

**BALANCING CHILDREN'S RIGHT TO EDUCATION AND CRIMINAL
RESPONSIBILITY IN ARSON CASES IN KENYA.**

Submitted in partial fulfilment of the requirements of the Bachelor of Laws Degree, Strathmore
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This research is the fruit of collective effort. Thank you.

DECLARATION

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

Signed:

Date:

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

Signed:

Date:

Mr. Harrison Mbori Otieno

ABSTRACT

The arson incident at Moi Girls Nairobi was a wake-up call to the Ministry of Education. Kenyans watched as firemen struggled to put out the raging fire. 9 students died. Property was lost to the fire. Many fires had been reported, many more came thereafter. This prompted various schools to take measures to insure themselves against future fires. Many reasons have been given for what is now a phenomenon, including a lack of awareness and support for student with mental health issues and the fact that the students are using the fire as political action. The Kenyan courts in determining these matters have increasingly ordered that the students suspected of the incidents of arson be accepted back in the schools.¹ This study seeks to find out the role of the Kenyan courts and other stakeholders in the mitigation of arson; from the backing of the right to property and the right to education to the creation of a balance. It also seeks to investigate the role of the right of property in encouraging arson and in its mitigation or eventual curbing.

¹ *In the matter of E.T.N (suing as the next friend of E.T.K (Minor) [2014] eKLR.*

LIST OF CASES

- i) *In the matter of E.T.N (suing as the next friend of E.T.K (Minor)* [2014] eKLR.
- ii) *Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR
- iii) *S O M v Republic* [2017] eKLR Criminal Appeal No.58 Of 2016.
- iv) *R. W. T. v S.N.S School* (2012) eKLR.
- v) *Peter Okech Kadamias vs. Municipal Council of Kisumu* Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194.
- vi) *Republic v Ishad Abdi Abdullahi* [2016] eKLR.
- vii) *RCK (a child suing through her mother and next friend TRC) vs. KSI* [2014] eKLR.
- viii) *F M vs. The Principal Kianda School Nairobi* No. 281 of 2012.
- ix) *Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR.
- x) *F B O v Board of Governors [particulars withheld] High School* [2017] eKLR.

LIST OF LEGISLATIONS

- i) Penal Code of Kenya, Cap 63, Laws of Kenya, 2014.
- ii) Constitution of Kenya (2010).
- iii) Children Act, No. 8 of 2001 (Revised Edition 2018), Laws of Kenya.
- iv) Office of the Director of Public Prosecutions, Diversion Policy, 2019.
- v) Basic Education Regulations, 2015.
- vi) Education (School Discipline) Regulations, 1972.
- vii) Education Act, Cap 211, (2012) Laws of Kenya.
- viii) Community Land Act (No.27 of 2016), Laws of Kenya.
- ix) Ministry of Higher Education, Science and Technology, Tivet Institutions Guidance and Counselling Policy and Operational Guidelines, 2011.
- x) Detention Camps Act, Cap 91, Laws of Kenya.
- xi) Children and Young Persons Act, Cap 141, Laws of Kenya.
- xii) Borstal Institutions Act, Cap 92, Laws of Kenya (Revised Edition 2012).
- xiii) Places established as Borstal Institutions under section 3, Borstal Institutions Act, Cap 92 Laws of Kenya (Revised Edition 2012), Subsidiary Legislation.
- xiv) Prisons Act, Cap 90, Laws of Kenya, (Revised 2009).
- xv) United Nations Convention on the Rights of the Child, 1989, C.N.322.1995.
- xvi) African Charter on the Rights and Welfare of the Child, 1990.

Balancing Children's Right to Education and Criminal Responsibility in Arson Cases in Kenya.

CHAPTER 1.

1. Introduction.

1.1. Background

In the years of 2016 to 2018, there have been incidents in schools, especially high schools, where students have set the schools on fire or been found with the tools to commit arson.² This is a crime under Sections 332 and 333 of the Penal Code of Kenya.³ In the schools where the culprits succeeded in committing arson, some students even lost their lives while others were injured, not to mention the vast destruction of school and public property.⁴

In light of this, there have been a number of taskforces to investigate arson, commissioned by the Kenyan government.⁵ Despite the taskforces work in trying to determine the 'why', it seems that their recommendations consistently failed.⁶ They agreed that there was a great problem and that the key stakeholders involved are the government education stakeholders, the students, the teachers and the parents. The stakeholders are also the key to curbing arson.

Following these investigations and those of the schools and police, the suspected students have been taken to court. The courts have had to consider the suspects' status as children and their rights and balance those alongside criminal responsibility in arson as against the school's right to property.⁷ They have also had to consider the other affected students' rights as children.⁸ There have been orders by courts to allow the students suspected of arson back in school to continue

² Daily Nation Newspaper, *Teachers Blame School Chaos on Calendar Changes*, 13 June 2016, <https://www.nation.co.ke/news/Teachers-blame-school-chaos-on-calendar-changes/1056-3246684-10sreoz/index.html>, accessed on 13 February 2019.

³ Cap 63, Laws of Kenya, 2014.

⁴ National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017. See also Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

⁵ National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017.

⁶ Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

⁷ In the matter of E.T.N (suing as the next friend of E.T.K (Minor) [2014] eKLR. S O M v Republic [2017] eKLR Criminal Appeal No.58 Of 2016.

⁸ S O M v Republic [2017] eKLR Criminal Appeal No.58 Of 2016.

pursuing their right to education.⁹ The schools use the tools of suspension and expulsion to try and deter another instance of arson and protect their right to property.¹⁰ Courts use judicial review to reverse the school decisions.

The right to property is protected under the Constitution of Kenya (2010).¹¹ Property plays a very important role in schools as it not only enables the accused person a way to exercise their right to education but the other students in the school too.¹² The property belongs to the society as a whole and thus should benefit the members equally.¹³ Furthermore, the rules in Traditional African understanding of property state that property belongs to the whole community, the ancestors, the living and the yet-to-be-born.¹⁴

This idea was embraced in the understanding of property as protected in Article 40 of the Constitution of Kenya 2010.¹⁵ Property should be protected and used for the benefit of the whole society, not just those in place at the moment.¹⁶ This necessitates that school and public property be used as if in communion with the whole Kenyan society and not just the children in the schools at the time. The students cannot then use the school property to express their grievances without consideration to the other members of the school body, the community and the younger ones that hope to use these facilities later on.¹⁷

Further, the Constitution of Kenya at Article 53, protects children's right to education unequivocally.¹⁸ This right can however be limited in the meaning and scope of Article 25.¹⁹ So,

⁹ *S O M v Republic* [2017] eKLR Criminal Appeal No.58 Of 2016

¹⁰ National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017.

¹¹ Article 40, Constitution of Kenya (2010). See also Lumumba P and Franceschi L, *The Constitution of Kenya, 2010; An Introductory Commentary*, Strathmore University Press, Nairobi, 2014, 187-194.

¹² See Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016, 1-45 and 75-97 for theories and roles of property that make it important.

¹³ Government of Kenya, Sessional paper of 1965, *African Socialism and Its Application to Planning in Kenya*, 1965.

¹⁴ Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016.

¹⁵ Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016. See also Lumumba P and Franceschi L, *The Constitution of Kenya, 2010; An Introductory Commentary*, Strathmore University Press, Nairobi, 2014.

¹⁶ Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016.

¹⁷ Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

¹⁸ Constitution of Kenya (2010).

¹⁹ Constitution of Kenya (2010).

just as children have a right to education, they have an obligation to protect the property they use. This is under the Hohfeld principles of rights and corresponding duties and the Traditional African understanding of property.²⁰²¹ The users of property today must protect the property for the users yet to come.²² Moreover, the same Constitution at Article 40 protects the right to public property for the schools.²³ The students should thus use the school and public property in such a way that those that come after them may benefit from the use of those facilities too.

Despite this, accused persons are supposed to be considered innocent until proven guilty.²⁴ These suspected children have this right too. The Children Act makes it the responsibility of the government and parents to ensure that Children's right to education is met and not the teachers or the schools.²⁵ Thus, the school has the power to suspend or expel students that exhibit gross indiscipline or pose a threat to the school and other students.²⁶ Education can be given in another place that does not pose a threat to the school. This is for example, in rehabilitation schools set up under the Children Act.²⁷

In the same way, Section 4 of the Children Act requires judges to make orders that are beneficial to the child.²⁸ The orders should safeguard and promote the rights of the child and should also provide any correction that may be required for the good of the child and public interest.²⁹ Thus, this study puts forward that the use of property rights and consideration of public interest can be beneficial to achieving a justiciable balance.

²⁰ Hohfeld, W. N., *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Aldershot, 2001.

²¹ Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016.

²² Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016.

²³ Constitution of Kenya (2010).

²⁴ Article 50 (2)(a), Constitution of Kenya (2010).

²⁵ Section 7, Children Act, No. 8 of 2001 (Revised Edition 2018).

²⁶ Section 2, Education (School Discipline) Regulations, 1972. This is also in Section 13 of the Education Act (2012) Cap 211, Laws of Kenya and Sections 32 and 33 of the Basic Education Regulations, 2015.

²⁷ Section 47, Children Act, No. 8 of 2001 (Revised Edition 2018).

²⁸ No. 8 of 2001 (Revised Edition 2018).

²⁹ Section 4, Children Act, No. 8 of 2001 (Revised Edition 2018).

1.2. Statement of problem

There is a gap in the way the law reacts to the balance between the rights of the child to education versus the rights to property of the schools where arson is committed. Whether or not the alleged perpetrators of the crime will try to commit the crime again given another chance, the courts have ordered that the suspects be allowed back into schools. More than anything, the criminal justice system by using prison sentences or ordering schools to accept the accused back may be encouraging criminal behaviour in the students. This may be causing a bigger threat to public good.

The schools go as far as suspending and expelling the accused persons to try and prevent any further damage to the school, or other admitted students who are also entitled to education. Calling on the police is in exercise of the school's rights to protect their property and protect other students. It is a right as well as an obligation for everyone involved to protect life and property. As the students are under the protection of the schools when in school, it is an even greater responsibility as one would question whether the rights of one child are greater than the other and whether these rights are above the greater public good.

1.3. Statement of objective(s)

The main objective for this study is to find a restorative balance between the right to education and the right to property in arson cases.

The study will also be guided by the following objectives:

1. To find a way to use property rights to try and curb arson.
2. Establish a right to property in schools for various stake holders.
3. Establish a right to education for all students including the suspects.
4. Find out what the relationship is between the right to education and the right of (public) property.
5. Find out what effect the commission of this crime has had on the schools especially the students who are present during re-building.

1.4. Hypothesis

The following hypothesis will guide this study:

Lack of listening to the students and positioning the right of education as higher than any other in determination of the crime of arson, or general indiscipline has failed to deter the crime of arson in schools.

1.5. Research question (s)

This study seeks to find out:

1. Where do courts draw the line and what tests should be applied in restoratively balancing the right to property and the right to education?
2. Can understanding the right of public/community property create solutions to curb arson?

1.6. Justification/Significance of the study

This study seeks to find a way through property rights to curb the phenomenon of arson. Despite policies and legislation passed regarding education and children, arson keeps rampant and unhindered. Thus, there is a need to approach the problem from a new light; to find how property compels arson and how its understanding can be used to mitigate and ultimately curb the phenomenon. The study proposes using restorative justice. Various stakeholders may use this understanding to mitigate the crime of arson in schools and eventually curb it completely.

1.7. Theoretical framework

Restorative Justice.

Restorative justice is not mediation.³⁰ It is a system of justice that considers the victim and requires the perpetrator to take responsibility for their actions.³¹ The victim also gets a chance to talk about the crime and in a way get psychological healing.³² This thus gets a new perspective on justice. One where the victim gets answers and the perpetrator has a chance to be reintegrated back into society.³³

It may also lead to discouragement of any further criminal activity by the perpetrator.³⁴ This is done by involving the families of the perpetrators to support them and reprimand them throughout the process.³⁵ This is especially important to this study because from the Freakonomics authors, early life does affect children; in doing so, the kind of life they are exposed to as children may cause a proclivity to crime.³⁶ In this sense, for this study, the way these arson cases are handled may do the same. If the students are treated as hard criminals, then they may become hard criminals. Then the country would have a bigger problem to contend with. Especially if they are a first-time offender, then the justice system should take greater care to prevent further offences by the child.³⁷

Restorative justice comes in as an alternative to the criminal justice system to do just that.³⁸ Section 191 of the Children Act allows the court to respond to a child in any other lawful manner other than the criminal justice system.³⁹ This is further supported by the Office of the Director of Public Prosecutions, Diversion Policy, 2019.⁴⁰ By considering protecting property rights, then the children would have to pay back for property lost in the act of arson. Then they could go through

³⁰ Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014.

³¹ Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014.

³² Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014.

³³ Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014.

³⁴ Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014.

³⁵ O'Driscoll M, Youth justice in New Zealand: *A Restorative Approach to Reduce Youth Offending*, 136th International Training Course.

³⁶ Levitt Steven D. and Dubner Stephen J., *Think Like a Freak (Freakonomics)*, William Morrow, 2014.

³⁷ O'Driscoll M, Youth justice in New Zealand: *A Restorative Approach to Reduce Youth Offending*, 136th International Training Course.

³⁸ Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014.

³⁹ No. 8 of 2001 (Revised Edition 2018), Laws of Kenya.

⁴⁰ Schedule A.5.1, Office of the Director of Public Prosecutions, Diversion Policy, 2019.

a rehabilitative institution for reform to facilitate reintegration instead of being released back to the school. This solves the problem of fear that some schools, as the victims may feel, and caters to the rehabilitation of students.

Utilitarian and Economic theories.

The utilitarian theory posed by Jeremy Bentham views property as a positive right created in law to achieve social and economic goals.⁴¹ Bentham states that property exists to maximise the utility and happiness of the people. Property, according to Bentham is used to promote social welfare. In this case children use school (public) property to exercise their right to education and teachers their right to livelihood.⁴² Bentham stated that property rights are created and limited by law to serve human values, to ensure that the essentials to public happiness are existent. This brings about public benefits.⁴³ Posner, using the economic theory, poses that the happiness in the utilitarian model may be measured in monetary terms.⁴⁴ This encourages sustainable utilization of property.⁴⁵

In this case, property should be used and protected to benefit the greater public good.⁴⁶ Property should be used to benefit the greater student body. It could be said that the suspected students pose a threat to the property rights of the school, the public and the other students. They should thus be kept separate, to deter the other students as they will see the consequences of destruction of property. The students being allowed back into the school may be interpreted convolutedly to mean that they can get away with destruction of public property and encourage others to do the same which may lead to worse results.⁴⁷ Furthermore, the losses suffered in these arson cases could be extended to mean that the greater public and the student body, including the staff, have suffered.

⁴¹ Bentham J, 1789, *An Introduction to the Principles of Morals and Legislation*, Oxford, Clarendon Press, 1907.

⁴² Article 43, Constitution of Kenya (2010).

⁴³ Posner R, *Utilitarianism, Economics, and Legal Theory*, Journal of Legal Studies, The University of Chicago Press, vol.8 no.1, pg. 103-140, 1979.

⁴⁴ Posner R, *Utilitarianism, Economics, and Legal Theory*, Journal of Legal Studies, The University of Chicago Press, vol.8 no.1, pg. 103-140, 1979.

⁴⁵ Posner R, *Utilitarianism, Economics, and Legal Theory*, Journal of Legal Studies, The University of Chicago Press, vol.8 no.1, pg. 103-140, 1979.

⁴⁶ Posner R, *Utilitarianism, Economics, and Legal Theory*, Journal of Legal Studies, The University of Chicago Press, vol.8 no.1, pg. 103-140, 1979.

⁴⁷ National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017.

Thus, the property lost impedes the public good. Ergo, arson impedes the public good. Thus, any threat to the public good should be kept separate from the property in danger.

African Socialism.

African Socialism is a positive non-alignment policy which carefully picks out the best of the Kenyan African social heritage and economic legacy and uses it to forward Kenyan policies for the good of the Kenyan people.⁴⁸ It is a homegrown ideology termed Democratic African Socialism.⁴⁹ The purpose of this is to achieve social justice, human dignity and economic welfare. The theory is adaptable to the changes and the time and that is why this study will depend on it. It also explains the understanding of property used in the Community Land Act today.⁵⁰ Land used by a distinct and organised group of users for socio-economic or other similar common interest is termed community land.⁵¹ This can be used as further protection to school property as land used for the interest of education. The study will use this theory and its ideas to put forward an African understanding of the right of property and how this understanding can be used to protect the rights covered in this study in an amicable way. This will be used to establish the rights being discussed and to try and balance them in a way that is applicable to Kenya.

⁴⁸ Government of Kenya, Sessional paper of 1965, African Socialism and Its Application to Planning in Kenya, 1965.

⁴⁹ Government of Kenya, Sessional paper of 1965, African Socialism and Its Application to Planning in Kenya, 1965. This is in the remarks of the then president Mzee Jomo Kenyatta and in the explanation of the ideology.

⁵⁰ Section 2, Community Land Act, No.27 of 2016, Laws of Kenya.

⁵¹ Section 2, Community Land Act, No.27 of 2016, Laws of Kenya.

2. Literature Review.

Various taskforces have investigated protest action in schools.⁵² School protests have been taking place in Kenya since as early as 1908.⁵³ The taskforces came up with reasons why protests are rampant. They also gave recommendations on how to try and stop the spread of destructive protest action. So far, there has been need for further investigation by another commission. The reasons given by the taskforces for arson are variable but connected and some insistently repetitive.

The Sagini report stated that some of the reasons why students commit arson are; communication breakdown between the student body and the administration, mismanagement of funds, mismanagement of schools, inadequate learning and teaching facilities and inadequate counselling services.⁵⁴ The Macharia Taskforce stated that the reasons were; geographical circumstances like proximity to slums, lack of recreational facilities, theft, low supply amenities and general hopelessness and despair caused by the prevailing economic and social hardships.⁵⁵ The Wangai Report gave the following reasons; rise in human rights awareness, insecurity within and outside school, external environment of vices and images of violence and deteriorating levels of nationalism.⁵⁶

The National Crime Research Centre gave the reasons as; peer pressure, fear of exams, poor parental upbringing, misunderstandings between the administration and the students, lack of avenues for students to pass on their grievances or not being listened to, removal of mid-terms, student indiscipline, poor living conditions, inadequate resources, poor/lack of resources in schools and lack of coordination between the government and the schools.⁵⁷

⁵² National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017.

⁵³ Republic of Kenya, *The Report of the Task Force on Student Discipline and Unrest in Secondary Schools* of 2001 (Wangai Report of 2001), Jomo Kenyatta Foundation, 2001.

⁵⁴ Republic of Kenya, *The Report of the Presidential Committee of 1991 on Student Unrest and Indiscipline in Kenyan Schools* (Sagini Report of 1991), 1991.

⁵⁵ Republic of Kenya, Ministry of Education, Science and technology, *Report on the Causes, Effects and Remedies of Indiscipline in Secondary Schools in Central Province* (Macharia Report), as presented to provincial students disciplinary committee, government printers, Jomo Kenyatta Foundation, Nairobi, 2000.

⁵⁶ Republic of Kenya, *The Report of the Task Force on Student Discipline and Unrest in Secondary Schools* of 2001 (Wangai Report of 2001), Jomo Kenyatta Foundation, 2001.

⁵⁷ National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017.

The taskforces also found that boy's boarding schools were more likely to be burnt down than any other.⁵⁸ The Ministry of Education, as a reaction to this phenomenon, stated that '*the wanton destruction of school property will not be tolerated*'.⁵⁹ This shows a willingness to protect school and public property by a major shareholder in education. Some of the recommendations given by the National Crime Research Centre include; addressing policy gaps in profiling indiscipline cases across schools to prevent arson perpetrators from moving to another school to perform the same crime; installing working counselling services in the schools and; further forensic investigations to determine planning, organisation and pattern of coordination in arson cases.⁶⁰⁶¹

Cooper's study and the reports have shown that students are using arson as political action to try and get heard by the other stakeholders.⁶²⁶³ Students realised that it was a very effective way to be seen in a society that seems to classify them as hormonal teenagers and stuff their problems in that closet too.⁶⁴ They have thus turned to destruction of property trying to mirror the violence around them.⁶⁵ This may be a foundation for the formation of future criminals as this is the only way students deem to have worked.⁶⁶ Students have also observed the general violence with which the greater society approaches demonstrations.⁶⁷ Cooper states that the students have observed that any demonstration without destruction of property did not gather the attention of the government.⁶⁸ The attention of other stakeholders could not be gathered either. Cooper states that the students

⁵⁸ National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017.

⁵⁹ National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017.

⁶⁰ National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017.

⁶¹ National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017.

⁶² Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

⁶³ Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

⁶⁴ Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

⁶⁵ Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

⁶⁶ Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

⁶⁷ National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017.

⁶⁸ Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

commit arson in their schools as a way to show their frustration.⁶⁹ The students use arson to get attention so that they can be listened to.

These findings are supported by those of Malenya who found that student violence was an expression of solidarity.⁷⁰ The students having gotten information about other students in other schools would participate in their own form of unrest.⁷¹ Akoko also states that the society and surrounding community influences the students to adopt violent acts and helped provide the materials used in arson.⁷² Akoko also states that the government and other relevant authorities failed to manage the affairs of the school pushing students into violent acts.⁷³

⁶⁹ Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

⁷⁰ Malenya, F. L., *The Phenomenon of Student Violence in the Context of Student Unrest in Kenyan Secondary Schools*, Doctoral dissertation, Kenyatta University, 2014.

⁷¹ Malenya, F. L., *The Phenomenon of Student Violence in the Context of Student Unrest in Kenyan Secondary Schools*, Doctoral dissertation, Kenyatta University, 2014.

⁷² Akoko-Okayo, *Factors Influencing Arson Attacks in Selected Public Boarding Secondary Schools in Trans-Nzoia County, Kenya*, Masters Dissertation, University of Nairobi.

⁷³ Akoko-Okayo, *Factors Influencing Arson Attacks in Selected Public Boarding Secondary Schools in Trans-Nzoia County, Kenya*, Masters Dissertation, University of Nairobi.

3. Research Design.

3.1. Research design & Methodology

This study will employ a descriptive design to meet its purpose. It will take the form of a qualitative desk-based research relying on library resources, online resources, journal articles, handbooks, national and international legislation. Reports and statistics by various taskforces, published research and academic papers will also form the secondary data for this study. This study will rely on interviews done in the schools and with the various stakeholders mentioned herein for its primary data. This will also form the quantitative data of this study and enhance the objectivity of the study.

The schools to be interviewed are including; Ngenia High School, Kamandura Girls Secondary School, Our Lady of Mercy Ngarariga Girls Secondary School and Senior Chief Koinange School. All these schools are in Kiambu County. There are schools that have been victims of arson and others attempted arson in this sample. Other stakeholders that will be interviewed will be; police stations in Kiambu, Limuru Law Courts and the Ministry of Education. An interview guidance sheet is attached herein. All interviews will be done in July 2019.

3.2. Assumptions

This research assumes that the correct students were arrested and that these students will be convicted. It also assumes that enough evidence has been gathered and the correct perpetrators will be convicted for the crimes.

3.3. Limitations

This research is limited by the right to be taken as innocent until proven guilty and the right of bail. It is also limited in the scope of region in which it will be covered. The researcher is restricted to the region of Kiambu where this research's raw data will be collected from and concentrated. Thus, this research may thus not be applicable to all cases, but it may hold generalities for the subject of this research; arson cases. Access to some stakeholders and schools is also difficult and may thus limit the expanse of the study.

3.4. Chapter breakdown

Chapter 1

Introduction. This chapter introduces the research by giving the history that inspires it and acknowledging the research done previously touching on this topic. It also gives a summary of what will be covered in the research.

Chapter 2

Theoretical Framework. This chapter gives the general jurisprudence that guides the researcher in this research. The same also guides the conclusions made in this research.

Chapter 3

Balancing the Right to Education with the Right to Property. This chapter outlines the right of education as it pertains to and affects the research. It also shows the jurisprudence that the courts have created in dealing with juveniles that is relevant to this research.

Chapter 4

An African Understanding of the Right to School Property. This chapter outlines the right of property as it pertains to schools. It shows the African philosophy, beliefs and attitude toward property and land and how it affects what this research is attempting to put forward.

Chapter 5

Recommendations and Conclusion. This chapter correlates the findings of the researcher especially during the interviews to the research done and recommends a way forward. A conclusion is then given to the research.

3.5. Time line/Duration

This research has taken an average of 7 months.

4. Conclusion.

The chapter gives an introduction to the problem that is arson. The chapter shows that despite the best-wished efforts, arson is still rampant in schools today. It also shows that this is a phenomenon that has been taking place for decades. The same strategies were used to try and curb it but it keeps rearing its ugly head again and again. The study seeks to find out why and propose a different solution.

CHAPTER 2.

THEORETICAL FRAMEWORK.

2.1.Introduction.

This chapter will give the frame of mind used for this research. It explains the theories relied on to explain the issue being studied. These theories will be used to explain the jurisprudence identified and to interpret the information collected. The chapter explains the reasoning used for this research and the lens through which all the information is observed.

The first theory is restorative justice which takes a more sympathetic approach to both perpetrators and victims. It puts them together to help the perpetrator understand the harm they have caused and offer catharsis to victims. It is used to help with reintegration of persons into the society and reduce recidivism.

The latter theories, economic and utilitarian theories of property, show that property plays an important role in society. Not just an economic one, but a social and emotional one too.

The last theory is African socialism. This theory posits an African understanding of property as belonging to the whole community. This means that all who depend on it are responsible for it holding it for those before them and those after them.

2.2. Restorative Justice.

There are different understandings of restorative justice around the world as interpretations are affected by the different legal systems and cultures.⁷⁴ But generally, restorative justice is meant to give a voice to the victims and ensure the perpetrator understands the harm they have caused.⁷⁵ This is done by encouraging conversation.⁷⁶ This however is not the same as mediation.⁷⁷ Mediation is about intervention while restorative justice is about conversation.⁷⁸

In New Zealand, they have specialized their restorative justice system to juvenile offenders. Using legislation like the Children and Young Person's Family Act (CYPFA) 1989, they have been able

⁷⁴ Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014.

⁷⁵ Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014.

⁷⁶ Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014.

⁷⁷ Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014.

⁷⁸ Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014.

to reduce recidivism in their juvenile offenders.⁷⁹ Using case studies like Kevin's sentence, they have even reduced certain crimes amongst juvenile offenders.⁸⁰ Kevin was a young man who killed his best friends while driving drunk. For his penance, under the restorative justice system, he was told to go around schools explaining what happened and why it's wrong to drive while drunk. He appealed that this was a worse punishment than prison but the courts held it to be better as it showed others who may be at risk of doing the same thing the harm they may cause and the consequences.⁸¹ This is the kind of scenario this proposes. One that feeds into the society instead of the criminal system. To do this, one must understand the Kenyan legal culture.

In Kenya, Justice N. R. O. Ombija has written very precisely and concisely on restorative justice. Justice Ombija begins with explaining the concept of justice. He explains that it is of utmost importance that one understands the concept of justice from an African understanding to understand why restorative justice is so important to this jurisdiction. Thus, an understanding of African customary law becomes important to understanding restorative justice as it affects Kenya.⁸² In Africa, restorative justice is based on the philosophies of *ubuntu*, *utu* and *ujamaa*.⁸³ It is based on community. Restorative justice was therefore existent in African communities long before Bishop Desmond Tutu was formalizing it.⁸⁴ This also translates to what restorative justice is in Kenya.

“The sense of justice may thus be modified by a community without losing its essential character and the court cannot itself transform and original concept of justice into modified one. Restorative justice has one of its aims [as] the offer of support to the crime victim.”⁸⁵

⁷⁹ O'Driscoll M, Youth justice in New Zealand: *a restorative approach to reduce youth offending*, 136th International Training Course.

⁸⁰ Restorative justice: how it actually works Radio New Zealand podcast, <http://www.restorativejusticeinternational.com/2018/new-zealand-restorative-justice-leaders-radio-new-zealand-podcast-april-2018/>, accessed on 27 August 2019.

⁸¹ Restorative justice: how it actually works Radio New Zealand podcast, <http://www.restorativejusticeinternational.com/2018/new-zealand-restorative-justice-leaders-radio-new-zealand-podcast-april-2018/>, accessed on 27 August 2019.

⁸² Justice N. R. O. Ombija, *Restorative Justice And Victims Of Crime In Kenya*, Kenya Law Review Publications, <http://kenyalaw.org/kl/index.php?id=1895>, accessed on 27 July 2019.

⁸³ Takagi P. & Shank G, *Critique of Restorative Justice*, Social Justice, Vol. 31, No. 3 (97), Social Justice for Workers in the Global Economy, 2004, pp. 147-163

⁸⁴ Takagi P. & Shank G, *Critique of Restorative Justice*, Social Justice, Vol. 31, No. 3 (97), Social Justice for Workers in the Global Economy, 2004, pp. 147-163

⁸⁵ Justice N. R. O. Ombija, *Restorative Justice And Victims Of Crime In Kenya*, Kenya Law Review Publications, <http://kenyalaw.org/kl/index.php?id=1895>, accessed on 27 July 2019.

Dr. Kinyanjui gives an example of this in studying the Kenyan communities and their version of restorative justice as nation states.⁸⁶ She shows how especially Bantu communities used a council of elders to settle disputes.⁸⁷ They also used restorative forms of punishment to restore the victim in some way and allow maintenance of relationships even with the perpetrator of the harm.⁸⁸ This is the foundation of the importance of restorative justice to Kenyan communities. The need to maintain relationships comes from the dependence on every member of the community to ensure survival of self and survival of the community.⁸⁹ This translates to the role restorative justice still plays in the different societies today. Even though it is not as it was understood then, the value placed on this form of justice has been recognized by the Kenyan justice system.⁹⁰

Following this, the Prisons Act in Kenya allows for youth to be admitted in rehabilitative schools.⁹¹ These are including detention camps as defined in Detention Camps Act, an approved school as was defined in the Children and Young Persons Act, or a borstal institution as defined in the Borstal Institutions Act.⁹²⁹³⁹⁴⁹⁵ This would be a better alternative to the current state of affairs as presented in this research. It would allow the perpetrators get guidance which they need for reintegration into the society. It would also show the rest of the students that there are tangible consequences to causing arson in schools. Use of restorative justice would make the students conscious of the effect of arson on others while creating an atmosphere of reconciliation which is important for reintegration to the society.

Restorative justice, as much as it is praised, is also heavily critiqued.⁹⁶ Even though restorative justice claims to be victim-oriented, it seems to just want to work with perpetrators in a more

⁸⁶ Kinyanjui S, *Restorative justice in traditional pre-colonial 'criminal justice systems' in Kenya*, 10 Tribal Law Journal, 2009-2010.

⁸⁷ Kinyanjui S, *Restorative justice in traditional pre-colonial 'criminal justice systems' in Kenya*, 10 Tribal Law Journal, 2009-2010.

⁸⁸ Kinyanjui S, *Restorative justice in traditional pre-colonial 'criminal justice systems' in Kenya*, 10 Tribal Law Journal, 2009-2010.

⁸⁹ Kinyanjui S, *Restorative justice in traditional pre-colonial 'criminal justice systems' in Kenya*, 10 Tribal Law Journal, 2009-2010.

⁹⁰ *Republic v Ishad Abdi Abdullahi* [2016] eKLR.

⁹¹ Section 67, Cap 90, Laws of Kenya, Revised 2009.

⁹² Children and Young Persons Act, (Repealed) Cap 141, Laws of Kenya.

⁹³ Detention Camps Act, Cap 91, Laws of Kenya.

⁹⁴ Borstal Institutions Act, Cap 92, Laws of Kenya.

⁹⁵ Section 67 (1) (i), Prisons Act, Cap 90, Laws of Kenya, Revised 2009.

⁹⁶ Takagi, Paul, and Gregory Shank, *Critique of Restorative Justice*, Social Justice, vol. 31, no. 3 (97), 2004, pg. 147–163. JSTOR.

positive way.⁹⁷ It seems to be just another way to deal with offenders.⁹⁸ It is also criticized for being affected by colonialism and so undermined by the adversarial justice system especially used in Kenya.⁹⁹¹⁰⁰ But as shown above, a tailored version of restorative justice can be applied in a way that maintains societal relationships while righting, or at least trying to, the wrongs done to the victim.¹⁰¹ If the students were required to consider property rights in this way, required to compensate those that were harmed in a restorative way, then justice as shown would still be served.

2.3.Utilitarianism and Economic Theories of Property.

The utilitarian theory was posed by Jeremy Bentham who views property as a positive right created in law to achieve social and economic goals.¹⁰² Bentham states that property exists to maximise the utility and happiness of the people. Property, according to Bentham is used to promote social welfare. Bentham stated that property rights are created and limited by law to serve human values, to ensure that the essentials to public happiness are existent. This brings about public benefits.¹⁰³ Utilitarian theorists view property as created by law to achieve other socio-economic needs.¹⁰⁴ As a way to achieve utility, use, for all persons, property is defined and divided to achieve general social welfare.¹⁰⁵ From here, Bentham posits that without law there can be no property as property rights are assigned by law.¹⁰⁶

Criticism against this theory is mainly based on the lack of a way to measure the ends that property is said to meet such as happiness and welfare.¹⁰⁷ The criticisms show that property rules may increase the welfare of some and make others suffer.¹⁰⁸ So then, the theory must show that it

⁹⁷ Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014, pg. 21.

⁹⁸ Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014, pg. 21.

⁹⁹ Braithwaite J, 'Principles of restorative justice' in Von Hirsch A et al (eds), *Restorative justice and criminal justice: competing or reconcilable paradigms?*, Hart Publishing, Oxford and Portland, 2003, 1.

¹⁰⁰ Section 3, Judicature Act, Cap 8, Revised Edition 2010.

¹⁰¹ O'Driscoll M, Youth justice in New Zealand: *A Restorative Approach to Reduce Youth Offending*, 136th International Training Course.

¹⁰² Bentham J, 1789, *An Introduction to the Principles of Morals and Legislation*, Oxford, Clarendon Press, 1907.

¹⁰³ Posner R, *Utilitarianism, Economics, and Legal Theory*, Journal of Legal Studies, The University of Chicago Press, vol.8 no.1, pg. 103-140, 1979.

¹⁰⁴ Panesar S., *Theories of private property in modern property law*, Denning Law Journal, 2000, 113-138.

¹⁰⁵ Sprankling J, *Understanding Property Law*, 2 edition, Mathew Bender, New Jersey, 2007.

¹⁰⁶ Bentham J, *The theory of legislation*, Oceana Publications, New York, 1975 (1690).

¹⁰⁷ Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016, 40.

¹⁰⁸ Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016, 40.

proposes what is good for everyone. In any case, the theory shows that property law is not rigid and can change to fit the time, hereby accommodating this criticism.¹⁰⁹

Posner, using the economic theory, poses that the happiness in the utilitarian model may be measured in monetary terms.¹¹⁰ This encourages sustainable utilization of property.¹¹¹ This adds an economic aspect to the theory of utilitarianism thus connecting these theories.¹¹² Here, the object of property is not happiness of general welfare but overall wealth.¹¹³ Posner showed that property is attached to value maximisation whose 'efficient allocation can only be achieved in a free market'.¹¹⁴ In economic theory, this is when two willing parties are brought together in successful transactions.¹¹⁵ This theory was put forward to solve the problem of inefficiency in allocation of resources which arose by not attaching property value to any one person.¹¹⁶ This is to provide incentives to use the property well for the promised revenue later.¹¹⁷

Criticism for this is attached to the fact that not all human desires are quantifiable in monetary/economic terms.¹¹⁸ That value is maximized in a capitalist way, for the rich, thus increasing the inequality when it comes to wealth and private ownership of property.¹¹⁹ This theory is further criticized for assuming that most people use their wealth rationally to maximize its use.¹²⁰ The theory has not shown that it works better than the others yet it may impede economic growth if overdone.¹²¹

¹⁰⁹ Sprankling J, *Understanding Property Law*, 2 edition, Mathew Bender, New Jersey, 2007.

¹¹⁰ Posner R, *Utilitarianism, Economics, and Legal Theory*, Journal of Legal Studies, The University of Chicago Press, vol.8 no.1, pg. 103-140, 1979.

¹¹¹ Posner R, *Utilitarianism, Economics, and Legal Theory*, Journal of Legal Studies, The University of Chicago Press, vol.8 no.1, pg. 103-140, 1979.

¹¹² Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016, 41.

¹¹³ Sprankling J, *understanding property law*, 2 edition, Mathew Bender, New Jersey, 2007.

¹¹⁴ Posner R, *Economic analysis of law*, 6 ed, Aspen Publishers, New York, 2003.

¹¹⁵ Posner R, *Economic analysis of law*, 6 ed, Aspen Publishers, New York, 2003.

¹¹⁶ Demsetz H, *Towards a theory of property rights*, American Economic Review, 1967, 356.

¹¹⁷ Sprankling J, *understanding property law*, 2 edition, Mathew Bender, New Jersey, 2007.

¹¹⁸ Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016, 43.

¹¹⁹ Smith A, *An inquiry into the nature and causes of the wealth of nations*, Campbell R and Skinner S (eds), Clarendon Press, Oxford, 1976.

¹²⁰ Smith A, *An inquiry into the nature and causes of the wealth of nations*, Campbell R and Skinner S (eds), Clarendon Press, Oxford, 1976.

¹²¹ Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016, 43.

2.4. African Socialism.

African Socialism is a positive non-alignment policy which carefully picks out the best of the Kenyan African social heritage and economic legacy and uses it to forward Kenyan policies for the good of the Kenyan people.¹²² It is a homegrown ideology termed Democratic African Socialism introduced in Africa by select leaders post-independence of their countries.¹²³ The purpose of this is to achieve social justice, human dignity and economic welfare. The theory is adaptable to the changes and the time and so is never out of touch with the people. This theory was put forward during the presidency of Mzee Jomo Kenyatta as an ideology by Kenyans for Kenya applying the African ideology of socialism. He writes the introduction to the Sessional Paper encouraging Kenyans to work together to bring this inbred idea to life.¹²⁴

Socialism existed in many African communities before colonialism as a culture and not as a philosophy.¹²⁵ It was inserted into political ideology to encourage Africans that a restoration of Africa was possible as it was pre-colonialism. The theory did not take off because the leaders did not act in good faith to make the promises in this theory a reality and the people to whom service was meant did not understand what socialism was.¹²⁶ This could be blamed on the education gap between the conceivers of the idea and the citizens of the different African countries that tried socialism like Julius Nyerere in Tanzania.¹²⁷

The theory was criticized not for its intrinsic value but for its application. That is; that is lacked consistency, was misunderstood, had no security strategy and the people did not trust in this vision.¹²⁸ The first is because colonialism affected and changed many African communities making the different countries significantly different in ideals and beliefs and thus values. The

¹²² Government of Kenya, Sessional paper of 1965, African Socialism and Its Application to Planning in Kenya, 1965.

¹²³ Government of Kenya, Sessional paper of 1965, African Socialism and Its Application to Planning in Kenya, 1965. This is in the remarks of the then president Mzee Jomo Kenyatta and in the explanation of the ideology. See also Yacouba, C. and Wologueme, B, *From the Failure of African Socialism, How to Set a New Trend for a New Generation?*, Open Journal of Social Sciences, 6, 27-36, 2018.

¹²⁴ Government of Kenya, Sessional paper of 1965, African Socialism and Its Application to Planning in Kenya, 1965.

¹²⁵ Yacouba, C. and Wologueme, B, *From the Failure of African Socialism, How to Set a New Trend for a New Generation?*, Open Journal of Social Sciences, 6, 27-36, 2018.

¹²⁶ Yacouba, C. and Wologueme, B, *From the Failure of African Socialism, How to Set a New Trend for a New Generation?*, Open Journal of Social Sciences, 6, 27-36, 2018.

¹²⁷ Yacouba, C. and Wologueme, B, *From the Failure of African Socialism, How to Set a New Trend for a New Generation?*, Open Journal of Social Sciences, 6, 27-36, 2018.

¹²⁸ Yacouba, C. and Wologueme, B, *From the Failure of African Socialism, How to Set a New Trend for a New Generation?*, Open Journal of Social Sciences, 6, 27-36, 2018.

second was due to the education gap between the elite leaders who created a complex ideology and the uneducated citizens who struggled to understand the concept. The third was because the countries lacked military power to secure and support the ideology as most in this service had been employed by the colonial regime and thus still held on to those beliefs. The last was because some leaders did not support the idea that Africa should get a completely new ideology from capitalism and old African socialism. They wanted the ‘positive contributions’ of colonialism incorporated into this new ideology even though the vision had been to make something authentically African for Africans.¹²⁹

Thus, the ideology failed in its application. However, this does not mean that this generation cannot learn from these past mistakes and use this ideology to better itself today.¹³⁰

2.5. Conclusion.

As seen from the above, this research is written with the premise that repaying property can be a form of restorative justice. This forms reparation to the victims but is not the only part to alleviating the process. They can also go around schools explaining what they have learnt from their experiences to deter others who may want to do the same, which has been seen to be a high number from this study. Students can use these instances to appreciate the role that property plays in their education and ultimate betterment of the Kenyan society. This study has found that there is an underappreciation of the importance of school property as an educational tool rather than a political one.¹³¹ This needs to change. Further, it shows that there is a need for the students found guilty to spend some time in a rehabilitative institution to be counselled. This way, both the victim and the perpetrator are catered for by the justice system in a way that benefits all.

¹²⁹ Yacouba, C. and Wologueme, B, *From the Failure of African Socialism, How to Set a New Trend for a New Generation?*, Open Journal of Social Sciences, 6, 27-36, 2018.

¹³⁰ Yacouba, C. and Wologueme, B, *From the Failure of African Socialism, How to Set a New Trend for a New Generation?*, Open Journal of Social Sciences, 6, 27-36, 2018.

¹³¹ Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

CHAPTER 3.

BALANCING THE RIGHT TO EDUCATION WITH THE RIGHT TO PROPERTY.

3.1.Introduction.

The Children Act defines education as ‘the giving of intellectual, moral, spiritual instruction or other training to a child’.¹³² The right to education is protected in the Constitution among other legislations that will be discussed in this chapter including the Children Act mentioned above.¹³³ After independence, the Mzee Jomo Kenyatta government made it clear that education was going to be a pillar for the country’s development during its rule.¹³⁴

‘Kenya's African social heritage and colonial economic legacy must be reorganized and mobilized for a concerted, carefully planned attack on poverty, disease and the lack of. education in order to achieve social justice, human dignity and economic welfare for all.’¹³⁵

This philosophy has been the leading drive as regards education and is reflected in Kenya’s Vision 2030.¹³⁶ In it, Kenya hopes to produce quality human resource by improving, making accessible and encouraging education for all.¹³⁷ This was to make a Kenyan labour force that could compete with the rest of the world. But, to do this, Kenya had to set aside its property to create schools for their children to have a place to access education from.¹³⁸ Thus, most schools were initiatives of the community. They were run and controlled in the same way since the importance for them was acknowledged. When the system changed and the government took control of the schools, they were largely viewed as public property and thus a way to get to the government and governing authority.¹³⁹ This is the attitude that most students hold when they are setting fire to school property. One of sending a message to the school administration and the government.

¹³² Section 2, Children Act, No. 8 of 2001 (Revised Edition 2018).

¹³³ Children Act, No. 8 of 2001 (Revised Edition 2018).

¹³⁴ Government of Kenya, Sessional paper of 1965, African Socialism and Its Application to Planning in Kenya, 1965.

¹³⁵ Sessional paper of 1965, African Socialism and Its Application to Planning in Kenya, 1965.

¹³⁶ Government of Kenya, Kenya Vision 2030, Page xii, 2007.

¹³⁷ Kenya Vision 2030, 2007.

¹³⁸ Interview with the District Education officer, Limuru (DEO).

¹³⁹ Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

This chapter first looks at legislation that establishes the right to education and sets out how to deal with juveniles. It also looks at how the Kenyan courts have treated cases of arson and compares it to other courts and their reactions to the same. It analyses both and sets out the system that has worked better, considering the sensitivity of the crime. It picks out lessons from these better instances.

3.2.How the Law views Education and Juvenile Offenders.

The Constitution of Kenya at Article 53, protects children's right to education unequivocally.¹⁴⁰ This puts an obligation on various stakeholders to ensure that education is accessible to children and that they are receiving it. The Basic Education Act also states that every child has a right to free and compulsory education.¹⁴¹ Further, the Children Act apart from defining education as it pertains to a child also sets out education as a right.¹⁴² The Children Act also makes it the responsibility of the government and parents to ensure that Children's right to education is met.¹⁴³ This is demonstrated in the vision held for Kenya in African Socialism;

‘The State has an obligation to ensure equal opportunities to all its citizens, eliminate exploitation and discrimination, and provide needed social services such as education...’¹⁴⁴

Regarding disciplinary measures, against students, the Education (School Discipline) Regulations, the Basic Education Regulations and the Education Act all state that the head teacher of the school is responsible for student discipline.¹⁴⁵ The schools are required to have internal rules and regulations that dictate the conduct of the children while in school.¹⁴⁶ Part III of the Basic Education Regulations, sets out in detail what indiscipline is.¹⁴⁷ Further, this Part includes destruction of school property as mass indiscipline when students take part in the destruction jointly.¹⁴⁸

¹⁴⁰ Constitution of Kenya (2010).

¹⁴¹ Part IV, specifically Sections 28 and 30, Basic Education Act, No.14 of 2013.

¹⁴² Section 7, Children Act, No. 8 of 2001 (Revised Edition 2018).

¹⁴³ Section 7, Children Act, No. 8 of 2001 (Revised Edition 2018).

¹⁴⁴ Sessional paper of 1965, African Socialism and Its Application to Planning in Kenya, 1965.

¹⁴⁵ Education (School Discipline) Regulations, 1972. Section 13 of the Education Act (2012) Cap 211, Laws of Kenya. Sections 32 and 33 of the Basic Education Regulations, 2015.

¹⁴⁶ Section 30, Basic Education Regulations, 2015.

¹⁴⁷ Basic Education Regulations, 2015.

¹⁴⁸ Section 33, Basic Education Regulations, 2015.

In addition, the provision above is followed by a set procedure to follow when there is such indiscipline.¹⁴⁹ This, therefore, gives the school the power to suspend or expel students that exhibit gross indiscipline or pose a threat to the school and other students.¹⁵⁰ Education can be given in another place that does not pose a threat to the school. This is, for example, in rehabilitation schools set up under the Children Act¹⁵¹ and encouraged in the Basic Education Act.¹⁵² These rehabilitative schools and institutions are including:

- a) Borstal institutions.¹⁵³ Only children aged between 15 and 18 are sent here.¹⁵⁴ These are under the Department of Prisons.¹⁵⁵ They are; Kamiti Youth Corrective Training Centre in Kiambu, Shikusa Borstal Institution in Kakamega and Admiralty Radio Station, Shimo-la-Tewa in Mombasa.¹⁵⁶
- b) Approved schools. Only children aged between age 10 and 15 are sent here.¹⁵⁷ There are 11 approved schools in Kenya. These are found in Kirigiti, Gitathuru, Likoni, Othaya, Dagoretti, Kisumu, Kericho, Kakamega, Wamumu, Kabete.¹⁵⁸ They are under the Department of Children's Services as mandated by the Children Act. The decision to send a child here is dependent, not only on a judge, but on the circumstances surrounding the child and the offence.¹⁵⁹ Children in need of care and protection are also set here.¹⁶⁰
- c) Rehabilitative schools. Before a child is sent to these schools, parents must obtain a committal order.¹⁶¹ e.g. before children are placed in rehabilitation centres like the above, they undergo an assessment programme; boys at Gitathuru Rehabilitation School and girls

¹⁴⁹ Section 34, Basic Education Regulations, 2015.

¹⁵⁰ Section 2, Education (School Discipline) Regulations, 1972. This is also in Section 13 of the Education Act (2012) Cap 211, Laws of Kenya and Sections 32 and 33 of the Basic Education Regulations, 2015.

¹⁵¹ Section 47, Children Act, No. 8 of 2001 (Revised Edition 2018).

¹⁵² Section 35, Basic Education Act, No.14 of 2013.

¹⁵³ Borstal Institutions Act, Cap 92 Laws of Kenya (Revised Edition 2012).

¹⁵⁴ UNICEF-IRC, *Rights at Risk: Issues of Concern for Kenyan Children, II. The Juvenile Justice System*, https://www.unicef-irc.org/portfolios/documents/785_jj_ngorep_kenya2.htm, accessed on 18 March 2020.

¹⁵⁵ Borstal Institutions Act, Cap 92 Laws of Kenya (Revised Edition 2012).

¹⁵⁶ Places established as Borstal Institutions under section 3, Borstal Institutions Act, Cap 92 Laws of Kenya (Revised Edition 2012), Subsidiary Legislation.

¹⁵⁷ UNICEF-IRC, *Rights at Risk: Issues of Concern for Kenyan Children, II. The Juvenile Justice System*.

¹⁵⁸ Otieno D., *Approved Schools in Kenya*, Information Cradle, 2020, <https://informationcradle.com/approved-schools-in-kenya/>, accessed on 18 March 2020.

¹⁵⁹ Otieno D., *Approved Schools in Kenya*, Information Cradle, 2020.

¹⁶⁰ Otieno D., *Approved Schools in Kenya*, Information Cradle, 2020

¹⁶¹ Otieno D., *Approved Schools in Kenya*, Information Cradle, 2020

at Kirigiti Rehabilitation School.¹⁶² From here, they are sent to different institutions (approved, Borstal or children's homes) depending on their level of risk.

Section 191 of the Children Act allows the court to respond to a child in any other lawful manner other than the criminal justice system.¹⁶³ The Office of the Director of Public Prosecutions, Diversion Policy, 2019 states that all child offenders irrespective of the nature of the offence are eligible for diversion into restorative justice systems.¹⁶⁴ This is following the Constitution of Kenya 2010 encouraging use of alternative dispute resolution mechanisms.¹⁶⁵ Thus, rehabilitative rather than retributive systems may be encouraged.

In the same way, Section 4 of the Children Act requires judges to make orders that are beneficial to the child.¹⁶⁶ The orders should safeguard and promote the rights of the child and should also provide any correction that may be required for the good of the child and public interest.¹⁶⁷ The Act does not specify in what circumstances the child should be, accused or not. This has led to rulings and judgements that may be contradictory to decisions made by school managements despite being well in their rights to do so.¹⁶⁸ This refers to instead of separating accused persons from their victims to prevent interference in any way, demanding schools take them back. Despite this, accused persons are supposed to be considered innocent until proven guilty.¹⁶⁹ These suspected children have this right too. This is demonstrated in the cases below.

3.3.How the Courts Have Dealt with Juvenile Offenders.

In the case of *R. W. T v S. N. S. School*, after the student was suspended for 'disciplinary issues', the court ordered re-admission of the student regardless of the welfare of other students.¹⁷⁰ This went against the decision made by the management of the school, within their rights and mandate. The child depended on the principles of natural justice, the best interest of the child and rights

¹⁶² Otieno D., *Approved Schools in Kenya*, Information Cradle, 2020

¹⁶³ No. 8 of 2001 (Revised Edition 2018), Laws of Kenya.

¹⁶⁴ Schedule A.5.1, Office of the Director of Public Prosecutions, Diversion Policy, 2019.

¹⁶⁵ Article 159, Constitution of Kenya (2010).

¹⁶⁶ No. 8 of 2001 (Revised Edition 2018).

¹⁶⁷ Section 4, Children Act, No. 8 of 2001 (Revised Edition 2018).

¹⁶⁸ *In the matter of E.T.N (suing as the next friend of E.T.K (Minor)* [2014] eKLR.

¹⁶⁹ Article 50 (2)(a), Constitution of Kenya (2010).

¹⁷⁰ (2012) eKLR.

enshrined in Articles 2(6), 3(1) 27(5), 36(1), 43(f), 47(1) and 53(1) (b), (d), (2) of the Constitution and Sections 4, 5 and 7 of the Children’s Act. Articles 2, 3, 12, 15, 28 and 37 of the United Nations Convention on the Rights of the Child and Articles 3, 4, 7, 8 and 11(1) (2) of the African Charter on the Rights and Welfare of the Child were also relied upon.

“Article 53 of our Constitution now recognizes the general principle that the best interests of the children is the paramount consideration in any matter concerning children. I agree that in a school environment, it is the welfare of all the children that must be taken into account rather than one deviant child who has a disciplinary problem. But there is also a responsibility to be borne in respect of that one child, one that flows from the human rights and fundamental freedoms of each individual. These cannot be subordinated to others merely because the interests of the other children are greater. There must be a good reason to do so consistent with the values and principles of the Constitution.”¹⁷¹

The court considered the right to education of the student higher and ordered readmission despite the school decision. It stated that schools have a set of rules which must be adhered to by the child and it is the duty of the guardian to ensure that the child is familiar with these rules and abides by them. But despite that, the school is required to have a fair disciplinary process, consistent with the rules of natural justice, in which an errant child can be disciplined.

In support of the above, Justice Majanja in *RCK (a child suing through her mother and next friend TRC) vs. KSI* [2014] eKLR stated that a School disciplinary panel dealing with children’s matters must have the necessary flexibility, having regard to the school environment and the child’s rights, to deal with student indiscipline provided the process is fair; that the child who is subject to the proceedings is given a hearing and an opportunity to defend himself/herself.¹⁷²

In the case of *In the matter of E.T.N (suing as the next friend of E.T.K (Minor)*, the student had been suspended indefinitely for, among other disciplinary issues, lighting a fire in the hostel.¹⁷³ The court ordered that the student be re-admitted into the school. The court in checking the administrative decision, committed itself to look at all the circumstances and used the justification

¹⁷¹ *R. W. T. v S.N.S School* (2012) eKLR.

¹⁷² *Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR.

¹⁷³ (2014) eKLR.

that ‘a claimant cannot be a judge in their own case’ to quash the administrative decision to suspend the student.¹⁷⁴ The court disregarded the procedure and decision despite the risk the school claimed the student was to it and other students.

In the case of *S O M v Republic*, the High Court quashed the sentence of a student who had been convicted for the crimes of arson and attempted arson.¹⁷⁵ He had been convicted on his own plea of guilty. The court stated that the sentence of being taken to the Shimo la Tewa Borstal Institution was against the child’s right to education which was paramount and in his best interest.¹⁷⁶ Despite the lower court providing the option of a rehabilitative school, as mentioned above, the High Court dismissed this and said it applied the law incorrectly. It relied on the fact that the appellant was issued a more severe sentence than the one imposed on fellow students. The court stated that this was irrational and failed to meet the test of reasonableness and proportionality.

This was done despite the reasoning by the trial judge that he carried out and executed the plan by setting the dormitory on fire and this showed that he needed to be taken to a correctional institution. The trial court found the other four accused fit for alternative punishment due to the fact that they changed their minds and refused to execute the plan to burn the dormitory.

The court also stated that Appellant’s rights to education was paramount and in his best interest. This was because by going to the Borstal institution he was been forced to attend standard seven classes yet he had been a Secondary School student at the time of the commission of the offence. This led to the court quashing the sentence and ordering no alternative sentence.

The above cases show an application of the law that is varying depending on the court but that keeps in mind the child at all times. The school is left to struggle by itself to reconstruct, repair and purchase new facilities to allow for normal proceedings in to school to resume.¹⁷⁷ Most of the school’s decisions are thus quashed by the children depending on judicial review systems and the

¹⁷⁴ *Peter Okech Kadamas vs. Municipal Council of Kisumu* Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194.

¹⁷⁵ Criminal Appeal No.58 Of 2016, [2017] eKLR.

¹⁷⁶ Criminal Appeal No.58 Of 2016, [2017] eKLR.

¹⁷⁷ Rolando C., *6 Months After Moi Girls Tragedy, Mental Health Questions Arise – AUDIO*, Daily Nation Newspaper, 15 March 2018.

best interest of the child principle. The trauma, mental or otherwise, borne by students and staff is not a consideration given by courts so far.¹⁷⁸

The courts, in considering these cases, quote *Republic vs. Kenya Revenue Authority Ex parte Yaya Towers Limited* [2008] eKLR where it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision-making process itself. Its purpose is to ensure that the individual is given fair treatment but one has to show that the decision they are complaining about is tainted with illegality, irrationality and procedural impropriety.

“It is important to remember in every case the purpose of the remedy of Judicial Review and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.”¹⁷⁹¹⁸⁰

The way shown above has not worked so far in curbing arson as 100% of the students interviewed in the course of this study stated that they would burn the schools down again given the chance. These were students in schools, not the perpetrators. They are emboldened by the fact that their friends suspended for arson keep coming back to schools. Justice Mumbi J stated that “the rights of the petitioner must be considered alongside the rights of other students in the school. The School has an obligation to all its students, and as the respondent submits, failing to discipline students who break the rules would set a bad precedent and affect students and parents who are willing to abide by the school regulations.”¹⁸¹ This shows an increase in probability of these students even committing crimes in the future.

Rather than doing the above then, Kenyan courts could learn from other jurisdictions and take up a wholly different approach. Kenyan courts are empowered by the Children Act 2001 to use other means, other than the criminal justice system, to deal with children.¹⁸² They are also empowered

¹⁷⁸ *S O M v Republic* [2017] eKLR Criminal Appeal No.58 Of 2016.

¹⁷⁹ *In the matter of E.T.N (suing as the next friend of E.T.K (Minor)* [2014] eKLR.

¹⁸⁰ *F B O v Board of Governors [particulars withheld] High School* [2017] eKLR.

¹⁸¹ *F M vs. The Principal Kianda School Nairobi* No. 281 of 2012.

¹⁸² Section 191, Children Act, No. 8 of 2001 (Revised Edition 2018).

by the Constitution of Kenya 2010 and the 2019 Diversion Policy to use alternative forms of dispute resolution.¹⁸³¹⁸⁴ Restorative justice falls in this purview.

In New Zealand for example, four boys participated in serious offences against youth unknown to them. They were arrested and charged with wounding with intent to injure and robbery.¹⁸⁵ The boys decided to apologize to the victims and their families. They made face-to-face apologies to the victims and their families and arranged and prepared a dinner for everyone involved.¹⁸⁶ They also put on a concert at the dinner. The show was videotaped and a Judge who heard about the video requested permission to play it in Youth Court.¹⁸⁷

“The apologies were accepted by the victims and their families. The plan for each young person stipulated other activities such as anger management training, community service, reparation, and the provision of mentors to support change. As a result of the FGCs and the efforts the boys have put in, three of the four offenders have completed their plans and received a discharge. It did not minimize the offences but required the boys to walk in the shoes of their victims to understand the hurt they inflicted.”¹⁸⁸

A similar case is reported where a juvenile arson offender experiences the full brunt of the pain suffered by the community he affected by committing arson in school.¹⁸⁹ The court encourages conferencing. The vice principal, his family and representatives from the justice system all sit through this with him as he realizes the harm he has caused. He apologizes, helps to raise money to repair the property and talks to his fellow students about the harm arson causes. He does not commit a crime again.

¹⁸³ Article 159, Constitution of Kenya (2010).

¹⁸⁴ Office of the Director of Public Prosecutions, Diversion Policy, 2019.

¹⁸⁵ O’Driscoll M, Youth justice in New Zealand: *A Restorative Approach to Reduce Youth Offending*, 136th International Training Course.

¹⁸⁶ O’Driscoll M, Youth justice in New Zealand: *A Restorative Approach to Reduce Youth Offending*, 136th International Training Course.

¹⁸⁷ O’Driscoll M, Youth justice in New Zealand: *A Restorative Approach to Reduce Youth Offending*, 136th International Training Course.

¹⁸⁸ O’Driscoll M, Youth justice in New Zealand: *A Restorative Approach to Reduce Youth Offending*, 136th International Training Course.

¹⁸⁹ Hunt R., *Conferencing a Serious Arson Case*, Paper presented at the 2nd International Conference on Conferencing and Circles, August 10-12, 2000, Toronto, Canada.

The above shows clear effort by the perpetrators and the justice system to be rehabilitative through reparations and family group conferences. The readiness of the courts empowered by law to accept and even encourage this has been helpful in reducing crime and recidivism by juveniles in New Zealand.¹⁹⁰ It may do the same for Kenya if the diversion policy were to be implemented well.¹⁹¹

3.4.Conclusion.

Kenya has been keen in ensuring the understanding that the best interest of the child is to be considered always.¹⁹² Furthermore, the cases mentioned show that the best interest is especially applied when it comes to education.¹⁹³ 40% of those interviewed for this study consider the right to education and the right to property to be equal. Another 40% consider the right of education to be higher. The reasons cited were that the constitution should be interpreted using a provision of soberness. That it should be interpreted to help the community. In this way then. Students shouldn't be allowed to get away with denying others this right. The other 10% consider the right of property to be higher because that property serves more than the perpetrators of the arson.

Education is a right for all children as demonstrated, whether accused of a crime or not, whether guilty or not.¹⁹⁴ The law provides for rehabilitative schools to prove this.¹⁹⁵ The question then, comparing the legislation and case law provided is which protects the best interest of the child better; going back to the same school or attending a rehabilitative one?

Then, should the child accused of the crime of arson be the only one under consideration? Or should courts also consider the needs of other students and find a working alternative like the example given to us by New Zealand? The answer is clear. There is a better way to deal with these accused students and that is to get them into a restorative justice system which would be more helpful to them and to the public good being sought by the justice system.

¹⁹⁰ O'Driscoll M, Youth justice in New Zealand: *A Restorative Approach to Reduce Youth Offending*, 136th International Training Course.

¹⁹¹ Office of the Director of Public Prosecutions, Diversion Policy, 2019.

¹⁹² Section 4, Children Act, No. 8 of 2001 (Revised Edition 2018).

¹⁹³ *S O M v Republic* [2017] eKLR Criminal Appeal No.58 Of 2016.

¹⁹⁴ *S O M v Republic* [2017] eKLR Criminal Appeal No.58 Of 2016.

¹⁹⁵ Section 35, Basic Education Act, No.14 of 2013.

CHAPTER 4.

AN AFRICAN UNDERSTANDING OF THE RIGHT TO SCHOOL PROPERTY.

2.1. Introduction.

This chapter is to establish the right to property that schools have over their property. This right is inclusive of the rights to possess, use, exclude and transfer.¹⁹⁶ Furthermore, the Legal theory of property establishes that the law is what gives property rights.¹⁹⁷ The state uses property rules to guarantee against violation of property rights and liability rules to discourage violation of these rights by requiring payment to the victims for harm suffered.¹⁹⁸ This requires establishment of what the property owner is entitled to; the protections they are due through property rules, liability rules and inalienability.¹⁹⁹ In this sense then, property is the legal

‘relationship between an individual and the community with regard to the use and exploitation of resources...’²⁰⁰

The Constitution of Kenya protects the right to property.²⁰¹ It also states that all land belongs to all Kenyans ‘collectively as a nation, as communities and as individuals...’.²⁰² More than this, it requires just compensation to violations committed against this right.²⁰³ This is what guides this chapter. In light of this, this chapter will rely on different property laws in Kenya to establish the right of property for the schools. It looks at these different laws to establish that school property is public property that should be protected as such. It then relies on African socialism to show that school property is community property and should be protected as such too.

¹⁹⁶ Ogendero O. HWO, *Teaching Manuals on Law of Property*, University of Nairobi, 83/84, 1982. See also Kariuki F, Ouma S and Ng’etich R, *Property Law*, Strathmore University Press, Nairobi, 2016.

¹⁹⁷ Bentham J, *The Theory of Legislation*, Oceana Publications, New York, 1987, 69.

¹⁹⁸ Kaplow L. and Shavell S., *Property Rules versus Liability Rules: An Economic Analysis*, Harvard Law Review, 109, 1996, 715.

¹⁹⁹ Calabresi G and Malamed A, *Property rules, liability rules and inalienability: One view of the cathedral*, Harvard Law Review, 85, 1972.

²⁰⁰ Kameri-Mbote P, Odote C, Musembi C and Kamande W, *Ours By Right: Law, Politics, and realities of Community Property in Kenya*, Strathmore University Press, Nairobi, 2013, 27.

²⁰¹ Article 40, Constitution of Kenya (2010). See also Lumumba P and Franceschi L, *The Constitution of Kenya, 2010; An Introductory Commentary*, Strathmore University Press, Nairobi, 2014, 187-194.

²⁰² Article 61, Constitution of Kenya (2010).

²⁰³ Article 40, Constitution of Kenya (2010).

2.2. School Property as Public Property.

A public good is one where an individual's use of it does not diminish or exclude the ability of another to consume the good.²⁰⁴ All individuals are entitled to use the property but not use or occupy it while excluding others.²⁰⁵

Section 57 (7) (p) of the Basic Education Act states that;

‘The County Director of Education shall, subject to the authority of the Cabinet Secretary and in consultation with the County Government... oversee the proper management and maintenance of school buildings, property...’

It refers to school property being in care of the County Government through the County Director of Education. This shows that the property is public property as it is part of the property under the County Government. Article 62 of the Constitution of Kenya states that public land is that which is

‘...at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date... Public land shall vest in and be held by a county government in trust for the people resident in the county...’²⁰⁶

This means, then, that property should be used and protected to benefit the greater public good.²⁰⁷ Property should be used to benefit the greater student body and the community around the school; not to mention the county itself since it is public land.

It could be said that the suspected students pose a threat to the property rights of the school, the public and the other students. They should thus be kept separate, to deter the other students as they will witness the consequences of destruction of property and be warned. The students being allowed back into the school may be interpreted convolutedly to mean that they can get away with

²⁰⁴ Ekelund RB and Tollison RD, *Economics: Private Markets and Public*, 6 ed, Addison-Wesley, New York, 2000, 447.

²⁰⁵ Moyle J, *The Institutes of Justinian*, 5 ed, Clarendon Press, Oxford, 1913, 2.1.

²⁰⁶ Article 62, Constitution of Kenya (2010).

²⁰⁷ Posner R, *Utilitarianism, Economics, and Legal Theory*, Journal of Legal Studies, The University of Chicago Press, vol.8 no.1, pg. 103-140, 1979.

destruction of public property and encourage others to do the same which may lead to worse results.²⁰⁸

Furthermore, the losses suffered in these arson cases could be extended to mean that the greater public and the student body, including the staff, have suffered. Thus, the property lost impedes the public good. Ergo, arson impedes the public good. Thus, any threat to the public good should be kept separate from the property in danger.

The schools use the tools of suspension and expulsion to try and deter another instance of arson and protect their right to property.²⁰⁹ The methods the schools use are valid and allowed to them in the Basic Education Regulations which provides these options as punishment for indiscipline also defined in the Act.²¹⁰ Destruction of public property is cited in the same regulations as indiscipline.²¹¹

2.3. School Property as Community Property.

The rules in Traditional African understanding of property stated that property belonged to the whole community and delineated user rights.²¹² Moreover, some communities considered the community property a gift from God to be held for the ancestors and yet-to-be-born by the living.²¹³ Hence, property rights could not be granted in these communities to an individual to the detriment of a community.²¹⁴ This is still done in some communities to ensure that resources are

²⁰⁸ National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017.

²⁰⁹ National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017.

²¹⁰ Sections 32 and 33 of the Basic Education Regulations, 2015. Section 2, Education (School Discipline) Regulations, 1972. This is also in Section 13 of the Education Act (2012) Cap 211, Laws of Kenya.

²¹¹ Section 33, Basic Education Regulations, 2015.

²¹² Mbiti J, *African Religions and Philosophy*, Heinemann, London, 1969, 36. Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya on principles of national land policy framework for land administration*, 2002, 19. Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016.

²¹³ Mbiti J, *African Religions and Philosophy*, 108.

²¹⁴ Republic of Kenya, *Report of the Commission of inquiry into the illegal/irregular allocation of public land*, 2004.

used in a way that does not compromise use by future generations.²¹⁵ Those who don't follow this are banished.²¹⁶

This idea was embraced in the understanding of property as protected in Articles 40 and 63 of the Constitution of Kenya 2010.²¹⁷ The Constitution of Kenya recognises that land held by a community with similar interest is community land.²¹⁸

'[it is] land attached...socially and for beneficial use, to a distinct population group... or some other social interest group.'²¹⁹

To support this, the Community Land Act defines a community as;

'...a consciously distinct and organized group of users of community land who are citizens of Kenya and share any of the following attributes- ...

(c) socio-economic or other similar common interest;

(d) geographical space;'²²⁰

School property can thus be considered community property as it is property occupied by a group of persons with a 'socio-economic or other similar common interest'.²²¹ More than that, many schools in Kenya were begun by the communities around them.²²² They were thus community property long before they were public property. They were run by the communities, taught by learned members of the community and those that graduated the schools helped with the younger ones.²²³ This fuelled the understanding that property should be protected and used for the benefit of the whole society, not just those in place at the moment.²²⁴ This is an understanding enshrined

²¹⁵ Okoth-Ogendo H, *The tragic African commons: A century of expropriation, suppression and subversion*, University of Nairobi Law Journal, 2003.

²¹⁶ Okoth-Ogendo H, *The tragic African commons: A century of expropriation, suppression and subversion*, University of Nairobi Law Journal, 2003.

²¹⁷ Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016. See also Lumumba P and Franceschi L, *The Constitution of Kenya, 2010; An Introductory Commentary*, Strathmore University Press, Nairobi, 2014.

²¹⁸ Article 63, Constitution of Kenya (2010).

²¹⁹ Kameri-Mbote P, Odote C, Musembi C and Kamande W, *Ours By Right: Law, Politics, and realities of Community Property in Kenya*.

²²⁰ Section 2, Community Land Act, No.27 of 2016.

²²¹ Section 2, Community Land Act, No.27 of 2016.

²²² Interview with the District Education officer, Limuru (DEO).

²²³ Interview with the District Education officer, Limuru (DEO).

²²⁴ Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016.

in African socialism. This necessitates that school and public property be used as if in communion with the whole Kenyan society and not just the children in the schools at the time.

This thus means that the students who assume that the property is theirs for the moment still do not acquire the right to use it to the detriment of those that will require those resources and facilities.²²⁵ They should thus be made aware of the kind of harm arson causes to schools and share these realizations with others. As the case is being solved, they should be isolated from the property. If found guilty in an African understanding, they should be ‘banished’ from the property to prevent further destruction.

The above is supported by the fact that 60% of interviewees consider school property both community and public property. This is because most schools were begun by parents in that community and the community provided/provides the resources used.²²⁶ 40% think it is public because it is used to educate students from all over the country. However, they all agree that an act of arson in the school is an act against the community. 80% agree that a different understanding of school property will deter students if it creates patriotism to the school. This will encourage students to deter others to protect their school. The other 20% state that students should be held responsible and accountable for how they handle school property, besides just teaching about it.²²⁷

Thus, when asked what effect arson has had on the school and community, the answers given were including: loss of life of the members of the school community, destruction of property, fear/distrust among members of the school community, wastage of learning time and poor performance. Other reasons that were given were higher financial costs due to damage of school facilities. This leads to extra costs to the school and community. This money could have been used to further development in the community. These cases also give a bad reputation to the school and parents who are considered responsible for the students.

Restorative justice systems, rehabilitative schools and institutions should thus be considered to rehabilitate students who cause arson.

²²⁵ Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

²²⁶ Interview with the District Education officer, Limuru (DEO).

²²⁷ Interview with Ngenia High School

2.4.Conclusion.

Property plays a very important role in schools as it not only enables the accused person a way to exercise their right to education but the other students in the school too.²²⁸ The property belongs to the society as a whole and thus should benefit the members equally.²²⁹ The students cannot then use the school property to express their grievances without consideration to the other members of the school body and the younger ones that hope to use these facilities later on.²³⁰ They also have to compensate the school for violating its property rights if held liable for the same. This may act as a deterrent to arson by other students if the consequences are put categorically to them. An understanding of its importance may also reduce chances of other students committing the same crime.

²²⁸ See Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016, 1-45 and 75-97 for theories and roles of property that make it important.

²²⁹ Government of Kenya, Sessional paper of 1965, African Socialism and Its Application to Planning in Kenya, 1965.

²³⁰ Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION.

5.1. Introduction.

The study so far has been analysing information gathered and laying it out as it affects and is affected by arson. The study relied on interviews and questionnaires to gather information from the field. The information gathered is presented throughout this study.

This final chapter depends on the findings to make recommendations to deal with arson and its associated factors like peer pressure and mental health issues. It then attempts to marry the findings with the information collected throughout the previous chapters. It further attempts to predict the expected outcomes of following recommendations and makes a conclusion to the study.

5.2. Recommendations.

5.2.1. Use of restorative Justice

Consider that using ‘combative’ means of trying to stop arson makes the students hardened to consequences and so makes them hardened criminals. As shown, a difficult history may lead to a life of crime as children try to escape that harsh reality.²³¹ 100% of the students stated that they would burn the schools again even after seeing their peers go through or even going through the justice system themselves. They do not care about the consequences as they are now. This is a rather alarming find especially for schools.

Use of restorative justice will allow induction back into the society/community. It thus allows the perpetrators a chance to redeem themselves after understanding the harm that arson causes. This is a process that involves the whole affected community. This creates a community of togetherness fostered on trust which is required in relationships that require bona fide actions i.e. student-teacher.

²³¹ Donohue John J. and Levitt Steven D., *The Impact of Legalized Abortion on Crime Over the Last Two Decades*, The National Bureau of Economic Research, 2019.

5.2.2. Better School Environment

Encourage better and more trusting teacher-student relationships. In this way, communication channels are open between the administration and the students which allows the students to air out their grievances. It also creates a need to deal with these grievances because of the accountability created by a relationship of trust. This can be done by creating an environment of better listening. It saves money and lives. It should also be considered that rehabilitative institutions may be a better environment for the perpetrators to allow for rehabilitation back into the society.

This is because some interviewees thought that the causes of arson in schools are: indiscipline, drugs and substance abuse and peer pressure. These seem to be the main reasons thought to be causes of arson. More than this, the factors thought to aggravate arson are: stress or fear of exams, mental health issues which especially involves thinking that nobody cares for the students, lack of parental guidance or poor home background which may include violence and dissatisfaction of students.

5.2.3. Active Guidance and Counselling

So far, the kind of guidance and counselling that has been carried out (if any) does not seem to work. This is especially because schools mainly use their own teachers as counsellors. Seeing as student-teacher relationships are already not held to be trustworthy by students, this creates a problem. Students cannot be honest about the issues they are facing because they do not feel like they are listened to. Schools should thus try partnerships with actual counselling services as they try to rebuild a relationship of trust with their students. Schools can also make use of a teacher with no previous relationship with the school if they are professionally trained to be counsellors. While doing this, they should ensure that basic privacy rights are guaranteed to the students as required in the constitution.²³²

Interviewees stated that students prefer arson to other forms of protest because: there is a lack of adequate communication channels, there are relaxed rules and regulations, hence higher indiscipline, peer pressure, it puts more pressure on the administration, fear of administration, it directly translates to going home and it is easy to get to the property to be burnt (dorms) since they

²³² Constitution of Kenya, 2010.

are not protected. It was stated that minor reasons why students commit arson are: heroism where students want to be viewed as such by their peers, rebellion against school rules and declarations e.g. limiting television time making students dissatisfied and student's desire to go home which can also be said to be a main reason why.

This platform then can also be used to encourage students to be proud, loyal and patriotic to their schools to protect them and help them prosper.

5.2.4. Others.

Other solutions given during the interviews were that schools in conjunction with the government should develop policies to counter arson and ensure supervision of school property. Students should also be educated on better ways to air their grievances. Apart from separating the perpetrators from other students, the rest should be given audience every once in a while, to audit their school experience.

5.3. Conclusion.

As has been mentioned throughout this research, arson is an issue that affects the whole community. The whole community is thus required to deal with it. This is the reason this research advocates for use of restorative justice mechanisms instead. There's an advantage to the society in using restorative justice in these cases. It gives an alternative to the criminal justice system while still ensuring that the perpetrators are held responsible. One way would be to pay back the property lost, go through counselling and go to rehabilitative institutions to finish their studies in a rehabilitative environment. In this way, a repeat of the same crime by the perpetrators is reduced and the chances for the children turning into hardened criminals is reduced. It brings a win-win situation to an originally painful one. The government, communities and schools should be considered and be a part of the whole process of justice in arson, especially as pertains incorporation of the recommendations in schools.

Bibliography.

Books

- i) Lumumba P and Franceschi L, *The Constitution of Kenya, 2010; An Introductory Commentary*, Strathmore University Press, Nairobi, 2014.
- ii) Kariuki F, Ouma S and Ng'etich R, *Property Law*, Strathmore University Press, Nairobi, 2016.
- iii) Kameri-Mbote P, Odote C, Musembi C and Kamande W, *Ours by Right: Law, Politics, and Realities of Community Property in Kenya*, Strathmore University Press, Nairobi, 2013, 27.
- iv) Ogendo O. HWO, *Teaching Manuals on Law of Property*, University of Nairobi, 83/84, 1982.
- v) Bentham J, *The Theory of Legislation*, Oceana Publications, New York, 1987, 69.
- vi) Bentham J, 1789, *An Introduction to the Principles of Morals and Legislation*, Oxford, Clarendon Press, 1907.
- vii) Posner R, *Utilitarianism, Economics, and Legal Theory*, Journal of Legal Studies, The University of Chicago Press, vol.8 no.1, pg. 103-140, 1979.
- viii) Ekelund RB and Tollison RD, *Economics: Private Markets and Public*, 6 ed, Addison-Wesley, New York, 2000, 447.
- ix) Moyle J, *The Institutes of Justinian*, 5 ed, Clarendon Press, Oxford, 1913, 2.1.
- x) Mbiti J, *African Religions and Philosophy*, Heinemann, London, 1969, 36.
- xi) Panesar S., *Theories of Private Property in Modern Property Law*, Denning Law Journal, 2000, 113-138.
- xii) Sprankling J, *Understanding Property Law*, 2 edition, Mathew Bender, New Jersey, 2007.
- xiii) Posner R, *Economic analysis of law*, 6 ed, Aspen Publishers, New York, 2003.
- xiv) Demsetz H, *Towards a theory of property rights*, American Economic Review, 1967, 356.
- xv) Smith A, *An Inquiry into The Nature and Causes of The Wealth of Nations*, Campbell R and Skinner S (eds), Clarendon Press, Oxford, 1976.
- xvi) Zehr H., *The Little Book of Restorative Justice*, Good Books, New York, 2014.

- xvii) Braithwaite J, 'Principles of restorative justice' in Von Hirsch A et al (eds), *Restorative justice and criminal justice: competing or reconcilable paradigms?*, Hart Publishing, Oxford and Portland, 2003, 1.
- xviii) Levitt Steven D. and Dubner Stephen J., *Think Like a Freak (Freakonomics)*, William Morrow, 2014.

Journals and Papers

- i) Cooper E, *Students, Arson, And Protest Politics in Kenya: School Fires as Political Action*, Oxford University Press on behalf of Royal African Society, 2014.
- ii) Government of Kenya, Sessional paper of 1965, *African Socialism and Its Application to Planning in Kenya*, 1965.
- iii) Hohfeld, W. N., *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Aldershot, 2001.
- iv) Justice N. R. O. Ombija, *Restorative Justice And Victims Of Crime In Kenya*, Kenya Law Review Publications, <http://kenyalaw.org/kl/index.php?id=1895>, accessed on 27 July 2019.
- v) Malenya, F. L., *The Phenomenon of Student Violence in the Context of Student Unrest in Kenyan Secondary Schools*, Doctoral dissertation, Kenyatta University, 2014.
- vi) Akoko-Okayo, *Factors Influencing Arson Attacks in Selected Public Boarding Secondary Schools in Trans-Nzoia County, Kenya*, Masters Dissertation, University of Nairobi.
- vii) Yacouba, C. and Wologueme, B, *From the Failure of African Socialism, How to Set a New Trend for a New Generation?*, Open Journal of Social Sciences, 6, 27-36, 2018.
- viii) Kaplow L. and Shavell S., *Property Rules versus Liability Rules: An Economic Analysis*, Harvard Law Review, 109, 1996, 715.
- ix) Calabresi G and Malamed A, *Property rules, liability rules and inalienability: One View of The Cathedral*, Harvard Law Review, 85, 1972.
- x) Posner R, *Utilitarianism, Economics, and Legal Theory*, Journal of Legal Studies, The University of Chicago Press, vol.8 no.1, pg. 103-140, 1979.
- xi) Kinyanjui S, *Restorative justice in traditional pre-colonial 'criminal justice systems' in Kenya*, 10 Tribal Law Journal, 2009-2010.

- xii) Takagi P & Shank G, *Critique of Restorative Justice*, Social Justice, vol. 31, no. 3 (97), 2004, pg. 147–163. JSTOR.
- xiii) Donohue John J. and Levitt Steven D., *The Impact of Legalized Abortion on Crime Over the Last Two Decades*, The National Bureau of Economic Research, 2019.
- xiv) O’Driscoll M, Youth justice in New Zealand: *A Restorative Approach to Reduce Youth Offending*, 136th International Training Course.
- xv) Hunt R., Conferencing a Serious Arson Case, Paper presented at the 2nd International Conference on Conferencing and Circles, August 10-12, 2000, Toronto, Canada.

Reports

- i) National Crime Research Centre, *Rapid Assessment of Arsons in Secondary Schools in Kenya - July-August 2016*, Printed in Nairobi, Kenya 2017.
- ii) Republic of Kenya, *The Report of the Task Force on Student Discipline and Unrest in Secondary Schools* of 2001 (Wangai Report of 2001), Jomo Kenyatta Foundation, 2001.
- iii) Republic of Kenya, *The Report of the Presidential Committee of 1991 on Student Unrest and Indiscipline in Kenyan Schools* (Sagini Report of 1991), 1991.
- iv) Republic of Kenya, Ministry of Education, Science and technology, *Report on the Causes, Effects and Remedies of Indiscipline in Secondary Schools in Central Province* (Macharia Report), as presented to provincial students disciplinary committee, government printers, Jomo Kenyatta Foundation, Nairobi, 2000.
- v) Republic of Kenya, *Report of the Commission of inquiry into the land law system of Kenya on principles of national land policy framework for land administration*, 2002, 19.
- vi) Republic of Kenya, *Report of the Commission of inquiry into the illegal/irregular allocation of public land*, 2004.
- vii) Kenya Vision 2030, 2007.

Internet Sources

- i) Rolando C., *6 Months After Moi Girls Tragedy, Mental Health Questions Arise – AUDIO*, Daily Nation Newspaper, 15 March 2018.

- <https://www.nation.co.ke/lifestyle/family/Mental-health-questions-arise-6-months-after-Moi-Girls-tragedy/1954198-4342836-tbuchi/index.html> , accessed on 13 February 2019.
- ii) Daily Nation Newspaper, *Teachers Blame School Chaos on Calendar Changes*, 13 June 2016, <https://www.nation.co.ke/news/Teachers-blame-school-chaos-on-calendar-changes/1056-3246684-10sreoz/index.html> , accessed on 13 February 2019.
 - iii) Restorative justice: how it actually works Radio New Zealand podcast, <http://www.restorativejusticeinternational.com/2018/new-zealand-restorative-justice-leaders-radio-new-zealand-podcast-april-2018/>, accessed on 27 August 2019.
 - iv) Otieno D., *Approved Schools in Kenya*, Information Cradle, 2020, <https://informationcradle.com/approved-schools-in-kenya/>, accessed on 18 March 2020.
 - v) United Nations Children’s Fund, Office of Research - Innocenti (UNICEF-IRC), *Rights at Risk: Issues of Concern for Kenyan Children, II. The Juvenile Justice System*, https://www.unicef-irc.org/portfolios/documents/785_jj_ngorep_kenya2.htm, accessed on 18 March 2020.

Annexures.

Annexure 1: Research Introductory Letter.



16 September 2019

To Whom It May Concern:

Re: Pamba, Jane Pauline Wangui admin No 94858

I hereby write to confirm that **Pamba, Jane Pauline Wangui admin No: 94858** is a Kenyan citizen.

Currently undertaking Bachelor of Laws in Strathmore Law School.

Pamba, Jane Pauline Wangui is in 4th year in the 2019/2020 academic year and is set to graduate in June, 2020.

Any assistance accorded her will be highly appreciated.

Yours faithfully,


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Annexure 2: **Interview.**

Questions.

Name of School/Place _____

Position/Form/Class _____

Name of Interviewer Jane P Pamba

Date: _____

Hello, my name is **Jane P. Pamba**. I am conducting a study on school unrests/burning in Kenya. This study aims at informing policy and programmes towards addressing unrests and arsons in secondary schools. As an important stakeholder you are requested to participate in the exercise by providing information on this subject matter. All the information you will provide will be treated with utmost confidentiality and will not be used against you.

1. How long have you been in this;
 - a. School
 - b. Court
 - c. Police station
 - d. Ministry of education
2. What do you think is the cause of arson in schools? How/why?
3. Why do you think students prefer arson to other forms of protest?
4. What effect has arson had on the school and the community around?
 - a) **School**
 - b) **Community**

5. Do you think the community around schools encourages arson/violent protests? How?
6. What do you think is your role in mitigating (reducing) arson in schools?
7. Is the right of education higher than the school's right to property? Why?
8. Do you consider school property community or public property?
9. Would you consider an act of arson an act against the community?
10. Do you think an understanding of school property as public property (that has to be paid for) can reduce arson in schools?
11. **For the students only:** if you were told that you would pay for the property lost in school protests/arson, among other ways to repair the damage, would you still do it?