

**THE IMPACT OF MEDIA COVERAGE OF CRIMINAL TRIALS ON THE
IMPARTIALITY OF THE COURTS**

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

By

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April 2018

9,948 words

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ACKNOWLEDGEMENTS

Above all else, I wish to express my sincere gratitude to the Almighty Father from whom I derived the strength, zeal and energy to carry on this dissertation.

I wish to express my sincere gratitude to my able supervisor, Mr Humphrey Sipalla, without whom this report would not have been possible. His commitment, guidance and supervision throughout the entire dissertation process have strongly added to the success of this report.

I would also like to express my gratitude to my family for their unfailing support throughout the dissertation. Their shoulders were always a place to lean on whenever any pressure overcame me. I give a special thanks to my mom for showing me that sky is the limit and that there is so far that one can go if you believe in yourself.

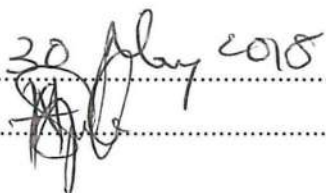
I would also like to express my gratitude to my sister, to whom I dedicate this work, and to my best friend. Their constant words of encouragement have taught me that anything is possible if you only set your mind to it.

DECLARATION

I, **BETTY MUENI MWANZA**, 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: .....
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This Research Proposal has been submitted for examination with my approval as University Supervisor.

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MR HUMPHREY SIPALLA

ABSTRACT

Court impartiality is a fundamental right that is accorded to accused persons. This right is in pursuit of a broader right of fair hearing which is recognised both internationally and nationally. Various factors contribute to the court bias. They include the normal human cognitive processes that limit a man to his observations. Prior exposure to facts of a criminal case may limit one's mind openness to the facts of a case that do not conform to the ones exposed to before.

Therefore, the overall purpose of this paper is to illustrate the relationship between media coverage of criminal trials and court bias in making judicial decisions in criminal cases. This is through objectives such as investigate why criminal proceedings attract media attention; investigating how media portrays criminal proceedings; and investigating how the bias arises in courts as an effect of media coverage.

There is a direct and indirect relationship that exists between media and judicial decisions. These exist between the media, the public and the judiciary. There is broad literature that has been covered to illustrate the same and judicial opinions in decided cases have also mentioned this relationship that leads to court bias.

It is hoped that this study will inform judicial authorities of the need to balance the freedom of expression of the media and the right of an accused person to a fair trial that will not lead to either of the rights being trumped on.

LIST OF ABBREVIATIONS

British Broadcasting Corporation	- BBC
Media Council Act of Kenya	- MCA
National Super Alliance	- NASA
Radio-Télévision Libre des Milles Collines	- RTL

LIST OF CASES

Foreign Cases

1. *British Steel Corporation v. Granada Television Ltd*, 1981 A.C. 1096 (1981)
2. *Derbyshire County Council v. Times Newspapers Limited and Others*, [1993] AC 534, [1993] 1 All ER 1011, [1993] 2 WLR 449, 91 LGR 179
3. *Manu Sharma v. State* (NCT of Delhi), (2010) 6 SCC 1
4. *Minister van Polisie v Van der Vyver* (861/2011) [2013] ZASCA 39
5. *Murphy v. Florida* 421 U.S. 794 (1975)
6. *Rideau v. Louisiana* 373 U.S. 723 (1963)
7. *Telfner v. Austria*, 33501/96 (2001)

African Regional Cases

The State v Oscar Leonard Carl Pistorius [2014]

Kenyan Cases

1. *John Chikamai v. Republic* [2015] eKLR
2. *John Kamau Mbugua v Standard Limited and Another* [2015] eKLR
3. *Republic v David Ruo Nyambura and Others* [1999]
4. *Republic v Attorney General and 3 others Ex-Parte Kamlesh Mansukhlal Damji Pattni*

LIST OF LEGAL INSTRUMENTS

1. *Access to Information Act* (Act No. 31 of 2016)
2. *Constitution of Kenya* (2010)
3. *Contempt of Court Act* (Act No. 46 of 2016)
4. *European Convention on Human Rights*
5. *Media Council Act* (Act No. 46 of 2013)

1. MEDIA AS A BRIDGE TO COURT BIAS

1.1. Introduction

Article 50 of the Constitution of Kenya¹ provides fair hearing as part of rights and fundamental freedoms. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before an independent and impartial court, tribunal or body.² The presumption of innocence places the burden of proof in criminal proceedings on the prosecution.³

However, law, crime and justice are frequent subjects of media news.⁴ Media is the production of electronic and print media for circulation to the public but does not include book publishing.⁵ It constitutes of broadcasting and narrow casting medium such as newspapers, magazines, television, radio and the internet. Media constitutes the art of journalism which is the collecting, writing, editing and presenting of news or news articles in newspapers and magazines, radio and television broadcasts, in the internet or any other manner as may be prescribed.⁶ The public have a right of access to information which is of public concern and which they ought to know.⁷ Consequently, the media acts as an agent for the public by reporting matters of general public importance.⁸ Yet the portrayal of crime can be misleading.⁹ This research will focus on the impact of the various portrayals of crime by the media on the impartiality of the courts.

1.2. Background

According to the study released by the Kenya Audience Research Foundation (KARF), the average number of Kenyans who consume media daily is 16 million; 94 per cent of which consume TV, radio and print while only 33 per cent consume new media but not

¹ *Constitution of Kenya* (2010)

² Article 50(1), *Constitution of Kenya* (2010)

³ Ashworth A, 'Four threats to the presumption of innocence' 123.1 *South African Law Journal* (2006), 63-97.

⁴ Hans V P and Dee J L, 'Media coverage law: Its impact on juries and the public' 35.2 *American Behavioural Scientist* (1991), 136.

⁵ Section 2, *Media Council Act* (Act No. 46 of 2013)

⁶ Section 2, *Media Council Act* (Act No. 46 of 2013)

⁷ *British Steel Corporation v. Granada Television Ltd*, 1981 A.C. 1096 (1981), 1129.

⁸ *British Steel Corporation v. Granada Television Ltd*, 1981 A.C. 1096 (1981), 1129.

⁹ Hans and Dee, 'Media coverage law', 136.

exclusively.¹⁰ Because most of the public has little direct knowledge of the justice system, public knowledge and views of law and the legal system are largely reliant on media representations.¹¹ As stated above, the media acts as an agent for the public by reporting matters of general public importance.¹² Media as opinion shapers is seen through this enlightenment of the relative importance and reinforcement of issues through news coverage which is a function of agenda setting.¹³ Through framing, the media is able to convey information to the public in news reports of how an issue is characterised.¹⁴ This can have an influence on how the information is understood by audiences.¹⁵ This does not mean that the media tries to spin a story or deceive their audiences.

However, a report by the Institute of Development Studies, Economic and Social Research Council found that social media and digital technology had mixed uses where they were not only used to propagate hate speech and mobilise for violence, but also to identify and map out violence hotspots.¹⁶ Since then, they have increasingly become an indispensable tool in Kenya's politics and governance, used by political leaders to spread information, campaign and mobilise.¹⁷

A research conducted by the BBC on exploring governance in Kenya found that the Kenyan national elections of 2007 were plagued by widespread violence.¹⁸ The media was central to the conflict and many local language radio stations played a role in calming tensions as well as inflaming them.¹⁹ However, the widespread reach of social media has also been a major challenge to security, peace and peace building since it has been used to incite hatred and violence. Hence, the media might have influence over the viewpoint through which people perceive various events.

¹⁰ 'Victor Amadala: Kenyans still prefer traditional media, says report' *The Star News*, 21 July 2017.

¹¹ Hans V P and Dee J L, 'Media coverage law, 136.

¹² *British Steel Corporation v. Granada Television Ltd*, (1981).

¹³ Kalyango Y, 'Media performance and democratic rule in East Africa: Agenda setting and agenda building influences on public attitudes' Unpublished thesis, University of Missouri, May 2008, 7.

¹⁴ Scheufele D A and Tewksbury D, 'Framing, agenda setting and priming: The evolution of three media effects models' 57 *Journal of Communication* (2007), 11.

¹⁵ Scheufele and Tewksbury, 'Framing, agenda setting and priming', 11.

¹⁶ Mutahi P and Kimari B, 'The impact of social media and digital technology on electoral violence in Kenya' 493 *Institute of Development Studies* (2017), 3.

¹⁷ Mutahi P and Kimari B, 'The impact of social media and digital technology on electoral violence in Kenya', 3.

¹⁸ BBC media action 'Research summary exploring governance in Kenya' *BBC News Centre*, July 2012, 1.

¹⁹ BBC media action 'Research summary exploring governance in Kenya', 1.

This study will narrowly focus on the attack on the presumption of innocence by the media. Here, the nature of the presumption of innocence will consider three central issues. Firstly, how the presumption of innocence is interfered with specifically by the media. Secondly, how the court's impartiality is affected by the interference. Lastly, it will focus on how the courts should address the question of when the presumption of innocence is interfered with.

1.3. Justification of the Study

Pre-trial publicity is injurious to the health of a fair trial.²⁰ Thus, there is the sub judice rule whereby something that is under judicial consideration is prohibited from public discussion.²¹ The presumption of innocence places the burden of proof in criminal proceedings on the prosecution.²² Every person has the right to be presumed innocent until proven guilty.²³ However, law, crime and justice are frequent subjects of media news.²⁴ Media as an opinion shaper threatens the protection of these rights by posing a harsh presumption of guilt following arrest.²⁵ The portrayal of criminal proceedings needs to be stopped in order to protect an accused person's right to an impartial court.

1.4. Statement of Problem

In a criminal case the onus is always on the prosecution to prove the guilt of an accused person, and the standard of proof is proof beyond reasonable doubt.²⁶ When the media takes on the duty to prove the guilt of an accused person to the public, most of which has little direct knowledge of the justice system, the public consumes the news as the truth.²⁷ This is because the public's knowledge and views of law and the legal system are largely reliant on media representations.²⁸ Therefore, the public feeds on the information given by

²⁰ Justice Chauhan RS, 'Trial by media: An international perspective' (2011), 1.

²¹ 'Peter Mwaura: Relax, judges told over sub judice rule' *Daily Nation*, 29 August 2014 <https://www.nation.co.ke/oped/opinion/Justice-Sub-Judice-Rule-Constitution-High-Court/440808-2434810-r9yh3yz/index.html> on 6 March 2018.

²² Ashworth A, 'Four threats to the presumption of innocence' 123.1 *South African Law Journal* (2006), 63-97.

²³ Article 50(2)(a), *Constitution of Kenya* (2010)

²⁴ Hans and Dee, 'Media coverage law', 136.

²⁵ Tharler J, 'Punishing the innocent: The need for due process and the presumption of innocence prior to trial' 2 *Wisconsin Law Review* (1978).

²⁶ *Republic v David Ruo Nyambura and Others* [1999], in the High Court at Nairobi Judgement of 2nd May 2001.

²⁷ Hans and Dee, 'Media coverage law', 136.

²⁸ Hans and Dee, 'Media coverage law', 136.

the media. Consequently, the media, through the public, may exert undue pressure on the courts to decide according to what they deem is right, otherwise it may be regarded as a failed justice system.

1.5. Hypothesis

As stated by Lord Salmon, free press is one of the pillars of a democratic society.²⁹ However, considering the influence that the media has on the general public regarding the status of various accused persons, the media's right to freedom of expression should be limited in as far as it infringes on an individual's right to access an impartial court.³⁰ This is by ending where the accused person's right begins.

1.6. Research Objectives

The research objectives are:

- 1) To investigate why criminal proceedings attract media attention.
- 2) To investigate how media portrays criminal proceedings.
- 3) To investigate how the bias arises in courts as an effect of media coverage.

1.7. Research Questions

The research questions are:

- 1) What is the role of the media in portraying criminal proceedings?
- 2) When has the media overlapped its role in portraying criminal proceedings?
- 3) How does bias arise in courts as an effect of the media portrayal of criminal proceedings?

1.8. Literature Review

Peter Vasterman discusses the concept of media-hype coverage.³¹ He refers it to the chain of events in which a specific risk is magnified, causing in turn all kinds of secondary social, political and economic consequences.³² He adds that media coverage on new crime problems contributes to the broadening of the concept by reporting all kinds of violence

²⁹ *British Steel Corporation v. Granada Television Ltd*, 1981 A.C. 1096 (1981).

³⁰ Article 50(1), *Constitution of Kenya* (2010)

³¹ Vasterman P, 'Media-hype: Self-reinforcing news waves, journalistic standards and the construction of social problems' 20 *European Journal of Communication* (2005), 513.

³² Vasterman, 'Media-hype' 513.

under the same denominator.³³ This in turn fuels up public outrage.³⁴ Peter Vasterman seems to address what the impact of the public outrage on the court impartiality might be on the court. It seems that it might influence the decision of a judge in a criminal case by making the judges to be more inclined to decide the case in view of the public.

Hans Valerie and Dee Juliet in their article, 'Media Coverage Law: Its Impact on Juries and the Public', state that critics of extended media coverage of court room events worry that television news programs incorporating actual footage of courtroom proceedings will mislead the public.³⁵ This is by playing intense highlights of controversial trials rather than the actual happenings in the courtroom proceedings.³⁶ What they do not mention however is what impact these highlights will have on the courts in deciding the case. However, as discussed above, the public seems to have power to exercise control over judicial decisions through external pressure.

Moran Gray, and Cutler Brian, in their article 'The Prejudicial Impact of Pre-trial Publicity', examine the influence of pre-trial publicity on potential jurors' attitudes toward a defendant.³⁷ Analyses of the survey data of two studies revealed that knowledge of the case specifics was positively and significantly correlated with perceived culpability of the defendant.³⁸

A Report to the Chief Justice on In-Court Media Coverage in Courts in New Zealand in its summary conclusions stated that Courts are bound to uphold the rule of law and ensure fair trials.³⁹ Media organisations on the other hand work in a commercial environment that is driven by profit. The media want to record and film material that will be of interest to their target audience, and improved access and procedures to assist them in attracting that audience. It stated that a tension remained between the goal of film in improving public understanding of what happens in the courts and objectively informing the public about court cases, and the commercially driven imperatives of the media.⁴⁰ Therefore it is

³³ Vasterman, 'Media-hype' 525.

³⁴ Vasterman, 'Media-hype' 525.

³⁵ Hans and Dee, 'Media coverage law', 137.

³⁶ Hans and Dee, 'Media coverage Law', 137.

³⁷ Moran and Cutler, 'The prejudicial impact of pre-trial publicity', 1.

³⁸ Moran and Cutler, 'The prejudicial impact of pre-trial publicity', 1.

³⁹ *Report to Chief Justice on In-Court Media Coverage*, 2015, 3.

⁴⁰ *Report to Chief Justice on In-Court Media Coverage*, 2015, 3.

unsurprising that recording and filming by the media has given rise to procedural challenges.

1.9. Limitations of the study

This study focuses on the impact that the media would have, through the coverage of criminal trials, on the courts to the extent that it would cause court impartiality. Public confidence in the criminal procedure is a very crucial matter in the operations of the court. This is because when the public is pleased with the workings of the court then the public will most probably accept the judgements and decisions passed by the various courts. However, if the public is not pleased with the courts then this would undermine the court process. Therefore, no judge would be willing to jeopardise the court's reputation by placing themselves in a compromising position through, for example, interviews.

Due to the sensitivity of the study, not much has been said nor discussed in the Kenyan courts concerning the impact of media coverage of criminal trials on the impartiality of the courts. For example, in carrying out the study my intention was to focus on the Court of Appeal cases from January 2011 to January 2018 and find out what has been said by the courts concerning the subject matter. However, most cases that involved the media did not mention what impact the media would have on judges at large.

2. WE FIND GUILTY WHO THE MEDIA FINDS GUILTY

2.1.Introduction

As discussed in the first chapter, law, crime and justice are frequent subjects of media news.⁴¹ The public's knowledge and views of law and the legal system are largely reliant on media representations as most of it has little direct knowledge of the justice system.⁴² Public confidence in the criminal procedure is a very crucial matter in the operations of the court. This is because when the public is pleased with the workings of the court then the public will most probably accept the judgements and decisions passed by the various courts. Therefore, this chapter is going to constitute a theoretical framework which will be aimed at explaining the reasons as to why judicial decisions may be a construct of societal circumstances. In order to achieve this it will focus on 'the evolving man theory' as opined by David Ndi Mbiti in his book 'Foundations of School Administration'.⁴³ It will also look at the 'ecocultural theory' as posited by John Berry as illustrated by Nsamenang in his article 'Ecocultural Theories of Development' as a support to the evolving man theory. To add to that, the chapter is going to give a conceptual framework court bias may form as a result of media influence. Conclusively, this chapter is going to illustrate how these two theories will better help in understanding how the media may influence judicial decisions.

2.2.The Evolving Man Theory

This theory posits the view that the child, like any other human being, is subject to environmental adaptations as he or she develops, thus, whatever the individual becomes is not as a result of innate predisposition but it is the result of environmental experiences.⁴⁴ In this view, the human being is born neither bad nor good but the environment determines what he becomes.⁴⁵ Environment then constitutes the platform of learning where desirable or undesirable behaviour patterns are formed within the individual.⁴⁶

⁴¹ Hans and Dee, 'Media coverage law', 136.

⁴² Hans and Dee, 'Media coverage law', 136.

⁴³ Mbiti D N, *Foundations of school administration*, Oxford University Press, Upper Hill, 2007.

⁴⁴ Mbiti D N, *Foundations of school administration*, 62.

⁴⁵ Mbiti D N, *Foundations of school administration*, 62.

⁴⁶ Mbiti D N, *Foundations of school administration*, 62.

2.3.The Ecocultural Theory

The term ecocultural is a hybrid coined from two concepts, ecology, which refers to a physical space and its ecosystem that includes networks of people and children, and culture.⁴⁷ This theory holds the view that human development is influenced by both the ecological context and the cultural context, whose features are often adapted to the ecological setting.⁴⁸ Furthermore, it gives the view that although culture is both inside or outside the individual, the frame of reference from a developmental position is that culture is inside the person. Therefore, it may be difficult to separate one from his ecocultural experiences.

The evolving man theory shows how the environment aids in determining who a person becomes. The ecocultural theory adds the concept of culture to the environment which forms part of the individual. Therefore, laws and policy may be posited but whatever environment and culture a person has been exposed to may have a great influence on what decisions one makes. One may tend to be bias in opting for whatever one was exposed to prior to, for example, a criminal proceeding. An environment is, after all, a complex message system, which imposes on human beings certain ways of thinking, feeling, and behaving.⁴⁹

2.4.Media as Part of the Environment

In all media, actors such as publishers, editors, journalists, and other content producers such as online bloggers generate, interpret, and communicate images, information, and imaginaries for varied forms of consumption.⁵⁰ ‘Media ecology’ as introduced by Marshal McLuhan’s theory in 1964, looks into the matter of how media of communication affect human perception, understanding, feeling, and value; and how our interaction with media facilitates or impedes our chances of survival.⁵¹

⁴⁷ Nsamenang BA, *Ecocultural theories of development*, Elsevier Limited, Bamenda, Cameroon, 2015, 839.

⁴⁸ Nsamenang BA, *Ecocultural theories of development*, 838.

⁴⁹ Logan RK, ‘The biological foundation of media ecology: Explorations in media ecology’ 6.1 *OCAD University Open Research Repository* (2007), 3.

⁵⁰ Boykoff MT, ‘Environment and the media’ 15 *International Encyclopaedia of Geography* (2017), 1.

⁵¹ Logan RK, ‘The biological foundation of media ecology’, 3.

Any understanding of social and cultural change is impossible without knowledge of the way media work as environments.⁵² A media ecosystem is a system consisting of human beings and the communications media and technology through which they interact and communicate with each other.⁵³ It also includes the languages and cultures with which they express and code their communication.⁵⁴

Media is a part of the environment because it tells us what we know about the world, what is happening around us, what environment we are living in, what is right and what is wrong, how to live our lives successfully and what is acceptable by the society.⁵⁵ In conclusion, media communication technologies, from writing to digital media create environments that affect the people who use them.⁵⁶

2.5. How Media May Influence Judicial Decisions

Human decision making has been found to suffer from limitations other than limited information processing capabilities.⁵⁷ Are court judges such impartial rulers that they can “call it like it is” or are they limited human observers confined by the boundaries of human cognition?⁵⁸ Judges are not exceptions to these limitations in decision making. Therefore, this section will link media opinion to judicial decisions.

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court, or, if appropriate, another independent and impartial tribunal or body.⁵⁹ Consequently, public confidence as a belief in the fairness and impartiality of the courts is built. However, the media’s influence on the

⁵² ‘Kiaialiisa: Media ecology: How media and new media influence life’, 3 December 2012 <https://kaiialiisa.wordpress.com/2012/12/03/media-ecology-how-media-and-new-media-influences-life/> on 7 February 2017.

⁵³ Logan R K, ‘The biological foundation of media ecology’, 6.

⁵⁴ Logan R K, ‘The biological foundation of media ecology’, 6.

⁵⁵ ‘Kiaialiisa: Media ecology: How media and new media influence life’, 3 December 2012 <https://kaiialiisa.wordpress.com/2012/12/03/media-ecology-how-media-and-new-media-influences-life/> on 7 February 2017.

⁵⁶ ‘Kiaialiisa: Media ecology: How media and new media influence life’, 3 December 2012 <https://kaiialiisa.wordpress.com/2012/12/03/media-ecology-how-media-and-new-media-influences-life/> on 7 February 2017.

⁵⁷ George J F, Duffy K and Ahuja M, ‘Countering the anchoring and adjustment bias with decision support systems’ 29 *Elsevier Science B.V.* (2000), 195.

⁵⁸ Peer E and Gamliel E, ‘Heuristics and biases in judicial decisions’, 114.

⁵⁹ Article 51(1), *Constitution of Kenya* (2010)

public has the ability to undermine public confidence and when the public is not pleased with the duties of the courts then it has the strength to change the system.

In the case of *Derbyshire County Council versus Times Newspapers Limited and Others*, the House of Lords established that in a democratic society the local authorities, such as courts, should be open to criticism.⁶⁰ Kenya recognises the freedom of the media as a right under Article 34 of its Constitution. In addition, the media has a right of freedom of expression as long as it does not extend to the propaganda for war, incitement to violence, hate speech or advocacy of hatred.⁶¹ This seems to show that the media plays a fundamental role in being a critic of the court process, for example, in its way of dispensing judgements. Therefore, the line should be drawn between proper criticism of the courts and unlawful criticism of the courts in a manner that upholds public confidence.

2.6. Biases that Occur in the Criminal Procedure as a result of Media Influence

The media may influence bias in judicial decisions in various stages of the proceedings. An example of such a stage is the hearing process.

2.6.1. Biases in the Hearing Process

2.6.1.1. Confirmation Bias

This type of bias states that if people have a preconception or hypothesis about a given issue, they tend to favour information that corresponds with their prior beliefs and disregard evidence pointing to the contrary.⁶² Consequently, people search, code, and interpret information in a manner consistent with their assumptions.⁶³ Thus, they are lead into making biased judgments and decisions.⁶⁴

In relation to judges, confirmation bias can be illustrated when the judges are in favor of evidence that confirms their prior hypotheses and might disregard evidence that does not correspond with their previous assumptions.⁶⁵ This is especially when they hear and

⁶⁰ *Derbyshire County Council v. Times Newspapers Limited and Others*, [1993] AC 534, [1993] 1 All ER 1011, [1993] 2 WLR 449, 91 LGR 179, House of Lords, 11.

⁶¹ Article 33, *Constitution of Kenya* (2010)

⁶² Peer E and Gamliel E, 'Heuristics and biases in judicial decisions', 115.

⁶³ Peer E and Gamliel E, 'Heuristics and biases in judicial decisions', 115.

⁶⁴ Peer E and Gamliel E, 'Heuristics and biases in judicial decisions', 115.

⁶⁵ Peer E and Gamliel E, 'Heuristics and biases in judicial decisions', 115.

evaluate evidence brought before them in court which can be described as the attribution of value only to evidence that supports one's own opinion or ideal version of events.

Confirmation bias was proven in the South African Court of Appeal case of *Minister van Polisie v Van der Vyver*⁶⁶ where the accused was arrested on charges that he was the murderer of the victim because he was in a permanent relationship with her.⁶⁷ The police had already determined the hypothesis earlier on that the accused was definitely the murderer, a hypothesis that the media framed too.⁶⁸ Thus, the entire police investigation and the prosecution was based on this hypothesis and every piece of evidence that could possibly absolve the respondent was ignored.⁶⁹ To add to that, any evidence that supported the hypothesis or that was ambiguous was interpreted to mean that he was guilty.

Consequently, a crucial piece of objective evidence was ignored that the respondent had been working in his office while the victim was murdered in her flat in Stellenbosch.⁷⁰ Ultimately, the respondent was acquitted but the detrimental factors that accompanied his denial of the right of presumption of innocence.

2.6.1.2.Hindsight Bias

This hindsight bias is the tendency for people with outcome knowledge to believe falsely that they would have predicted the reported outcome of an event.⁷¹ In the basic experiment, participants are given a set of possible outcomes and are told which one of them is true.⁷² For example, two judges are given two versions of a statement A and B. Version A states that there is a high possibility of verdicts predicted by the media in the coverage of criminal proceedings to be true. On the other hand, version B states that there is a low possibility of the verdicts predicted by the media in the coverage of criminal proceedings to be true. They are then asked to assess the probability of each outcome.⁷³ Although the

⁶⁶ *Minister van Polisie v Van der Vyver* (861/2011) [2013] ZASCA 39

⁶⁷ *Minister van Polisie v Van der Vyver*.

⁶⁸ *Minister van Polisie v Van der Vyver*.

⁶⁹ *Minister van Polisie v Van der Vyver*.

⁷⁰ *Minister van Polisie v Van der Vyver*.

⁷¹ Hawkings, Scott A, Hastie and Reid, 'Hindsight: Biased judgements of past events after the outcomes are known' 107(3) *Psychological Bulletin* (1990), 311-327.

⁷² Peer E and Gamliel E, 'Heuristics and biases in judicial decisions', 115.

⁷³ Peer E and Gamliel E, 'Heuristics and Biases in Judicial Decisions', 115.

different judges are told that different outcomes are true, all assign higher probabilities to the outcome told to be true, no matter what it is.⁷⁴

In the end, what the experiment means is that no matter what the finding was, the judges had the impression that they 'knew it all along'.

2.7. Conclusion

In conclusion, the environment is a factor that influences people's opinions. The media is a part of the environment and thus, it is capable of influencing judge's opinions to cause bias.

⁷⁴ Peer E and Gamliel E, 'Heuristics and Biases in Judicial Decisions', 115.

3. JUDICIAL DECISIONS: AN END OF JUSTICE OR PREJUDICE

3.1.Introduction

In the previous chapter, the media has been seen to have the power to affect human perception, understanding, feeling, and value; and how our interaction with media facilitates or impedes our chances of survival.⁷⁵ This is because media as a part of the environment tells us what we know about the world, what is happening around us, what environment we are living in, what is right and what is wrong, how to live our lives successfully and what is acceptable by the society.⁷⁶ Therefore, media is valuable, however, at the same time, it is that parasite which kills the impartiality of the judiciary if the same Judiciary fails to acknowledge the same fact.⁷⁷ The right to freedom of expression and information by the media must be regulated to the extent that in the exercise of that right, the media respects the rights and reputation of others and that they do not violate the rights and freedoms of others.⁷⁸ This chapter is going to look into media oversight structures in the portrayal of criminal proceedings and provide instances when the media has been seen to overstep its role in portraying criminal proceedings.

3.2.The Role of the Media in Reporting Crime in Kenya

3.2.1. The Media Council of Kenya

The Media Council of Kenya is an independent national institution established by the Media Council Act 2013 (MCA) for purposes of setting of media standards and ensuring compliance with those standards as set out in Article 34(5) of the Constitution and for connected purposes. To add to that, the Code of Conduct for the Practice of Journalism as entrenched in the Second Schedule of the Act governs the conduct and practice of all media practitioners in the country.

The MCA provides for various codes of conduct that journalists, media practitioners, foreign journalists or media enterprises must adhere to. Among these codes of conduct are:

⁷⁵ Logan RK, 'The biological foundation of media ecology, 3.

⁷⁶ 'Kiaialiisa: Media ecology: How media and new media influence life', 3 December 2012 <https://kaiialiisa.wordpress.com/2012/12/03/media-ecology-how-media-and-new-media-influences-life/> on 7 February 2017.

⁷⁷ 'Ombo Malumbe: Doctrine of res sub judice' 19 July 2014 <https://ombomalumbe.wordpress.com/2014/07/19/doctrine-of-res-sub-judice/> on 6 March 2018.

⁷⁸ *John Kamau Mbugua v Standard Limited and Another* [2015] eKLR

- 1) A person subject to this Act shall write a fair, accurate and an unbiased story on matters of public interest;
- 2) All sides of the story shall be reported, wherever possible;
- 3) Comments shall be sought from anyone who is mentioned in an unfavourable context and evidence of such attempts to seek the comments shall be kept.⁷⁹

Arguing from these requirements on the code of conduct for the practice of journalism under the MCA, it seems that the media was able to write a fair, accurate and an unbiased story on this matter of public interest in the case of Mr Samuel Ndung'u who had been accused of allegedly colluding with other men in murdering his wife.⁸⁰ An autopsy that was carried out had presented that the lady had been raped, beaten to death and that corrosive chemical were present in her mouth indicating that she had been forced to take it before her demise.⁸¹ The media was able to write down all sides of the story by focusing on what the allegations were and what the accused person had to say for himself. This was achieved by the obtaining of comments that from the accused who had been mentioned in an unfavourable context. Comments a witness who had been present to notice an alleged kidnap of the victim by her husband and the other perpetrators of the crime were put into consideration. All in all, the media did take note of the requirements under the second schedule of the Media Council Act.

The media is central to expanding the democratic space for people to not only access information on parties, politicians and policies, but to express an opinion in the public sphere.⁸² It seems to me that crime is also a matter that falls under this. By definition, crime is an illegal act, omission or event, with consequences that the offender, if detected and a decision is made to prosecute him, is prosecuted by or in the name of the state, and if found guilty is liable to be punished.⁸³ A crime is a wrong which harms the society.⁸⁴ Therefore, it seems that since crime harms the society then it is a matter of public interest.

⁷⁹ Section Schedule, *Media Council Act* (Act No. 46 of 2013)

⁸⁰ 'James Kohangeh: Njambi killers forced her to take acid' *Daily Nation*, on 1 February 2018, 2.

⁸¹ 'James Kohangeh: Njambi killers forced her to take acid', 2.

⁸² 'Amateur Longlist: Making peace not war: The role of the media in Kenya' *The Guardian*, 23 July 2009 <https://www.theguardian.com/journalismcompetition/making-peace-not-war> on 5 March 2018.

⁸³ Musyoka W, *Criminal law*, Law Africa Publishing Ltd, 2013, 4.

⁸⁴ Musyoka, *Criminal law*, 5.

3.2.2. Instances Where the Media has Been Seen to Overstep its Role in Portraying Criminal Proceedings

In contrast, the media has been noted before to act as an aid in the furtherance of crime. Take for instance the post-election violence after the 2007 general elections of Kenya where the media was claimed to have actively incited violence. Vernacular radio stations were involved in the incitement of people along ethnic lines.⁸⁵ Thus, it is quite clear that a grossly biased media (in this case the vernacular radio in some rural areas) has the potential to undermine democracy through prioritising identity politics and circumventing impartiality under the sway of political patronage and personal bribery.⁸⁶

In the 1994 Rwanda genocide, both domestic and international news media played a crucial role in propagating it.⁸⁷ There was the strange dichotomy of local media, on one side, fuelling the killing while international media, on the other side, virtually ignored or misunderstood what was happening.⁸⁸ The local media, particularly the extremist radio station Radio-Télévision Libre des Milles Collines (RTL), were literally part of the genocide.⁸⁹

The media should report crime in an effort to promote peace and harmony among people. Moreover, the focus of criminal proceedings has changed in recent decades, from gathering, presenting and evaluating evidence for and against the defendant to becoming, through mass-media coverage and globalisation, more of a reflection of public opinion on important news items and issues of political and social interest (as, for example, in government corruption cases). Thus, the effectiveness of criminal proceedings and control of the mass media can be excellent ways for gaining people's trust in government institutions and even to prevent crime being committed.

The media plays a central role in informing the public about what happens in the world, particularly in those areas in which audiences do not possess direct knowledge or experience.⁹⁰ This is because every citizen has the right of access to information held by

⁸⁵ Commission of Inquiry into the Post-Election Violence report (2008), 41.

⁸⁶ 'Amateur Longlist: Making peace not war: The role of the media in Kenya', on 5 March 2018.

⁸⁷ Dallaire R, *The media and the Rwanda Genocide*, Fountain Publishers, Kampala, 2007, 12.

⁸⁸ Dallaire, *The media and the Rwanda Genocide*, 12.

⁸⁹ Dallaire, *The media and the Rwanda Genocide*, 12.

⁹⁰ Happer C and Philo G, 'The role of the media in the construction of public belief and social change' 1 *Glasgow University Media Group* (2013), 1.

the state and information held by another person and required for the exercise or protection of any right of fundamental freedom.⁹¹ The Constitution under Article 35 also provides for this right to information.

3.3.Sub judice Rule and Media in Kenya

The term sub judice relates to the discussion of any matter that is before the court prior to its determination.⁹² In the literal sense sub judice means “under judicial consideration” and, therefore, prohibited from public discussion.⁹³ It is part of the law relating to contempt of court which is punished by imprisonment, fine, and whatever other sanctions the court may deem fit.⁹⁴

The freedom of the media does not embrace the freedom to commit contempt of court. The media commits the offence of contempt of court when it makes use of any speech or writing misrepresenting such proceeding or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority taken a judicial proceeding is pending.⁹⁵

It is valuable to note that most of the media platforms will always have a partisan view on certain matters which consequently sways their viewers on certain matters.⁹⁶ Media as a platform leverages most people than any other platform thus, once the media instils its ideology of a certain happening to a given matter, the faithful subordinating viewers to that media platform will believe that what was uttered was true.⁹⁷ Hence, the Courts findings might be in favour of this partisan view.

3.4.Instances where the Media has been in Contempt of Court in Kenya

After Kenya’s General Elections of 8th August 2017, the National Super Alliance (NASA) coalition filed at the Supreme Court of Kenya a petition that challenged President Uhuru

⁹¹ Article 4(1), *Access to Information Act* (Act No. 31 of 2016)

⁹² ‘Ombo Malumbe: Doctrine of res sub judice’ 19 July 2014 <https://ombomalumbe.wordpress.com/2014/07/19/doctrine-of-res-sub-judice/> on 6 March 2018.

⁹³ ‘Peter Mwaura: Relax, judges told over sub judice rule’, on 6 March 2018.

⁹⁴ ‘Peter Mwaura: Relax, judges told over sub judice rule’, on 6 March 2018.

⁹⁵ Section 27(f), *Contempt of Court Act* (Act No. 46 of 2016)

⁹⁶ ‘Ombo Malumbe: Doctrine of res sub judice’, on 6 March 2018.

⁹⁷ ‘Ombo Malumbe: Doctrine of res sub judice’, on 6 March 2018.

Kenyatta's win. No sooner had this been done than there was a media spiral around the matter. The discussion in the media was so intensive to the extent that the Supreme Court and the Law Society of Kenya cautioned members of the public and parties to the presidential election petition against publicly discussing the matter.⁹⁸ This was done in order to ensure impartial determination and, as stated by the court, it was aimed at sustaining independence of the court and for the cause of justice.⁹⁹

This caution extended to petitioners, respondents and any other party to the petition including their agents, advisors or supporters, in adherence to the sub judice were directed to refrain from prosecuting the merits of their case(s) in any forum other than the court.¹⁰⁰ The Supreme Court went further to say that such statements would have been intended or would have been perceived as intended to direct the court on conduct of the petition.¹⁰¹

3.5. Infringement of the Right to an Impartial Court

Article 14 of the Constitution of Kenya incorporates the principle of equality before law and equal protection of laws. This study will look into how the media may have indirectly affected the judicial decisions in Kenya. In order to establish that there is need for discussing what the various legislations surrounding the right to presumption of innocence, the right to access an impartial court and finally the freedom of expression of the media as provided under Article 33 of the Constitution of Kenya.

3.6. The Presumption of Innocence

Human rights are indefeasible and inalienable entitlements of human beings as human beings whatever their social-economic standing, race, tribe, religion, politics, ideology and other factors that differentiate human beings.¹⁰² The right to an impartial court is linked very closely to the presumption of innocence. Each is to be respected and protected for the

⁹⁸ 'Judy Nguta: Supreme Court, LSK caution against public comments on presidential petition' *The Standard* 23 August 2017 <https://www.standardmedia.co.ke/article/2001252304/supreme-court-lsk-caution-against-public-comments-on-presidential-petition> on 6 March 2018.

⁹⁹ 'Judy Nguta: Supreme Court, LSK caution against public comments on presidential petition', on 6 March 2018.

¹⁰⁰ 'Judy Nguta: Supreme Court, LSK caution against public comments on presidential petition', on 6 March 2018.

¹⁰¹ 'Judy Nguta: Supreme Court, LSK caution against public comments on presidential petition', on 6 March 2018.

¹⁰² Lumumba and Franceschi, *The Constitution of Kenya 2010: An introductory commentary*, Strathmore University Press, 2014, 121.

other to be realized. The presumption of innocence, which places the burden of proof in criminal proceedings on the prosecution, is to be found in most declarations of human rights and constitutional bills of rights.¹⁰³

3.6.1. International Laws on the Presumption of Innocence

Article 6(2) of the European Convention on Human Rights¹⁰⁴ provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. In the case of *Telfner v. Austria*¹⁰⁵, the applicant asserted that the criminal courts had disregarded the presumption of innocence laid down in Article 6(2) of the Convention.¹⁰⁶ Furthermore, he claimed that even if it had been established that he generally used the car which was at issue for an accident, neither this fact nor the fact that he had not passed the night at his mother's house permitted the "sole, unequivocal conclusion" that he had driven the car at the time of the accident.¹⁰⁷ He claimed that the conclusion was arbitrary and violated the presumption of innocence in that it wrongly placed the burden of proof on the defence.¹⁰⁸

In giving its judgment the European Court of Human Rights noted that the national courts had relied in essence on a report of the local police station that the applicant was the main user of the car and had not been home on the night of the accident which were not corroborated by evidence taken at the trial.¹⁰⁹ In the Courts opinion, in requiring the applicant to provide an explanation the courts shifted the burden of proof from the prosecution to the defence.¹¹⁰ In addition, the Court noted that the national courts had speculated about the possibility of the applicant having been under the influence of alcohol which had not supported by any evidence.¹¹¹ Although such speculation was not directly relevant to establishing the elements of the offence with which the applicant had been charged, it contributed to the impression that the courts had a preconceived view of the

¹⁰³ Ashworth A, 'Four threats to the presumption of innocence' 123.1 *South African Law Journal* (2006), 63-97.

¹⁰⁴ *European Convention on Human Rights*, 4 November 1950.

¹⁰⁵ *Telfner v. Austria*, 33501/96 (2001) in the European Court of Human Rights, Judgement.

¹⁰⁶ *Telfner v. Austria*, 12.

¹⁰⁷ *Telfner v. Austria*, 13.

¹⁰⁸ *Telfner v. Austria*, 13.

¹⁰⁹ *Telfner v. Austria*, 18.

¹¹⁰ *Telfner v. Austria*, 18.

¹¹¹ *Telfner v. Austria*, 19.

applicant's guilt.¹¹² Therefore, the Court found that there had been a violation of Article 6(2) of the Convention.

In addition to the international laws on the presumption of innocence, Article 14(2) of the 1966 International Covenant on Civil and Political Rights provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. Furthermore, Article 8(2) of the 1969 American Convention on Human Rights provides that every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law. Moreover, Article 7(1) of the 1981 African Charter on Human and Peoples' Rights provides that every individual shall have the right to have his cause heard which comprises of inter alia the right to be presumed innocent until proved guilty by a competent court or tribunal. Finally, Article 66 of the 1998 International Criminal Court Statute on the presumption of innocence provides that:

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

In conclusion and as stated above, the presumption of innocence is to be found in most declarations of human rights and constitutional bills of rights.¹¹³

3.6.2. Kenyan Laws on the Presumption of Innocence

A fair trial is required for correct sentencing.¹¹⁴ In Kenya fair trial principles are set out under Article 50 of the Constitution. They include the right to a fair public hearing before a competent tribunal and the right to a fair trial.¹¹⁵ To add to that, Article 50(2) of the Constitution states that every accused person has the right to be presumed innocent until

¹¹² *Telfner v. Austria*, 19.

¹¹³ Ashworth A, 'Four threats to the presumption of innocence', 63-97.

¹¹⁴ Lumumba and Franceschi, *The Constitution of Kenya 2010*, 230.

¹¹⁵ Article 50, *Constitution of Kenya* (2010)

the contrary is proved. The presumption of innocence underlines the criminal law of Kenya.¹¹⁶

In the case of *John Chikamai v. Republic*¹¹⁷, the Appellant raised a ground of Appeal that the Trial Magistrate in the lower court had erred in Law in failing to appreciate the fact that the Appellant, in some alleged paedophile cases that had been preferred against, was supposed to be presumed innocent until proved guilty.¹¹⁸ The judge in giving his judgement stated that the lower court's ruling ought to have demonstrated that the court had taken into account the right to the presumption of innocence to which an accused is entitled until he is proven guilty.¹¹⁹ Therefore, it was the Court's opinion that the prosecution should raise compelling reasons sufficient to override the considerations of the Appellant's right to a presumption of innocence.¹²⁰

3.7.The Right to an Impartial Court

The principle that a court of law should be independent and impartial is firmly embedded in all legal systems and in all major international human rights instruments.¹²¹ It is a possible consequence of the denial of the right of the presumption of innocence until the contrary is proven.

3.7.1. International Laws on the Impartiality of the Courts

All general universal and regional human rights instruments guarantee the right to a fair hearing in criminal proceedings before an independent and impartial court or tribunal. To begin with, Article 6(1) of the European Convention on Human Rights provides that in the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.¹²²

To add to that, Article 10 of the Universal Declaration of Human Rights provides that everyone is entitled in full equality to a fair and public hearing by an independent and

¹¹⁶ Musyoka, *Criminal law*, 63.

¹¹⁷ *John Chikamai v. Republic* [2015] eKLR, in the Court of Appeal Judgement of 22 April 2016 at Naivasha.

¹¹⁸ *John Chikamai v. Republic*, 3.

¹¹⁹ *John Chikamai v. Republic*, 14.

¹²⁰ *John Chikamai v. Republic*, 15.

¹²¹ Article 6(1), *European Convention on Human Rights*.

¹²² Article 6(1), *European Convention on Human Rights*.

impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

3.7.2. Kenyan Laws on the Impartiality of the Courts

This fundamental right of an accused is generally recognized as being an integral component of the requirement that an accused should have a fair trial as illustrated in Article 50 of the Constitution of Kenya. Here, every person has the right to have any dispute that can be resolved by the application of law decided before inter alia an impartial court.¹²³

However, as stated in the first chapter not much has been said nor discussed in the Kenyan courts concerning the impact of media coverage of criminal trials on the impartiality of the courts. My research on the Court of Appeal cases from January 2011 to January 2018 did not yield much fruit as not much has been said by the courts concerning the subject matter. Most cases that involved the media did not mention what impact the media would have on judges at large.

3.8. Conclusion

There are several legislations, both national and international, that protect the rights of an accused person. The media plays a role in informing the public of criminals and the crime. However, media portrayal of criminal proceedings should be guided as it may be prone to abuse.

¹²³ Article 50(1), *Constitution of Kenya* (2010)

4. JUDICIAL DECISIONS ON THE IMPACT OF MEDIA COVERAGE OF CRIMINAL TRIALS ON THE IMPARTIALITY OF THE COURTS

4.1.Introduction

As previously discussed, the media plays a central role in informing the public about what happens in the world, particularly in those areas in which audiences do not possess direct knowledge or experience.¹²⁴ However, this role has been seen to go over and beyond what legislation provides under the Media Council Act and the Constitution of Kenya under Article 35. This chapter is going to state the freedom of expression of the media and thus, present evidence and data on judicial decisions of criminal proceedings where the media has been stated to have infringed on a person's presumption of innocence and thus, the right to impartiality of the courts.

4.2.What Foreign Courts have said Concerning the Impact of Media Coverage of Criminal Proceedings on the Impartiality of the Courts

In the case of *Manu Sharma v. State*, the Indian Apex Court extensively observed about the danger of trial by media.¹²⁵ It held that there is danger of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom such that it publishes photographs of the suspects or the accused before the identification parades are constituted or if the media publishes statements which out rightly hold the suspect or the accused guilty even before such an order has been passed by the court.¹²⁶

In *Attorney General v. Guardian Newspapers Ltd*, the House of Lords observed that in assessing whether there has been a violation of the right to a fair trial, courts must determine whether the risk of prejudice from the publication is both immediate and serious.¹²⁷ The courts must consider the nature of the published material and its presentation, the timing of the publication, the likelihood of its coming to the attention of

¹²⁴ Happer C and Philo G, 'The role of the media in the construction of public belief and social change' 1 *Glasgow University Media Group* (2013), 1.

¹²⁵ *Manu Sharma v. State* (NCT of Delhi), (2010) 6 SCC 1

¹²⁶ *Manu Sharma v. State* (NCT of Delhi), (2010) 6 SCC 1

¹²⁷ *Attorney General v Guardian Newspapers Ltd* 2 HL 1988

jurors or potential jurors, the likely impact on the jury and the ability of the jury to abide by any judicial directions which seek to neutralise any prejudice.¹²⁸

The United States Supreme Court in the case of *Murphy v. Florida* laid down the totality of circumstances test in order to determine whether the pre-trial publicity had adversely affected the fairness of the trial or not.¹²⁹ In this case, the Court was seized of the issue whether the petitioner had been denied a fair trial because members of the jury had learned from news accounts about a prior felony conviction or certain facts about the crime with which he was charged.¹³⁰ The Court observed that Juror exposure to information about a State defendant's prior convictions or to news accounts of the crime with which he is charged do not alone presumptively deprive defendant of due process.¹³¹ Such exposure must be viewed with the totality of the circumstances to determine whether the trial was fundamentally unfair.¹³²

The United States Supreme Court in the case of *Rideau v. the State of Louisiana* laid down the presumed prejudice test.¹³³ In this case the Court presumed the prejudice caused by the broadcasting of the confession interview of the defendant, who was charged with murder, which was televised three times to large local audiences.¹³⁴ Since so many potential jurors from the small local community had viewed the confession, the defence counsel for Rideau moved for a change of venue which the trial court denied and the defendant was convicted of capital murder.¹³⁵ The Supreme Court overturned the defendant's conviction finding that the television confession along with the kangaroo court proceedings violated the defendant's due process rights.¹³⁶ Thus, the Supreme Court, due to the presumed jury prejudice, found it unnecessary to even examine a particularized transcript of the voir dire.¹³⁷

¹²⁸ *Attorney General v Guardian Newspapers Ltd*

¹²⁹ *Murphy v. Florida* 421 U.S. 794 (1975)

¹³⁰ *Murphy v. Florida*

¹³¹ *Murphy v. Florida*

¹³² *Murphy v. Florida*

¹³³ *Rideau v. Louisiana* 373 U.S. 723 (1963)

¹³⁴ *Rideau v. Louisiana* 373

¹³⁵ *Rideau v. Louisiana*

¹³⁶ *Rideau v. Louisiana*

¹³⁷ *Rideau v. Louisiana*

Justice R S Chauhan in his article ‘Trial by Media: An International Perspective’ states that pre-trial publicity convinces the witnesses to custom-tailor their testimony to the prosecution case.¹³⁸ Most importantly, the appreciation of the evidence by the public and the judiciary may differ because while the people are convinced of the guilt of the accused, the court, after meticulous examination of the evidence may acquit him.¹³⁹ Such differences in perception weaken the faith of the public in the criminal justice system which, ultimately, undermines the criminal justice system and overturns the rule of law. Therefore, we learn that prior exposure to the facts of a case by a judge causes court partiality as conclusions are made even before the case is heard.

4.3. African Regional Judicial Opinions

Media has also been shown to affect the status of witnesses. In the case of *State v. Pistorius*, the accused had been charged with several counts including the murder of his girlfriend, Reeva Steenkamp.¹⁴⁰ The witnesses in giving their evidence claimed that they had heard a woman scream.¹⁴¹ The trial judge, Justice Masipa, stated that most witnesses got their facts wrong.¹⁴² This is because the injuries that had been sustained by the victim would have led to immediate death.¹⁴³ Therefore, the screams that were allegedly heard could not have been the victim’s but the accused.¹⁴⁴ In writing her judgement she alluded this to the fact that this case attracted much media attention, especially soon after the incident.¹⁴⁵

Almost every witness who was asked under cross-examination if he or she had followed the news relating to the events or the bail proceedings or the trial proceedings responded positively.¹⁴⁶ Justice Masipa was of the view that some witnesses had probably failed to separate what they knew personally, from what they had heard from other people or what

¹³⁸ Justice Chauhan RS, ‘Trial by media’, 1.

¹³⁹ Justice Chauhan RS, ‘Trial by media’, 1.

¹⁴⁰ *The State v Oscar Leonard Carl Pistorius* [2014], in the High Court of South Africa Judgement of 9th November 2014.

¹⁴¹ *State v Pistorius*, Judgement.

¹⁴² *State v Pistorius*, Judgement.

¹⁴³ *State v Pistorius*, Judgement.

¹⁴⁴ *State v Pistorius*, Judgement.

¹⁴⁵ *State v Pistorius*, Judgement.

¹⁴⁶ *State v Pistorius*, Judgement.

they had gathered from the media.¹⁴⁷ This affected the credibility of witnesses who would have unwittingly relayed what he or she had heard elsewhere as though he or she had personal knowledge of the events.¹⁴⁸

4.4. Kenyan Judicial Opinions

In Kenya, trial by media is a recent phenomenon. Hence, we find sporadic obiter there is no concrete ratio decidendi. However, media publicity is capable of converting into “trial by press” at the extreme.¹⁴⁹ In the judge’s view, the adverse media publicity may negatively impact upon the rights of an accused person.¹⁵⁰ This is particularly where the reporting extended to opinions that that amounted to pre-judging the Applicant’s guilt.¹⁵¹ The court found that press releases by the respondent had an adverse impact on the applicant’s constitutional rights to fair trial.¹⁵² This was particularly due to the element of subjectivity in such reporting.¹⁵³

As in the case of *Manu Sharma v. State*, the serious risk of prejudice has been posed where the media has exercised an unrestricted and unregulated freedom such that it has published photographs of the suspects or the accused and where it has published statements which out rightly hold the suspect or the accused guilty even before such an order has been passed by the court.¹⁵⁴ For instance, the arson killed nine students at the Moi Girls High School was linked to one of the form one students.¹⁵⁵ The media went ahead to display the pictures of the accused student, without regard to the fact that she was a minor, and even aired evidence that was linked to the case based on what other students were saying regarding the said girl.¹⁵⁶ This was an infringement of the girl’s right to a fair trial.

¹⁴⁷ *State v Pistorius*, Judgement.

¹⁴⁸ *State v Pistorius*, judgement.

¹⁴⁹ *Republic v Attorney General and 3 others Ex-Parte Kamlesh Mansukhlal Damji Pattni*, [2003], 80.

¹⁵⁰ *Republic v Attorney General and 3 others Ex-Parte Kamlesh Mansukhlal Damji Pattni*, 80.

¹⁵¹ *Republic v Attorney General and 3 others Ex-Parte Kamlesh Mansukhlal Damji Pattni*, 80.

¹⁵² *Republic v Attorney General and 3 others Ex-Parte Kamlesh Mansukhlal Damji Pattni*, 80.

¹⁵³ *Republic v Attorney General and 3 others Ex-Parte Kamlesh Mansukhlal Damji Pattni*, 80.

¹⁵⁴ *Manu Sharma v. State* (NCT of Delhi), (2010) 6 SCC 1

¹⁵⁵ ‘Bernard Momanyi: Suicidal girl sets Moi Girls School on fire killing 9: Police’ *Capital News*, 4 September 2017 <https://www.capitalfm.co.ke/news/2017/09/suicidal-girl-set-moi-girls-school-on-fire-killing-9-police/> on 2 April 2018.

¹⁵⁶ ‘Bernard Momanyi: Suicidal girl sets Moi Girls School on fire killing 9’, on 2 April 2018.

4.5. Conclusion

The study has found that judges, like other humans, have been found to suffer from limitations other than limited information processing capabilities in their human decision making.¹⁵⁷ This makes them prone to bias which may lead to court partiality when it comes to decision making in criminal cases. Consequently, this not only infringes upon an accused person's right to an impartial court is but also on an accused person's right to the presumption of innocence until the contrary is proven.

The study has found that the media may affect judicial decisions either directly through bias or indirectly through the public pressure. This is because the media is like a giant beast: Its teeth are persuasion, its eyes information, and its hands formation of public opinion.¹⁵⁸ Therefore, the media's opinion on the presumption of guilt before a fair criminal trial may subconsciously affect the court's decision.

This chapter has presented evidence the infringement of the right to impartiality of the courts as a consequence of media coverage. This has been done on a national, regional and international perspective.

¹⁵⁷ George, Duffy and Ahuja, 'Countering the anchoring and adjustment bias with decision support systems', 195.

¹⁵⁸ Lumumb and Franceschi, *The Constitution of Kenya 2010*, 172.

5. CONCLUSIONS AND RECOMMENDATIONS

5.1.Introduction

Following the discussions before this chapter, the objective of this chapter is to present in a concise form a chapter breakdown of the research, conclusion and it will provide recommendations for practice or improvement.

5.2.Summary of the Chapters

Chapter one was an introductory chapter into the research problem which was that the media may infringe upon an accused person's right to a fair trial by influencing a judge's decision to cause bias.

Chapter two introduced a theoretical framework that showed the environment as a factor that influences people's opinions. It further linked the media to the environment thus its capability of influencing judge's opinions to cause bias. As a consequence, it provided a conceptual framework that showed how bias may arise in courts as a result of media influence.

Chapter three looked into the role of the media in portraying criminal proceedings and provided instances where the media had been seen to overstep its role in portraying criminal proceedings.

Chapter four was focused on presenting evidence and data on judicial decisions of criminal proceedings where the media had been found to have infringed on a person's right to impartiality of the courts. This was done on a national, regional and international level.

Following the discussions before this chapter, the objective of chapter five is to present in a concise form a chapter breakdown of the research, conclusion and it will provide recommendations for practice or improvement.

5.3.Conclusion

The public highly relies on media representations of facts and cases, views of law, the legal system.¹⁵⁹ Therefore, as stated above the media acts as an agent for the public by reporting

¹⁵⁹ Hans and Dee, 'Media Coverage Law', 136.

matters of general importance.¹⁶⁰ It has been established that media opinion may directly affect public opinion. In Kenya, the media has freedom of expression under Article 33 of the Kenyan Constitution. However, as provided for under Article 24 of the Constitution, this is not an illimitable right. It can be limited by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.¹⁶¹ The media's freedom is not an absolute right and the State plays an important role in limiting it, especially through the screening and censorship and sometimes the banning of certain shows in the interest of public morals.¹⁶² Therefore, in interest of an accused person's inherent dignity as provided for under Article 28 of the Constitution which is a right that ought to be respected and protected, the media's freedom of expression should be limited where the accused person's right to presumption of innocence and access to an impartial court begins. Thus, the right of free media and the right of fair trial must peacefully co-exist.

5.4.Recommendations

5.4.1. Balancing the Media's Freedom of Expression and the Right to Fair Trial of an Accused Person

Under the fundamental right of freedom of speech and expression, the media claims the right to investigate, to reveal, to expose and to highlight the criminal cases as in a democracy the people have the right to be informed.¹⁶³ Therefore, the media has a corresponding duty to inform the people about the criminal and the crime thus, demanding the right to carry on pretrial publicity. Yet, on the other hand, the judiciary is keenly aware of the fundamental rights of the accused to a fair trial and of due process of law. Since pretrial publicity can derail a fair and a speedy trial, the judiciary has to balance the competing fundamental rights. While the freedom of speech and expression of the media, the right to know of the people need to be protected and promoted, the right to fair trial of the accused needs to be secured and guaranteed. The O.J. Simpson trial, in particular, is

¹⁶⁰ *British Steel Corporation v. Granada Television Ltd*, (1981).

¹⁶¹ Article 24, *Constitution of Kenya* (2010)

¹⁶² Lumumba and Franceschi, *The Constitution of Kenya 2010*, 173.

¹⁶³ Justice Chauhan RS, 'Trial by media: An international perspective' (2011), 1.

frequently cited as a clear illustration of the difficulty of harmonizing a strong commitment to freedom of the press and principles of fair trial in a time of saturation coverage.¹⁶⁴

5.4.2. Proper Legislation of the Issue of Media Coverage of Criminal Trials

Article 2(5) of the Constitution of Kenya provides that the general rules of international law shall part of the law of Kenya. Since the notion of trial by media seems to be a rising issue in Kenya, there is need for proper legislation that will govern the media coverage of criminal trials. Courts in Kenya can borrow principles from decided international case law. Such would include the totality of the circumstances test and the presumed prejudice test as discussed in chapter four. This would help in identifying exactly when an accused person's right to an impartial court has been infringed.

5.4.3. Theoretical Recommendation

The right of an accused person to a fair hearing in an impartial court may border with the freedom of expression of the media. There is need for a proper framework that will function as the border to limit the media's freedom of expression to specific information that can be covered in the criminal trials. This is in a bid to end what can be called "*trial by media*". Yes, the public has the right to be informed of any matter that concerns them in their interest, but media speculation of criminal trials impact heavily on the public.

Indeed there is legislation that that ensures that the freedom of the media is not an absolute right under Article 24 of the Constitution but there is need for a specific law that will limit the media's freedom of expression to the extent that it will not injure an accused person's right under Article 50 of the same Constitution.

¹⁶⁴ Resta G, 'Law and contemporary problems' 71.4 *Duke University School of Law* (2008), 31.

BIBLIOGRAPHY

Books

- Dallaire R, *The media and the Rwanda Genocide*, Fountain Publishers, Kampala, 2007.
- Lumumba PLO and Franceschi L, *The Constitution of Kenya 2010: An Introductory Commentary*, Strathmore University Press, 2014.
- Mbiti D N, *Foundations of school administration*, Oxford University Press, Upper Hill, 2007.
- Musyoka W, *Criminal Law*, LawAfrica Publishing Ltd, 2013.
- Nsamenang BA, *Ecocultural theories of development*, Elsevier Limited, Bamenda, Cameroon, 2015.
- Scott J, *Understanding Contemporary Society: Theories of the Present*, Sage Publications Limited, London, 2000.

Journal Articles

- Ashworth A, 'Four threats to the presumption of innocence' 123.1 *South African Law Journal* (2006).
- Boykoff MT, 'Environment and the media' 15 *International Encyclopaedia of Geography* (2017).
- George J F, Duffy K and Ahuja M, 'Countering the anchoring and adjustment bias with decision support systems' 29 *Elsevier Science B.V.* (2000).
- Hans V P and Dee J L, 'Media coverage law: Its impact on juries and the public' 35.2 *American Behavioural Scientist* (1991).
- Happer C and Philo G, 'The role of the media in the construction of public belief and social change' 1 *Glasgow University Media Group* (2013).
- Hawkings, Scott A, Hastie and Reid, 'Hindsight: Biased judgements of past events after the outcomes are known' 107(3) *Psychological Bulletin* (1990).

Logan RK, 'The biological foundation of media ecology: Explorations in media ecology' 6.1 *OCAD University Open Research Repository* (2007).

Mutahi P and Kimari B, 'The impact of social media and digital technology on electoral violence in Kenya' 493 *Institute of Development Studies* (2017).

Peer E and Gamliel E, 'Heuristics and biases in judicial decisions' 49 *Court Review* (2001).

Resta G, 'Law and contemporary problems' 71.4 *Duke University School of Law* (2008).

Scheufele D A and Tewksbury D, 'Framing, agenda setting and priming: The evolution of three media effects models' 57 *Journal of Communication* (2007).

Tharler J, 'Punishing the innocent: The need for due process and the presumption of innocence prior to trial' 2 *Wisconsin Law Review* (1978).

Vasterman P, 'Media-hype: Self-reinforcing news waves, journalistic standards and the construction of social problems' 20 *European Journal of Communication* (2005).

Reports

BBC media action 'Research summary exploring governance in Kenya' *BBC News Centre* (2012).

Commission of Inquiry into the Post-Election Violence report (2008).

Report to Chief Justice on In-Court Media Coverage in New Zealand, (2015).

Dissertation

Kalyango Y, 'Media performance and democratic rule in East Africa: Agenda setting and agenda building influences on public attitudes' Unpublished Thesis, University of Missouri, May 2008.

Newspaper Articles

'James Kohangeh: Njambi killers forced her to take acid' *Daily Nation*, on 1 February 2018.

Internet Resources

'Amateur Longlist: Making peace not war: The role of the media in Kenya' *The Guardian*, 23 July 2009 <https://www.theguardian.com/journalismcompetition/making-peace-not-war>.

‘Bernard Momanyi: Suicidal girl sets Moi Girls School on fire killing 9: Police’ *Capital News*, 4 September 2017 <https://www.capitalfm.co.ke/news/2017/09/suicidal-girl-set-moi-girls-school-on-fire-killing-9-police/>.

‘Judy Nguta: Supreme Court, LSK caution against public comments on presidential petition’ *The Standard* 23 August 2017 <https://www.standardmedia.co.ke/article/2001252304/supreme-court-lsk-caution-against-public-comments-on-presidential-petition>.

‘Kiaialiisa: Media ecology: How media and new media influence life’, 3 December 2012 <https://kaialiisa.wordpress.com/2012/12/03/media-ecology-how-media-and-new-media-influences-life/>.

‘Ombo Malumbe: Doctrine of res sub judice’ 19 July 2014 <https://ombomalumbe.wordpress.com/2014/07/19/doctrine-of-res-sub-judice/>.

‘Peter Mwaura: Relax, judges told over sub judice rule’ *Daily Nation*, 29 August 2014 <https://www.nation.co.ke/oped/opinion/Justice-Sub-Judice-Rule-Constitution-High-Court/440808-2434810-r9yh3vz/index.html>.

‘Victor Amadala: Kenyans still prefer traditional media, says report’ *The Star News*.