

**IMPERCEPTIBLE DEPTHS: ASSESMENT OF THE CONSTRAINTS  
AFFECTING WILDLIFE CRIME PROCEEDINGS IN THE JUDICIARY  
AS A RESULT OF SUBPAR COOPERATION OF THE ARMS OF  
GOVERNMENT**

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

By

Ochwada Aisha Leya

094590

Prepared under the supervision of

PURITY WANGIGI

NOVEMBER2019

Word Count:

## Table of Contents

Acknowledgements .....	iv
Dedication .....	v
Abstract.....	vii
List of Cases.....	ix
List of Statute & Policy, Documents.....	x
<b>CHAPTER ONE: INTRODUCTION .....</b>	<b>1</b>
<b>1.1. Background of the Problem .....</b>	<b>1</b>
<b>1.2. Problem Statement.....</b>	<b>2</b>
<b>1.3. Purpose of the study.....</b>	<b>3</b>
<b>1.4. Hypothesis.....</b>	<b>4</b>
<b>1.5. Research Questions .....</b>	<b>4</b>
<b>1.6. Importance of study .....</b>	<b>4</b>
<b>1.7. Literature Review .....</b>	<b>4</b>
<b>1.8. Theoretical Framework.....</b>	<b>6</b>
<b>1.8.1. Systems Theory&amp; Structural Functionalism .....</b>	<b>6</b>
<b>1.9. Research Design .....</b>	<b>7</b>
<b>1.10. Limitations.....</b>	<b>7</b>
<b>1.11 Definition of Terms .....</b>	<b>7</b>
<b>1.12. Chapter breakdown .....</b>	<b>8</b>
<b>1.12.1. Chapter 1: Introduction .....</b>	<b>8</b>
<b>1.12.2. Chapter 2: Theoretical framework.....</b>	<b>8</b>
<b>1.12.3. Chapter 3: Assessment of the Judiciary’s Efforts in the Fight against Wildlife Crimes .....</b>	<b>8</b>
<b>1.12.4. Chapter 4: Assessment of the Role of KWS and the Legislature.....</b>	<b>9</b>
<b>1.12.5. Chapter 5: Conclusion and Recommendations .....</b>	<b>9</b>
<b>CHAPTER 2: THEORETICAL FRAMEWORK AND METHODOLOGY.....</b>	<b>10</b>
<b>2.1. Introduction.....</b>	<b>10</b>
<b>2.2. Systems Theory .....</b>	<b>10</b>
<b>2.3. Structural Functionalism .....</b>	<b>11</b>
<b>2.4. Critique of the Theories.....</b>	<b>11</b>
<b>2.4.1. Systems Theory .....</b>	<b>11</b>
<b>2.4.2. Functionalism .....</b>	<b>12</b>
<b>2.5 Methodology .....</b>	<b>12</b>
<b>CHAPTER 3: ASSESMENT OF THE JUDICIARY’S EFFORTS IN THE FIGHT AGAINST WILDLIFE CRIMES .....</b>	<b>14</b>

3.1. Introduction.....	14
3.2. The Independence of the Judiciary .....	14
3.3. Case Study of the Issues Affecting the Judiciary .....	15
3.3.1. Backlog of cases.....	15
<b>CHAPTER 4: ASSESSMENT OF THE ROLE OF KWS AS THE RELEVANT EXECUTIVE INSTITUTION AND THE LEGISLATURE IN THE FIGHTS AGAINST WILDLIFE.....</b>	<b>16</b>
4.1. Introduction.....	16
4.2. Concept of Separation of Powers and the Tripartite.....	17
4.3. The Role of the Legislature and the WCMA.....	18
4.4. The Role of KWS as the Relevant Executive Institution .....	20
4.4.1. Security Service.....	21
4.4.2. Case study: Republic V David N Mwathi & 2 others .....	23
4.5. Analysis.....	24
<b>CHAPTER 5: CONCLUSION AND RECOMMENDATION .....</b>	<b>26</b>
5.1. Introduction.....	26
5.2. Chapter Summaries .....	26
5.2.1. Chapter 1 .....	26
5.2.2. Chapter 2 .....	26
5.2.3. Chapter 3 .....	26
5.2.4. Chapter 4 .....	27
5.2.5. Chapter 5 .....	27
5.3. Findings & Recommendation .....	27
5.3.1. Findings.....	27
5.3.2. Recommendations .....	28
<b>Bibliography.....</b>	<b>29</b>

## **Acknowledgements**

I wish to thank my supervisor, Mrs Purity Wangigi, for her patience, guidance and insight throughout this process of writing my dissertation. Support from my good friend Muhammad Ahmad Adaan has also been invaluable

## **Dedication**

This paper is dedicated to my mum, who remains my ride of die.

## **Declaration**

I, **AISHA LEYA OCHWADA**, do hereby declare that this research paper is my original work and that to the best of my knowledge and behalf; 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 the University Supervisor.

Signed.....

Purity Wangigi

## **Abstract**

Kenya ranks among the world's top wildlife destinations and wildlife is a source of national pride, the foundation for the tourism industry that contributes around 10% of National Gross development product (GDP) and 11% of total formal workforce.<sup>1</sup> This major source of revenue as well as national pride and prestige has been under threat with the high rates in which our wildlife population is being put out. There have been institutional efforts that have been made such as the amendment to outdated legislation, that is the Wildlife Conservation and Management Act (2013) to the erection of the wildlife crimes unit in the independent Office of the Director of Public Prosecution. These changes have improved the fight against wildlife crimes with an increase in convictions. Further analysis of the matter shows that poor case management in the judiciary incapacitates this fight however, might there be more that meets the eye?

The arms of the government essentially cooperate together to achieve the goals and objectives of governance. For an objective to be fulfilled, each arm is required to carry out its mandate to its full capacity. This paper seeks to analyse the mandate of the judiciary and investigate whether it has fulfilled its objectives in the fight against wildlife crimes particularly. The avenue of a case study is adopted to scrutinize this. It further goes to assess the mandate of the Legislature and the Kenya Wildlife Service (KWS) which is the relevant Executive body. These are compared and contrasted with the case study to affirm or refute the hypotheses highlighted within.

---

<sup>1</sup>Government of Kenya, *National Tourism Strategy, 2018-2030*, Department of Tourism, Ministry of East Africa, Commerce & Tourism, 2018, 4.

## **List of Abbreviations**

1. **GDP** - Gross Development Profit.
2. **CITES**- Convention on International Trade in Endangered Species of Wild Fauna and Flora
3. **INTERPOL** - International Criminal Police Organization.
4. **KWS** - Kenya Wildlife Services.
5. **ODPP**–Office of the Director of Public Prosecution
6. **WCPU**–Wildlife Crime Prosecution Unit
7. **UNCCPJ**-United Nations Convention Against Transnational Organised Crime
8. **SOJAR**- State of the Judiciary and Administrative Justice Report
9. **INTERPOL**- International Police
10. **eKLR**- Electronic Kenya Law Reports

## **List of Cases**

1. Republic v Feisal Mohammed Ali Alias Feisal Shahbal & 5 others No 1098 of 2014.
2. Republic v David Njeru Mwathi & 2 others No 611 of 2014.
3. Republic v Enock Wekesa & Another No 267 of 2010.

## **List of Statute & Policy, Documents**

1. Constitution of Kenya 2010.
2. Proceeds of Crime and Anti-money Laundering Act No. 9 of 200
3. The Prevention of Organized Crimes Act of 2010
4. Wildlife Conservation and Management Act of 2010
5. The National Wildlife Conservation and Management Policy, Ministry of Forest and Wildlife 2012.

## CHAPTER ONE: INTRODUCTION

### 1.1. Background of the Problem

Kenya ranks among the world's top wildlife destinations generally experiencing the wild in habitats preserved in a near neutral state however in contemporary time, game hunting is banned in Kenya with licenced hunting being regulated under Part IV of the Wildlife Conservation and management Act 2013 (WCMA) and so tourists in recent time come to see the animals and make photographic safaris.<sup>2</sup> Wildlife is not only a source of revenue but additionally a source of great prestige for Kenya. This can be seen in the various uses of wildlife on National symbols in the country such as the Coat of Arms as well as the National seal as is highlighted under the Second Schedule of the Constitution.<sup>3</sup>

Kenya ranks among the world's top wildlife destinations and wildlife is a source of national pride, the foundation for the tourism industry that contributes 10% of National Gross development product (GDP) and 11% of total formal workforce.<sup>4</sup> This major source of revenue as well as national pride and prestige has been under threat with the high rates in which our wildlife population is being put out. Animals such as the elephants and the Northern white rhino in Africa have severely been affected by wildlife crimes and the latter is currently extinct in the wild from years of widespread poaching in their home range devastated.<sup>5</sup> Only two remain, both in Ol Pejeta Conservancy.

Wildlife crime is a good concern affecting various countries across the world; nonetheless, some reasons are more affected than others. By estimate, the illegal wildlife trade on a global scale is operated by transnational organized crime syndicated and valued at an estimated 7-10 billion dollars annually.<sup>6</sup> High profile ivory seizures<sup>7</sup> and court cases indicate that it is prevalent in Kenya at varying scales. North Central Kenya is one of the most critical wildlife refuges in East Africa. It is home to the regions second largest African elephant population and majority of Kenya's black and white rhinos that are considered high value targets for

---

<sup>2</sup>Sindiga I, Wildlife-based Tourism in Kenya: *Land use conflicts and government compensation policies over protected areas*, 6, The Journal of Tourism Studies, 2, 1995, 47

<sup>3</sup> Article 9(2), Second Schedule, *The Constitution of Kenya*, 2010.

<sup>4</sup> Government of Kenya, *National Tourism Strategy, 2018-2030*, Department of Tourism, Ministry of East Africa, Commerce & Tourism, 2018, 4.

<sup>5</sup> Olpejeta Conservancy, Northern <https://www.olpejetaconservancy.org/wildlife/rhinos/northern-white-rhinos/> on 17 February 2019.

<sup>6</sup> Office of the Director of National Intelligence, Special Report: *The Threat to U.S. National Security Posed by Transnational Organized Crime*, 2011.

<sup>7</sup> Akwiri J, Kenya seizes nearly two tonnes of ivory from shipment bound for Cambodia, 22 December 2016 - <https://www.reuters.com/article/us-kenya-ivory-idUSKBN14B0IM-->> on 1 November 2019.

organized wildlife crime syndicates because it holds the highest amount of wildlife outside protected areas in Kenya.<sup>8</sup>

Such numbers reveal the environmental, social and economic cost of wildlife crimes resulting from the illegal trade in their products, the negative impact of investment in tourism as well as the threatened ecosystem and biodiversity. Despite having laws in place, Kenya has been facing the menace of poaching which has largely led to the major depopulation of various species in the country. Kenya has been heavily hit by this poaching epidemic which has led to the extinction of the northern white rhino in the wild as well as the endangerment of other species such as the African elephant as mentioned above.

At the Giants Club Summit in Botswana 2018,<sup>9</sup> the former Director of Public Prosecutions cited the leap in national conviction rates for wildlife crime from 24% to over 80% since the advent of the WCMA.<sup>10</sup> Kenya has made significant advances in her fight against wildlife crime in particular, not just with the legislation but with the creation of a wildlife crime unit at the Independent Office of the Director of Public Prosecutions (ODPP), the development of inter-agency protocols for early and continued prosecution-led investigations and several training events aimed at sensitizing the Judiciary on the impact of such crimes on economies and security.<sup>11</sup>

## **1.2. Problem Statement**

A legal framework targeted to the conservation of wildlife exists and has been reformed by the passing of an extensive act of parliament namely the WCMA, introduction of policies and ratification of international conventions such as Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The recently amended WCMA provides for comprehensive and broad regulations on the protection of national wildlife resources from activities such as poaching however there exists a discrepancy between what is stipulated in the law and the results which are the contentious poaching to the point of bringing a species near extinction in the country.

In the instances whereby alleged criminals are arrested and tried in court, there is still the matter of low conviction rates.

---

<sup>8</sup>A Wildlife Conservation Strategy for Laikipia County (2012-2030): First Edition, 2012. Laikipia Wildlife Forum, Nanyuki, Kenya.

<sup>9</sup>Space for Giants, Giants Club Summit 2018: Summary Report, 16 April 2016 - <https://spaceforgiants.org/2018/04/16/giants-club-summit-2018-summary-report/> on 1 November 2019.

<sup>10</sup>Space for Giants, A Case Study: Analysis of Prosecutions of Ivory, Rhino Horn and Sandalwood Crime in North Central Kenya, Laikipia report 2014-2018, 6.

<sup>11</sup> Space for Giants, A Case Study: Analysis of Prosecutions of Ivory, Rhino Horn and Sandalwood Crime in North Central Kenya, Laikipia report 2014-2018, 6.

What is amiss in the trials of wildlife crimes in Kenya with these laws in place? Could the other arms of the government have a role to play in this? This research paper takes a deeper look into the mandate of the arms of the government in a bid to answer these questions for they are but mere parts of a whole system that each need to carry their weight in order for the system to work effectively. Unfortunately, at the moment, it seems like part of the system is weakened, and it is important to not just look at the external environment, but the internal governmental factors that might be asserting internal weaknesses.

### **1.3. Purpose of the study**

Wildlife crime, which was once overlooked, is now categorized as a crime with the gravitas of others such as organized crimes such as human trafficking by the United Nations Commission on Crime, Prevention and Criminal Justice (UNCCPJ) through its Resolution of 2013.<sup>12</sup> Kenya is strategically positioned and has an advanced telecommunication system within the region and because of this; it's easily targeted as the region's hub for illegal wildlife trade.<sup>13</sup> It serves as the region's export hub to areas such as Europe, North America and Far East Asia, China to be precise. Which is the area's largest consumer markets for the products<sup>14</sup> Kenya is therefore the best starting point for this epidemic in the region for it shall enable us to appropriately understand and analyse this issue considering the global ramifications from an ecological point of view.

The aim of this study is to determine where the problem in trying wildlife crimes in Kenya lies specifically putting the Judiciary under the microscope as the starting point and determining where the issue lies considering the fact that a recently reformed legal framework on wildlife conservation exists. The cases involving the international trafficking of high value items like ivory, rhino horn and pangolin scales remain a major challenge in Kenya where cases are frequently delayed, and suspects are not brought to justice. The objective therefore is to analyse where the discrepancy in legislation and the implementation in court lies in a bid to improve the judicial process. It shall therefore seek to propose recommendations to help moderate these underlying issues. It enables ongoing investment in strategic interventions that would enhance the criminal justice pathway as an efficient and accountable deterrent in combating wildlife crime in the region.

---

<sup>12</sup>Ngatia PM, Unveiling the Challenges of Curbing Wildlife Crime in Kenya: Evaluating the 3Cs solution, unpublished PhD Thesis, University of Bolton, Bolton, 2018, 14 & 17.

<sup>13</sup>Ngatia PM, Unveiling the Challenges of Curbing Wildlife Crime in Kenya: Evaluating the 3Cs solution, unpublished PhD Thesis, University of Bolton, Bolton, 2018, 14 & 17.

<sup>14</sup>Ngatia PM, Unveiling the Challenges of Curbing Wildlife Crime in Kenya: Evaluating the 3Cs solution, unpublished PhD Thesis, University of Bolton, Bolton, 2018, 14 & 17.

#### **1.4. Hypothesis**

The hypothesis tested in this research is that the amendment of the Wildlife Conservation and Management Act of 2013 has led to an increased number of arrests which has led to a backlog of cases and poor case management in the Judiciary.

#### **1.5. Research Questions**

The questions that shall be answered by this research include:

1. What theories can aid in the study of this issue?
2. Is the judiciary's mandate being followed?
3. Is KWS efficiently carrying out its mandate in support of the Judiciary in the fight against wildlife crimes?

#### **1.6. Importance of study**

Kenya is at battle with the organized wildlife crime such as poaching that has led to the rampant depopulation of wildlife species bringing a few near extinction and sadly rendering others completely extinct in the wild. This dissertation is important due to the fact that it intends to highlight the mandate of the independent arms of the government in combating wildlife crime as a unit as well as shed some light as to which probable issues might be leading to poor case management at the Judiciary level.

#### **1.7. Literature Review**

Available literature is examined in a bid to answer the research questions. First, the literature legitimates the quest of this study to establish the role of prosecution as a tool for addressing poaching and wildlife trafficking in Kenya. Secondly, the literature review examines whether Kenya's legislative framework adequately addresses prosecution of poaching and wildlife trafficking crimes. To do so, the literature studied includes texts on wildlife crimes, and prosecution in Kenya. Third, the literature sheds light on the insufficient concentration of authors on whether the institutional framework involved in prosecution of poaching and wildlife trafficking crimes in Kenya is appropriately structured to address poaching and wildlife trafficking. Lastly, the literature review explores texts on inter-agency coordination, finding that there is inadequate literature specific to our jurisdiction available on whether improved inter-agency coordination may be used as a solution to the inadequacies of how wildlife crimes are handled in the Judiciary. In exploring the available literature on the key themes of wildlife management and conservation, wildlife crime, prosecution, and inter-agency coordination, this study seeks to fill the gap in knowledge on the management and

address of wildlife crimes, the legislative and institutional framework dealing them, and inter-agency coordination as a solution.

The mandate of the various arms of government is detailed by John Ambani in his text on constitutional law. It details the history of governance in Kenya as well as outlines a comprehensive assessment of the three arms of government, outlining their history as well as their current state with regard to the constitution that was (post-independence) and that which is following the referendum in Kenya in 2010.

Isioma Iregu Ile meets the theories I deem to have guide my research directly in a paper titled the public administration approach to managing intergovernmental relations in the governance of the state in a case review of Nigeria and South Africa. This paper enshrines the assessment of internal shortfalls in the Nigerian and South African governments that may be weakening the achievement of their set objectives. It inspired my assessment more specifically targeting the arena of wildlife crime considering there is a lack of literature that holistically addresses institutional shortfalls leading to the persistence of the menace considering the efforts made as a result of external factors such as a lucrative market for the products of wildlife crime.

Jurisprudence and scholarly works on environmental law more specifically on the fight against wildlife crime goes years back to the managing of hunting from the early 1900's and has gradually progressed to where it is at today.<sup>15</sup> In this part of the research paper, pertinent literature on the management of intergovernmental Relations with regard to wildlife crimes and how these relate to the study are discussed.

Valerie Wabungo performs research on the underlying factors that limit the enforcement of the legal framework relating to the prosecution of wildlife related crimes in Kenya and takes an external approach analysing these factors from the economics Rational Choice Theory analysing what incentives are present on the ground that would encourage wildlife crimes in the country. Through her research work it was clear that external incentives are indeed present such as its high profitability. Her theoretical framework is based on the rational thought theory which suggests that with adequate incentives in place a criminal may act on the intention of committing the crime based on their perspective of the opportunity cost. In this case, their freedom or a good opportunity to escape the jaws of justice is that nudge. From this point onwards she goes on to dissect the possible external opportunities that are

---

<sup>15</sup>The National Wildlife Conservation and Management Policy, Ministry of Forest and Wildlife, (2012) 10.

worth the risk in their eye in order to highlight the incentives for the organized crime surrounding wildlife. In relation to wildlife crimes, majority of it is committed across borders whereby the poaching of the animal itself occurs in one country and the transportation and consequent illegal sale of their trophies occur in another country. Her research paper highlights, that between 2002 and 2010, the price of ivory increased eighteen-fold from about \$100 per kilogram to \$1,800<sup>106</sup> fuelled mainly due to the proliferation of their demand in Asia. In order to meet this demand, the poaching of wildlife in Kenya increased accordingly whereby it was reported that 247 tusks from 123 Elephants were seized in Thailand following their smuggling from Kenya. The penalties in relation to specific wildlife crimes in Kenya have become more stringent following the proliferation of the crime. Following the recent amendments to it, fines have increased to up to twenty million Kenya shillings as well as life imprisonment sentences.” This being noted as a conclusion, I take it upon myself to take a different approach. One that is internal. This shall be done from the perspective of a different theoretical framework which is the systems theory among others, to instead assess why the statistics are still so high beginning from the institutional point of view. It allows me to contribute to the field of literature by highlighting the mandate of the arms of government and assessing whether or not they are playing their part in the fight against wildlife crimes.

## **1.8. Theoretical Framework**

### **1.8.1. Systems Theory & Structural Functionalism**

The genesis of the systems theory works on the assumption that a whole is as a result of the cooperation of individual functioning's of internal components. In this context, a government can only successfully achieve its collective objectives when each arms carries out its individual mandate as prescribed.<sup>16</sup> Although the structures of government can be divided, it is best to regard it as an integral whole, for it is the relationship between these institutions, rather internal working, which is crucial.<sup>17</sup>

Proposed by Emile Durkheim, the theory is a broad perspective which sets out to interpret the government as a structure with internal interrelated parts. A common analogy popularized by

---

<sup>16</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: A Case Review of Nigeria and South Africa, Unpublished PhD Thesis, University of Pretoria, Pretoria, 2007, 59.

<sup>17</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: A Case Review of Nigeria and South Africa, Unpublished PhD Thesis, University of Pretoria, Pretoria, 2007, 59.

Herbert spencer, present these parts as organs that work towards the proper and efficient working of a body.<sup>18</sup>

This research paper shall be guided by the systems theory which is further asserted by structural functionalism. The institutions involved in wildlife conservation highlighted by the legal framework which include, inter alia, the Constitution and legislation need to perform their prescribed functions in order to further the battle against wildlife crimes, the Judiciary and Kenya Wildlife Services as the relevant executive body.

These theories shall also be linked with the Butterfly effect theory which is one invented by the American meteorologist Edward N. Lorenz to highlight the possibility that small causes may have momentous effects. This shall be connected to show that a slight mishap in a sector of governance affects the system at large as well as shapes outcomes.

### **1.9. Research Design**

The research methodology to be undertaken in this research is desktop research which amounts to qualitative research. A considerable number of sources to be used for investigation will include the use of primary sources such as The Constitution of Kenya (2010), legislation (WCMA) and numerous case law that exposes the weaknesses in trying wildlife crime cases in the courts. The secondary sources which shall be used include the use of relevant books, journal articles, working papers, discussion papers, self-published articles, which includes articles by professors and distinguished academics, reports, dissertations and theses, and internet sources.

### **1.10. Limitations**

The various limitations faced when working on this dissertation include:

1. The time limit to conduct the study is limited to approximately a few months.
2. Overreliance on online sources.

### **1.11 Definition of Terms**

Terms used in the dissertation that may need clarification include;

1. **Endangered Species**- Any wildlife specified in the 4<sup>th</sup> Schedule of the WCMA or declared as such by any other written law or any wildlife specifies in appendices of CITES<sup>19</sup>.
2. **Trophies**- Remains of a dead animal<sup>20</sup>.

---

<sup>18</sup>Urry J, Metaphors, Sociology Beyond Societies: *Mobilities for the Twenty-First Century*, Routledge. p. 23, -- <http://books.google.co.uk/books?id=ogyDBobOHVEC&pg=PA23> on 17 February 2019.

<sup>19</sup>Section 2, *Wildlife Conservation and Management Act* (2013).

3. **Tripartite**- Of three parts; a term applied to an indenture to which there are three several parties, (of the first, second, and third parts) and which is executed in triplicate<sup>21</sup>.

## **1.12. Chapter breakdown**

### **1.12.1. Chapter 1: Introduction**

This chapter details the structure of the entire research. It introduces the concept of wildlife conservation and its development in Kenya within and outside the legal scope. It identifies the research problem to be pursued by the dissertation as well as the objectives that will guide this study. Moreover, it outlines and expounds on the extensive literature to create an understanding of the existing works that supports and informs the subject matter of the research as well as drawing a link between previous research and this dissertation. It finally outlines the methods used in acquiring research information and sets out a theoretical framework in which the principles are explored and anchored towards the objectives of the research.

### **1.12.2. Chapter 2: Theoretical framework**

In this chapter, the theoretical frameworks on the management of intergovernmental relations with regard to wildlife crimes and how these relate to the study are discussed. This section of the study elaborated the public administrative approach that is paramount in managing these intergovernmental relationships and activities. The notion of making governance work better and bringing about efficient and effective service delivery through better coordinated and aligned sub-governmental systems is one that should be earnestly pursued especially in Kenya in order to champion the battle against wildlife crime that has led to the massive depopulation of horned wildlife species.

### **1.12.3. Chapter 3: Assessment of the Judiciary's Efforts in the Fight against Wildlife Crimes**

This chapter seeks to unfold the Judiciary as an institution involved in the fight against wildlife crimes. It bids to shed light on its mandate and consequently the internal factors that may be contributing to this. It further provides an in-depth review of the reality in which wildlife crimes are handled in the Judiciary today with the aid of recent case law in a bid to investigate the cooperation of government arms in combating wildlife crimes and their changing dynamics over the years.

---

<sup>20</sup>Section 83, *Wildlife Conservation and Management Act* (2013).

<sup>21</sup>Black's Law Dictionary 2 ed.

#### **1.12.4. Chapter 4: Assessment of the Role of KWS and the Legislature**

This chapter provides a review of the mandate of The Legislature and KWS as the relevant Executive institution and seeks to shed light on the workings of the wildlife crime division, their mandate, its efficiency and whether or not they are following through with it. This is intended to further understand probable institutional shortfalls present in combating wildlife crimes and their changing dynamics over the years as a continuation from the findings of the previous chapter. This section includes an overview of Public administration principles that intergovernmental relations we must take cognizance of, has been attempted. The first part of this chapter will analyse the background of the important concept of separation of powers in a bid to emphasise the importance of cooperation despite the separation of various government arms. The Second part shall highlight the current reformed legislative framework on wildlife related crimes.

#### **1.12.5. Chapter 5: Conclusion and Recommendations**

This final chapter concludes the dissertation as well as gives possible recommendations to various authorities involved in the fight against poaching as well as informing law makers on areas that need to be addressed in order to promote the most efficient means of wildlife conservation in the fight against poaching.

## **CHAPTER 2: THEORETICAL FRAMEWORK AND METHODOLOGY**

### **2.1. Introduction**

This chapter details the theoretical framework in which this research is to be guided by. The public administration approach is particularised, and its importance expounded upon with regard to intergovernmental relations. Kenya should earnestly pursue the notion of making governance work better to bring about efficient and effective delivery of services through better coordination and alignment of sub governmental systems in order to champion the battle against wildlife crime that has now led to the massive depopulation of horned wildlife species.<sup>22</sup>

The theories that provide a basis for this work have been explored to ensure the cohesion with the topic at hand and to assert the study is academically sound and grounded. This chaptershall analyse these theories by assessing its key elements as well as its proponents and opponents to understand the approach. It asserts the viability of the legal strategy inour jurisdiction when dealing with institutional shortfalls surrounding wildlife crimes in Kenya.

### **2.2. Systems Theory**

The initial stance of this theory proports that the relations of the arms of government are paramount for the achievement of the collective objective of the government body as a whole. Hague and Harrop note that although the arms may be divided, it is key to interpret it as an integral whole, for it is the cooperation of the three that is crucial.<sup>23</sup>

The reality of government functions is complex, especially in today's day and ageconsidering their mandate develops with the development of society.<sup>24</sup> It has been said that the taskof coordination doesn't just become more difficult because its bigger, but because the issues have become complex over time. With advancement, decisions have far reaching and unforeseeable ramifications however, an efficient, sustainable and reliable system is required to advance as society does.<sup>25</sup>

Public administration is undertaken by these systems and within them, exist sub systems that must interrelate in their effort to achieve their objective. Public administration therefore

---

<sup>22</sup>Hague R & Harrop M, *Comparative Government and Politics*, 6<sup>th</sup> ed, Palgrave Macmillan, 2004, 131.

<sup>23</sup>Hague R & Harrop M, *Comparative Government and Politics*, 2004, 131.

<sup>24</sup>Hague R & Harrop M, *Comparative Government and Politics*, 2004, 131.

<sup>25</sup>Hague R & Harrop M, *Comparative Government and Politics*, 2004, 131.

works towards achieving set objectives through the interrelation of these subsystems and concurrently limits any unintended negative consequence.<sup>26</sup>

For the purpose of this research, I shall sight the system as an integrated whole that consists of interrelated subsystems that can be linked to the analogy of the human body in a manner that reflects the subsystems as interrelated and interdependent, despite the fact that each body system may achieve functionality on its own and indeed impacts the activities of the body as a whole.

### **2.3. Structural Functionalism**

Considering the dynamic nature of the systems theory, it is important to reflect on it not only from a point of interdependence rather, from a functional point of execution that relates to the law/ This considers the relationship between the various arms of government as not sufficient in themselves.<sup>27</sup> To what extent are these arms achieving their individual objectives? It is paramount for them to do so for as highlighted by the systems theory, all subsystems are required to carry their weight in the achievement of a collective goal. They must be aligned and organized in a manner that ensures power relations and interests achieve the desired outcomes.

Structural functionalism, otherwise known as the functional approach within the systems theory seeks to propose an efficient and holistic technique of organizing inputs within the systems analogy so that unalignment is managed better especially in the intergovernmental relations subsystems.<sup>28</sup>

### **2.4. Critique of the Theories**

#### **2.4.1. Systems Theory**

The criticism suggests that the systems generate subsystems in themselves that may be blockages to the process of ensuring efficient and effective service delivery to the public. The functionalism approach to the utilization of the systems theory within the framework of intergovernmental relations seeks to counter this and suggests that in the study of society, one

---

<sup>26</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: A Case Review of Nigeria and South Africa, Unpublished PhD Thesis, University of Pretoria, Pretoria, 2007, 59.

<sup>27</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: 2007, 59.

<sup>28</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: 2007, 59.

should analyse how the various institutions combine to give society continuity over time and this includes intergovernmental relations.<sup>29</sup>

#### **2.4.2. Functionalism**

The criticism posed for this theory is that it fails to integrate a connection between the institutions and societal interests. It therefore poses the challenge on to an analyst to draw the connections and determine which relationships needs such consistency and cohesion and the burden of structuring feedback on relationships amongst the various organizations whilst maintaining their relative authority, autonomy and independent spheres of action.<sup>30</sup> Chaumont- Chancelier attempts to justify those relations arguing that the complex order can be explained with a spontaneous approach, as its name indicates, it is not concerned with the formation of any particular directive.<sup>31</sup> Rather, it simply attempts to detail the existence of order, rooted in the complex web of rules and the institutions and highlights a recurrent pattern of cooperation and coordination.<sup>32</sup>

#### **2.5 Methodology**

The advantage of summing up the systems theory and integrating it with structural functionalism is that the political and administrative contexts openly highlighted in the systems theory are not filtered in an effort to promote functionalism which is a dire part of the research. The ideal theoretical framework can explicitly be embedded in the systems theory but one that takes cognizance of context and fills in any fissures with the functionalist approach.<sup>33</sup> An integration of the two as well as the principle of public administration therefore inform and guide this research. The bedrock of the research asserts that within the functionalist model of the systems theory, the standards to ensuring efficiency and effectiveness are the application of the process of public administration.<sup>34</sup>

This approach is immensely valuable considering the usefulness of a specific intergovernmental relations system in the accomplishment of the desired outcome. It points

---

<sup>29</sup>Karin F, Noble power brokerage in the Polish-Lithuanian Commonwealth: The case of Bogusław Radziwiłł, University of Aberdeen, United Kingdom, 37-38.

<sup>30</sup>Wuncsh JS, Decentralization, Local Governance and the Democratic Transition in Southern Africa: A Comparative Analysis, Volume 2, Issue 1, African Studies Quarterly, 1998, 81.

<sup>31</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: 2007, 59.

<sup>32</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: 2007, 59.

<sup>33</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: 2007, 59.

<sup>34</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: 2007, 59.

out the notion that although models adopted in different states vastly vary in institutional arrangements there must be functions that should be performed at the very basis to survive and operate efficiently.<sup>35</sup> This is assessed in the following chapters in the Kenyan context.

The need for clarity of roles is a paramount consideration to this study. The objectives and mandates of the various government institutions and subsisting institutions alike need to be efficiently communicated through efficient and statutory channels to various actors in various forums.<sup>36</sup> It fosters good governance and democracy. In addition, there should be clear expectations and mandates for coordination, a culture of participation and strong leadership that ensure the efficient utilization of scarce resources and the alignment of activities with a view of strengthening linkages amongst diverse units can exist.<sup>37</sup> This facilitates locally oriented programmes, allowing units to share concerns, complement each other's skills and bring about economies of scales.<sup>38</sup> This Public administration functionalist approach to systems can meet the legitimate and unavoidable requirements for cohesion and consistency without seeking centralization of rule, homogenization, or precluding a very broad autonomy for organizations.<sup>39</sup>

In the management of intergovernmental relations, and within the systems perspective, there is value in promoting a relational approach to intergovernmental relations.<sup>40</sup> An integral part of this is the proper orientation of intergovernmental forums, so that they understand how they all fit together as a whole so that they can easily facilitate governmental processes rather than become stumbling blocks in the developmental process.<sup>41</sup>

---

<sup>35</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: 2007, 59.

<sup>36</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: 2007, 59.

<sup>37</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: 2007, 59.

<sup>38</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: 2007, 59.

<sup>39</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: 2007, 59.

<sup>40</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: 2007, 59.

<sup>41</sup>Ile IU, A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: 2007, 59.

## **CHAPTER 3: ASSESMENT OF THE JUDICIARY’S EFFORTS IN THE FIGHT AGAINST WILDLIFE CRIMES**

### **3.1. Introduction**

This chapter seeks to unfold the various internal elements in the Judiciary that have actively played a role in possibly retarding the fight after the passing of the WCMA to highlight whether there is an element that is a miss that may be contributing to this. It provides a review of the reality in which wildlife crimes are handled in the Judiciary today with the aid of recent case law in a bid to investigate the cooperation of government arms in combating wildlife crimes and the changing dynamics over the years. It seeks to unfold the various elements that have actively played a role in the persistence of this menace.

### **3.2. The Independence of the Judiciary**

Judicial authority essentially denotes the power that is vested on an appointed tribunal to authoritatively, impartially and conclusively rule on disputes brought before it. The authority is expected to make pronouncements, including awarding remedies to the aggrieved party in exercising its authority.<sup>42</sup> In Kenya, the institution empowered to provide remedies and sanctions of a breach of the constitution or an ordinary law is the Judiciary. It is the government arm conferred with the mandate to adjudicate on controversies between individuals or between individual and state.<sup>43</sup>

The 2010 constitution has explicitly conferred judicial authority to the courts and tribunals established under chapter ten and derive this authority from the people.<sup>44</sup> The judiciary is guided by five key principles in exercising its authority; Firstly, they are required to deliver justice to all irrespective to status; secondly, they are to deliver prompt dispensation of this justice; thirdly, they are to promote alternative forms of dispute resolution that are in alignment with the constitution which are reconciliation, arbitration, mediation and traditional dispute resolution mechanism; fourthly, the judiciary is to administer justice without undue regard to procedural technicalities; and finally, it is to protect and promote the principles of the constitution.<sup>45</sup>

Chapter 10 of the constitution acknowledges two tiers of courts, that I superior courts and subordinate courts. The jurisdiction of these courts varies from one to another. The superior courts comprise of the supreme court as the highest court, the court of appeal soon after and

---

<sup>42</sup> Curie & De Waal, *The New Constitutional and Administrative Law* (2001) 286.

<sup>43</sup> Article 159 *Constitution of Kenya* (2010).

<sup>44</sup> Article 159 *Constitution of Kenya* (2010).

<sup>45</sup> Article 159(2) *Constitution of Kenya* (2010).

the high court following it along with the other courts with the status of the high court with competence to hear and determine disputes relating to employment and labour relations and the environment and Land court.<sup>46</sup>The subordinate courts include the magistrate's court, Kadhis court, Court martial and any other court or local tribunal as may be established by an act of parliament.<sup>47</sup>

### **3.3. Case Study of the Issues Affecting the Judiciary**

#### **3.3.1. Backlog of cases**

The progress made by the Judiciary in effecting delivery and administration of justice efficiently to the populace is evidently remarkable. A survey was conducted by wildlife Direct named eyes in the courtroom which is a court monitoring project that keeps watch on how proceedings in wildlife crime cases are being handled by law enforcement in Kenya, reported from a study performed in 121 Kenyan courts between the beginning of January 2016 and the end of December 2017 in a bid to examine how efficiently the Wildlife conservation and Management Act 2013 is being enforced. During this period of two years, 1958 persons were arrested and charged with 2610 wildlife crime related offences in 957 cases.<sup>48</sup>This is considered a high conviction rate at 95% by the prosecution pointing to better prosecutions – in the past many cases were dismissed and suspects acquitted. This success is however mainly limited to low level wildlife crime offenders possessing wildlife trophies, bush meat or perpetrating illegal entry into protected areas with livestock.<sup>49</sup>The cases involving the international trafficking of high value items like ivory, rhino horn and pangolin scales remain a major challenge in Kenya where cases are frequently delayed, and suspects are not brought to justice<sup>50</sup> and the question arises, is the judiciary solely to blame, or is there a speck in the bigger picture? There is the matter of the backlog of cases that are yet to be tried in court as well. In as much as the cases taken to trial may result in convictions, it is evident that more could be done so that they see the light of court and justice maybe served.

The backlog in the general sense since the promulgation of the WCMA may be attributed to the clarity brought forth. More criminals may face charges and be scheduled for trial however the number of judges, magistrates and courts have remained. The World Bank projects the

---

<sup>46</sup>Article 162 (1) & (2) *Constitution of Kenya* (2010).

<sup>47</sup>Article 162(4) *Constitution of Kenya* (2010).

<sup>48</sup>On the Right Path? An Analysis of Kenya's Law Enforcement Response to Wildlife Crime, Eyes in the courtroom report 2016-2017, 8.

<sup>49</sup> On the Right Path? An Analysis of Kenya's Law Enforcement Response to Wildlife Crime, Eyes in the courtroom report 2016-2017, 8.

<sup>50</sup> On the Right Path? An Analysis of Kenya's Law Enforcement Response to Wildlife Crime, Eyes in the courtroom report 2016-2017, 8.

country's population to have grown from 47.24 million in the year 2015 to approximately 48.46 million in the year 2016<sup>51</sup> which leaves the magistrate to citizen ratio at 1:115000.<sup>52</sup>The State of the Judiciary and Administration of Justice Report (SOJAR), 2016-2017 which was released by Chief Justice David Maraga, there are 158 judges, 421 magistrates and 55 Kadhis spread across the nation. Although there was no mention of the desired justice to population ratio in the report, there was a significant increase in pending cases with the annual publication showing that there were 533,350 cases pending in law courts countrywide. A total of 344,180 of over half a million cases pending, were filed during the reporting period (Financial Year 2016/17).<sup>53</sup>

The hiring of 28 judges in the 2016/17 year alone notwithstanding, the increasing pendency was notable if a Judiciary Case Audit and Institutional Capacity Survey unveiled in August 2014 is anything to go by. The survey recorded the number of pending cases as at June 30, 2013 at 426,508.<sup>54</sup> At the time of the 2014 audit, the justice to population ratio was a judge to 300,000 Kenyans and a magistrate for every 80,000. The audit was pegged on an estimated population of 40 million. With the number of cases growing over the years, over 60,000 had by the time of the publication of the SOJAR 2016-2017 been pending for at least five years.<sup>55</sup> The backlog can evidently be tied down to the limited number of legal offices and legal officers present in the judiciary.

## **CHAPTER 4: ASSESSMENT OF THE ROLE OF KWS AS THE RELEVANT EXECUTIVE INSTITUTION AND THE LEGISLATURE IN THE FIGHTS AGAINST WILDLIFE**

### **4.1. Introduction**

This chapter seeks to review the functions of KWS as the relevant Executive institution and Legislature in a bid to further understand the institutional shortfalls present in

---

<sup>51</sup>World Bank Annual Report 2016, IBRD-IDA, World Bank Group, --  
<<http://pubdocs.worldbank.org/en/908481507403754670/Annual-Report-2017-WBG.pdf>>-- on 15 November 2019.

<sup>52</sup>World Bank Annual Report 2016, IBRD-IDA, World Bank Group, --  
<<http://pubdocs.worldbank.org/en/908481507403754670/Annual-Report-2017-WBG.pdf>>-- on 15 November 2019.

<sup>53</sup>Wakaya J, One judge serves 304,000 citizens in Kenya; *Kenya's Justice to Population Ratio Now Stands at a Judge to at Least 304,000 Citizens*, 8 Jan 2018, --<<https://www.capitalfm.co.ke/news/2018/01/one-judge-serves-304000-citizens-kenya/>>-- on 15 November 2019.

<sup>54</sup>Wakaya J, One judge serves 304,000 citizens in Kenya; *Kenya's Justice to Population Ratio Now Stands at a Judge to at Least 304,000 Citizens*, 8 Jan 2018, --<<https://www.capitalfm.co.ke/news/2018/01/one-judge-serves-304000-citizens-kenya/>>-- on 15 November 2019.

<sup>55</sup>Wakaya J, One judge serves 304,000 citizens in Kenya; *Kenya's Justice to Population Ratio Now Stands at a Judge to at Least 304,000 Citizens*, 8 Jan 2018, --<<https://www.capitalfm.co.ke/news/2018/01/one-judge-serves-304000-citizens-kenya/>>-- on 15 November 2019.

combating wildlife crimes and the development in their nature over the years as a continuation from the findings of the previous chapter. This section includes an outline of Public Administration principles that institutions must recognize and assesses whether they have been attempted. The first part of this chapter will scrutinize the background of the important concept of separation of powers in a bid to emphasise the importance of cooperation despite the separation of government arms. The second part shall overview the current legislative framework on wildlife related crimes. The next shall assess KWS and shed some light on the mandate of the wildlife crime division and connect it to the findings of the previous chapter.

#### **4.2. Concept of Separation of Powers and the Tripartite**

It has been previously recounted by De Smith that the doctrine of separation of powers can be traced as far back as to Aristotle and was futuristically developed by John Locke and best developed by French jurist Montesquieu.<sup>56</sup> Lord Atkin however takes the cup for conceiving what may be said is the most influential statements in legal and political thought, which is, that power tends to corrupt, and that absolute power corrupts absolutely.<sup>57</sup>

As a champion of the notion, Locke warned against the concentration of state power in the hands of a few individuals and he explicitly pointed out that where it is trusted to a few, the liberty and security of the people being governed is at risk. He then goes to propose the separation of state powers to different individuals making up different institutions by pointing out three arms of government namely; a Legislature; an Executive and a Federative.<sup>58</sup> Locke highlights that the power vested on a few may pose great temptation to human frailty, for the same persons with the power are the same persons with the power to execute it. It is therefore stated that it may move them to exempt themselves from obeying the law for their own advantage.<sup>59</sup>

French jurist Montesquieu however encapsulated the doctrine and assesses the power structure as per the constitution of the United Kingdom (UK) as a good example. During this study, he highlighted that the UK had a noticeable Executive, a Legislature and a Judicial arm.<sup>60</sup> He later denoted that these three arms played an active role in governing and that through past experiences, any man vested with powers is apt to use it in a bit to perform his

---

<sup>56</sup>De Smith S, Constitutional and administrative law, (1977), 40.

<sup>57</sup>Mbondenyi MK & Ambani AO, The new Constitutional Law of Kenya, *Principles, Government & Human Rights*, Claripress LTD Nairobi, 2015, 59.

<sup>58</sup>Sarvis RC, Legislative delegation and two conceptions of the legislative power (2006) *Pierce Law Review*, 319.

<sup>59</sup>Locke J, *Second Treatise on Civil Government* (1690) 183.

<sup>60</sup>Nugent T, De Montesquieu B; *The Spirit of laws trans* (1949).

mandate as far as it will go.<sup>61</sup> He then details that in order to prevent this, one arm must act as a check to another. This proposed concept of the separation of powers essentially drives to three main principles. Firstly that no one individual shall form part of more than one of the three organs of governance, secondly that no arm of government shall interfere with the workings of another and thirdly that one arm shall not exercise the functions of another.<sup>62</sup>

Most states have abided by the doctrine of separation of powers, including Kenya. It clearly and explicitly is a nation that enshrines these three principles into its system of government through the constitution. It provides that Legislative authority of the Republic is derived from the sovereign people of the nation and is vested and exercised by parliament.<sup>63</sup> It also provides that the Legislative is singlehandedly the only body vested with the force of making laws in this jurisdiction.<sup>64</sup> The Executive is made up of the President, Deputy President and the Cabinet and outlines that parties in these positions hold no other state<sup>65</sup> or public<sup>66</sup> office in government. The structure and mandate of the judiciary is also separated from that of the other arms of government and active measures are taken to ensure that the independence of this body is not interfered with.<sup>67</sup>

The doctrine essentially bids to prevent tyranny of any sort by giving too much power to a single arm, person or group of persons. Instances of this from the 2010 constitution are such as the presidential power of mercy and free and conditional pardon to persons convicted of an offense in so much that it is within the judiciary's mandate to adjudicate over disputes including criminal conflicts and make determination on the same.<sup>68</sup>

#### **4.3. The Role of the Legislature and the WCMA**

Legislative authority can simply be explained as the law-making function vested by the constitution on the legislature. The concept of separation of powers notes that a clear division of the functions, powers, and in some instance's personnel of each arm of the government be drawn so that none is excessively bestowed with powers and so that each arm can check another. Significantly therefore the 2010 constitution establishes a legislature distinct from the other arms of government both in function and membership. At the national level, Kenya has

---

<sup>61</sup>Nugent T, De Montesquieu B; *The Spirit of laws trans* (1949).

<sup>62</sup>Mbondenyi MK & Ambani AO, *The new Constitutional Law of Kenya; Principles, Government & Human Rights*, Claripress LTD Nairobi, 2015, 61.

<sup>63</sup>Article 94(1) *Constitution of Kenya* (2010).

<sup>64</sup>Article 94(5) *Constitution of Kenya* (2010).

<sup>65</sup>Article 130(1) *Constitution of Kenya* (2010).

<sup>66</sup>Article 131(3) *Constitution of Kenya* (2010).

<sup>67</sup>Article 160(1) *Constitution of Kenya* (2010).

<sup>68</sup> Article 133(1)(b) *Constitution of Kenya* (2010).

a bicameral Parliament consisting of the National Assembly and the Senate.<sup>69</sup> This research shall however address the National legislature responsible for the enactment of laws at the national level.

Legislative processes lead proposed law into passing if agreed upon by the houses of parliament. The senate's primary function is to protect and relay the interests of the county's and therefore are excluded from discussions on proposed bills that do not affect them. The matter of Wildlife conservation affects the country at a national level as well as on a county level with regard to counties in which national parks are present and others in which the Kenyan Wildlife roam and therefore the presence of the senate was assured during discussions on The WCMA. It was at the promulgation of the Constitution 2010 that Kenya sought to review the Act of 1989 due to the recognition of the importance of wildlife resources to her economy as denoted in the preamble which states "...respectful the environment, which is our heritage, and determined to sustain it for the benefit of generations to come..."<sup>70</sup>The act was promulgated to provide stringent penalties as a response to emerging trends surrounding threats against wildlife<sup>71</sup> as well as aimed at improving the protection, conservation, sustainable use and management of the country's wildlife resources.<sup>72</sup>

The act restructures the manner in which governance of wildlife resources was conducted prior to its passing, whereby now, regulatory and management functions are separated from research and new structures have been put into place at the county level as prescribed by the Constitution.

Important principles outlined by the Act under section 4 guide the conservation and management efforts followed through by other institutions and they, inter alia, include the effective public participation setting a basis of strengthening the community based natural resource management, the use of eco system approach in wildlife management, equitable sharing of benefits accruing from wildlife resources, sustainable utilization, recognition and

---

<sup>69</sup> The Law Library of Congress, National Parliaments: Kenya, --<<https://www.loc.gov/law/help/national-parliaments/kenya.php>>-- on 15<sup>th</sup> November 2019.

<sup>70</sup>Preamble, *Constitution of Kenya* (2010).

<sup>71</sup>Section 92, *The Wildlife Conservation and Management Act*, (2013).

<sup>72</sup>World Wide Fund for Nature, Kenya finally gets a new Wildlife law, 17 February 2017, --<[http://wwf.panda.org/wwf\\_news/?216350/Kenya-finally-gets-a-new-wildlife-law](http://wwf.panda.org/wwf_news/?216350/Kenya-finally-gets-a-new-wildlife-law)>-- on 15 November 2019.

encouragement of wildlife conservation and management as a form of land use on public, community and private land.<sup>73</sup>

The recurring challenges to wildlife conservation and management, particularly poaching, has been addressed by the law as stated above, setting out stiffer consequences and punishments for offenders, a move intended to deter them from committing such gruesome acts. Research has demonstrated how effective this Act has been since its enactment as highlighted in earlier chapters giving statistics (see Section 3.4.1. on the backlog of cases in the previous chapter on page 16) and the first conviction being in January of 2014 when Mr Tang Yong Jian was ordered to pay Kshs20 Million or serve a jail term of 7 years for being in possession of a Tusk weighing 3.4 Kgs.<sup>74</sup> An additional advantage is that of compensation to communities living with wildlife and for those who live adjacent to the protected Areas. The Act has provided for a significant increase in the awards for injury and death resulting from wild animals under section 24 which is reason to reduce the issues surrounding the human wildlife conflict in these areas.<sup>75</sup>

#### **4.4. The Role of KWS as the Relevant Executive Institution**

The executive organ of state is essential however it is usually hard to delineate the contours of its functions because it is often beyond legislation to conclusively anticipate all the executive duties of state. Executive functions are therefore not capable of being defined in a comprehensive manner because they merely carry out the residue of government functions after the assignment of Legislative and Judicial functions to other institutions.<sup>76</sup> The executive mandate entails all else, after the spheres of judicature and legislature are carved out. The term executive has been defined as the aggregate or totality of all functionaries or agencies concerned with the execution of the will of the state.<sup>77</sup> Chapter nine of the Constitution of Kenya 2010 addresses it as mainly the president, deputy president and the Cabinet.<sup>78</sup>

Kenya Wildlife Services is the institution responsible for conserving and managing and enforcing laws related to Kenya's wildlife for the Kenyan people and the world at large. It is established by the WCMA which also outlines its structure and mandate.<sup>79</sup> It carries out its

---

<sup>73</sup>Section 4, *Wildlife Conservation and Management Act* (2013).

<sup>74</sup>World Wide Fund for Nature, Kenya finally gets a new Wildlife law, 17 February 2017, -- [http://wwf.panda.org/wwf\\_news/?216350/Kenya-finally-gets-a-new-wildlife-law](http://wwf.panda.org/wwf_news/?216350/Kenya-finally-gets-a-new-wildlife-law) on 15 November 2019.

<sup>75</sup>Section 24, *Wildlife Conservation and Management Act* (2013).

<sup>76</sup>

<sup>77</sup>Kapur AC, *Principles of Political Science* (1996) 575.

<sup>78</sup> Article 130(1) *Constitution of Kenya* (2010).

<sup>79</sup>Inter alia, Parts II, III, IV & IV, *Wildlife Conservation and Management Act* (2013).

mandate and objectives It undertakes its mandate across all protected areas in collaboration with other stakeholders and they collectively uphold the premise that if people benefit from wildlife and other natural resources, they will take care of these resources.<sup>80</sup> Their vision aims to save the last great species and places on earth for humanity while their mission is to achieve this as well as to sustainably conserve, manage and enhance Kenya's wildlife, its habitats and provide a wide range of public uses I collaboration with stakeholders for future generations.<sup>81</sup>

#### **4.4.1. Security Service**

The security Division is the institutional division of the KWS which ensures that wildlife and their resources in their habitats.<sup>82</sup> A significant population of wildlife live outside protected areas on either a seasonal or permanent basis, and therefore the scope in which the security division can act upon their mandate spans beyond just protected areas.

The division protects wildlife, their resources and habitat, enhances security in protected areas and safeguards while enforcing the WCMA.<sup>83</sup> Their overall goal among the ones stated above Include the enforcement of the law, enhance tourist security in protected areas and protect KWS assets.

##### **4.4.1.2. The Mandate of the Division**

The division is divided into four departments that deal with different aspects of wildlife security. The first id the Wildlife Protection Department which is mainly charged with provision of security to the wildlife, their resources and habitat, provision of security to visitors in protected areas and other tourist circuits under the jurisdiction of KWS, protection of KWS assets and combats poaching through high profile foot, vehicle and aerial patrols.<sup>84</sup> A Canine unit has also been incorporated into this sub-division in order to compliment the work of its professionally trained ranger workforce.<sup>85</sup> The second unit is the SEAL unit which essentially is one specialized in the rapid response to emergency threats against wildlife, their resources, their habitat or tourists.<sup>86</sup>

The intelligence department is the third, which essentially is charged responsible for collecting and analysing security related information from which it generates intelligence

---

<sup>80</sup>Kenya Wildlife Services, --<<http://www.kws.go.ke/content/wildlife-security>>-- on 15 November 2019.

<sup>81</sup><sup>81</sup>Kenya Wildlife Services, --<<http://www.kws.go.ke/content/wildlife-security>>-- on 15 November 2019.

<sup>82</sup>Kenya Wildlife Services, --<<http://www.kws.go.ke/content/wildlife-security>>-- on 15 November 2019.

<sup>83</sup>Kenya Wildlife Services, --<<http://www.kws.go.ke/content/wildlife-security>>-- on 15 November 2019.

<sup>84</sup>Kenya Wildlife Services, --<<http://www.kws.go.ke/content/wildlife-security>>-- on 15 November 2019.

<sup>85</sup>Kenya Wildlife Services, --<<http://www.kws.go.ke/content/wildlife-security>>-- on 15 November 2019.

<sup>86</sup>Kenya Wildlife Services, --<<http://www.kws.go.ke/content/wildlife-security>>-- on 15 November 2019.

concerning the security of wild Flora and Fauna, that of tourists and finally that of KWS resources.<sup>87</sup> In carrying out its objectives, it carries out surveillance and monitoring of bandits and gangs around wildlife protected areas. It houses a data collection and analysis section that is specialized in maintaining a security database to service the entire organization.<sup>88</sup> This is the sub-division responsible for carrying out investigations related to all wildlife crimes such as poaching and possession of trophies without a licence as well as illegal trade and therefore the officers are tasked with arresting such offenders, recovering trophies and aiding in submitting relevant evidence in the prosecution with regard to the same.<sup>89</sup>

The final sub-division is the Service Quartermaster Department which is responsible for the management and procurement of all armed wing stores such as uniforms, equipment, arms, ammunition and related accessories as well as food ration for field armed wing personnel.<sup>90</sup>

Under the Office of the Director of Public Prosecutions (ODPP), exists a specialized unit primarily prosecute wildlife related crimes in court, and it is known as the Wildlife Crime Prosecution Unit (WCPU). It is established by the WCMA and enables the specialists in the OPP to address wildlife crime matters separately.<sup>91</sup> This was as a result of the incapacity of the KWS who are limited to prosecute under the WCMA. The ODPP has a broader scope of law to refer to and stand by during prosecution of offenders and they can therefore prosecute relating to other statutes such as the Proceeds of Crime and Anti-Money Laundering Act, No. 9 of 2009 which recognizes related offences such as money laundering,<sup>92</sup> corruption<sup>93</sup> and fraud.<sup>94</sup> The commissioning of wildlife crimes is widely connected to these offences in Kenya and they carry strict penalties.<sup>95</sup> The Prevention of Organized Crimes Act of 2010 also applies following the recent recognition of wildlife crimes as organized crimes.

The office of the public prosecution works together with the division of KWS in investigating and making a case against alleged criminals on behalf of the state. One is somewhat dependant on another, and insufficient practice of each party's allocated role may gradually

---

<sup>87</sup>Kenya Wildlife Services, --<<http://www.kws.go.ke/content/wildlife-security>>-- on 15 November 2019.

<sup>88</sup>Kenya Wildlife Services, --<<http://www.kws.go.ke/content/wildlife-security>>-- on 15 November 2019.

<sup>89</sup>Kenya Wildlife Services, --<<http://www.kws.go.ke/content/wildlife-security>>-- on 15 November 2019.

<sup>90</sup>Kenya Wildlife Services, --<<http://www.kws.go.ke/content/wildlife-security>>-- on 15 November 2019.

<sup>91</sup>Section 107, *Wildlife Conservation and Management Act*, 2013.

<sup>92</sup>Section 3, *Proceeds of Crime and Anti-Money Laundering Act*, No.9 of 2009.

<sup>93</sup>Section 48, *Proceeds of Crime and Anti-Money Laundering Act*, No.9 of 2009.

<sup>94</sup>Wildlife Direct, Outcome of Court Trials in the First Two Years of implementation of the Wildlife Conservation & Management Act 2013,2016,21-22.

<sup>95</sup>Wildlife Direct, Outcome of Court Trials in the First Two Years of implementation of the Wildlife Conservation & Management Act 2013,2016,21-22.

but surely lead to a weak standing in the fight against wildlife crime. The division has aided in the reduction of wildlife crimes such as poaching, improved visitor security and has successfully strengthened management of parks and reserves but is yet to completely.<sup>96</sup>

#### **4.4.2. Case study: Republic V David N Mwathi & 2 others**

##### **4.4.2.1. Brief Facts**

The accused persons were charged with being in possession of wildlife trophies contrary to section 95 as read with section 105 of the WCMA. The second count was for dealing in wildlife trophies contrary to section 84(1) as read with section 92 of the WCMA. The first accused person was further charged on the third count of obstructing an officer in the execution of his powers contrary to section 101(b) of the WCMA.

##### **4.4.2.2. Issues**

The issue in this case was whether the accused persons were found in possession of the wildlife trophies which happened to be 11 pieces of ivory, without a permit.

##### **4.4.2.3. Held**

Possession was defined by the definition ruled out in the Black's Law Dictionary as having in one's actual control; while legal possession was that which is accompanied by the intent to hold object in question in one's own control, otherwise known as possession in law. The evidence brought to court pointed to the fact that the 11 pieces of ivory were found in the house that belonged to a late relative of the accused. The prosecution failed to connect the accused person to the fact that they knew about the ivory and to the fact that they indeed had criminal possession of the same and that was never proved to the required standards in law which is, with regard to a criminal case beyond reasonable doubt.<sup>97</sup>

According to the judgement, the prosecution failed to establish that the three accused persons were indeed in possession of the ivory. This is because the evidence that was adduced in court was incoherent, untenable inconsistent, contradictory, self-defeating and never connected the three accused persons to the tusks recovered.<sup>98</sup> The offenders therefore had the benefit of the doubt from the court.

The prosecution failed to categorically highlight the dealings that the accused persons were involved in whether selling or otherwise, and the particulars were not exhaustive in the slightest and the omission of the dealings the accused persons were involved in was crucial.

---

<sup>96</sup>Kenya Wildlife Services, --<<http://www.kws.go.ke/content/wildlife-security>>-- on 15 November 2019.

<sup>97</sup>*Republic v David Njeru Mwathi & 2 others* (2014) eKLR.

<sup>98</sup>*Republic v David Njeru Mwathi & 2 others* (2014) eKLR.

Inventories to be produced in court to serve as proof of the recovery were absent. It would have been good practice to submit such especially where such serious exhibits produced were recovered from the suspects.<sup>99</sup> The exhibits couldn't be held in court for they were never signed and therefore never entered into the inventory of the same.

On the court visit to the scene of the possession of the recovered trophies, the court noted that the house appeared unclean, deserted, unoccupied and locked out.<sup>100</sup> It was clear that it belonged to the late brother of the accused persons. The first accused person was charged under section 10(b) of the WCMA, which did not create an offence for his acts. The charge had not been amended and he was therefore charged under a wrong section of law.

This led to the acquittal of the accused under section 215 of the Criminal Procedure Code. The prosecution failed to prove all charges against the accused persons and the KWS never investigated the case to the required standard for justice to have been considered to have prevailed in this matter.<sup>101</sup>

## **4.5. Analysis**

### **4.5.1. Executive Weaknesses**

The KWS objectives are straight forward from the description above however, it is clear that they have fallen short in carrying out these objectives. From the findings of the previous chapter, an institutional failure that has occurred in some instances is the performance of poor investigations. In the case of *Republic v David Njeru Mwathi & 2 others*, the accused persons acquitted under section 215 of the Criminal Procedure Code. The prosecution failed to prove all charges against the accused persons because the Kenya Wildlife Service never investigated the case to the required standards.<sup>102</sup>

The case above highlight an interesting perspective to the internal functioning's of our institutions. It is evident from the above, that although the judiciary may be undergoing a backlog of cases, there are still some glitches in cooperation towards eradicating wildlife crime that result from the ineffective and unreliable officers. Cases such as the ones illustrated above may have severe consequences in the long run if the strategy is adopted by other persons involved in the organized crime that is wildlife trafficking and may retard

---

<sup>99</sup>*Republic v David Njeru Mwathi & 2 others* (2014) eKLR.

<sup>100</sup>*Republic v David Njeru Mwathi & 2 others* (2014) eKLR.

<sup>101</sup>*Republic v David Njeru Mwathi & 2 others* (2014) eKLR.

<sup>102</sup> Kenya Wildlife Crimes Digest 2016, --<<file:///C:/Users/aloch/Downloads/WL%20Digest%202016.pdf>>-- on 15 November 2019.

efforts the government has made to completely eradicate wildlife crime and trafficking in the country.

## **CHAPTER 5: CONCLUSION AND RECOMMENDATION**

### **5.1. Introduction**

The final chapter to this research paper shall offer a summary of the previous chapters, highlighting the key ideas sought to explain in depth as well as provide a summary of the findings from the research. It shall then seek to offer plausible recommendations for the issues outlined from the findings of the research.

### **5.2. Chapter Summaries**

#### **5.2.1. Chapter 1**

This chapter elaborates the structure of the entire research paper. It introduces the concept of wildlife conservation and its development in Kenya within and outside the legal scope. It identifies the research problem to be pursued by this dissertation as well as spells out the objectives that shall guide this study. Moreover, it outlined and expounded on the extensive literature to create an understanding of the existing works that supports and informs the subject matter of the research as well as drawing a link between previous research and this dissertation. It finally outlined the methods used in acquiring research information and set out the theoretical framework in which the principles are explored and anchored towards the objectives of the research.

#### **5.2.2. Chapter 2**

In this chapter, the theoretical framework on the cooperation of intergovernmental departments with regard to wildlife crimes and how these relate to the study were discussed. This section of the study elaborates the collaborative administrative approach that is integral in managing intergovernmental relationships and activities. It is important to consider the notion of actively working towards making governance work better through more efficient and cooperative sub-governmental systems. This may largely improve its position and meet the efforts already made in battling wildlife crime.

#### **5.2.3. Chapter 3**

This chapter seeks to unfold the Judiciary as an institution involved in the fight against wildlife crimes. It sheds light onto the elements that are a miss and may be contributing to this. It further provides a review of reality in which wildlife crimes are handled in the Judiciary today with the aid of recent case law in a bid to investigate the cooperation of government arms in combating wildlife crimes and their changing dynamics over the years. It seeks to unfold the various elements that have actively played a role in the persistence of wildlife crimes and reveals that the Judiciary is indeed carrying out its mandate given the circumstances.

This chapter further provides a review of the mandate of The Legislature and KWS as the relevant Executive institution and seeks to shed light on the workings of the wildlife crime division, their mandate, its efficiency and whether or not they are following through with it. This was intended to further understand probable institutional shortfalls present in combating wildlife crimes and their changing dynamics over the years.

#### **5.2.4. Chapter 4**

This chapter provides a review of the functions of KWS as the relevant Executive institution and Legislature in a bid to further understand the institutional shortfalls present in combating wildlife crimes and their changing dynamics over the years as a continuation from the findings of the previous chapter. It included an overview of Public administration principles that institutions must take cognizance of and assesses whether they have been attempted. The first part of this chapter analysed the background of the concept of separation of powers in a bid to emphasise the importance of cooperation despite the separation of government arms. The Second part reviews the current legislative framework on wildlife related crimes. The last assess KWS and sheds light on the mandate of the wildlife crime division and connects it to the findings of the previous chapter and reveals that minor institutional shortfalls retard the fight against wildlife crimes on a greater scale.

#### **5.2.5. Chapter 5**

This final chapter concludes the dissertation as well as gives possible recommendations to various authorities involved in the fight against poaching as well as informing law makers on areas which need to be addressed in order to promote the most efficient means of wildlife conservation in the fight against poaching.

### **5.3. Findings & Recommendation**

#### **5.3.1. Findings**

The major findings in the research highlight the institutional issues that are limiting the government's own fight against wildlife crimes in Kenya. They include but are not limited to poor case management and backlog in the Judiciary and insufficient action by investigative divisions under the executive arm. The weaknesses in one arm may trickle to weakening the ability of another to achieve its mandate. This is evident in the in the case of the Republic V David Njenga & 2 others whereby despite the efforts made by the independent office of the DPP, KWS happened to slip and not conduct investigations as thoroughly as required leading

to the courts inability to pass the most fitting judgement considering the partial lack of information presented.

With regard to the hypotheses, the findings of this paper assert the poor case management at the Judiciary has led to the delay in justice which frustrates wildlife conservation efforts. This hypothesis is expressly affirmed.

With regard to the research questions, the findings further assert that KWS as the relevant Executive institution is efficient in carrying out its mandate. The issues in carrying out this mandate are as a result of officers' dereliction of duty with regards to matters such as investigations among others.

The structural functionalism theory as well as the butterfly effect may therefore come in whereby issues as discussed, which may seem minor, may consequentially result in a heap of chaos. The backlog of cases is already a major issue faced by the justice system. The investigative shortfalls are currently minor however with time, may lead to catastrophic results due to the weak front the government currently portrays and the dingy methods in which perpetrators can possibly escape justice such as corrupting the system by bribing officers with lower levels of integrity whereby the criminals gain wind of and moving forward use the institutional shortfalls in their favour.

### **5.3.2. Recommendations**

Below are the recommendations purported after the consideration of the position of the country with regard to these issues. They include;

1. The establishment of a separate court for the hearing of wildlife crime cases such as the separate court for environment and land matters and the labour courts that are at the level of the high court in the hierarchy of courts.
2. The first may be accompanied by the appointment of officers specialised in wildlife and environmental law specialists would further promote justice and work towards efficiently eradicating the menace and giving to each their due.

# Bibliography

## Books

Hague R & Harrop M, *Comparative Government and Politics*, 6<sup>th</sup> ed, Palgrave Macmillan, 2004.

Wuncsh JS, *Decentralization, Local Governance and the Democratic Transition in Southern Africa: A Comparative Analysis*, Volume 2, Issue 1, *African Studies Quarterly*, 1998.

Curie & De Waal, *The New Constitutional and Administrative Law* (2001).

Paulson LB & Paulson LS, *Hans Kelsen's Introduction to the Problems of legal Theory* (1992).

Mbondenyi MK & Ambani AO, *The new Constitutional Law of Kenya; Principles, Government & Human Rights*, Claripress LTD Nairobi, 2015.

Elliot C & Quinn F, *English Legal Systems* (2009).

Sarvis RC, *Legislative delegation and two conceptions of the legislative power* (2006) *Pierce Law Review*.

Kapur AC, *Principles of Political Science* (1996).

## Journal Articles & Working Papers

Sindiga I, *Wildlife-based Tourism in Kenya: Land use conflicts and government compensation policies over protected areas*, 6, *The Journal of Tourism Studies*, 2, 1995, 47

Ngatia PM, *Unveiling the Challenges of Curbing Wildlife Crime in Kenya: Evaluating the 3Cs solution*, unpublished PhD Thesis, University of Bolton, Bolton, 2018, 14 & 17.

Ile IU, *A Public Administration Approach to Managing Intergovernmental Relation System in the Governance of the State: A Case Review of Nigeria and South Africa*, Unpublished PhD Thesis, University of Pretoria, Pretoria, 2007, 59.

Urry J, *Metaphors, Sociology Beyond Societies: Mobilities for the Twenty-First Century*, Routledge, --<http://books.google.co.uk/books?id=ogyDBobOHVEC&pg=PA23> on 17 February 2019.

Karin F, *Noble power brokerage in the Polish-Lithuanian Commonwealth: The case of BogusławRadziwiłł*, University of Aberdeen, United Kingdom.

Locke J, *Second Treatise on Civil Government* (1690).

Nugent T, De Montesquieu B; *The Spirit of laws trans* (1949).

Parpworth N, *Constitutional and administrative law*, 3ed.

Ng'etich FC, *An Assessment of the Role of Prosecution Authorities in Combating Poaching and Wildlife Trafficking in Kenya*, Unpublished, University of Nairobi, Nairobi, 2016, 9.

## Reports

Government of Kenya, *National Tourism Strategy, 2018-2030*, Department of Tourism, Ministry of East Africa, Commerce & Tourism, 2018, 4.

Office of the Director of National Intelligence, Special Report: *The Threat to U.S. National Security Posed by Transnational Organized Crime*, 2011.

A Wildlife Conservation Strategy for Laikipia County (2012-2030): First Edition, 2012. Laikipia Wildlife Forum, Nanyuki, Kenya.

Space for Giants, Giants Club Summit 2018: Summary Report, 16 April 2016 - <https://spaceforgiants.org/2018/04/16/giants-club-summit-2018-summary-report/> on 1 November 2019.

On the Right Path? An Analysis of Kenya's Law Enforcement Response to Wildlife Crime, Eyes in the courtroom report 2016-2017, 8.

De Smith S, Constitutional and administrative law, (1977).

Paula Kahumbu and others, Scoping Study On The Prosecution Of Wildlife Related Crimes In Kenyan Courts (Wildlife Direct 2014).

Patricia KameriMbote and Migai Akech, Kenya: *Justice Sector and the Rule of Law* (Open Society Initiative for Eastern Africa 2011).

Wildlife Direct, Outcome of Court Trials in the First Two Years of implementation of the Wildlife Conservation & Management Act 2013.

## Online Resources

Olpejeta Conservancy, Northern--

<<https://www.olpejetaconservancy.org/wildlife/rhinos/northern-white-rhinos/>>- on 17 February 2019.

The Law Library of Congress, National Parliaments: Kenya, --

<<https://www.loc.gov/law/help/national-parliaments/kenya.php>>-- on 15<sup>th</sup> November 2019.

Patton F, *London Conference Marks Turning Point in Wildlife Protection*, SWARA, April – June 2014; Bales K & Lize K, Investigating Human Trafficking: *Challenges, Lessons Learned and Best Practices*, FBI Law Enforcement Bulletin 4, United States Department of Justice, Federal Bureau of Investigation, April 2007.

Kenya Wildlife Crimes Digest 2016, --

<<file:///C:/Users/aloch/Downloads/WL%20Digest%202016.pdf>>-- on 15 November 2019.

## Other Sources

Akwiri J, Kenya seizes nearly two tonnes of ivory from shipment bound for Cambodia, 22 December 2016 --<<https://www.reuters.com/article/us-kenya-ivory-idUSKBN14B0IM>--> on 1 November 2019.

<https://www.theguardian.com/environment/africa-wild/2016/jul/23/kenya-jails-ivorykinpin-for-20-years>

World Wide Fund for Nature, Kenya finally gets a new Wildlife law, 17 February 2017, --<[http://wwf.panda.org/wwf\\_news/?216350/Kenya-finally-gets-a-new-wildlife-law](http://wwf.panda.org/wwf_news/?216350/Kenya-finally-gets-a-new-wildlife-law)>-- on 15 November 2019.

Kenya Wildlife Services, --<<http://www.kws.go.ke/content/wildlife-security>>-- on 15 November 2019.