

**THE USE OF TRADITIONAL DISPUTE RESOLUTION  
MECHANISMS IN RESOLVING HUMAN-WILDLIFE CONFLICTS  
IN KENYA.**

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

**By**

**TEVIN MWENDA GITONGA**

**083699**

**Prepared under the supervision of**

**FRANCIS KARUIKI**

**JANUARY 2018**

**Word count 11,122**

## Declaration

I, TEVIN MWENDA GITONGA, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: ..... 

Date: ..... 28/05/18

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed: ..... 

[Supervisor's Name] 28/05/18

## Table of Contents

Declaration .....	ii
DEDICATION .....	vi
ACKNOWLEDGMENTS.....	vii
ABSTRACT .....	viii
LIST OF ABBREVIATIONS .....	ix
LIST OF STATUTES.....	x
LIST OF CASES.....	xi
CHAPTER 1.....	1
Introduction to the Study.....	1
1.0 Introduction .....	1
1.1 Background .....	2
1.3 Statement of problem .....	3
1.4 Justification .....	3
1.5 Research objectives.....	3
1.6 Literature review .....	4
1.6.1 Human-wildlife conflict.....	4
1.6.2 Access to justice .....	5
1.6.3 Restorative Justice.....	7
1.7 Theoretical framework.....	9
1.7.1 Social capital theory .....	9
1.8 Hypotheses.....	14
1.9 Research methodology .....	14
1.10 Statement of Limitations.....	15
1.11 Outline of the dissertation.....	15
Chapter 1: Introduction to the study.....	15
Chapter 2: The Legal Framework for Traditional Dispute Resolution Mechanisms in Kenya. ....	16
Chapter 3: Legal Framework for Human-Wildlife Conflict in Kenya.....	16
CHAPTER 2.....	17
The Legal Framework for Traditional Dispute Resolution Mechanisms in Kenya. .....	17
2.0 Introduction .....	17
2.1 Constitution of Kenya 2010 .....	17
2.2 Acts of Parliament .....	19
2.2.1 Judicature Act.....	19
2.2.2 Commission on Administrative Justice Act .....	19

2.2.3 National Land Commission Act .....	19
2.2.4 Community Land Act.....	20
2.2.5 Environmental and Land Court Act.....	20
2.2.6 Marriage Act.....	20
2.3 Kenyan Cases illustrating the role of TDRMs .....	20
2.3.1 R v Mohamed Abdow Mohamed .....	20
2.3.2 Stephen Kipruto Cheboi & 2 others v R.....	21
2.4 Conclusion .....	21
CHAPTER 3.....	23
The Legal Framework for Human-Wildlife Conflict in Kenya .....	23
3.0 Introduction. ....	23
3.1 History of human-wildlife conflict in Kenya.....	23
3.2 Legal Framework for Human-wildlife Conflict.....	26
3.2.1 Constitution of Kenya 2010 .....	26
3.2.2 Statutes addressing human-wildlife conflict. ....	27
1) Wildlife Conservation and Management Act .....	27
3.4 Conclusion .....	31
Chapter 4 .....	32
Appropriateness of Traditional Dispute Resolution Mechanisms in Resolving Human-Wildlife Conflict in Kenya.....	32
4.0 Introduction .....	32
4.1 Centralization of wildlife management.....	32
4.2 Appropriateness of using TDRMs in resolving human-wildlife conflict.....	34
4.3 Challenges facing the use of TDRMs in resolving Human-wildlife conflict..	36
4.4 Conclusion .....	38
CHAPTER 5.....	39
CONCLUSION FINDINGS AND RECOMMENDATIONS.....	39
5.1 Introduction .....	39
5.2 Findings .....	40
5.3 Recommendations.....	41
5.4 Conclusion .....	42
5.5 Hypotheses.....	43
Bibliography.....	44
Books.....	44
Reports.....	44

<b>Journal Articles and Conference Papers.....</b>	<b>44</b>
<b>Theses.....</b>	<b>46</b>
<b>Internet Sources.....</b>	<b>46</b>
<b>Personal Communications .....</b>	<b>47</b>

## **DEDICATION**

To God for His grace and mercy and my family for their inspiration, support encouragements, good will and prayers which have followed me all my life.

## **ACKNOWLEDGMENTS**

I am grateful to my supervisor Mr. Francis Kariuki for his guidance and encouragement. I am also grateful to Ms. Cynthia Amutete for all her guidance. I am grateful to Strathmore Law School for giving me the opportunity to undertake this study. I offer my sincere gratitude to my family for the encouragement, inspiration and support during this study.

## **ABSTRACT**

Human-wildlife conflicts are not adequately addressed in the current legal framework. This is because the current legal framework mainly relies on litigation, compensation and killing of animals to resolve human-wildlife conflicts. The problem with these forms of resolving conflicts is that they do not achieve any form of restorative justice. In addition to this, they create a rift between the involved parties and end up affecting wildlife conservation efforts.

This has created a need to come up with alternative methods of resolving human-wildlife conflict. Since most human-wildlife conflicts occur in areas which border community land. The most appropriate method to resolve disputes would appear to be the use of Traditional Dispute Resolution Mechanisms. The Constitution of Kenya 2010 under article 159 recognizes Traditional Dispute Resolution Mechanism as a method of resolving conflicts. The constitution recognizes the benefits of using these methods to resolve conflicts.

The Wildlife Conservation and Management Act 2013 contains provisions that allow for the formation of wildlife associations. These associations are formed by the community. One of the purposes of this associations is to resolve Human-wildlife conflicts. This study found out that if this associations adopt Traditional Dispute Resolution Mechanism to resolve human-wildlife conflict, they will promote restorative justice. It did this by first looking at the current legal framework governing Traditional Dispute Resolution Mechanisms in Kenya. It then looked at the current legal framework used in resolving human-wildlife conflict. In addition, it then looked at the viability of using TDRMs in resolving human-wildlife conflict.

The study elaborated on how TDRMs can be used to resolve human-wildlife conflict. It contends that, this can be done by the wildlife associations including the people in charge of resolving disputes in communities in the associations to handle any cases of human-wildlife conflicts that touch on the community.

## **LIST OF ABBREVIATIONS**

**TDRMs**

**Traditional Dispute Resolution  
Mechanisms**

## LIST OF STATUTES

*African Convention on the Conservation of Nature and Natural Resources*, (1969).

*Agenda 21* (1992).

*Civil Procedure Rules*, (2010).

*Commission on Administrative Justice Act*, (2011).

*Community Land Act*, (2016).

*Constitution of Kenya*, (2010).

*Convention on Bio Diversity*, (1993).

*County Government Act* (2012).

*Environmental and Land Court Act*, (2011).

*Judicature Act*, (1967).

*Marriage Act*, (2014).

*National Land Commission Act*, (2012).

*Statement on Future Wildlife Management Policy in Kenya*, (1975) Sessional Paper.

*The Rio Declaration on Environment and Development*, (1992).

*Wildlife Conservation and Management Act*, (2013).

## LIST OF CASES

*Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others*, [2012].

*Galana & 3 others v AG & 2 Others*, [2007].

*Hassan & 4 others v KWS*, [1996].

*R v Mohamed Abdow Mohamed*, [2013].

*Stephen Kipruto Cheboi & 2 others v R*, [2014].

# CHAPTER 1

## Introduction to the Study

### 1.0 Introduction

Human wildlife conflict is defined as; the negative resultant impact that occurs due to interaction between humans and wildlife.<sup>1</sup> The conflict is largely attributed to the rising human population.<sup>2</sup> This in turn, creates a scarcity in resources for both humans and wildlife<sup>3</sup> therefore, leading to both being exposed to vulnerability and risk.<sup>4</sup> Human-wildlife conflict takes many forms, ranging from loss of both wildlife and human life, to competition for scarce resources.<sup>5</sup>

The purpose of this study is to find out whether; Traditional Dispute Resolution Mechanisms (hereinafter referred to as TDRMs) can be used to resolve human-wildlife conflict. It will be done by answering the following questions. These questions are: Can TDRMs achieve justice when used in resolving human wildlife conflict? Is the use of TDRMs a viable option in resolving human wildlife conflict as compared to other forms of resolving disputes? Given the change in lifestyle in most communities, do they still uphold TDRMs?

The study, will find out the importance of using TDRMs in resolving human-wildlife conflicts, the reasons that lead to human-wildlife conflict, the challenges that may be faced in tackling human-wildlife conflict through the use of TDRMs and lastly, give recommendations on the application of TDRMs in resolving human-wildlife conflicts.

---

<sup>1</sup> <http://www.slideshare.net/reethur/human-wildlife-conflict> accessed on 7 February 2017.

<sup>2</sup> <http://www.slideshare.net/reethur/human-wildlife-conflict> accessed on 7 February 2017.

<sup>3</sup> <http://www.slideshare.net/reethur/human-wildlife-conflict> accessed on 7 February 2017.

<sup>4</sup> Leela, 'Living among lions (panthera leo): Coexistence or killing? community attitudes towards conservation initiatives and the motivations behind lion killing in Kenyan maasailand' published LLM Thesis University of Wisconsin- Madison, 2006,5.

<sup>5</sup> <http://www.slideshare.net/reethur/human-wildlife-conflict> accessed on 7 February 2017.

resolution mechanisms as provided for by the Wildlife Conservation and Management Act hinders access to justice. There is therefore a need, for development of alternative dispute resolution mechanisms in this case the use of TDRMs in resolving these conflicts.

### **1.3 Statement of problem**

Article 159 of the Constitution of Kenya 2010 provides for the use of TDRMs as a mode of resolving disputes.<sup>9</sup> Section 40 and 41 of the Wildlife Conservation and Management Act, provides for the formation of community wildlife associations whose purpose is to facilitate conflict resolution.<sup>10</sup> However, in outlining the functions of the wildlife associations the law does not outline conflict resolution as one of its functions. In addition, the Act does not outline the methods that will be used in resolving these disputes. The problem with this is that the associations will not know what rules to apply in resolving the conflicts. In addition, due to the discretion given, it may lead to the associations using formal systems of resolving disputes. Which may not achieve the intended justice to the aggrieved parties. This is because, the Act does not specifically refer to TDRMs as the first method that would be used to resolve any disputes that may arise. When resolving human-wildlife conflicts, the associations will need to use TDRMs and to recognize their importance. Thus, the law should recognize that these wildlife associations can use TDRMs in resolving human-wildlife conflict.

### **1.4 Justification**

The purpose of this study is to find out if TDRMs can be used to resolve human-wildlife conflict as opposed to litigation. This is because litigation has proved to be a long and tedious process and does not achieve restorative justice. However, the limitation is that not all human-wildlife conflicts can be resolved through TDRMs.

### **1.5 Research objectives**

1. To analyse the current legal framework used in resolving human-wildlife conflicts.
2. To establish whether the use of TDRMs in resolving human-wildlife conflict, will achieve restorative justice.

---

<sup>9</sup>Article 159, *Constitution of Kenya* (2010).

<sup>10</sup> Sections 40 and 41, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

## 1.1 Background

Article 159 of the Constitution of Kenya 2010 provides for the use of TDRMs as a mode of resolving disputes, provided that the TDRMs do not contravene the Bill of Rights, are not repugnant to justice and morality, inconsistent with the constitution or any other written law.<sup>6</sup> The courts have also, promoted the use of TDRMs, as a method of resolving disputes. For example, in the case of *R v Mohamed Abdow Mohamed*,<sup>7</sup> the courts applied TDRMs in resolving a murder case. Abdow Mohamed was charged with the murder of Osman Ali Abdi on 19 October 2011 in Eastleigh, within Starehe District in Nairobi. On the date of the trial the prosecution made an application for the matter to be settled based on Islamic laws and customs. The prosecution claimed that the accused had compensated the family of the deceased in the form of camels, goats and performed rituals. This ritual acted as blood money to the deceased family. Further, the prosecution claimed that no witness had come forth to testify. This case illustrates how the scope of TDRMs has expanded to the extent of handling criminal matters. This case further illustrates how TDRMs are flexible and can be used to resolve cases of different nature.

The Wildlife Conservation and Management Act 2013<sup>8</sup> in section 40 establishes wildlife conservation associations whose main purpose, shall be to facilitate conflict resolution and cooperative management of wildlife within a specified geographic region. However, section 41 which outlines the functions of the associations does not include, facilitating conflict resolutions. In addition to that, Part XI of the Act that deals with the types of offences, does not envision an alternative to the resolving of these crimes. The Act in Section 25 contains a provision that allows for one to be compensated in case of personal injury or death caused by wildlife. The compensation is only in monetary form. The lack of an alternative dispute resolution mechanism has led to human-wildlife conflicts being referred to the courts for litigation. Thus, only achieving retributive justice.

However, when it comes to human-wildlife conflict what should be sought out is restorative justice. Restorative justice aims at reconciling parties and returning them to the position of peace and harmony they were in before the conflict occurred. The aim of TDRMs is to achieve this restorative justice. The limited scope of alternative dispute

---

<sup>6</sup> Article 159, *Constitution of Kenya* (2010).

<sup>7</sup> *R v Mohamed Abdow Mohamed* [2013] eKLR.

<sup>8</sup> Sections 64-65, 75-95, *Wildlife Conservation and Management Act* (Act No. of 2013).

and the lions which are conserved by the Kenya Wildlife Service are in conflict, and the role of the community in resolving this conflict. She further outlines the flaws in the current community based conservation efforts, by stating that they have not incorporated the use of TDRMs in resolving human-wildlife conflicts. In addition, the writer also looks at the way the needs of the community keep on changing and how this in turn, changes the methods used in resolving conflicts. For example, as much as the Maasai are nomads some are embracing farming and this change of lifestyle calls for a change in the way they resolve human-wildlife conflict. This dissertation is relevant in the current study because the writer shows how by not allowing the community to participate in the community based conservation associations leads to lack of achievement of justice. However, the writer did not state how the community based conservations, can incorporate TDRMs in resolving human-wildlife conflict.

### **1.6.2 Access to justice**

In the article ‘Alternative Dispute Resolution, Access to Justice and Development in Kenya’ written by Francis Kariuki and Kariuki Muigua,<sup>13</sup> the role of ADR and TDRMs in resolving conflicts to promote access to justice is discussed. The article tries to define the concept of justice. Some of the definitions it gives are, distributive justice or economic justice which is concerned with fairness in sharing; procedural justice which entails the principle of fairness in sense of fair play; restorative justice (corrective justice) or retributive justice.<sup>14</sup> It defines access to justice as; the situation where people in need of help, find effective solutions available from justice systems which are accessible, affordable, comprehensible to ordinary people, and which dispense justice fairly, speedily and without discrimination, fear or favour and offer a greater role for alternative dispute resolution.<sup>15</sup>

Furthermore, the article also highlights how TDRMs can be used to promote restorative justice. The article states that restorative justice aims at reconciliation by restoring the parties’ relationships, peace-building and focusing on parties’ interests rather

---

<sup>13</sup> Kariuki F and Kariuki M ‘Alternative dispute resolution, access to justice and development in Kenya’ *Strathmore Law Journal*, (2015), 1-21.

<sup>14</sup> Available at [http://changingminds.org/explanations/trust/four\\_justice.html](http://changingminds.org/explanations/trust/four_justice.html) on 4 February 2017.

<sup>15</sup> <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0CFcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07-> on 4 February 2017.

3. To make recommendations on how the community wildlife associations can incorporate TDRMs in resolving human-wildlife conflicts.

## **1.6 Literature review**

For the purpose of this study literature means and includes, constitutions, statutes, books, magazines, articles, journal, dissertations, newspapers and magazine articles and online sources. The study will focus on the materials listed above as the sources of the literature review. In discussing the literature review it will be organized into three themes.

First, human wildlife conflict. Second access to justice. Third restorative justice. The study will principally rely on the works of A.J. Dickman, Leela N. Hazzah, Francis Karuiki and Hollie Nyseth Brehm.

### **1.6.1 Human-wildlife conflict**

In the article ‘Complexities of conflict: the importance of considering social factors for effectively resolving human–wildlife conflict’ by A. J Dickman<sup>11</sup> the writer, identifies three areas that should be considered when resolving human-wildlife conflict. These areas are: perception of risk, disproportionate response and social influences. He states that, one should consider the social aspects of the communities to determine why the conflict arises. He develops a four-part method of resolving human-wildlife conflict. These are: the level of wildlife damage, level of conflict, response to conflict, and conservation consequence. This article is important for the study because, it sheds light on the various social factors that lead to human-wildlife conflict, and how communities’ beliefs affect human-wildlife conflict. The limitation of this article however is that, it does not provide how this four-part method can be combined with TDRMs to achieve justice to the aggrieved parties.

In the dissertation, ‘Living Among Lions (*Panthera Leo*): Coexistence or Killing? Community Attitudes towards Conservation Initiatives and the Motivations behind Lion Killing in Kenyan Maasailand’<sup>12</sup> by Leela N. Hazzah, she uses the Maasai community as a case study for human-wildlife conflict. The writer discusses why the Maasai community

---

<sup>11</sup> Dickman A ‘Complexities of conflict: the importance of considering social factors for effectively resolving human–wildlife conflict’ *Animal Conservation*, (2010), 458–466.

<sup>12</sup> Leela, ‘Living among lions (*panthera leo*): Coexistence or killing? community attitudes towards conservation initiatives and the motivations behind lion killing in Kenyan maasailand’ published LLM Thesis University of Wisconsin- Madison, 2006,1.

wins.<sup>26</sup> Its salient feature are that; its offences are against the state, offenders are accountable to the state, accountability is equated with suffering; the more one suffers the more it is assumed that they have been held accountable for their mistakes, victims are not the primary subjects and misbehavior is a result of individual choices with individual consequences.<sup>27</sup>

TDRMs tend to be resolution geared mechanisms.<sup>28</sup> This is also the aim of restorative justice. Their guiding aim is to restore peace and social harmony within the community by ensuring that disputants and their respective supporters are reconciled.<sup>29</sup> The parties dig deeper to the issues and try to find a solution that works for all parties. The outcome of the process is usually enduring, non-coercive, mutually satisfying, address root of the problem and rejects power based outcomes.<sup>30</sup> TDRMs try to address the underlying issues that caused the problems. They try to find a common ground by looking at the relationship which the parties have.<sup>31</sup>

TDRMs manifest a concern of dispute settlement through consensus. They do not isolate the dispute from its social context. Rather through TDRMs they seek a solution that promotes social harmony or abates group conflict or tension.<sup>32</sup> Reconciliation of parties through compromise and consensus is what characterizes decisions of the persons resolving the disputes in the community.<sup>33</sup> While in the adversarial system the approach is a winner takes all.

---

<sup>26</sup> Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, ' 2 *Alternative Dispute Resolution Journal* (2014), 202-228, 216.

<sup>27</sup> [http://www.ywcamadison.org/atf/cf/%7BAC4038C4-BCCA-4F24-B55C-F41063EDF6FE%7D/Restorative\\_Justice\\_Resource\\_Guide.pdf](http://www.ywcamadison.org/atf/cf/%7BAC4038C4-BCCA-4F24-B55C-F41063EDF6FE%7D/Restorative_Justice_Resource_Guide.pdf) on 16 August 2017.

<sup>28</sup> Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, 216.

<sup>29</sup> *ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,'* ICJ, 201, 32.

<sup>30</sup> Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, 216.

<sup>31</sup> *Interface between Formal and Informal Justice Systems in Kenya*, 32.

<sup>32</sup> *Interface between Formal and Informal Justice Systems in Kenya*, ' 32.

<sup>33</sup> *Interface between Formal and Informal Justice Systems in Kenya*, ' 32.

Further in TDRMs, the decisions are a series of compromise from both sides to promote social harmony.<sup>34</sup> This is due to the importance of coming up with a solution that is mutually acceptable to both parties.<sup>35</sup> Thus the concept of justice is derived from what is regarded by the community as fair and just in light of the overall context.<sup>36</sup> This however, does not mean that there are no rules.<sup>37</sup> Rules are seen as bargaining tools used in the process of reaching an outcome and not the determinant of the outcome<sup>38</sup>

The aim of TDRMs is to ensure that there is restorative justice by ensuring that the root cause of the matter is addressed.<sup>39</sup> For example in the Moahammed Abdow case, a court process would not yield any results as the witnesses refused to appear in court.<sup>40</sup> It is only after the families came together addressed the key issues and a traditional ritual had been performed that both parties felt satisfied.<sup>41</sup>

## **1.7 Theoretical framework**

This study draws from two major theories for its formulation. These theories are the social capital theory and the vulnerability and risk theory.

### **1.7.1 Social capital theory**

This theory sets out to explain how communities came into place and the ties that bind them.<sup>42</sup> Putnam states that social ties are what allow people to stay together. These social ties involve trust and reciprocal duty towards each other.<sup>43</sup> There are two social capital approaches that Putnam proposes. The first one is bonding social capital that fastens ties of individual members of a group. The second one is bridging social capital that allows

---

<sup>34</sup> Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, 216.

<sup>35</sup> *ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,'* ICJ, 2011.

<sup>36</sup> *ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,'* ICJ, 2011.

<sup>37</sup> *ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,'* ICJ, 2011.

<sup>38</sup> *ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,'* ICJ, 2011.

<sup>39</sup> Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, 216.

<sup>40</sup> *R v Mohamed Abdow Mohamed* [2013] eKLR.

<sup>41</sup> *R v Mohamed Abdow Mohamed* [2013] eKLR.

<sup>42</sup> Kariuki .F, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' *Alternative dispute resolution* (2015), 30-53, 32.

<sup>43</sup> Robert D. Putnam, *Bowling Alone*, 1st edition, Simon & Schuster, United States, 2000, 19.

than allocating rights between disputants. This article will be important for this study because it highlights what justice is and the importance of achieving justice using other methods as opposed to litigation. This study sets out to discredit the use of litigation to resolve human-wildlife conflict and the importance of using TDRMs. However, it does not specifically address the use of TDRMs in resolving human-wildlife conflict and focuses on using TDRMs in resolving disputes in general.

In the article *Genocide, Justice, and Rwanda's Gacaca Courts* written by Hollie Nyseth Brehm, Christopher Uggen, and Jean-Damascène Gasanabo the paper outlines how the Gacaca courts, which used TDRMs to resolve the conflicts that occurred during the Rwandan genocide worked in Rwanda further,<sup>16</sup> it also highlights the barriers that one would face in the application of TDRMs. This paper will assist in shedding light on the use of TDRMs in line with modern ways of solving disputes and how both can be combined. In addition, to that the study showed how restorative justice can be achieved through the use of TDRMs in criminal cases. This paper however, did not address the use of TDRMs in resolving human-wildlife conflict.

In the dissertation *Devolution of Wildlife Management in Kenya to Enhance Community Participation: An Assessment of Kenyan Legal Frameworks* by Didi Wamukoya.<sup>17</sup> The writer states that there is a lack of devolution of wildlife management. This lack of devolution has prevented communities in participating in wildlife management,<sup>18</sup> in turn leading to communities, disregarding wildlife and the importance of taking care of wildlife.<sup>19</sup> The writer recommends the legal recognition of communities in wildlife management.<sup>20</sup>

---

<sup>16</sup> Hollie .B. Christopher .U. and Jean .G. 'Genocide, Justice, and Rwanda's Gacaca Courts' *Journal of Contemporary Criminal Justice* (2014), 333–352.

<sup>17</sup> Wamukoya, 'Devolution of wildlife management in Kenya to enhance community participation: An assessment of Kenyan legal frameworks' published LLM Thesis University of Nairobi, 5.

<sup>18</sup> Wamukoya, 'Devolution of wildlife management in Kenya to enhance community participation: An assessment of Kenyan legal frameworks' published LLM Thesis University of Nairobi, 5.

<sup>19</sup> M. T. Cirelli, 'Legal Trends in Wildlife Management' *Legislative Study 74, FAO* (2002), 39.

<sup>20</sup> Wamukoya , 'Devolution of Wildlife Management in Kenya to Enhance Community Participation: An Assessment of Kenyan Legal Frameworks' published LLM thesis University of Nairobi,71.

In addition to that, the sustainability of community wildlife programs is heavily dependent on whether the community can benefit from the wildlife.<sup>21</sup> If these recommendations are actualized and communities, are allowed to take part in the control and governance of wildlife, the modes of resolving disputes that would be applied would be TDRMs. The Wildlife Conservation and Management Act of 2013<sup>22</sup> has tried to devolve the management of wildlife by establishing the community wildlife associations. These associations responsibilities are to inform the Kenya Wildlife Service of any illegalities occurring in the parks, assist in combatting these illegal activities, assist in animal control.<sup>23</sup> Thus, even though the dissertation did not address the use of TDRMs in resolving human-wildlife conflict, it did address the importance of allowing communities to take part in wildlife management. If communities are eventually fully allowed to do so TDRMs will play a critical role in the way they will be resolving human-wildlife conflict.

### **1.6.3 Restorative Justice**

Restorative justice is a form of justice system that focuses on the needs of the victims and the offenders rather than satisfying the rule of law or imposing community punishment to the offender.<sup>24</sup> The salient features of restorative justice that makes it stand out from retributive justice which is what is aimed at by the courts are that. Firstly, misbehavior is regarded as towards the community, offender is accountable to the victim and the community, accountability is defined as taking responsibility for one's mistakes, victims and the community are directly involved and play a key role in response to misbehavior, offenders are defined by their ability to take responsibility of their actions and victims by their ability to reconcile with the victim, offenses have both personal and social consequences.<sup>25</sup>

On the other hand, retributive justice which is the intended outcome in a formal legal system is one which the one with the best advocate, powerful and most resourceful

---

<sup>21</sup> Wamukoya , 'Devolution of Wildlife Management in Kenya to Enhance Community Participation: An Assessment of Kenyan Legal Frameworks' published LLM thesis University of Nairobi,12.

<sup>22</sup> Section 41 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>23</sup> Section 41 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>24</sup> [http://www.ywcamadison.org/atf/cf/%7BAC4038C4-BCCA-4F24-B55C-F41063EDF6FE%7D/Restorative\\_vs\\_retributive\\_justice.pdf](http://www.ywcamadison.org/atf/cf/%7BAC4038C4-BCCA-4F24-B55C-F41063EDF6FE%7D/Restorative_vs_retributive_justice.pdf) on 16 August 2017.

<sup>25</sup> [http://www.ywcamadison.org/atf/cf/%7BAC4038C4-BCCA-4F24-B55C-F41063EDF6FE%7D/Restorative\\_Justice\\_Resource\\_Guide.pdf](http://www.ywcamadison.org/atf/cf/%7BAC4038C4-BCCA-4F24-B55C-F41063EDF6FE%7D/Restorative_Justice_Resource_Guide.pdf) on 16 August 2017.

There are three concepts that underlie vulnerability and risk theory in relation to communities. These are 1) entitlement 2) coping and 3) resilience.<sup>51</sup> Entitlement focuses on the customary or legal rights and access to resources.<sup>52</sup> For example during a drought communities that have access to food and water via customary entitlement will be better off as compared to communities who lack.<sup>53</sup> The communities that lack access to food and water will be exposed to the hazards that come with a drought. Entitlement assists in explaining why some communities are exposed to risks that other communities are not. For example, pastoral communities are entitled to livestock and the risks they face are related to their livestock. As compared to communities who conduct farming and are entitled to fertile lands to conduct their farming. They will therefore face hazards and risks related to farming. Coping focuses on the different strategies that different communities have in dealing with hazards and ultimately how vulnerable they will be.<sup>54</sup> Lastly resilience can be defined as the ability of an ecosystem to bounce back after being exposed to hazards, to its original state.<sup>55</sup> Resilience can be interpreted as the ability of a social system to find ways of responding and adapting to a situation.<sup>56</sup> The social aspect of entitlement, coping and

---

<sup>51</sup> Leela, 'Living among lions (panthera leo): coexistence or killing? community attitudes towards conservation initiatives and the motivations behind lion killing in Kenyan maasailand' published LLM Thesis University of Wisconsin- Madison, 2006,6.

<sup>52</sup> Leela, 'Living among lions (panthera leo): coexistence or killing? community attitudes towards conservation initiatives and the motivations behind lion killing in Kenyan maasailand' published LLM Thesis University of Wisconsin- Madison, 2006,6.

<sup>53</sup> Leela, 'Living among lions (panthera leo): coexistence or killing? community attitudes towards conservation initiatives and the motivations behind lion killing in Kenyan maasailand' published LLM Thesis University of Wisconsin- Madison, 2006,6.

<sup>54</sup> Turner, B. L., R. Kasperson, P. Matson, J. McCarthy, R. Corell, L. Christensen, N. Eckley, J. Kasperson, A. Luers, M. Martello, C. Polsky, P. A and A. Schiller. 'A framework of vulnerability analysis in sustainable science' *proceedings of the national academy of science of the United States of America* (2003), 8074.

<sup>55</sup> Turner, B. L., R. Kasperson, P. Matson, J. McCarthy, R. Corell, L. Christensen, N. Eckley, J. Kasperson, A. Luers, M. Martello, C. Polsky, P. A and A. Schiller. 'A framework of vulnerability analysis in sustainable science',8074.

<sup>56</sup> Cutter, S., J. Mitchell, and M. Scott, 'Revealing the Vulnerability of People and Places: A case study of Georgetown County, South Carolina' *90 Annals of the Association of American Geographers* 90 (2000) 713-737.

interlink age with other social groups.<sup>44</sup> The study will emphasize on the latter which allows interlink age with other social groups. The reason for this being in human-wildlife conflict the communities, are not the only parties involved but also the Kenya Wildlife Service and the owners of conservancies. Therefore, when it comes to the formation of the TDRMs, there will be a need to consider the parties who do not form part of the community, but are involved in the protection of wildlife. In addition to that, these are the parties that the communities will have to go to in order to settle the disputes. The social capital theory will also assist in explaining restorative justice in the African traditional system.<sup>45</sup>

This is because the elders aim was to restore social relations whenever a situation arises. Without proper social ties the community cannot function as required.<sup>46</sup> One of the aims of this study; is to show that the use of TDRMs in resolving human-wildlife conflict, will lead to the achievement of restorative justice and thus promote social relations. These social relations are between the communities and the various stakeholders involved in the conservation of wildlife.

### **1.7.2 Vulnerability and risk theory**

Vulnerability is the degree in which a system or sub-system is likely to experience harm due to pressure it receives from being exposed to hazard or stress.<sup>47</sup> A hazard is a threat to a system and any consequences it may produce.<sup>48</sup> A risk is the magnitude of the consequences of a hazard.<sup>49</sup> It should be noted that vulnerability and risk are not only caused by physical environment but also social factors.<sup>50</sup>

---

<sup>44</sup> Putnam, *Bowling Alone*, 19.

<sup>45</sup> Kariuki .F, 'Conflict resolution by elders in Africa: successes, challenges and opportunities', 32.

<sup>46</sup> Kariuki .F, 'Conflict resolution by elders in Africa: successes, challenges and opportunities', 32.

<sup>47</sup> White, G. F, *Natural Hazards*, Oxford Press, New York, 1974, 1.

<sup>48</sup> Turner, B. L., R. Kasperson, P. Matson, J. McCarthy, R. Corell, L. Christensen, N. Eckley, J. Kasperson, A. Luers, M. Martello, C. Polsky, P. A and A. Schiller. 'A framework of vulnerability analysis in sustainable science' proceedings of the national academy of science of the United States of America (2003), 8074.

<sup>49</sup> Turner, B. L., R. Kasperson, P. Matson, J. McCarthy, R. Corell, L. Christensen, N. Eckley, J. Kasperson, A. Luers, M. Martello, C. Polsky, P. A and A. Schiller. 'A framework of vulnerability analysis in sustainable science', 8074.

<sup>50</sup> Cutter, S., J. Mitchell, and M. Scott. 'Revealing the vulnerability of people and places: A case study of Georgetown County, South Carolina', *Annals of the Association of American Geographers* 90 (2000) 713-737.

to community based conservation is attributed to the failure of exclusive neo colonial fortress conservation.<sup>65</sup> That form of conservation excluded the community. However, this form of conservation also has its own demerits. It still leaves the community vulnerable. This is because it does not cooperate the rules and values that the community up holds.<sup>66</sup> This rules and values include their traditional methods of solving disputes. There is need for greater attention to the integration of institutions that a play a role in the conservation of wildlife and the interests of the community.<sup>67</sup>

In addition, it will be difficult for outside institutions for example, government agencies to introduce rules and regulations without the consultation of the community.<sup>68</sup> As the rules may not be in line with the values of the community.<sup>69</sup> Moreover it will be difficult to enforce these rules.<sup>70</sup> Thus if we are to ensure that conservation does not make communities vulnerable and exposed to risk, there is need to embrace community rules and values. This includes using of traditional justice systems in solving of human-wildlife conflict. Communities' mostly pastoral communities are vulnerable to human-wildlife conflict. One of the best ways to reduce this risk would be to embrace their systems of solving disputes, as they are tailored to protect them against various vulnerabilities and risk. An example of this would be a case in which the Kenya Wildlife Service, was requested by a community that lived next a national park, to bring goats as compensation for the ones

---

<sup>65</sup> Leela, 'Living among lions (panthera leo): coexistence or killing? community attitudes towards conservation initiatives and the motivations behind lion killing in Kenyan maasailand' published LLM Thesis University of Wisconsin- Madison, 2006,9.

<sup>66</sup>Leela, 'Living among lions (panthera leo): coexistence or killing? community attitudes towards conservation initiatives and the motivations behind lion killing in Kenyan maasailand' published LLM Thesis University of Wisconsin- Madison, 2006,9.

<sup>67</sup>Leela, 'Living among lions (panthera leo): coexistence or killing? community attitudes towards conservation initiatives and the motivations behind lion killing in Kenyan maasailand' published LLM Thesis University of Wisconsin- Madison, 2006,9.

<sup>68</sup> Ostrom, E., J. Burger, C. Field, R. Norgaard, and D. Policansky. 'Revisiting the Commons: Local Lessons, Global Challenges', *Science* 284 (1999), 278-282.

<sup>69</sup> Ostrom, E., J. Burger, C. Field, R. Norgaard, and D. Policansky. 'Revisiting the Commons: Local Lessons, Global Challenges', 278-282.

<sup>70</sup> Ostrom, E., J. Burger, C. Field, R. Norgaard, and D. Policansky. 'Revisiting the Commons: Local Lessons, Global Challenges', 278-282.

resilience assist in explaining vulnerability theory.<sup>57</sup> They do so by highlighting the factors to consider when determining how a community deals with situations that expose them to hazards and risks that follow.

Communities tend to utilize traditional coping mechanisms to reduce vulnerability to their livelihoods due to environmental and social pressures.<sup>58</sup> This also includes the use of traditional dispute resolution mechanisms in solving conflicts. For example, the Karamajong and the Teso communities of Uganda have a council of elders that is mandated to resolve conflicts within the community.<sup>59</sup> Their work is to ensure that social order is maintained by preventing violations of community rules.<sup>60</sup> This is important because this social order is what ensures that the community can cope with various vulnerabilities and risks that they may encounter. When there was conflict between the community and another community, the elders used compensation and negotiation to resolve the conflicts.<sup>61</sup> This traditional method of resolving disputes was important because, it prevented conflicts between the communities and their neighbors.

Conservation can make communities vulnerable.<sup>62</sup> Over the years there has been a push for community based conservation mechanisms.<sup>63</sup> The main purpose for this form of conservation is to put the community at the center of conservation of wildlife.<sup>64</sup> This push

---

<sup>57</sup> Leela, 'Living among lions (panthera leo): coexistence or killing? community attitudes towards conservation initiatives and the motivations behind lion killing in Kenyan maasailand' published LLM Thesis University of Wisconsin- Madison, 2006,6.

<sup>58</sup>Naughton-Treves, L. 'Predicting Patterns of Crop Damage by Wildlife around Kibale National Park', Uganda' *Conservation Biology* 12 February1998 <http://onlinelibrary.wiley.com/doi/10.1111/j.1523-1739.1998.96346.x/full> on 15 January 2018.

<sup>59</sup> Kariuki .F, 'Conflict Resolution By Elders In Africa: Successes, Challenges and Opportunities' *Alternative dispute resolution* (2015), 36.

<sup>60</sup> Kariuki .F, 'Conflict Resolution By Elders In Africa: Successes, Challenges and Opportunities', 37.

<sup>61</sup> Chris Chapman and Alexander Kagaha, *Resolving Disputes using Traditional mechanisms in the Karamoja and Teso Regions of Uganda*, Minority Rights International 2009, 3.

<sup>62</sup> Leela, 'Living among lions (panthera leo): coexistence or killing? community attitudes towards conservation initiatives and the motivations behind lion killing in Kenyan maasailand' published LLM Thesis University of Wisconsin- Madison, 2006,9.

<sup>63</sup> Leela, 'Living among lions (panthera leo): coexistence or killing? community attitudes towards conservation initiatives and the motivations behind lion killing in Kenyan maasailand' published LLM Thesis University of Wisconsin- Madison, 2006,9.

<sup>64</sup> Agrawal, A. 'Community in Conservation: Beyond Enchantment and Disenchantment' *Conservation and Development Forum*, Gainesville, Florida, 1997,7.

purchase them online, this form of research is heavily dependent on relying on someone else's work and this work may not be accurate and requirement to have a computer or laptop to conduct your research.

### **1.9.2 Conducting Interviews**

The second mode of research that was used in coming up with this paper was conducting of interviews. This was done for the purposes of finding out, about some aspects of the paper that could not be found through desktop research or desktop research proved to be limiting in terms of information. The writer of the paper was required to conduct interviews with the various stakeholders who are mentioned in the paper.

The interview process involved having a one on one meeting with the person that was being interviewed and asking questions pertaining to the topic. The answers were then recorded down to be used in the writing of this paper.

The advantages of conducting interviews as a mode of collecting data is that, one gets first-hand information on the subject and meeting with the people who interact with the issues you are writing on, daily and getting to know the pros and cons of their work. The limitations encountered when conducting interviews were; setting up a meeting with the person that was to be interviewed, getting to the actual meeting point due to transport logistics and time constraints; the time given to conduct the interviews was limited.

### **1.10 Statement of Limitations**

1. Time constraints. There is a limited time in which the study should be conducted.
2. Due to time constraints and finances the study will not deploy an on the ground research.

### **1.11 Outline of the dissertation.**

#### **Chapter 1: Introduction to the study**

This chapter introduces the reader to the area of study. It gives an overview of what the reader should expect in relation to use of TDRMs in resolving human wildlife conflict in order to achieve justice. This overview addresses the theoretical framework in which the research is based on.

that were attacked by wildlife.<sup>71</sup> These goats had to be without blemish.<sup>72</sup> The Kenya Wildlife Service complied and this in turn created trust between the two parties.<sup>73</sup> They now work together towards conservation of wildlife.<sup>74</sup>

### **1.8 Hypotheses**

1. The use of TDRMs in resolving human wildlife conflict will promote restorative justice.
2. The community wildlife associations will be effective if they adopted the use of TDRMs.

### **1.9 Research methodology**

The paper used one method of research to come up with the findings it has highlighted. This research method is desktop research.

#### **1.9.1 Desktop research**

Most of the research done was conducted through desktop research. Desktop research involves going through data that is already available in print<sup>75</sup> either on the internet or has been physically published.

The desktop research involved reading and analysing two types of data. These are primary and secondary data. Primary data involved reading and analysing the main sources of information for this paper. These sources are the Constitution of Kenya 2010, Acts of Parliament of Kenya, Acts of Parliament of other countries and International Instruments. Secondary data involved reading and analysing books, journal, conference papers websites and dissertations from different authors who have written something related to the work in this paper.

The advantages of using desktop research was that it was time saving, ability to go through a wide range of material, one can easily work from any place all that is required is a medium for conducting research.

The limitations that were encountered when conducting desktop research were access to the materials needed to conduct the research for example some books required one to

---

<sup>71</sup> Personal communication with Kitili M on 17 September 2016.

<sup>72</sup> Personal communication with Kitili M on 17 September 2016.

<sup>73</sup> Personal communication with Kitili M on 17 September 2016.

<sup>74</sup> Personal communication with Kitili M on 17 September 2016.

<sup>75</sup> <http://www.businessdictionary.com/definition/desk-research.html> on 21 August 2017.

## CHAPTER 2

### The Legal Framework for Traditional Dispute Resolution Mechanisms in Kenya.

#### 2.0 Introduction

Traditional Dispute Resolution Mechanisms are all those mechanisms that have been used by local communities in resolving disputes and have been passed from one generation to another.<sup>76</sup> These dispute resolution mechanisms are embedded in the culture and customs of the communities.<sup>77</sup> They are justice processes based on cooperation, communitarism, strong group coherence, social obligations, consensus-based decision-making, social conformity, and strong social sanctions.<sup>78</sup> In this chapter, the study expounds on the legal framework of Traditional Dispute Resolution Mechanisms (TDRMs) in Kenya. The study will look at the Constitution of Kenya 2010, statutes and case law to elaborate on the legal framework of TDRMs in Kenya. The study then proceeds to look at how restorative justice is achieved through the use of TDRMs. The study then looks at the benefits of TDRMs as compared to other modes of dispute resolution.

#### 2.1 Constitution of Kenya 2010

The Constitution of Kenya 2010, contains various provisions that recognize Traditional Practices of communities. This is in contrast to the independence Constitution that did not contain provisions on traditional practices and systems. First and foremost, Article 2 (4) of the Constitution states that any law including customary law that is inconsistent with the constitution will be deemed to be invalid.<sup>79</sup> This is the first indicator in our Constitution that it envisions the use of customary law in resolving disputes. These customary laws are the ones used in TDRMs.

---

<sup>76</sup> Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR,' 204.

<sup>77</sup> Penal Reform International, *Access to Justice in Sub-Saharan Africa*, Penal Reform International, 2000, 11.

<sup>78</sup> Erin Sherry & Heather Myers, 'Traditional Environmental Knowledge in Practice' *Society & Natural Resources*, Vol. 15 No. 4 (2002), 351.

<sup>79</sup> Article 2 (4), Constitution of Kenya (2010).

## **Chapter 2: The Legal Framework for Traditional Dispute Resolution Mechanisms in Kenya.**

In this chapter the study expounds on the legal framework of TDRMs. It looks at the various laws that govern TDRMs in Kenya. These laws are the Constitution of Kenya 2010, parliamentary legislation and case law. The study then looks at the benefits of TDRMs as compared to other modes of dispute resolution.

## **Chapter 3: Legal Framework for Human-Wildlife Conflict in Kenya.**

This chapter highlights what human-wildlife conflict is, the history of human-wildlife conflict in Kenya and the legal framework of human-wildlife conflict in Kenya. The study then looks at the various ways which human-wildlife conflicts are resolved. How effective or ineffective these methods have been.

## **Chapter 4: Role of Traditional Dispute Resolution Mechanisms in Resolving Human Wildlife Conflict in Kenya.**

This chapter discusses how Traditional Dispute Resolution Mechanisms can be used in resolving human-wildlife conflicts. The importance of using TDRMs in resolving some human-wildlife conflict and the impact it will have on the parties involved.

## **Chapter 5: Conclusion, Findings and Recommendations**

This chapter gives a conclusion from the findings of the study. It will also give a raft of recommendations that it proposes should be adopted by the relevant parties involved in the study.

Constitution does not limit the use of TDRMs to any particular matter.<sup>89</sup> This can be inferred that the constitution envisions where TDRMs are applied in resolving both civil and commercial disputes.

## **2.2 Acts of Parliament**

There are a number of parliamentary legislation that recognize TDRMs as an alternative dispute resolution mechanism.

### **2.2.1 Judicature Act**

The first Act to recognize TDRMs was the Judicature Act of Kenya under Section 3 (c) it states that African customary Law and consequently TDRMs can be used to resolve civil case, provided that the law is not repugnant to justice and morality, inconsistent with any provisions of written law.<sup>90</sup> The limitation however of this Act is that it only limited the use of TDRMs to civil cases. Thus, TDRMs could not be applied in resolving criminal cases.

### **2.2.2 Commission on Administrative Justice Act**

The Commission on Administrative Justice Act under section 8 (f), the commission is required to promote alternative dispute resolution mechanism in resolving complaints related to public administration.<sup>91</sup> As stated earlier in the Constitution of Kenya under section 159 one of the alternative dispute resolution mechanism is TDRMs.

### **2.2.3 National Land Commission Act**

The National Land Commission Act under section 5 (1) (f) states that the National Land Commission shall encourage the use of TDRMs in resolving land conflicts.<sup>92</sup> This is in line with the Constitution that mandates the National Land Commission to use TDRMs to resolve conflicts.<sup>93</sup> The purpose of using TDRMs in resolving land conflicts is to foster restorative justice and avoid enmity between the conflicting parties after the dispute is resolved.

---

<sup>89</sup> <http://www.kmco.co.ke/attachments/article/192/African%20Traditional%20Justice%20Systems.pdf> on 16 September 2017.

<sup>90</sup> Section 3(2), *Judicature Act*, (Act No. 16 of 1967).

<sup>91</sup> Section 8 (f), *Commission on Administrative Justice*, (Act No. 23 of 2011).

<sup>92</sup> Section 5 (1), *National Land Commission Act*, (Act No. 5 of 2012).

<sup>93</sup> Article 60 (1), *Constitution of Kenya* (2010).

Secondly, Article 11 (b) states that the state shall facilitate the promotion of traditional cultures.<sup>80</sup> TDRMs can be said to be part of the culture of many communities. For example, in the Meru culture they contain a method of resolving disputes in which they resolve these conflicts by going to the Njuri Ncheke.<sup>81</sup> The Njuri Ncheke is a council of elders that listens and resolves disagreements among the people from the Ameru community and make a decision on them.<sup>82</sup>

Thirdly, Article 60 (1) of the Constitution states that communities should use local community initiatives in resolving land conflicts.<sup>83</sup> This local community initiatives can use TDRMS in resolving the land disputes that occur. This is in cognizant to the fact that before colonialism land was owned communally and whenever a dispute arose the community had mechanisms to resolve the disputes.

In addition, Article 67 (2) mandates the National Land Commission to use TDRMs in resolving land disputes.<sup>84</sup> The Constitution recognizes the importance of TDRMs in resolving disputes among communities. Further, due to the sensitivity of land issues in Kenya TDRMs are very important as they would restore the relationship between the parties once the dispute has been resolved.<sup>85</sup>

Lastly, Article 159 1 (c) of the Constitution requires that Judicial officers consider alternative dispute resolution mechanism to resolve disputes.<sup>86</sup> The Constitution states that TDRMs is one of the mechanisms that should be used to resolve disputes. The exception being that the method is not repugnant to justice and morality, inconsistent with any provisions of the constitution and contravenes the bill of rights.<sup>87</sup> The Constitution recognizes that TDRMs promote access to justice and foster good governance.<sup>88</sup> The

---

<sup>80</sup> Article 11 (b), Constitution of Kenya (2010).

<sup>81</sup> Marguerite Johnson, 'Giriama Reconciliation,' 16 *African Legal Studies*, (1978), 95.

<sup>82</sup> *Erastus Gitonga Mutuma v Mutia Kanuno & 3 Others* [2012] eKLR.

<sup>83</sup> Article 60 (1), Constitution of Kenya (2010).

<sup>84</sup> Article 67 (2), Constitution of Kenya (2010).

<sup>85</sup> <http://www.kmco.co.ke/attachments/article/192/African%20Traditional%20Justice%20Systems.pdf> on 16 September 2017.

<sup>86</sup> Article 159, 1 (c), Constitution of Kenya (2010).

<sup>87</sup> Article 159, 3, Constitution of Kenya (2010).

<sup>88</sup> <http://www.kmco.co.ke/attachments/article/192/African%20Traditional%20Justice%20Systems.pdf> on 16 September 2017.

#### **2.2.4 Community Land Act**

The Community Land Act under section 39 states that communities are free to use TDRMs in resolving any disputes involving community land.<sup>94</sup> The purpose of using TDRMs is foster restorative justice. Further, to ensure that the community still continues to co-exist peacefully after the dispute has occurred and has been resolved.

#### **2.2.5 Environmental and Land Court Act**

The Environmental and Land Court Act under Section 20 encourages the use of Alternative Dispute Resolution where there is a possibility that they can be used to resolve a case.<sup>95</sup> The Act further states that the court is required to stay aside any matter that can be resolved through alternative dispute resolution mechanisms until the matter is resolved through it.<sup>96</sup>

#### **2.2.6 Marriage Act**

The Marriage Act 2014 under Section 68 (1) states that in customary marriage the aggrieved parties may choose to resolve their conflicts through TDRMs before going to court.<sup>97</sup> If this fails the parties may then go to court for it to determine the dissolution of the marriage.

Parliament has made strides in passing various legislations that promote the use of alternative dispute resolutions. In addition, some of the legislations passed go a step further and recognize TDRMs has a mode of resolving disputes.

### **2.3 Kenyan Cases illustrating the role of TDRMs**

#### **2.3.1 R v Mohamed Abdow Mohamed<sup>98</sup>**

In this case, Mohamed Abdow was charged with the murder of Osman Ali Abdi. The crime is said to have occurred in Easleigh area Nairobi County on 19<sup>th</sup> October 2011. The accused was arraigned in court and pleaded not guilty. A hearing date was therefore set. On the date of the hearing, the prosecution stated on record that; the defence counsel acting on behalf of the deceased family had written to the office of the prosecution requesting for the case to be withdrawn. The reason was that the two aggrieved parties had

---

<sup>94</sup> Section 39 (1), Community Land Act (Act No. 27 of 2016).

<sup>95</sup> Section 20 Environmental and Land Court Act (Act No. 19 of 2011).

<sup>96</sup> Section 20 Environmental and Land Court Act (Act No. 19 of 2011).

<sup>97</sup> Section 68 (1), Marriage Act (Act No. 4 of 2014).

<sup>98</sup> *R v Mohamed Abdow Mohamed* [2013] eKLR

come to an agreement. The families, had agreed that the accused gives the deceased family compensation. This compensation was in form of camels, goats and other traditional ornaments. In addition, one of the rituals that was performed was said to have paid for the blood of the deceased under Islamic traditional laws. They therefore, did not wish to pursue the matter any further. Both parties were content with the agreement. The prosecution therefore requested the case to be marked as settled. The prosecutor cited article 159 (1) of the Constitution of Kenya 2010 that allows for alternative dispute resolution mechanisms one of them being traditional dispute resolution mechanisms.

The trial judge agreed to the case being considered as settled. The judge agreed with the prosecution on invoking article 159 (1) of the Constitution of Kenya. He also noted that the witnesses were also not willing to testify as they were also satisfied with the settlement that was agreed upon. The judge therefore marked the case as settled.

### **2.3.2 Stephen Kipruto Cheboi & 2 others v R<sup>99</sup>**

In this case the 5 appellants were convicted for assaulting 3 complainants. All the complainants and appellants were brothers. However, on 10th May 2012 complains touching on two of the brothers were quashed after the issues was resolved through TDRMs. This was under the basis that TDRMs are applicable to misdemeanours and not felonies. This is why only three of the brothers appealed against the previous court's decision. They cited that they had come to an amicable resolution to resolve the dispute. The resolution was aimed at voluntarily enhancing family cohesion and reconciliation. In addition, the reconciliation meeting had been attended by 89 people from Nerkwō-Katee village. Consequently, an affidavit was filed by one of the complainants asking court to quash convictions. However, the Court held that a conviction could stand even though there had been reconciliation.

### **2.4 Conclusion**

Traditional Dispute Resolution Mechanisms are embedded in the culture and beliefs of the community.<sup>100</sup> The Constitution of Kenya under article 159 (1) <sup>101</sup> advocates for traditional dispute resolution as an alternative mode of resolving disputes in Kenya.

---

<sup>99</sup> *Stephen Kipruto Cheboi & 2 others v R* [2014] eKLR.

<sup>100</sup> Penal Reform International, *Access to Justice in Sub-Saharan Africa*, Penal Reform International, 2000, 11.

<sup>101</sup> Article 159 (1) *Constitution of Kenya* (2010).

However, the dispute resolution mechanism should not be inconsistent with any law in Kenya.<sup>102</sup> In addition, parliament has also passed laws that promote TDRMs as a mechanism for resolving disputes. Further the case of *R v Mohammed Abdow* demonstrates that members of a community tend to be satisfied with outcomes from the traditional justice systems as compared the court system.

---

<sup>102</sup> Article 2 (4) *Constitution of Kenya* (2010).

## CHAPTER 3

### The Legal Framework for Human-Wildlife Conflict in Kenya

#### 3.0 Introduction.

Human-wildlife conflict is defined as conflict between people and animals.<sup>103</sup> It is a significant threat to the survival of the species caught up in the conflict and also a threat to the local human population who are part of the conflict.<sup>104</sup> Some examples of human-wildlife conflict are attacks by the wild animals, livestock predation, harassment, property damage, interpersonal conflicts over wildlife issues.<sup>105</sup>

#### 3.1 History of human-wildlife conflict in Kenya.

Before the advent of colonialism the native people of Africa and wildlife lived together in harmony.<sup>106</sup> With the arrival of the Europeans this mode of living was looked down upon and was banned.<sup>107</sup> The Europeans gazetted certain areas and declared them to be parks and prevented other people including the communities that lived there from accessing the land.<sup>108</sup> The ownership of the land was then transferred to the government.<sup>109</sup> This mode of having pristine land for wildlife was adopted from the United States of America where it was first suggested by John Muir.<sup>110</sup> A conference held in London in 1933, led to the establishment of national parks in East Africa.<sup>111</sup> The Kenya National Park organization was created to protect the wildlife that was now in national parks.<sup>112</sup> This marked the beginning of wildlife conservation in Kenya being centralized and the alienation of communities.<sup>113</sup>

---

<sup>103</sup> [http://wwf.panda.org/about\\_our\\_earth/species/problems/human\\_animal\\_conflict/](http://wwf.panda.org/about_our_earth/species/problems/human_animal_conflict/) on 15 December 2017.

<sup>104</sup> [http://wwf.panda.org/about\\_our\\_earth/species/problems/human\\_animal\\_conflict/](http://wwf.panda.org/about_our_earth/species/problems/human_animal_conflict/) on 15 December 2017.

<sup>105</sup> <https://howtoconserve.org/2015/12/04/human-wildlife-conflict/> on 15 December 2017.

<sup>106</sup> <http://pubs.iied.org/pdfs/7810IIED.pdf> on 24 September 2017.

<sup>107</sup> V.O. Wasonga, D. Kambewa and I. Bekalo, 'Community-Based Natural Resource Management' in Washington Ochola, Pascal Sanginga and Isaac Bekalo (eds), *Managing Natural Resources for Development In Africa: A Resource Book*, UNP, 2010, 165,168.

<sup>108</sup> <http://pubs.iied.org/pdfs/7810IIED.pdf> on 24 September 2017.

<sup>109</sup> <http://pubs.iied.org/pdfs/7810IIED.pdf> on 24 September 2017.

<sup>110</sup> V.O. Wasonga, D. Kambewa and I. Bekalo, 'Community-Based Natural Resource Management', 168.

<sup>111</sup> Daniel Musili Nyeki, *Wildlife Conservation and Tourism in Kenya*, Jacaranda Designs Ltd. 1993, 3.

<sup>112</sup> Daniel Musili Nyeki, *Wildlife Conservation and Tourism in Kenya*, 3.

<sup>113</sup> Dennis A. Rondinelli, John R. Nellis and G. Shabbir Cheema *Decentralisation in Developing Countries; A Review of Recent Experience* World Bank, 1983,19.

When Kenya got its independence, the new independent government ran by Kenyans adopted the same approach to wildlife conservation as the British.<sup>114</sup> This approach locked out communities in the conservation of wildlife.<sup>115</sup> In 1969, however, Kenya became a signatory of the African Convention on the Conservation of Nature and Natural Resources.<sup>116</sup> This convention tasked the countries that were signatories to include communities in wildlife management.<sup>117</sup> It required that customary rights be integrated in the laws dealing with conservation of wildlife.<sup>118</sup> Kenya came up with a wildlife policy in 1975.<sup>119</sup> The plan was for the government to play a facilitator and advisor role to the communities.<sup>120</sup> In the 1975 Wildlife (Conservation and Management) Act<sup>121</sup> however, the government still made conservation of wildlife centralized and controlled by the government.<sup>122</sup> Further it merged tourism and wildlife in to one docket.<sup>123</sup>

In the 1980s, African countries were under pressure to include communities in the conservation of wildlife.<sup>124</sup> Kenya therefore, became one of the African countries that adopted the Langkawi Declaration on environment.<sup>125</sup> The declaration puts responsibility

---

<sup>114</sup> <http://www.gsid.nagoyau.ac.jp/bpub/research/public/paper/article/153.pdf> accessed on 25 September 2017.

<sup>115</sup> V.O. Wasonga, D. Kambewa and I. Bekalo, 'Community-Based Natural Resource Management', 168.

<sup>116</sup> <http://kenyalaw.org/treaties/treaties/37/AFRICAN-CONVENTION-ON-THE-CONSERVATION-OF-NATURE-AND> on 25 September 2017.

<sup>117</sup> Article II, *African Convention on The Conservation of Nature and Natural Resources*, May 12th, 1969, No 14689.

<sup>118</sup> Article V, *African Convention on The Conservation of Nature and Natural Resources*, May 12th, 1969, No 14689.

<sup>119</sup> Paragraph 6, *Statement on Future Wildlife Management Policy in Kenya* (Sessional Paper No. 3 of 1975).

<sup>120</sup> Paragraph 9, *Statement on Future Wildlife Management Policy in Kenya* (Sessional Paper No. 3 of 1975).

<sup>121</sup> *Wildlife Conservation and Management Act* (Act No.1 of 1976).

<sup>122</sup> Patricia Kameri-Mbote, 'Aligning Sectoral Wildlife Law to the Framework Environmental Law', in C.O. Okidi *et al.*(eds), *Environmental Governance in Kenya: Implementing the Framework Law East Africa* Educational Publishers, 2008, 281, 291.

<sup>123</sup> Daniel Musili Nyeki, *Wildlife Conservation and Tourism in Kenya*, 3.

<sup>124</sup> <http://pubs.iied.org/pdfs/7810IIED.pdf> on 24 September 2017.

<sup>125</sup> Commonwealth Heads of Government Meeting, *Langkwi Declaration on the Environment*, 21 October 1989.

on countries to involve people from all levels in environmental programs.<sup>126</sup> This led to Kenya amending the Wildlife Conservation and Management Act to create a provision for the creation of the Kenya Wildlife Service.<sup>127</sup> However, this did not offer inclusion of communities in wildlife conservation as Kenya Wildlife Service was still centralized.<sup>128</sup>

In 1992, Kenya became a signatory to the Convention on Biological Diversity.<sup>129</sup> This convention provided that conservation of wildlife should be one that involves everyone.<sup>130</sup> It further stated, that wildlife conservation should start from the grassroots and in the Kenyan case this meant the communities.<sup>131</sup> In addition, Kenya also became a signatory to the Rio Declaration which under principle 22 required that communities are involved in environmental management and development.<sup>132</sup> This was because of their knowledge and traditional practices. Further Kenya also became a signatory to Agenda 21 in 1992.<sup>133</sup> Chapter 26 of the Agenda contained provisions that advocated for the involvement of communities in conservation of the environment.<sup>134</sup> The Kenyan Wildlife Service formed the Community Wildlife Service Department whose mandate was to conserve wildlife found outside the designated parks.<sup>135</sup> This task was given to the communities.<sup>136</sup>

In 2000, the second Pan African Symposium on Sustainable Use of Natural Resources in Africa was held.<sup>137</sup> One of the symposiums key resolutions was that community wildlife management should go beyond community participation but should

---

<sup>126</sup> Commonwealth Heads of Government Meeting, *Article 7 Langkwi Declaration on the Environment*.

<sup>127</sup> Section 3, *Wildlife Conservation and Management Act* (Act No.1 of 1976).

<sup>128</sup> Daniel Musili Nyeki, *Wildlife Conservation and Tourism in Kenya*, 3.

<sup>129</sup> *Convention on Bio Diversity*, 29 December 1993, 30619 UNTS.

<sup>130</sup> Article 1, *Convention on Bio Diversity*, 29 December 1993, 30619 UNTS.

<sup>131</sup> Article 8, *Convention on Bio Diversity*, 29 December 1993, 30619 UNTS.

<sup>132</sup> UNCED, *The Rio Declaration on Environment And Development*, 3 to 14 June 1992, 22.

<sup>133</sup> UNCED, *Agenda 21*, 3 to 14 June 1992, 26.

<sup>134</sup> UNCED, *Agenda 21*, 3 to 14 June 1992, 26.

<sup>135</sup> Daniel Musili Nyeki, *Wildlife Conservation and Tourism in Kenya*, 7.

<sup>136</sup> Daniel Musili Nyeki, *Wildlife Conservation and Tourism in Kenya*, 7.

<sup>137</sup> <https://www.iucn.org/content/2nd-pan-african-symposium-sustainable-use-natural-resources-africa> on 26 September 2017.

also include legal empowerment.<sup>138</sup> This led to the formation of the Wildlife Conservation and Management Act of 2013.<sup>139</sup>

## 3.2 Legal Framework for Human-wildlife Conflict

### 3.2.1 Constitution of Kenya 2010

The Constitution of Kenya 2010 contains various provisions that ensure conservation of the environment and consequently the conservation of wildlife and the resolving of human-wildlife conflict. Environment can be defined as anything that surrounds a living organism including natural forces and other living organisms.<sup>140</sup> This includes wildlife.

Article 69 (1) states that the state shall ensure that there is sustainable, conservation, management and utilization of natural resources.<sup>141</sup> In addition, the same article states that the state should encourage public participation in the conservation and management of the environment.<sup>142</sup>

In addition, Article 72 of the Constitution states that parliament should enact legislation that ensures that the environment is conserved.<sup>143</sup> It must be noted that this legislation also apply to wildlife as wildlife forms part of the environment. This legislation will include provisions for dealing with human-wildlife conflicts. Further, the legislations should include provisions that allow communities to participate in resolving human-wildlife conflicts.

The fourth Schedule of the Constitution of Kenya that outlines the various roles of the county and national government also outlines the responsibility of each level of government in relation to environment and specifically wildlife conservation.<sup>144</sup> The schedule states that the national government has the mandate under Section (22) to protect the environment with the intent of ensuring that a durable and sustainable system of

---

<sup>138</sup> <https://www.iucn.org/content/2nd-pan-african-symposium-sustainable-use-natural-resources-africa> on 26 September 2017.

<sup>139</sup> *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>140</sup> <http://www.businessdictionary.com/definition/environment.html> on 27 January 2018.

<sup>141</sup> Article 69 (1), *Constitution of Kenya* (2010).

<sup>142</sup> Article 69 (1), *Constitution of Kenya* (2010).

<sup>143</sup> Article 72, *Constitution of Kenya* (2010).

<sup>144</sup> Schedule 4, *Constitution of Kenya* (2010).

conservation is established for protecting animals and wildlife. Schedule 4 part 2 which highlights the functions of the county government states that, it is the work of the county government to ensure community participation in governance at the local levels and assisting communities in establishing administrative capacities. This has led to the County Government Act.<sup>145</sup> Section 43 of the Act states that the counties should establish village units that take into account communities interests, historical and economic ties.<sup>146</sup>

### **3.2.2 Statutes addressing human-wildlife conflict.**

#### **1) Wildlife Conservation and Management Act**

The first legislation that primarily deals with wildlife conservation and human-wildlife conflict is the Wildlife Conservation and Management Act of 2013. The Act contains various provisions that deal with human-wildlife conflict and the modes used to resolve these conflicts.

##### **1.1 Compensation**

Section 18 of the Act contains a provision that allows for the formation of a county wildlife committees and compensation committee.<sup>147</sup> The committee shall consist of a chairperson, a representative of the county government, an agricultural officer based in the county, a land use planning officer responsible for the county, a livestock officer responsible for the county, officer of the Service for the county who shall be the secretary, four persons not being public officers knowledgeable in wildlife matters and nominated by the community wildlife associations within the area through an elective process, a medical officer for health for the county, the officer in-charge of the county police matters; and the county environment officer. The work of this compensation committee is stated in the same act under Section 19 shall be to assess compensation claims and determine how much the affected party in the conflict should be awarded.<sup>148</sup>

In addition, Section 24 of the same Act, states that the government shall establish a wildlife compensation scheme whose main work shall be to compensate any person who is killed, injured or have had their crop destroyed by wildlife.<sup>149</sup> Further, section 25 of the Act

---

<sup>145</sup> Section 43, *County Government Act* (Act No. 17 of 2012).

<sup>146</sup> Section 43, *County Government Act* (Act No. 17 of 2012).

<sup>147</sup> Section 18, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>148</sup> Section 19, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>149</sup> Section 24, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

provides the procedure for applying for compensation when human-wildlife conflict occurs.<sup>150</sup> It also contains the amount of compensation one is entitled to in relation to how grievous the harm was.<sup>151</sup> If a person is not satisfied with the compensation one may appeal to the National Environmental Tribunal and consequently to the Environment and Land Court.<sup>152</sup>

The main aim of conservation is to create a balance between distribution of costs and benefits of conservation.<sup>153</sup> Conservationists believe that compensation deters communities from killing the predators that attacked their property for example livestock as retaliation.<sup>154</sup>

Compensations is designed to reduce the economic hardships that communities face.<sup>155</sup> However, many of this programs have failed due to corruption,<sup>156</sup> delays in delivering the monies on time.<sup>157</sup> Compensation schemes that are implemented without consulting local communities are often received with a negative attitude by the community.<sup>158</sup> Compensation is also seen as a method of imposing western values on the community.<sup>159</sup> Compensation is also criticized for discouraging communities from playing

---

<sup>150</sup> Section 25, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>151</sup> Section 25, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>152</sup> Section 25, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>153</sup> Naughton-Treves, R. Grossberg, and A. Treves, 'Paying for Tolerance: Rural Citizens' Attitudes toward Wolf Depredation and Compensation' *Conservation Biology* 17 2003:1500-1511.

<sup>154</sup> Wagner, K., R. Schmidt, and M. Conover, 'Compensation programs for wildlife damage in North America' 25 *Wildlife Society Bulletin* (1997), 312-319.

<sup>155</sup> Naughton-Treves, R. Grossberg, and A. Treves, 'Paying for Tolerance: Rural Citizens' Attitudes toward Wolf Depredation and Compensation' 1500-1511.

<sup>156</sup> Hussain, S. 'The status of the snow leopard in Pakistan and its conflict with local farmers' 26-33.

<sup>157</sup> Naughton-Treves, R. Grossberg, and A. Treves, 'Paying for Tolerance: Rural Citizens' Attitudes toward Wolf Depredation and Compensation' 1500-1511.

<sup>158</sup> Hussain, S. 'The status of the snow leopard in Pakistan and its conflict with local farmers' 26-33.

<sup>159</sup> Ferraro, J. P., and A. Kiss, 'Direct payments for biodiversity conservation' 298 *Science* (2002),1718-1719.

a role in protecting their property against wildlife.<sup>160</sup> This is because the communities are assured of compensation for any damage caused by the wild animals.<sup>161</sup>

## 1.2 Killing

The second mode of resolving human-wildlife conflict envisioned under the Wildlife Conservation and Management Act is killing.<sup>162</sup> Section 77 of the Act states that a member of the service may kill an animal if it is deemed a problematic animal.<sup>163</sup> It further states that an owner of a piece of land may also kill a problematic animal but they have to report the killing within 48 hours and surrender all the trophies gotten from the animal.<sup>164</sup> In addition, one is not allowed to kill an animal in a protected area.<sup>165</sup> Section 78 of the same Act, further states that it is unlawful to kill an animal in self-defense or in the defense of another.<sup>166</sup>

Killing of wild animals as a mode of resolving human-wildlife conflict acts as a form of retributive justice.<sup>167</sup> For example, pastoral communities have resulted to killing predators as retaliation for the death of their livestock that was caused by the carnivore predators.<sup>168</sup> Communities have resulted to deliberate killing of predatory animals as they are perceived to be a threat to their livelihoods.<sup>169</sup> The problem of killings as a mode of resolving human-wildlife conflict is that eliminating the animals only solves the problem temporarily.<sup>170</sup> Regardless of how many animals are killed, the problem component is still

---

<sup>160</sup> Nyhus, P., and R. Tilson, 'Characterizing human-tiger conflict in Sumatra, Indonesia: implications for conservation' 68-74.

<sup>161</sup> Nyhus, P., and R. Tilson, 'Characterizing human-tiger conflict in Sumatra, Indonesia: implications for conservation' 68-74.

<sup>162</sup> Section 77, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>163</sup> Section 77, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>164</sup> Section 77, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>165</sup> Section 77, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>166</sup> Section 78, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>167</sup> Leela, 'Living among lions (panthera leo): coexistence or killing? community attitudes towards conservation initiatives and the motivations behind lion killing in Kenyan maasailand' published LLM Thesis University of Wisconsin- Madison, 2006,23.

<sup>168</sup> <https://portals.iucn.org/library/sites/library/files/documents/1996-008.pdf> on 17 December 2017.

<sup>169</sup> Ogada, M. O., R. Woodroffe, N. O. Oguge, and L. G. Frank, 'Limiting Depredation by African Carnivores: the Role of Livestock Husbandry' *17 Conservation Biology* (2003),1521-1530.

<sup>170</sup> Hoare, R. E. 'Determinants of human-elephant conflict in a land-use mosaic' *36 Journal of Applied Ecology* (1999),689-700.

there and the animals that died will eventually be replaced and subsequently conflicts will therefore continue to occur.<sup>171</sup>

In addition, in high conflict areas majority of the problem animals cannot be identified and therefore a token animal is killed instead.<sup>172</sup> Communities believe that killing of a token animal solves the issue and brings greater economic fortunes.<sup>173</sup> However this only results in the reduction of wildlife population.<sup>174</sup>

### 1.3 Court system

The other method envisioned for resolving human-wildlife under legislation is the court system. The Environmental and Land Court Act under Section 3 grants the court powers to hear matters related to the environment.<sup>175</sup> This includes matters dealing with human-wildlife conflict. The Wildlife Management and Conservation Act for example allows a party to go to court if they are not satisfied with the compensation granted to them by the compensation committee.<sup>176</sup> In addition, the courts are also mandated to deal with cases of illegal livestock grazing under Section 105 of the Wildlife Conservation and Management Act.<sup>177</sup>

However, the courts have a number of limitations that may prevent justice from being achieved as effectively as the aggrieved party would have wanted. Litigation is often regarded as slow cumbersome and ineffective.<sup>178</sup> In addition to that cases dealing with illegal livestock grazing are normally thrown out as the culprits in most case are children.<sup>179</sup>

---

<sup>171</sup> Hoare, R. E. 'Determinants of human-elephant conflict in a land-use mosaic' 689-700.

<sup>172</sup> Hussain, S. 'The status of the snow leopard in Pakistan and its conflict with local farmers' 37 *Oryx* (2003), 26-33.

<sup>173</sup> Hussain, S. 'The status of the snow leopard in Pakistan and its conflict with local farmers' 26-33.

<sup>174</sup> Nyhus, P., and R. Tilson, 'Characterizing human-tiger conflict in Sumatra, Indonesia: implications for conservation' 38 *Oryx* (2004), 68-74.

<sup>175</sup> Section 3, Environmental and Land Court Act (Act No. 19 of 2011).

<sup>176</sup> Section 25, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>177</sup> Section 105, *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>178</sup> Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR', 4.

<sup>179</sup> Personal Communication with Jim Karani on 27 January 2018.

The other limitation is the time take for courts to resolve a case for example in the case of *Rift Valley Agricultural Contractors Limited V Kenya Wildlife Service*.<sup>180</sup> Rift Valley Contractors Limited had taken the Kenya Wildlife Service to court in the year 2000 in relation to acquiring compensation over their crops getting destroyed by wild animals. The matter is still in court and in April 2016 the Supreme Court judges ruled that it warranted enough merit to be heard in the Supreme Court after the Kenya Wildlife Service appealed the decision made by the court of appeal that they should pay Rift Valley for the crops damaged. However, the matter is yet to be heard. This case has been in courts for the last seventeen years and there is still no sign that it will be resolved anytime soon.

### **3.4 Conclusion**

Current laws aim at resolving human-wildlife conflict through various mechanisms. These mechanisms are compensation, killing and Litigation. In addition, the Wildlife Conservation Act has gone further and provided for the formation of community wildlife associations whose functions shall include to resolve human-wildlife conflicts.<sup>181</sup> However, legislation is yet to consider TDRMs as a mode of resolving human-wildlife conflicts.

---

<sup>180</sup> *Rift Valley Agricultural Contractors Limited V Kenya Wildlife Service* [2000] eKLR.

<sup>181</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

## Chapter 4

### **Appropriateness of Traditional Dispute Resolution Mechanisms in Resolving Human-Wildlife Conflict in Kenya.**

#### **4.0 Introduction**

This chapter discusses the role that TDRMs will play in resolving human-wildlife conflict. The two previous chapters looked at the legal framework of both TDRMs and Human-wildlife conflict. This chapter sets out to address the appropriateness of TDRMs in resolving Human-wildlife conflict. Firstly, it addresses how centralization of wildlife management affects resolution of human-wildlife conflict. It then considers the other modes of resolving conflicts that were earlier discussed and tries to justify why TDRMs are better than the other methods. Lastly, the study looks at the challenges faced by TDRMs in resolving Human-Wildlife conflicts.

#### **4.1 Centralization of wildlife management.**

Wildlife contributes directly or indirectly to the economy through revenue generation and wealth creation.<sup>182</sup> Wildlife has a big role in supporting the livelihoods of local people.<sup>183</sup> However communities view wildlife negatively since they see no actual or potential benefit from it.<sup>184</sup> This is because communities are not involved in conservation of wildlife.<sup>185</sup>

Wildlife management is highly centralized in Kenya.<sup>186</sup> It is often stated that wildlife management in Kenya is managed at two levels national and county.<sup>187</sup> However in section 31 of the Wildlife Conservation and Management Act it states that only the Cabinet

---

<sup>182</sup> Patricia Kameri-Mbote, 'Aligning Sectoral Wildlife Law to the Framework Environmental Law' in C.O. Okidi et al.(eds), *Environmental Governance in Kenya: Implementing the Framework Law*, East Africa Educational Publishers, 2008, 281.

<sup>183</sup> Wamukoya, 'Devolution of wildlife management in Kenya to enhance community participation: An assessment of Kenyan legal frameworks' published LLM Thesis University of Nairobi, 6.

<sup>184</sup> Dilys Roe Evaluating Eden; Exploring the Myths and Realities of Community-Based Wildlife Management *Series No. 8, IIED 1994*, 124.

<sup>185</sup> Dilys Roe Evaluating Eden; Exploring the Myths and Realities of Community-Based Wildlife Management, 124.

<sup>186</sup> Dilys Roe Evaluating Eden; Exploring the Myths and Realities of Community-Based Wildlife Management, 124.

<sup>187</sup> Wamukoya, 'Devolution of wildlife management in Kenya to enhance community participation: An assessment of Kenyan legal frameworks' published LLM Thesis University of Nairobi, 6.

Secretary can declare an area a protected area.<sup>188</sup> Further, the Cabinet Secretary under section 35 of the Wildlife Conservation and Management Act is the only one with the power of declaring an area a national reserve.<sup>189</sup> Ownership of land is distinguished from ownership of wildlife.<sup>190</sup> The repealed Local Government Act empowered local authorities to own land on behalf of the community including the national reserves.<sup>191</sup> However, the wild animals remained the property of the national government to be held on behalf of the people of Kenya.<sup>192</sup> Under current legislation the Wildlife Conservation and Management Act under section 8 states that the Kenya Wildlife service is in charge of all National Parks and Reserves and the maintaining the Wildlife in the parks and reserves.<sup>193</sup>

Communities have been trying to get involved in Wildlife Management and have even resulted to judicial reprieve.<sup>194</sup> In the case of *Galana & 3 Others v AG & 2 Others*<sup>195</sup> the Ndero and Gwano communities went to court seeking the quashing of an order for the gazettement of the Tana Primate Reserve and to stop the Kenya Wildlife Service from interfering with the wildlife in that area. The High Court of Mombasa quashed the order gazetting the Reserve. However, the learned Judge Serگون did not address the issue of Kenya Wildlife Service interfering with wild animals in that area. In the case of *Hassan and 4 others v KWS*<sup>196</sup> the Arawale community of Garissa took KWS to court over their plan to relocate the endangered Arwale antelope from the Arwale community. They argued that the antelope was a gift to the community. The High Court of Nairobi barred Kenya Wildlife Service from relocating the antelope. The court stated that KWS would be acting outside its powers if they relocated the antelopes without the consent of the community.

---

<sup>188</sup> Section 31 *Wildlife Conservation and Management Act* (act no.47 of 2013).

<sup>189</sup> Section 35 *Wildlife Conservation and Management Act* (act no.47 of 2013).

<sup>190</sup> Wamukoya, 'Devolution of wildlife management in Kenya to enhance community participation: An assessment of Kenyan legal frameworks' published LLM Thesis University of Nairobi,5.

<sup>191</sup> Wamukoya, 'Devolution of wildlife management in Kenya to enhance community participation: An assessment of Kenyan legal frameworks' published LLM Thesis University of Nairobi, 7.

<sup>192</sup> Wamukoya, 'Devolution of wildlife management in Kenya to enhance community participation: An assessment of Kenyan legal frameworks' published LLM Thesis University of Nairobi, 7.

<sup>193</sup> Section 8 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>194</sup> Wamukoya, 'Devolution of wildlife management in Kenya to enhance community participation: An assessment of Kenyan legal frameworks' published LLM Thesis University of Nairobi, 7.

<sup>195</sup> *Galana & 3 others v AG & 2 Others* [2007] eKLR.

<sup>196</sup> *Hassan & 4 others v KWS* [1996] 1KLR.

Communities in Kenya are willing to participate in wildlife conservation.<sup>197</sup> However their ability to participate is hampered by legislation.<sup>198</sup> As illustrated from the cases above and the Wildlife Conservation and Management Act that still be stores most of the powers of wildlife conservation to the Kenya Wildlife Service. However, the Act contains provisions for the formation of Wildlife Conservation Committees that will include communities as part of the committees.<sup>199</sup>

#### **4.2 Appropriateness of using TDRMs in resolving human-wildlife conflict.**

TDRMs as a mode of resolving conflicts is envisioned in article 159 of the Constitution of Kenya.<sup>200</sup> Section 40 of the Wildlife Conservation and Management Act, gives the right to communities to start their own wildlife associations.<sup>201</sup> The purpose of this associations is to resolve conflicts.<sup>202</sup> To form such an association, they need to fill a form indicating from which conservancy or park they will be operating from.<sup>203</sup> Section 41 of the Act provides that the associations shall; have a management plan, report any illegal activities in the parks, assist in animal control and do any other act necessary to promote conservation and protection of wildlife.<sup>204</sup>

The Act does not give a specific law that would govern how the associations will work and seems to leave it to them to decide. The associations can therefore, consider the use of traditional justice systems in resolving human-wildlife conflict. However, in this case they would apply this system amongst themselves or between the community and Kenya Wildlife Service. It can be seen from section 40 of the Act that the government has gradually come to accept that traditional dispute resolution mechanism can be used as a mode of resolving human-wildlife conflicts.<sup>205</sup> The government is now ready and willing to engage the communities in finding the best ways of resolving human-wildlife conflict.

---

<sup>197</sup> Wamukoya, 'Devolution of wildlife management in Kenya to enhance community participation: An assessment of Kenyan legal frameworks' published LLM Thesis University of Nairobi, 8.

<sup>198</sup> Wamukoya, 'Devolution of wildlife management in Kenya to enhance community participation: An assessment of Kenyan legal frameworks' published LLM Thesis University of Nairobi, 8.

<sup>199</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>200</sup> Article 159, *Constitution of Kenya* (2010).

<sup>201</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>202</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>203</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>204</sup> Section 41 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>205</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

The use of TDRMs will allow communities to participate in the resolution of human-wildlife conflicts. This is because the rules that will be in place in case a conflict occurs will be those of the community. Therefore, the mechanisms that will be used will be TDRMs. The communities will therefore feel that restorative justice has occurred when resolving human wildlife conflict. They will be willing to comply with the decisions gotten from the use of TDRMs in resolving the conflicts.

For example, when a dispute occurs among the Maasai it is resolved by a council of elders.<sup>206</sup> If it is a minor issue or if you are a first-time offender one is normally pardoned.<sup>207</sup> If the issue is grave or one has repeatedly committed the crime they are compelled by the council of elders to pay a fine in the form of livestock.<sup>208</sup> This fine is considered to be grave and worse than going to jail. <sup>209</sup> This is because livestock is considered very important and integral to the livelihood of the Maasai. <sup>210</sup> Maasais therefore, tend to respect the judgments handed out by their council of elders.<sup>211</sup> In addition the compensation mechanisms envisioned in section 25 of the Wildlife Conservation and Management Act does not appear to be working.<sup>212</sup> The Maasai claim that they do not get compensation for livestock lost through wildlife.<sup>213</sup> They have therefore, resulted in killing the animals has retaliation for their lost wildlife.<sup>214</sup> This is because there are no other alternatives offered to them for resolving the human-wildlife conflict.

The Wildlife Conservation and Management Act of Kenya, under section 40 provides for the formation of community wildlife associations.<sup>215</sup> These wildlife associations are made up of the community, land owners, and existing wildlife

---

<sup>206</sup> Personal Communication with Maasai Moran on 26 December 2017.

<sup>207</sup> Personal Communication with Maasai Moran on 26 December 2017.

<sup>208</sup> Personal Communication with Maasai Moran on 26 December 2017.

<sup>209</sup> Personal Communication with Maasai Moran on 26 December 2017.

<sup>210</sup> Personal Communication with Maasai Moran on 26 December 2017.

<sup>211</sup> Personal Communication with Maasai Moran on 26 December 2017.

<sup>212</sup> Section 25 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>213</sup> Personal Communication with Maasai Moran on 26 December 2017.

<sup>214</sup> Personal Communication with Maasai Moran on 26 December 2017.

<sup>215</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

organizations.<sup>216</sup> These associations shall be required to be registered and the Kenya Wildlife Service shall keep a record of the approved associations.<sup>217</sup>

The functions of these associations shall be: a) to facilitate conflict resolution b) facilitate cooperative management of wildlife within a specified geographical region c) assist service in compacting illegal activities d) inform the wildlife area conservation committee of any significant change in the area that may affect wildlife e) assist in problem of animal control in the area which the associations works d) do any other act that is necessary to ensure that communities take part in wildlife conservation, management and protection.<sup>218</sup>

As stated earlier one of the functions of the associations is to facilitate conflict resolution. They can do this by incorporating TDRMs. Since the associations include members of the community, the members of the community can incorporate their methods of resolving conflicts in the associations. For example, as stated earlier, the Maasai community have elders that resolve conflicts that arise along the community. In relation to human-wildlife conflict these elders may be part of the associations and whenever a human-wildlife conflict arises the conflicting parties and in this case the Kenya Wildlife Service and the affected community will avail themselves to the elders who are part of the association to resolve the conflict. The decision reached by the elders is what the parties will follow. If any of the parties is not satisfied with the decision they may consequently go to the Environmental Tribunal.

In addition, as stated earlier one of the modes of resolving human-wildlife conflict is compensation. By incorporating TDRMs in resolving human-wildlife conflict. The compensation mechanism may also change. Instead of the government compensating the affected individual person, they may now start compensating the entire community. The money for compensation will now go to the community. The elders in the community will in turn decide on how best to assist the community with the money gotten. This will be in line with the communal aspect of ownership among communities.

#### **4.3 Challenges facing the use of TDRMs in resolving Human-wildlife conflict.**

The first challenge facing the use of TDRMs in resolving human-wildlife conflict is that, TDRMs are regarded as inferior by the present when compared to other modes of

---

<sup>216</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>217</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

<sup>218</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

resolving conflicts.<sup>219</sup> This is because they use customary law which is subjugated when compared to other sources of law.<sup>220</sup> In addition, the Constitution of Kenya under section 159 (3) creates a repugnancy clause that limits the use of Customary law and consequently the use of TDRMs; in resolving conflicts including human-wildlife conflict.<sup>221</sup>

The second challenge facing the use of TDRMs is the inadequate or unclear legal and policy framework.<sup>222</sup> This poses a threat to contemporary African society.<sup>223</sup> Kenya like many other African countries lacks a clear policy on TDRMs.<sup>224</sup> This is because of the plural nature of TDRMs.<sup>225</sup> This plurality makes it challenging for the parties involved in resolving the conflict to know what rules to apply when using TDRMs as each community has their own version of TDRMs.

The third challenge facing TDRMs in resolving human-wildlife conflict is the evolving nature of African Traditional Systems.<sup>226</sup> They therefore cannot be codified. In addition, TDRMs vary from community to community there will be challenges in coming up with codified laws that harmonize and consolidate all the different mechanisms.<sup>227</sup>

The fourth challenge is whether, TDRMs can be used to resolve disputes that are criminal in nature as some of the human-wildlife conflicts tend to be criminal in nature. Article 159 2 (c) of the Constitution of Kenya is ordered in a way that it does not limit the

---

<sup>219</sup> Francis Kariuki, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' *Alternative Dispute Resolution*, (2015), 30-53, 50.

<sup>220</sup> Francis Kariuki, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities', 50-51.

<sup>221</sup> Article 159 (3), *Constitution of Kenya* (2010).

<sup>222</sup> <http://www.kmco.co.ke/attachments/article/192/African%20Traditional%20Justice%20Systems.pdf> on 19 January 2018.

<sup>223</sup> <http://www.kmco.co.ke/attachments/article/192/African%20Traditional%20Justice%20Systems.pdf> on 19 January 2018.

<sup>224</sup> <http://www.kmco.co.ke/attachments/article/192/African%20Traditional%20Justice%20Systems.pdf> on 19 January 2018.

<sup>225</sup> <http://www.kmco.co.ke/attachments/article/192/African%20Traditional%20Justice%20Systems.pdf> on 19 January 2018.

<sup>226</sup> <http://www.kmco.co.ke/attachments/article/192/African%20Traditional%20Justice%20Systems.pdf> on 19 January 2018.

<sup>227</sup> <http://www.kmco.co.ke/attachments/article/192/African%20Traditional%20Justice%20Systems.pdf> on 19 January 2018.

use of TDRMs in resolving criminal cases.<sup>228</sup> However, the same article 159 states that TDRMs shall not be used in a manner that contravenes the bill of rights or is repugnant to any other law. In relation to human-wildlife conflict not all case may be used to resolve human-wildlife conflict and it varies according to the nature and circumstances of the case. For example, an illegal grazing case may be handled through TDRMs, however a poaching case may not be handled through TDRMs since it goes beyond the privy of affecting communities.

#### **4.4 Conclusion**

It is time for the indigenous communities to be involved in the conservation and preservation of wildlife in all aspects. The Wildlife Management and Conservation Act already provides for these by allowing communities to form their own wildlife associations.<sup>229</sup> They should therefore also be involved in the process of resolving human-wildlife conflict. The government should not be quick to impose a resolution for resolving human-wildlife conflict without the consultation of the communities that would be affected by the resolution.

---

<sup>228</sup> Article 159, *Constitution of Kenya* (2010).

<sup>229</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47 of 2013).

## CHAPTER 5

### CONCLUSIONS, FINDINGS AND RECOMMENDATIONS

#### 5.1 Introduction

Traditional Dispute Resolution Mechanisms have always been part of our communities. It was what communities relied on to resolve conflicts and were passed from one community to another.<sup>230</sup> They were based on the culture, beliefs and customary laws of the people.<sup>231</sup> TDRMs were meant to be reconciliatory in nature.<sup>232</sup> They created harmony among the members of the community.

The constitution of Kenya 2010 ushered in a new era by officially recognizing TDRMs as a mode of resolving disputes in Kenya.<sup>233</sup> Initially only the Judicature Act<sup>234</sup> recognized TDRMs as a source of resolving disputes but it limited what could be resolved through TDRMs. The Constitution of Kenya 2010 ushered in a new era which allowed a variety of cases to be heard via TDRMs. This is demonstrated in cases such as *R v Mohammed Abdow*<sup>235</sup> a murder case that was resolved through TDRMs. This case illustrates that TDRMs are still an integral part of the community. The Ameru for example still have the Njuri Ncheke who resolve conflicts that occur in the community.<sup>236</sup>

Human-wildlife conflict poses a significant threat to the local human population and is also a threat to the animals caught up in the conflict.<sup>237</sup> Various methods have been used to resolve this issue for example killing of animals, compensation, arresting of people. However, all these methods have proved not to be as effective as envisioned. The problem

---

<sup>230</sup> Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of *Republic v Mohamed Abdow Mohamed* [2013] eKLR, 204.

<sup>231</sup> <http://www.kmco.co.ke/attachments/article/192/African%20Traditional%20Justice%20Systems.pdf> on 31 December 2017.

<sup>232</sup> Penal Reform International, *Access to Justice in Sub-Saharan Africa*, 22.

<sup>233</sup> Article 159, *Constitution of Kenya* (2010).

<sup>234</sup> Section 3(2), *Judicature Act*, (Act No. 16 of 1967).

<sup>235</sup> *R v Mohamed Abdow Mohamed* [2013]eKLR

<sup>236</sup> [https://www.the-star.co.ke/news/2017/09/18/history-roles-and-impact-of-the-once-united-council-of-elders\\_c1636601](https://www.the-star.co.ke/news/2017/09/18/history-roles-and-impact-of-the-once-united-council-of-elders_c1636601) on 31 December 2017.

<sup>237</sup> [http://wwf.panda.org/about\\_our\\_earth/species/problems/human\\_animal\\_conflict/](http://wwf.panda.org/about_our_earth/species/problems/human_animal_conflict/) on 15 December 2017.

appears to be the lack of involvement of the community when it comes to coming up with policies that affect them.<sup>238</sup> In this case communities are not involved in resolving human-wildlife conflict. Policies are just imposed on them. This leads to them not abiding by them. When an incident occurs, it has resulted to each of the involved parties' taking matters in to their own hands. As illustrated earlier the Maasai will kill any wild animal that kills their cattle.<sup>239</sup>

## 5.2 Findings

This study set out to explore whether TDRMs can be applied in resolving human-wildlife conflict it analyzed the current legal frame work on TDRMs it then looked at the current legal frame work on human-wildlife conflict. The study then discussed how TDRMs can be used to resolve conflicts the opportunities this presents, the challenges and the viability of TDRMs in resolving human-wildlife conflict.

The study found out that, the Wildlife Management and Conservation Act 2013 section 40<sup>240</sup> allows communities to establish wildlife associations. The purpose of these associations shall be to facilitate conflict resolution and assist in wildlife management.<sup>241</sup> The wording of section 40 indicates that it leaves it up to the community to decide on what methods will be used to resolve any conflicts that may arise involving wildlife. Section 41 of the Act tries to highlight some of the functions of the associations.<sup>242</sup> However, the section dos not highlight the duty of facilitating conflict resolution, yet it is one of the primary functions of the association has highlighted in section 40 of the Act.<sup>243</sup>

Section 4 gives further gives leeway for communities to resolve human-wildlife conflicts. The study therefore concludes that communities have, been given an opportunity to resolve human-wildlife conflict using TDRMs. The study discovered that Communities tend to respect decisions that are resolved using TDRMs. The community therefore, is satisfied with the outcomes and so is the Kenya Wildlife Service. In addition, the

---

<sup>238</sup> 'Julie Narimatsu: Maasai Land Rights in Kenya and Tanzania' *Environmental Justice Case Study 12* July 2014 <http://www.umich.edu/~snre492/Jones/maasai.htm> on 30 December 2017.

<sup>239</sup> Personal Communication with Maasai Moran on 26 December 2017.

<sup>240</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47of 2013).

<sup>241</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47of 2013).

<sup>242</sup> Section 41 *Wildlife Conservation and Management Act* (Act No.47of 2013).

<sup>243</sup> Section 40 *Wildlife Conservation and Management Act* (Act No.47of 2013).

community will be encouraged to take part in conservation of wildlife as they will now be stakeholders in conservation of wildlife.

However, the study also found out that there are still some setbacks in using TDRMs in resolving human-wildlife conflict. Firstly, not all human-wildlife conflicts can be resolved using TDRMs for example poaching. Secondly, the Constitution of Kenya contains a repugnancy clause that limits the extent to which TDRMs may be used to resolve conflicts.<sup>244</sup>

### **5.3 Recommendations**

#### **1) Adoption of TDRMs by the Wildlife Associations to resolve some Human-wildlife conflicts.**

Section 40 of the Wildlife Management and Conservation Act states that the work of the wildlife associations shall be to facilitate the resolving of conflicts. This can be done by them adapting, the methods used by the communities in resolving disputes. They can apply this methods in resolving human-wildlife conflict. They can do this by first including the people in charge of resolving disputes in the community in to the wildlife associations. The work of this people shall be to hear cases dealing with human-wildlife conflict that affect the community. The laws used shall be the customary laws of the people if they are in line with article 159 of the Constitution of Kenya 2010. The outcome of their decisions shall bound the involved parties. If any party is not satisfied with the outcome they shall have the option of appealing. For example, if a cow is killed by a wild animal among the Maasai, Kenya Wildlife Service and the Maasai may go to the council of elders among the Maasai and request them to resolve the issue. Whatever the outcome given by the elders they should both respect it. In addition, to that the compensation received will go to the community. The elders of the community will then decide on what they deem fit for the compensation received should be used for.

#### **2) Encouraging the use of Alternative Dispute Resolution Mechanisms in resolving human-wildlife conflict.**

There is also need to encourage and educate both the Kenya Wildlife Service and the community on the benefits of using alternative dispute resolution mechanisms as a mode of resolving conflicts. The Constitution of Kenya 2010 ensured that alternative dispute

---

<sup>244</sup> Article 159, *Constitution of Kenya* (2010).

resolution mechanisms are used to resolve conflicts.<sup>245</sup> Kenya Wildlife Service and the community must know that the courts are not always the best arena for resolving conflicts. They must be taught to apply other dispute resolution mechanisms and specifically TDRMs. Communities must learn how important these TDRMs are in resolving human-wildlife community. This education can be facilitated by the wildlife associations.

#### **5.4 Conclusion**

The study has achieved its objectives and responded to the statement of problem. The objectives were:

- i. To analyze the current legal framework used in resolving human wildlife conflicts.**

The study has achieved this objective as seen in chapter two and three of the study. In chapter two, the study looked at the current legal framework of TDRMs and in chapter three, the study looked at the current legal framework used in resolving human-wildlife conflict. In chapter two, the study looked at the position of TDRMs in society and looked at the laws related to TDRMs. While in chapter three, the study looked at the various methods used to resolve human-wildlife conflict by analyzing the legal framework in human-wildlife conflict.

- ii. To establish whether the use of TDRMs in resolving human wildlife conflict, will achieve restorative justice.**

In chapter four, the study discussed how TDRMs can be used to resolve human-wildlife conflict. In doing so it showed how by using TDRMs restorative justice is achieved. The study found out that communities tend to respect decisions resolved through TDRMs and will be at ease with outcomes gotten through TDRMs thus achieving restorative justice.

- iii. To make recommendations on how the community wildlife associations can incorporate TDRMs in resolving human wildlife conflicts**

In chapter five of the study, the study gave a number of recommendations on how TDRMs can be used in resolving human-wildlife conflict. The recommendations given are; the adoption of TDRMs by the Wildlife Associations in resolving some Human-wildlife conflicts, Involving Communities in Conservation of Wildlife, Educating the Various

---

<sup>245</sup> Article 159, *Constitution of Kenya* (2010)

Stakeholders on the Benefits of Using Alternative Dispute Resolution Mechanisms to Resolve Disputes.

## **5.5 Hypotheses**

### **i) The use of TDRMs in resolving human wildlife conflict will promote restorative justice.**

This study has proven the hypothesis that the use of TDRMs in resolving human-wildlife conflict does achieve restorative justice. It did this by first looking at the legal frame work of both TDRMs and Human-wildlife conflict. The study then went ahead to discuss how TDRMs will be used in resolving human-wildlife conflict. The study found out that the use of TDRMs does indeed achieve restorative justice. This is because, when TDRMs are used to resolve the conflicts the affected parties are still willing to work together after the conflict is resolved. In addition, both parties are satisfied with the outcome.

### **ii) The community wildlife associations will be effective if they adopted the use of TDRMs.**

This study has proven the hypothesis that the community wildlife associations will be more effective if they use TDRMs in resolving human-wildlife conflicts. First and foremost the study found out that the wildlife associations are at liberty to use which ever method they deem fit to resolve human-wildlife conflicts. This is because, the Wildlife Conservation and Management Act does not impose a specific dispute resolution mechanism. The study therefore, went ahead and advocated for the use TDRMs in resolving human-wildlife conflict. Further, chapter four highlighted how TDRMS would be applied by the wildlife associations in resolving human-wildlife conflicts. It did this by suggesting that the people in charge of resolving disputes in communities should be the ones involved in resolving disputes brought to the associations. This people should use TDRMs in resolving the dispute if it is a dispute that affects the community and their decision on the matter should be respected by the conflicting parties.

In this case, the disputing parties are the community and the Kenya Wildlife Service. If any of the parties fails to respect the decision of the wildlife association, the aggrieved party may turn to the courts for assistance in resolving the matter.

## **Bibliography**

### **Books**

- 1) Daniel Musili Nyeki, *Wildlife Conservation and Tourism in Kenya*, Jacaranda Designs Ltd, Nairobi, 1993.
- 2) Robert D. Putnam, *Bowling Alone*, 1st ed, Simon & Schuster Press, United States, 2000.
- 3) White, G. F, *Natural Hazards*, Oxford Press, New York, 1974.
- 4) Patricia Kameri-Mbote, 'Aligning Sectoral Wildlife Law to the Framework Environmental Law' in C.O. Okidi et al.(eds), *Environmental Governance in Kenya: Implementing the Framework Law*, East Africa Educational Publishers, Nairobi, 2008.
- 5) V.O. Wasonga, D. Kambewa and I. Bekalo, 'Community-Based Natural Resource Management' in Washington Ochola, Pascal Sanginga and Isaac Bekalo (eds), *Managing Natural Resources for Development In Africa: A Resource Book*, University of Nairobi Press, Nairobi, 2010.

### **Reports**

- 1) ICJ-Kenya Report, 'Interface between Formal and Informal Justice Systems in Kenya,' ICJ, 2011.

### **Journal Articles and Conference Papers**

- 1) Agrawal, A, "Community in Conservation: Beyond Enchantment and Disenchantment" Conservation and Development Forum, Gainesville, Florida, 1997.
- 2) Chris Chapman and Alexander Kagaha, 'Resolving Disputes using Traditional mechanisms in the Karamoja and Teso Regions of Uganda' *Minority Rights International* (2009).

- 3) Cutter, S., J. Mitchell, and M. Scott. 'Revealing the vulnerability of people and places: A case study of Georgetown County, South Carolina' *Annals of the Association of American Geographers* 90, (2000), 713-737.
- 4) Dennis A. Rondinelli, John R. Nellis and G. Shabbir Cheema, 'Decentralisation in Developing Countries' *A Review of Recent Experience World Bank* (1983).
- 5) Dickman A, 'Complexities of conflict: the importance of considering social factors for effectively resolving human-wildlife conflict' *Animal Conservation*, 13 (2010), 458-466.
- 6) Dilys Roe, 'Evaluating Eden; Exploring the Myths and Realities of Community-Based Wildlife Management' *Series No. 8, IIED* (1994).
- 7) Ferraro, J. P., and A. Kiss, 'Direct payments for biodiversity conservation' *Science* 298 (2002), 1718-1719
- 8) Erin Sherry & Heather Myers, 'Traditional Environmental Knowledge in Practice' *Society & Natural Resources*, Vol. 15 No. 4 (2002), 351.
- 9) Hollie .B. Christopher .U. and Jean .G. 'Genocide, Justice, and Rwanda's Gacaca Courts' *Journal of Contemporary Criminal Justice* (2014), 333-352.
- 10) Hoare, R. E. 'Determinants of human-elephant conflict in a land-use mosaic' *Journal of Applied Ecology*, 36 (1999), 689-700.
- 11) Hussain, S. 'The status of the snow leopard in Pakistan and its conflict with local farmers' *Oryx*, 37 (2003), 26-33.
- 12) Kariuki F and Kariuki M 'Alternative dispute resolution, access to justice and development in Kenya' *Strathmore Law Journal*, 1 (2015), 1-21.
- 13) Kariuki F, 'Applicability of traditional dispute resolution mechanisms in criminal cases in Kenya: Case study of Republic v Mohamed Abdow Mohamed [2013] eKLR' 2 *Alternative Dispute Resolution Journal* (2014), 202-228.
- 14) Kariuki .F, 'Conflict Resolution by Elders in Africa: Successes, Challenges and Opportunities' *Alternative Dispute Resolution Journal* (2015), 30-53.
- 15) Marguerite Johnson, 'Giriama Reconciliation' *African Legal Studies*, 16 (1978).
- 16) M. T. Cirelli, 'Legal Trends in Wildlife Management' *Legislative Study* 74, *FAO* (2002).
- 17) Naughton-Treves, R. Grossberg, and A. Treves, 'Paying for Tolerance: Rural Citizens' Attitudes toward Wolf Depredation and Compensation' *Conservation Biology* 17 (2003), 1500-1511.

- 18) Nyhus, P., and R. Tilson, 'Characterizing human-tiger conflict in Sumatra, Indonesia: implications for conservation' *Oryx*, 38 (2004), 68-74.
- 19) Ogada, M. O., R. Woodroffe, N. O. Ouge, and L. G. Frank, 'Limiting Depredation by African Carnivores: the Role of Livestock Husbandry' *Conservation Biology*, 17 (2003), 1521-1530.
- 20) Penal Reform International, 'Access to Justice in Sub-Saharan Africa' *Penal Reform International* (2000).
- 21) Turner, B. L., R. Kasperson, P. Matson, J. McCarthy, R. Corell, L. Christensen, N. Eckley, J. Kaspterson, A. Luers, M. Martello, C. Polsky, P. A and A. Schiller. 'A framework of vulnerability analysis in sustainable science' *proceedings of the national academy of science of the United States of America* (2003), 8074-8079.
- 22) Wagner, K., R. Schmidt, and M. Conover, 'Compensation programs for wildlife damage in North America' *Wildlife Society Bulletin*, 25 (1997), 312-319.

### **Theses**

- 1) Leela, 'Living among lions (panthera leo): coexistence or killing? community attitudes towards conservation initiatives and the motivations behind lion killing in Kenyan maasailand' published LLM Thesis University of Wisconsin-Madison, 2006.
- 2) Wamukoya, 'Devolution of wildlife management in Kenya to enhance community participation: An assessment of Kenyan legal frameworks' published LLM Thesis University of Nairobi, 2013.

### **Internet Sources**

- 1) Naughton-Treves, L. 'Predicting Patterns of Crop Damage by Wildlife around Kibale National Park Uganda' *Conservation Biology* 12 February 1998 <http://onlinelibrary.wiley.com/doi/10.1111/j.1523-1739.1998.96346.x/full>.
- 2) Julie Narimatsu 'Maasai Land Rights in Kenya and Tanzania' Environmental Justice Case Study (2014), <http://www.umich.edu/~snre492/Jones/maasai.htm>.
- 3) <http://www.slideshare.net/reethur/human-wildlife-conflict>
- 4) [http://changingminds.org/explanations/trust/four\\_justice.html](http://changingminds.org/explanations/trust/four_justice.html)
- 5) <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=16&cad=rja&uact=8&ved=0C>

FcQFjAFOAo&url=http%3A%2F%2Fwww.abu.edu.ng%2Fpublications%2F2009-07-,

- 6) [http://www.ywcamadison.org/atf/cf/%7BAC4038C4-BCCA-4F24-B55C-F41063EDF6FE%7D/Restorative\\_Justice\\_Resource\\_Guide.pdf](http://www.ywcamadison.org/atf/cf/%7BAC4038C4-BCCA-4F24-B55C-F41063EDF6FE%7D/Restorative_Justice_Resource_Guide.pdf)
- 7) <http://www.businessdictionary.com/definition/desk-research.html>
- 8) <http://www.kmco.co.ke/attachments/article/192/African%20Traditional%20Justice%20Systems.pdf>
- 9) [http://wwf.panda.org/about\\_our\\_earth/species/problems/human\\_animal\\_conflict/](http://wwf.panda.org/about_our_earth/species/problems/human_animal_conflict/)
- 10) <https://howtoconserve.org/2015/12/04/human-wildlife-conflict/>
- 11) <http://pubs.iied.org/pdfs/7810IIED.pdf>
- 12) <http://www.gsid.nagoyau.ac.jp/bpub/research/public/paper/article/153.pdf>
- 13) <https://www.iucn.org/content/2nd-pan-african-symposium-sustainable-use-natural-resources-africa>
- 14) <https://portals.iucn.org/library/sites/library/files/documents/1996-008.pdf>
- 15) <http://www.kmco.co.ke/attachments/article/192/African%20Traditional%20Justice%20Systems.pdf>
- 16) [https://www.the-star.co.ke/news/2017/09/18/history-roles-and-impact-of-the-once-united-council-of-elders\\_c1636601](https://www.the-star.co.ke/news/2017/09/18/history-roles-and-impact-of-the-once-united-council-of-elders_c1636601)

#### **Personal Communications**

- 1) Personal communication with Kitili M.
- 2) Personal Communication with Maasai Moran.