects the right to access to justice as under Article 48 of the CoK.¹³² Further, the recognition

¹²⁹ United Nations, *Human Rights and Traditional Justice Systems in Africa*, 37.

¹³⁰ Article 159 (2) (c), *Constitution of Kenya*, (2010).

¹³¹ Muigua K, Kariuki F, 'ADR, Access to Justice and Development in Kenya,' Strathmore Annual Law Conference 2014, Strathmore University Law School, 3 -4 July 2014, 1.

¹³² Article 48, *Constitution of Kenya*, (2010).

of TDRMs reflect the spirit of the constitution under Article 11¹³³ which recognizes the diverse cultures in Kenya and protects the rights of citizens to choose and participate in the cultural life as under Article 44,¹³⁴ this includes participation in TDRMs which are organs of civil society.

c.) The extent to which TDRMs engender the right to a fair hearing.

As outlined in chapter three and four, this study finds that given the nature of TDRMs, the right to a fair hearing is far from being incorporated to the dispute resolution processes. The study finds that there is a need to incorporate the right in TDRMs given the constitutional and statutory provisions legitimising their use in dispute resolution. Furthermore, it is foreseeable that TDRMs will be increasingly applicable in resolving a wider range of disputes; including criminal¹³⁵ matters excluding felonies as stated in *Juma Faraji Serenge alias Juma Hamisi v Republic*.¹³⁶

5.2 Recommendations

a. The protection of the right to a fair hearing in TDRMs

The adjudication of disputes in TDRMs should be modified to include the aspects of the right to a fair hearing in order to be consistent with the provisions of the Constitution and to adhere to the principles of natural justice in order for justice to be done. This may be achieved through establishing a separate legislation regulating TDRMs. The legislation should list the official TDRMs in the different communities in Kenya. The legislation should also outline the customary powers and functions of the elders in TDRMs, to reflect the principles of natural justice and thus include the right to a fair hearing in TDRMs. The legislation should also detail the structure of TDRMs to provide for an appeal process within the traditional courts. Further, the legislation should direct that the trials in TDRMs be documented and the documentation be passed to the formal courts in order to ensure effective supervision of TDRMs.¹³⁷

¹³³ Article 11, *Constitution of Kenya* (2010).

¹³⁴ Article 44, *Constitution of Kenya* (2010).

¹³⁵ Chepkoech C, 'The Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya' LLB Dissertation, Strathmore University, January 2017, 37.

¹³⁶ *Juma Faraji Serenge alias Juma Hamisi v Republic* [2007] eKLR.

¹³⁷ 'Rautenbach Christa: Legal Reform of Traditional Courts in South Africa: Exploring the Links Between Ubuntu, Restorative Justice and Therapeutic Jurisprudence' *Hein Online*, 20 December 2017

<http://heinonline.org/HOL/Page?handle=hein.journals/jintc12&collection=journals&id=276&startid=276&endid=358> on 10 January 2017.

b. The nature of TDRMs

Given that the adjudicators in TDRMs have low literacy levels¹³⁸ as stated in chapter four and three, civic education programs should be carried out. These programs would be helpful in educating the adjudicators in TDRMs in every community on the right to a fair hearing as well as its importance. In turn the execution of the program would aid in seeing that the right to a fair hearing is practically engendered in TDRMs.

5.2 Conclusion

This study has met its objectives as well as responded to the statement of the problem.

The objectives to be met were;

- i. To find out what is entailed in the right to a fair hearing.
- ii. To investigate the nature of traditional dispute resolution mechanisms (TDRMs).
- iii. To examine whether TDRMs engender the right to a fair hearing in the proceedings.

Objective i.

This study has outlined the various elements on the right to a fair hearing including the regulatory framework protecting the right to a fair hearing in Kenya. Chapter two has explained the various statutes and case law explaining the nature and application of the right to a fair hearing.

Objective ii.

The study has examined the nature of TDRMs in Kenya. The regulatory framework in Kenya legitimising their application as discussed in chapter three as well as the case study on the Somali, Agikuyu and Pokot communities has proven fit in meeting the objective.

Objective iii.

The study as under chapter four has demonstrated the extent to which the right to a fair hearing is engendered in TDRMs. Under chapter five, the study has provided recommendations on how the right to a fair hearing can be engendered in TDRMs.

¹³⁸ Kinyanjui S, 'Restorative Justice in Traditional Pre-Colonial 'Criminal Justice Systems' In Kenya', *tribal law journal* (2010),5.

Hypothesis

The hypothesis was that TDRMs do not engender the right to a fair hearing in dispute resolution.

This study tested and proved the hypothesis by examining the nature of the right to a fair hearing as well as the nature of TDRMs in Kenya. Chapter three has highlighted the nature of TDRMs. Chapter four on the other hand has examined the extent to which the right to a fair hearing is engendered in TDRMs and has proven the hypothesis right. The aspects of the right to a fair hearing as discussed under chapter two in meeting objective one of the study, are not fully engendered in TDRMs. In sum, the right to a fair hearing is an important right and its lack of inclusion in TDRMs jeopardizes the execution of justice which demands that it must not only be done but should be seen to be done.¹³⁹

¹³⁹ *R v Sussex Justices, Ex Parte McCarthy*, [1924] 1 KB 256.

Bibliography

Books

- Kenyatta J, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, Clays Ltd. St Ives PLC Great Britain, 1974.
- Kalya P Ruto, Adan Mohamud, Masinde Isabella, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, Intermediary Technology Development Group – Eastern Africa, January 2004
- United Nations, *Human Rights and Traditional Justice Systems in Africa*, 2016.

Journal Articles

- Aristotle, Nicomachean Ethics Book V, Translated by Ross W.D, *Batoche Books Kitchener* (1999).
- FIDA KENYA, Traditional Justice Systems in Kenya: A Study of Communities in Coast Province, Kenya, *Mua Institutional Repository*.
- Glinz Cornelia, Kenya's New Constitution, *Biesshop Consulting* (2011).
- Kariuki Muigua & Francis Kariuki ADR, Access to Justice and Development in Kenya.
- Kinama Emily, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010', *Strathmore Law Journal* (2015).
- Kinyanjui Sarah, 'Restorative Justice in Traditional Pre-Colonial 'Criminal Justice Systems' In Kenya', *tribal law journal* (2010).
- Muigua K & Kariuki F, ADR, Access to Justice and Development in Kenya, Strathmore Annual Law Conference 2014, Strathmore University Law School, 3 -4 July 2014.
- Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya' *Law Society of Kenya Journal* (2015).

- Habil, Alfonsas Vaisvila, Human Dignity and The Right to Dignity in Terms of Legal Personalism' (From Conception of static dignity to conception of dynamic one) Mykolas Romeris University Faculty of Law Department of Philosophy of Law; Ateities str. 20, LT-08303 Vilnius.
- Traditional Dispute Resolution Unit Ministry of Justice and Constitutional Affairs Federal Government of Somalia, 'Policy Paper on the Somali Customary Justice System', 23 November 2014.
- Wanjala Wafula, 'Spotlight on Harmful Traditional Practices and Customs in Kenya' *Wordpress* (2013).

Dissertation(s)

- Chepkoech C, 'The Applicability of Traditional Dispute Resolution Mechanisms In Criminal Cases in Kenya' LLB Dissertation, Strathmore University, January 2017.

Online Sources

- <https://wanjalawafula.wordpress.com/2013/08/04/spotlight-on-harmful-traditional-practices-and-customs-in-kenya/>
- <http://repository.mua.ac.ke/414/1/Traditional-Justicefinal.pdf>.
- <https://gaurlaw.wordpress.com/2015/05/01/natural-justice-rule-of-fair-hearing/>
- http://www.kas.de/wf/doc/kas_22103-1522-1-30.pdf?110408073553.
- <http://www.saflii.org/za/journals/PER/2014/42.html>.
- <https://pdfs.semanticscholar.org/0680/786dcb4246f1c1b1034a68a802de21c13500.pdf>
- <https://gaurlaw.wordpress.com/2015/05/01/natural-justice-rule-of-fair-hearing/>
- <http://kelinkenyana.org/wp-content/uploads/2010/10/Widows-Training-1.pdf>