

**THE LAW OF THE PAW; IS THE TRAINING OF THE CANINE NECESSARY TO  
PROVE ITS RELIABILITY WITHIN THE KENYAN LEGAL FRAMEWORK?**

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

By

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Thank you.

## **DEDICATION**

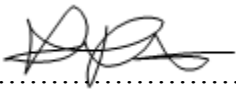
This dissertation is dedicated to the legal system and hopes to have provided insight into the future of canine evidence.

To the canines who have worked tirelessly alongside humans, offering their keen senses and unwavering loyalty in service to our society and to the training institutions that are dedicated to the continuous training and care of these dogs.

May this work honour their contribution to the field of law enforcement and humanitarian missions and serve as a tribute to the extraordinary skill and our appreciation thereof.

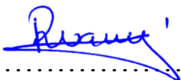
## DECLARATION

I, HAZEL WANJUGU TAITI 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 being submitted to any other university for a degree or a diploma. Other works cited or referred to are accordingly acknowledged.

Signed: ..... 

Date: ..... 26/02/2024

This dissertation has been submitted for examination with my approval as university supervisor.

Signed: ..... 

**MISS. PURITY WANGIGI**

## ABSTRACT

Dogs possess an innate talent that enables them to excel in various tasks, a skill honed by specialised training institutions to integrate them into law enforcement and humanitarian missions. Their remarkable abilities have revolutionised criminal apprehension and scent identification, extending their impact beyond traditional realms into wildlife conservation, where they aid in the apprehension of poachers, thus safeguarding endangered species. According to the Kenyan Courts, canine evidence is a very niche and new area, thus the evidence produced by canines is subject to extreme scrutiny for a court to consider it admissible. The natural olfactory skill of canines which is further sharpened through their training underscores their classification as experts, warranting their evidence to be deemed as expert opinion evidence.

While expert witnesses typically require educational qualifications and training, to qualify as experts, the precedent set by *R v Stockwell* establishes an exception, allowing individuals to be recognized as experts even with the absence of traditional credentials. Drawing parallels between the educational qualifications of human experts and the training of dogs, it becomes evident that the training of canines should not be a strict prerequisite for the admissibility of canine evidence. This dissertation delves into the evolving landscape of canine evidence within biological science and legal contexts, advocating for the recognition of dogs as expert witnesses and delineating avenues for future research to refine the admissibility criteria for canine testimony.

## LIST OF ABBREVIATIONS

MNO	Main Olfactory Epithelium
VNO	Vomeronasal Organ
OB	Olfactory Bulb
PAE	Party Appointed Expert
IFF	Ichikowitz Family Foundation
ORCS	Olfactory Receptor Cells

## LIST OF CASES

1. *John Njogu Weru v Republic* (2016) eKLR.
2. *Julius Mugambi Njeri v Republic* (2017) eKLR.
3. *Omondi and Anor v Republic* (1967), East African Court of Justice.
4. *Uganda v Muheirwe and Anor* (2012), High Court of Uganda.
5. *Folkes v Chadd* (1782), King's Bench of England.
6. *Holtzhausen v Roodt* (1997), South African Case Law.
7. *R v Stockwell* (1993), Court of Appeal of England.
8. *Mbae Maijani and Timothy Kimani v Republic* (2006) eKLR.
9. *Kennedy Maina v Republic* (2008) eKLR.
10. *Godfrey Mugambi Gikundi v Republic* (2017) eKLR.
11. *R v Pieterston* (1994), The Court of Appeal of British Columbia.
12. *Folkes v Chadd* (1782), King's Bench of England.
13. *Davie v Edinburgh Magistrates* (1953) SC 34 Court of Session (Scotland).
14. *Gatheru s/o Njagwara v R* (1954) 21 EACA 384.
15. *Charles Ng'ang'a v R* High Court Crim Case number 66 of 1980. (Unreported)
16. *R v Kupikandimu and 3 others* (1946) 7 ZLR 90.
17. *Holtzhausen v Roodt* (1997) South African Case Law.
18. *R v Inch* (1989) 91 Cr App R 51
19. *Charles Ng'ang'a v R* (1980), High Court, (unreported).
20. *Kagina v Kagina* (2021) KECA 242 (KLR).
21. *David Njeru Kibuthu & others v Republic* (1999) eKLR.
22. *Abdallah bin Wendo & Another v Republic* (1953), EACA.
23. *Samuel Karani v Republic* (2009) eKLR.
24. *Patrick Nyaga Muratha v Republic* (2010) eKLR,
25. *Vitalis Obonyo Onya v Republic* (2008) eKLR
26. *Rex v Trupedo* (1920), App Div 58 (S Africa).

## **LIST OF LEGAL INSTRUMENTS**

### **INTERNATIONAL INSTRUMENTS**

Federal Rules of Civil Procedure, (United States) 1937.

Federal Criminal Rule of Procedure, (United States), 2023.

### **DOMESTIC INSTRUMENTS**

Evidence Act, 1963.

## CHAPTER 1: INTRODUCTION

### **1.1 Background**

Dogs are known to possess skills far beyond technology with regard to their olfactory skills,<sup>1</sup> which man has used to track scents for thousands of years.<sup>2</sup> How the tracking works is through the skin flakes and oils contained in human skin which the dog sniffs and relies on when tracking a suspect and the disturbance on the vegetation.<sup>3</sup> Such evidence is called canine evidence. It is the evidence acquired through the utilisation of sniffer dogs through their olfactory skills to detect certain scents.<sup>4</sup> The range within which the dog's olfactory senses operate is very broad, stretching from sniffing out accelerants, explosives and illegal drugs<sup>5</sup> to contraband,<sup>6</sup> and even in the identification of suspects.<sup>7</sup>

Canine evidence falls squarely into circumstantial evidence, as it cannot make a conviction or dismiss a charge by itself, it has to be corroborated and its foundation must be adequate.<sup>8</sup>

The general rule for canine evidence is that it is purely circumstantial, and cannot stand alone to produce a conviction.<sup>9</sup> Therefore, burdening the prosecution with the task of adducing additional evidence to support the findings of the canine evidence.<sup>10</sup> This follows the assumption that the dog is unreliable, due to the impossibility of cross-examining the canine and the possibility of the evidence being fallible.<sup>11</sup>

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<sup>1</sup> Meslow C, 'Scent as Forensic Evidence and its Relationship to the Law Enforcement Canine' Academia.edu, 2002, 2.

<sup>2</sup> Chapman S, 'Police Dogs in North America' Springfield Charles C Thomas-Publisher, Illinois, 2002.

<sup>3</sup> Pearsall M and Leedham C, 'Dog Obedience Training, New York' Charles Scribner's Son's, New York, 1958.

<sup>4</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, Hastings Law Journal 1, 1990, 17.

<sup>5</sup> Bowles C, 'What Can Dogs Smell?' eHow, June 10 2010 [What Can Drug Dogs Smell? | Cuteness](#) on 9 January 2023.

<sup>6</sup> Jenkins A, 'Dogs Used to Sniff Out Cell Phones in NW Prisons' KPLU Local News, 2009 [KPLU: Dogs Used to Sniff Out Cell Phones in NW Prisons \(2009-07-22\) \(archive.org\)](#) on 10th January 2023.

<sup>7</sup> Meslow C, Scent as Forensic Evidence and its Relationship to the Law Enforcement Canine, Academia.edu, 2002, 3.

<sup>8</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 344.

<sup>9</sup> John Njogu Weru v Republic (2016) eKLR.

<sup>10</sup> Julius Mugambi Njeri v Republic (2017) eKLR.

<sup>11</sup> Omondi and Anor v Republic (1967), East African Court of Justice.

In *R v Pieterston*,<sup>12</sup> the courts stated that upon adducing on canine evidence, evidence as to the nature of the test used to train the dog should be produced by the dog trainer.

In addition to that, the case outlined safeguards that should be administered before admitting canine evidence. These include, laying a foundation for the production of canine evidence through presenting detailing evidence to establish the reliability of the dog and cautioning the court from placing too much weight on canine evidence due to the fact that dogs cannot be cross-examined and may not always be reliable.<sup>13</sup>

The Ugandan High court as well, attempted to remedy the unreliability of canine evidence in the case against Muheirwe and another by providing guiding principles that the court should consider in determining admissibility or exclusion of and attaching weight over canine evidence.<sup>14</sup> Among them, is the principle that evidence should be provided as to the reliability of the dog.

It is thus undeniable that the training of the dog must be produced by the party relying on that evidence.<sup>15</sup>

The general rule for opinion evidence is that it is inadmissible.<sup>16</sup> The rationale behind it is that the role of a witness is to state the facts and not make any opinion upon those facts, otherwise

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<sup>12</sup> (1994), The Court of Appeal of British Columbia.

<sup>13</sup> “In our judgment, if a dog handler can establish that a dog has been properly trained and that over a period of time the dog’s reactions indicate that it is a reliable pointer to the existence of a scent from a particular individual, then that evidence should properly be admitted. However, it is important to emphasise two safeguards. First, the proper foundation must be laid by detailed evidence establishing the reliability of the dog in question. Secondly, the learned judge must, in giving his directions to the jury, alert them to the care that they need to take and to look with circumspection at the evidence of tracker dogs, having regard to the fact that the dog may not always be reliable and cannot be cross-examined.”

<sup>14</sup> *Uganda v Muheirwe and Anor* (2012), High Court of Uganda. The guiding principles on admissibility are:

1. Caution must be exercised by the court when the evidence is presented and given the fullest sort of explanation by the prosecution.
2. There must be material before the court that speaks to the experience of the dog handler.
3. The dog handler should prove the reputation, skill and training of the tracker dog before the court.
4. The circumstances relating to the actual trailing must be demonstrated and proven that the trail has not become stale.
5. The human handler must not try to explore the inner workings of the animal's mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behaviour of the dog and give an expert opinion as to the inferences which might properly be drawn from a particular action by the dog.
6. The court should direct its attention to the conclusion which it is minded to reach on the basis of the tracker evidence and the perils in too quickly coming to that conclusion from material not subject to the truth-eliciting process of cross-examination.
7. It should be noted by the trial judge that according to the circumstances otherwise deposited in evidence, the canine evidence might be at the forefront of the prosecution case or a lesser link in the chain of evidence.

<sup>15</sup> *Uganda v Muheirwe and Anor* (2012), High Court of Uganda.

Principle 3: The dog handler should prove the reputation, skill and training of the tracker dog before the court.

<sup>16</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 321.

they would be encroaching upon the court's role.<sup>17</sup> Nonetheless, there are exceptions to this rule; where a qualified expert may exercise his expertise and express his opinion on a matter he is skilled to testify on, that the court would be unable to form a conclusion upon and where there is no way of detaching the fact from opinion.<sup>18</sup>

The first exception introduces a new branch in opinion evidence, expert opinion evidence, which is admissible.<sup>19</sup> This is further grounded in the case of *Folks v Chadd* whereby the concept of allowing evidence of an expert was first introduced by Lord Mansfield, when the court required the assistance of an engineer regarding the purpose of the construction of the bank. He stated that 'in matters of science, the reasoning of men of science can only be understood by men of science'.<sup>20</sup>

This then raises the question, who is an expert? The Kenyan Evidence Act, 1963, section 48 describes an expert as a person specially skilled in foreign law, science or art.<sup>21</sup> Shouldn't a trained dog who has special skill in tracking be considered an expert?

Various safeguards have been outlined by the courts guiding on the steps required to be satisfied for expert evidence to be admissible. The case of *Holtzhausen v Roodt* formulated principles in that regard.<sup>22</sup>

Under opinion evidence, the academic qualifications of the expert are not as important, rather, the decision by the court as to whether the matter before it requires special skill and whether the witness presented has expert status to testify.<sup>23</sup> The court in the case of *R v Stockwell* formed this opinion when, an artist who did not have any scientific qualifications, was held to be an expert,

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<sup>17</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 321.

<sup>18</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 321.

<sup>19</sup> Keane A, *The Modern law of Evidence*, Oxford University Press, 2008, 363.

<sup>20</sup> *Folkes v Chadd* (1782), King's Bench of England.

<sup>21</sup> Section 48, Evidence Act, 1963.

<sup>22</sup> (1997), South African Case Law.

1. The expert witness must be called to give evidence on matters calling for specialised skill or knowledge.

2. The expertise of the witness should not be overstated to such an extent that the court's own capabilities and responsibilities are disregarded.

3. The witness must be a qualified expert with sufficient skill or expertise.

4. The facts upon which the expert opinion is based must be proved by admissible evidence and must not be based on hypothetical scenarios.

5. The guidance offered by the expert must be sufficiently relevant to the matter in issue which is to be determined by the court.

6. Opinion evidence must not usurp the function of the court. A witness should not be permitted to give an opinion on legal matters and must not be called to answer questions which the court has to decide – this is sometimes referred to as "the ultimate issue."

<sup>23</sup> Mbobu K, *The Law and Practice of Evidence in Kenya*, Law Africa Publishing, Kampala, 2011.

because of his experience.<sup>24</sup> Shouldn't then a dog be allowed to be an expert witness without having to prove his training?

The use of dogs to produce canine evidence is not common in Kenyan courts.<sup>25</sup> However, in the few cases in which it has been adduced as evidence, it has been found to be ineffective unless with the corroboration of the dog's training.<sup>26</sup>

## **1.2 Statement of Problem**

The position of expert opinion evidence in Kenya is that it is admissible and case law has been provided stating that expert opinion evidence need not be corroborated with evidence of the academic qualifications of the expert. Since the dog has special skill, canine evidence should be placed in the same category as expert opinion evidence and have the same rules apply. However, the court requires that the training of the dog be adduced for canine evidence to be held to be admissible, owing to the fact that canine evidence is not common in Kenyan courts, thus does not inspire reliance. Nevertheless, if academic qualifications are to a person what training is to a dog, then the training of the dog should not be a requirement of the court for the admissibility of canine evidence.

## **1.3 Research Objectives**

1. To examine whether canines can be experts not because of their training but the skill they naturally possess.
2. To determine if academic qualifications of a person are what training evidence is to a dog.
3. To assess if the training of the dog can be removed from being a stringent requirement in proving the reliability of the dog.

## **1.4 Research Questions**

1. a) Who does the law regard to be an expert?  
b) Are canine experts due to their training or their natural skill as trackers?

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<sup>24</sup> (1993), Court of Appeal of England.

<sup>25</sup> Kennedy Maina v Republic [2008] eKLR.

<sup>26</sup> Julius Mugambi Njeri & 2 others v Republic (2017), eKLR; Mbae Maijani and Timothy Kimani v Republic (2006), eKLR.

2. Is there a similarity between the academic qualifications of a human expert to the training of a dog?
3. Should the requirements of proving the reliability of the dog remain to be applied as strictly as they are?

### **1.5 Hypothesis**

The current position of canine evidence is that for the reliability of the canine to be proven, evidence as to its training must be adduced. This is proportionate to the goal of determining the reliability of the dog. However, this requirement does not follow the rule of exception offered to expert opinion evidence, whereby the lack of academic qualifications of the expert do not bar the court from admitting the testimony of the expert witness. Since canine evidence has been categorised under expert opinion evidence, it too should be subject to this exception. For that reason, my hypothesis is that the requirement of the dog's training to ascertain its reliability should not be strictly applied, owing to the dog being an expert. Instead, the court should look at the circumstances around the tracking process of the dog in question.

### **1.6 Justification**

The classification of canine evidence under expert opinion evidence, subjects it to the rules stated under expert opinion evidence. One of them being that the expert's academic qualifications are not necessary to prove the reliability of the expert. In this case, academic qualifications of a person are tantamount to the training experience of the dog.

Since law enforcement agencies such as wildlife law enforcement, have begun to rely more and more on canine evidence to track people and detect substances, the reliability of canine evidence comes into question.<sup>27</sup> Therefore, this study will equip the law enforcers with the knowledge they would require to adduce proper canine evidence in court.

This study will be useful to the party relying on canine evidence in court as it would reduce the burden of producing more evidence to prove the reliability of the dog.<sup>28</sup> It would give them an

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<sup>27</sup> Didiwamukoya, 'Admissibility of Canine Evidence in Wildlife Crime Cases' Wildlife Law Africa, 20 November 2019 [Admissibility of Canine Evidence in Wildlife Crime Cases | Wildlife Law Africa | Legislation and Cases](#) on 1 January 2023.

<sup>28</sup> Julius Mugambi Njeri v Republic (2017) eKLR.

opportunity to focus on more substantial circumstances around the tracking, such as *inter alia*, the terrain, the weather and the duration of the tracking.

Taslitz<sup>29</sup> argues that the current position of canine evidence is as such, due to the lack of information the courts have regarding the skill of the canine.<sup>30</sup> On that account, by divulging into the inner workings of the dogs, adjudicators who judge on matters involving canine evidence would be further educated and have greater confidence to judge on matters of canine evidence. In addition, researchers and students of evidence law would also benefit from this study, as very little research has been done in this area.

Generally, this study will attempt to amalgamate canine evidence into expert opinion evidence, with the intent of canine evidence having recognition in statute in the foreseeable future which would strengthen its standing in law.<sup>31</sup>

Even in instances when the canine has not received any training, such as homestead dogs, their evidence will not be immediately struck out through the application of the stringent requirement giving an opportunity for justice to be further achieved.

### **1.7 Conceptual Framework: The Canine as a Skilled Tracker**

This framework proposes expertise is not always gained through formal training and that the training of the dog is not the only factor that would determine reliability of canine evidence.

Therefore, canine evidence need not be subjected to the same standards of reliability as expert evidence. This framework proposes expertise is not always gained through formal training and that the training of the dog is not the only factor that would determine reliability of canine evidence,<sup>32</sup> by subjecting that canine evidence to the same standards of reliability as expert evidence.

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<sup>29</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' *Hastings Law Journal* 1, 1990, 133.

<sup>30</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' *Hastings Law Journal* 1, 1990, 133.

<sup>31</sup> Didiwamukoya, 'Admissibility of Canine Evidence in Wildlife Crime Cases' *Wildlife Law Africa*, 20 November 2019 [Admissibility of Canine Evidence in Wildlife Crime Cases | Wildlife Law Africa | Legislation and Cases](#) on 1 January 2023.

<sup>32</sup> Onzivua S, 'Kiruhura murders: The evidence of an independent dog handler' *Monitor*, 30 May 2020 [Kiruhura murders: The evidence of an independent dog handler | Monitor](#) on 8th February 2023; Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?', *Hastings Law Journal* 1, 1990, 83.

Since the academic qualifications of an expert are not as important, rather, the decision by the court as to whether the matter before it requires special skill and whether the witness presented is qualified to testify as an expert,<sup>33</sup> the court need only be satisfied that a dog possesses the skills of identification of scents to be considered reliable. As opposed to the current position in Kenya where only the training of the dog would prove the dog a reliable witness.<sup>34</sup>

Dogs have superior olfactory skills when compared to human beings, at least to the tune of 44 times better.<sup>35</sup> Therefore, it should be noted that this conversation on whether or not training of the dog should be required to prove reliability of the dog is rooted in the undeniable fact that the dog already possesses the skill for the job, even without training.<sup>36</sup>

The use of dogs to track scents dates back as early 300-272 BC, when the first record of scent discrimination and identification was documented during the reign of Pyrrhus.<sup>37</sup> This was before training ever existed, yet the dog's identification of the murderers was assumed as sufficient evidence.

Williams,<sup>38</sup> at the Institute for Biological Detection Systems, Auburn University, found that the training of dogs to detect more than ten odours did not exert the dogs one bit and even a prolonged period of more than 120 days without refresher training did not deteriorate the performance of the dog, as odour identification remained stable.<sup>39</sup>

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<sup>33</sup> Mbobu K, *The Law and Practice of Evidence in Kenya*, Law Africa Publishing, Kampala, 2011.

<sup>34</sup> John Njogu Weru v Republic [2016] eKLR 2 OF 2015, Godfrey Mugambi Gikundi v Republic [2017] eKLR Criminal Appeal 3 of 2015.

<sup>35</sup> Syrotuck G 'Scent and The Scenting Dog' Mechanicsburg, Pa Barkleigh Productions, 2000, 21

<sup>36</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, *Hastings Law Journal* 1, 1990, 17.

<sup>37</sup> Chapman S 'Police Dogs in North America' Springfield, IL: Charles C Thomas-Publisher, 1990, 9-10.

'A certain slave for some unknown reason had been done to death by two men when they met him on a lonely road. His dog, who was with him and sole witness, remained by the body. The King passed that way on a royal 5 progress, and observed the animal by the side of the corpse, had his charioteers halt. "Bury the body," he commanded, "and bring the dog to me." Some time elapsed: the dog remained with his new master and accompanied him when he went to a review of his troops. As two of the soldiers marched smartly past, the animal flew at them with such a fury that he all but tore them to pieces. No further evidence was needed, for in order to escape from the dog, the criminals confessed to their guilt'

<sup>38</sup> Williams M, Johnston J, Waggoner L, Cicoria M, Hallowell S, Petrousky J 'Canine Substance Detection: Operational Capabilities' Atlantic City, NJ.: Federal Aviation Administration Statistics, 1997, 294 to 298.

<sup>39</sup> Williams M, Johnston J, Waggoner L, Cicoria M, Hallowell S, Petrousky J 'Canine Substance Detection: Operational Capabilities' Atlantic City, NJ.: Federal Aviation Administration Statistics, 1997, 294 to 298.

It is also important to note that the training of dogs happens in controlled environments, whereby conditions such as humidity, temperature, and wind are all regulated by the scientist.<sup>40</sup> Meaning that the dogs that are trained in this manner would be less likely to separate these environmental factors from their track as it was done for them, one could argue that training in this manner could potentially weaken the dog's olfactory skills.

In conclusion, the training of the dog is recognized as an important factor in determining the reliability of the dog, however other factors, which would be arguably more important, do play a key role in the reliability of the evidence. Therefore, this framework highlights the non-essential requirement of the training of the dog to test reliability.

This concept of a canine as a naturally skilled tracker, will be used to critique Kenya's approach to the requirement of the dog's tracking record to prove reliability of the dogs and his evidence, by looking into whether it is in accordance with the inherent characteristic of the canine. Firstly, the courts should recognize the canine as an expert witness. Secondly, they should apply the rules of expert evidence aptly to canine evidence. This will be useful in removing the stringent requirement of the dog's tracking records to prove reliability for purposes of achieving effective justice.

## **1.8 Literature Review**

Moriasi, bases his contribution to the conversion on canine evidence on a statement made by Florence Magoma on an article in the Daily Nation.<sup>41</sup> With regard to the admissibility of canine evidence, he finds that it falls under the category of circumstantial evidence, where additional evidence or facts have to be provided to back circumstantial evidence.<sup>42</sup> Additionally, he classifies canine evidence as expert evidence owing to the fact that records of the dog's

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<sup>40</sup> Meslow C, 'Scent as Forensic Evidence and its Relationship to the Law Enforcement Canine' Academia.edu, 2002, 21.

<sup>41</sup> Omulo C 'Canine evidence hitch in poaching cases' Nation Media Group, 1 May 2018, [Canine evidence hitch in poaching cases | Nation](#) on 15 February 2023.

"Sniffer Dogs are properly trained and they have a high sense of smell which enables them to smell 12,000 different scents. They can never lead you to a wrong exhibit. In this case, the dog is just a tool helping its handler to retrieve evidence."-Florence Magoma (head of prosecutions at the Kenya Wildlife Service(KWS)).

<sup>42</sup> Keane A, The Modern law of Evidence, Oxford University Press, 2008, 10.

veterinary check-ups and the handler's experience be presented, as is the case with expert reports in expert evidence.<sup>43</sup>

He relied on the case of *Wendo v R* to bring out his argument, that for identification by police dogs to be admissible, the dog must qualify as an expert, therefore evidence as to its training must be provided.<sup>44</sup> His position is sound, however, to what end should the training be provided, if there is no standard level to measure the dog's training to?

Vijay in his article,<sup>45</sup> found a way to answer this question. He holds the position that canine evidence is expert evidence, however, its validity and reliability is far from clear.<sup>46</sup> He attacks canine evidence by pointing out the clear challenge which the courts face, that is, the inability to know the reasoning mechanisms of the dog during its trail.<sup>47</sup> Therefore, the dog's evidence must pass the test of investigation and dependability by satisfying four established principles. One, that a document of the exact manner in which the track was conducted shall be presented alongside a panchnama.<sup>48</sup> Two, the evidence of the dog will have to be proven correctly and backed by the handler. Three, in comparing the evidence by the dog and the handler, no contradiction whatsoever should exist, and the handler's proof would be subject to cross

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<sup>43</sup> Moriasi P, 'Prudence In Presentation Of Circumstantial Evidence In Kenya, A Scrutiny Of Canine Evidence' Court and Legal Corridors, 3 May 2018 [PRUDENCE IN PRESENTATION OF CIRCUMSTANTIAL EVIDENCE IN KENYA, A SCRUTINY OF CANINE EVIDENCE. – In the Court and Legal Corridors \(wordpress.com\)](#) on 23 February 2023.

<sup>44</sup> Moriasi P, 'Prudence In Presentation Of Circumstantial Evidence In Kenya, A Scrutiny Of Canine Evidence' Court and Legal Corridors, 3 May 2018 [PRUDENCE IN PRESENTATION OF CIRCUMSTANTIAL EVIDENCE IN KENYA, A SCRUTINY OF CANINE EVIDENCE. – In the Court and Legal Corridors \(wordpress.com\)](#) on 23 February 2023.

<sup>45</sup> Vijay M, 'Admissibility And Significance Of Expert Evidence In Dog Tracker Evidence', Legal Service India [Admissibility And Significance Of Expert Evidence In Dog Tracker Evidence \(legalserviceindia.com\)](#) on 24 February 2023.

<sup>46</sup> Vijay M, 'Admissibility And Significance Of Expert Evidence In Dog Tracker Evidence', Legal Service India [Admissibility And Significance Of Expert Evidence In Dog Tracker Evidence \(legalserviceindia.com\)](#) on 24 February 2023.

<sup>47</sup> Vijay M, 'Admissibility And Significance Of Expert Evidence In Dog Tracker Evidence', Legal Service India [Admissibility And Significance Of Expert Evidence In Dog Tracker Evidence \(legalserviceindia.com\)](#) on 24 February 2023.

<sup>48</sup> Pande A, 'Panchnama- Meaning of Panchnama'

Panchnama- Meaning of Panchnama - The Next Advisor 10 September 2021.

A panchnama is merely a record of what a panch sees. The only use to which it can properly be put is that when the panch goes into the witness box and swears to what he saw, the panchnama can be used as a contemporary record to refresh his memory".

examination. Lastly, the details of the training of the dog should be presented by the dog handler and the results of its assessments.<sup>49</sup>

The question postulated above, from Moriasi's work, finds footing in the fourth principle. That the purpose of producing records of the training of the dog is to allow the court to measure the weight to attach to the dog's evidence.<sup>50</sup>

Freckleton refuses to acknowledge canine evidence as expert opinion evidence. He maintains that canine evidence runs the risk of being more prejudicial than having probative weight.<sup>51</sup> In addition to the standard to requirements that have to be fulfilled for canine evidence to be admissible,<sup>52</sup> Freckleton alludes to additional requirements that would properly ground canine evidence as expert opinion evidence, such as the dog's success rates, its susceptibility to distractions, the manner in which the dog came into contact with the scent, and the kind of terrain upon which the tracking occurred.<sup>53</sup> In conclusion he opines that canine evidence may be taken for purposes of identification in an investigation, however not for the purposes of establishing guilt, unless the above requirements are satisfied because canine evidence is only as good as the evidence establishing its reliability.<sup>54</sup>

Syrotuck introduces his study by comparing humans and dogs with regard to their olfactory skills. He states that more than twelve percent of the canine brain is dedicated to olfaction as compared to the human, whose brain dedicates a lesser percentage to olfactory functions.<sup>55</sup> He focuses on the surrounding conditions that influence the dog's tracking. Such as the vegetative vapour, which is very similar to surrounding scents that dogs so often rely on, which may lead the dog to follow an incorrect scent.<sup>56</sup> Nevertheless, when it comes to tracking humans, it is generally accepted that each human has its own distinct scent.<sup>57</sup> He concludes that it is extremely

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<sup>49</sup> Vijay M, 'Admissibility And Significance Of Expert Evidence In Dog Tracker Evidence', Legal Service India [Admissibility And Significance Of Expert Evidence In Dog Tracker Evidence \(legalserviceindia.com\)](https://legalserviceindia.com) on 24 February 2023.

<sup>50</sup> Vijay M, 'Admissibility And Significance Of Expert Evidence In Dog Tracker Evidence', Legal Service India [Admissibility And Significance Of Expert Evidence In Dog Tracker Evidence \(legalserviceindia.com\)](https://legalserviceindia.com) on 24 February 2023.

<sup>51</sup> Freckleton I. Expert Evidence: Law, Practice, Advocacy and Procedure. 6th edn. Thomson Reuters. 2019, 55.

<sup>52</sup> Keane A, The Modern law of Evidence, Oxford University Press, 2008, 15. "R v Haas "Evidence of tracking by a dog is admissible provided that (i) There is detailed evidence establishing the reliability of the dog by reason of its training and its experience; and (ii) The jury is directed to consider the evidence carefully and with circumspection."

<sup>53</sup> Freckleton I. Expert Evidence: Law, Practice, Advocacy and Procedure. 6th edn. Thomson Reuters. 2019, 59.

<sup>54</sup> Freckleton I. Expert Evidence: Law, Practice, Advocacy and Procedure. 6th edn. Thomson Reuters. 2019, 52 and 59.

<sup>55</sup> Syrotuck G 'Scent and The Scenting Dog' Mechanicsburg, Pa- Barkleigh Productions, 2000, 19.

<sup>56</sup> Syrotuck G 'Scent and The Scenting Dog' Mechanicsburg, Pa- Barkleigh Productions, 2000, 84.

<sup>57</sup> Syrotuck G 'Scent and The Scenting Dog' Mechanicsburg, Pa- Barkleigh Productions, 2000, 5, 27 and 42.

impossible to test that dogs have equal training with varying factors such as climate, wind conditions and temperature. What matters is not the dog's training because these environmental factors could very quickly change the game, rather the orientation of the dog to the vapours.<sup>58</sup>

Taslitz<sup>59</sup> is unique in his study of canine evidence by saying that the courts' reliance on the dog's evidence could be based on the mythical belief in the dog's infallible nature. For that reason, canine evidence has been able to stand against attacks on its reliability and accuracy, as well as allegations that the scent lineups hold potential violation of the constitutional right of an accused to confront the witness testifying against him.<sup>60</sup>

He finds that there are different categories of scenting dogs; point source dogs or air scent dogs, trailing dogs and tracking dogs. These differences are based on the dog's orientation towards air scent, ground scent or a combination of both.<sup>61</sup> For this purpose it is important to adduce evidence of the dog's training so as to prevent misidentification or wrongful detection.<sup>62</sup>

He acknowledges the natural skill of the dog, however warns against the blind admission of such evidence, by emphasising that canine evidence is highly scientific and that there is inadequate research in the matter. For that reason, he advises the courts to apply a high level of scrutiny, lest the idea of convictions being based upon myth rather than rational belief become reality.<sup>63</sup>

Therefore, he maintains that because of the different categories of scenting dogs, the training as to whether they are for purposes of detection or distinction of scents is important.<sup>64</sup> For instance, detection requires a higher degree of training than distinction does.<sup>65</sup> His opinion is similar to that

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"It is generally accepted that humans have a scent and that it differs from one individual to another.",

"Heredity gives rise to individual differences."

"Human beings are made up of cells and vapours which are individual through heredity, diet, emotion, metabolism, environment, experience and bacterial flora."

<sup>58</sup> Syrotuck G 'Scent and The Scenting Dog' Mechanicsburg, Pa- Barkleigh Productions, 2000, 102.

<sup>59</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, Hastings Law Journal 1, 1990, 19.

<sup>60</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, Hastings Law Journal 1, 1990, 19.

<sup>61</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, Hastings Law Journal 1, 1990, 48.

<sup>62</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, Hastings Law Journal 1, 1990, 50.

<sup>63</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, Hastings Law Journal 1, 1990, 134.

<sup>64</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, Hastings Law Journal 1, 1990, 48.

<sup>65</sup> Syrotuck G 'Scent and The Scenting Dog' Mechanicsburg, Pa- Barkleigh Productions, 2000, 10.

of Freckleton, with regard to the warning that canine evidence should not be used as evidence upon which a guilty conviction is made.<sup>66</sup>

### **1.9 Contribution**

This work will provide a new outlook on evidence law in Kenya, through an attempt to divulge the inner workings of the canine and expose the dog as an expert. At which point the rules of the expert evidence will apply and the production of the dog's training records will not be a strict requirement to ascertain reliability of the canine. This will provide a new outlook on the law of canine evidence because previous studies have only gone so far as to point out the weaknesses of canine evidence and further enforce the requirement on the dogs training records, with the exclusion of Syrotuck. Who still, focuses on environmental factors as requirements for reliability, as opposed to the training of the dog.

### **1.10 Methodology**

The research used for this study will be qualitative through the analysis definitions of terms,<sup>67</sup> interpretation of rules<sup>68</sup> and characteristics of evidence among others. The main source of data will be books, reports, articles and journals. Additionally statutes<sup>69</sup> and case law<sup>70</sup> will be relied on, for purposes of showing the position of canine and expert evidence in various jurisdictions and how courts interpret those rules. The study will comprise two parts, expert opinion evidence and canine evidence and how the latter should be classified under the former, consequently being subject to the principles of expert opinion evidence. At large, the research material used will produce deductive reasoning.

The first chapter, of proving that dogs are experts, will rely on doctrinal analysis of legal rules as a basis to determine what the courts say an expert is. Then apply the rules and principles that define an expert to prove that a dog should be classified as an expert.

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<sup>66</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, *Hastings Law Journal* 1, 1990, 133.

<sup>67</sup> Such as expert evidence, canine evidence.

<sup>68</sup> General rules (expert evidence is admissible, canine evidence is purely circumstantial) and their exceptions (the academic qualifications need not be produced if the court finds that the matter before it requires special skill and the expert before it is qualified to testify as an expert witness on that matter.) Statutes such as the Law of Evidence Act.

<sup>69</sup> Statutes such as the Law of Evidence Act.

<sup>70</sup> Cases such as R v Pieterston, R v Stockwell.

Furthermore, the study will look into the origin of the reliance on the dog's olfactory skills as a tracking mechanism. This will be through a historical analysis of the works of historians on the use of dogs to track and a scientific analysis on the psychology and biology of the scenting and tracking dogs.

Lastly, the study will make a critical analysis by comparing a person's academic qualifications to the dog's training, in a bid to demonstrate that if the stringent rule of requiring the dog's training for the dog's evidence to be held to be admissible, then the understanding that training of the dog need to be adduced for that evidence to be admissible will be foreclosed.

Therefore, the research will deconstruct the safeguards<sup>71</sup> that must be laid out for the dog to be considered reliable and construct them without needing the strict adherence to training records of the dog.

All this is with the aim of classifying canine evidence under expert evidence and excluding the stringent requirement of the training of the dog to find the dog's evidence admissible.

### **1.11 Chapter Breakdown**

Chapter one is an introduction to the study, through describing terms and the position of canine evidence in Kenya. It has detailed the background to the study, the research objectives, hypothesis, justification, conceptual framework and the literature material surrounding the topic of study.

Chapter two discusses the first objective by looking at what the law has interpreted an expert to mean, by focusing on case law and statute, followed by the rules of expert evidence and whether the dog can be classified as an expert.

Chapter three goes into the intricacies of comparing the academic qualifications of an expert to the training of the dog with the aim of reducing the stringent application of the requirement of the dog's training for the dog to be considered a reliable expert.

Chapter four seeks to relieve the strict adherence to the requirement to produce training records of the dogs and make an attempt to suggest other conditions that should be looked into for the

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<sup>71</sup> The safeguards outlined in *R v Pieterse*:

‘The proper foundation must be laid by detailed evidence establishing the reliability of the dog in question. Secondly, the learned judge must, in giving his directions to the jury, alert them to the care that they need to take and to look with circumspection at the evidence of tracker dogs, having regard to the fact that the dog may not always be reliable and cannot be cross-examined’

evidence of the dog to be considered reliable as an alternative to the records of the training of the dog.

Chapter five concludes the study by presenting a summary of each chapter and making recommendations.

## CHAPTER 2: WHO IS AN EXPERT

### 2.1 Introduction

This chapter will discuss the first objective by looking at what the law has interpreted an expert to mean, by focusing on case law and statute, followed by the rules of expert evidence and whether the dog can be classified as an expert.

### 2.2 Opinion Evidence

Opinion evidence as a category of evidence is the inferences or conclusions made by a witness in court, based on observations made through their five senses.<sup>72</sup> Opinion evidence is generally inadmissible, meaning that a witness is only restricted to testifying on the facts directly perceived.<sup>73</sup> The rationale behind this is for the witness to present facts allowing the court to draw its own conclusions.<sup>74</sup> where a qualified expert may exercise his expertise and express his opinion on a matter he is skilled to testify on, that the court would be unable to form a conclusion upon and where there is no way of detaching the fact from opinion

Nevertheless, the general rule has two exceptions whereby opinion evidence may be admissible.<sup>75</sup> First is where a qualified expert may exercise his expertise and express his opinion on a matter he is skilled to testify on. This exception recognizes that the court may need an expert to reach a conclusion on certain matters. Second, is when there is no way of detaching the fact from opinion, this exception appreciates the fact that the words of the witness's testimony are typically influenced by personal views on what was perceived are always coloured by opinion as to what was perceived.<sup>76</sup>

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<sup>72</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 344.

<sup>73</sup> Keane A, *The Modern Law of Evidence*, Oxford University Press, London, 2008, 363.

<sup>74</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 321.

<sup>75</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 321.

<sup>76</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 321.

### 2.3 Expert Opinion Evidence

The first exception introduces expert opinion evidence which is admissible. In the case of *Folkes v Chadd*, Lord Mansfield,<sup>77</sup> stated that matters of special knowledge, skill or experience, which the court cannot form an opinion on, can be supplied for the purpose of informing the court by an expert's opinion on the matter. This statement later informed the Kenyan Evidence Act, 1963, in section 48 which states that *'when the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by person skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger or other impressions.'*<sup>78</sup> In addition to the general rule on expert opinion evidence, a South African court decided that any opinion expressed on an issue the court can very well form a conclusion on without having to receive external opinion is inadmissible due to its irrelevance.<sup>79</sup> In essence, opinion evidence is only admissible when the witness is more knowledgeable or experienced than the court

Furthermore, the case of *Davie v Edinburgh Magistrates*,<sup>80</sup> elucidates that the views offered by the expert do not bind the court to their conclusions even if not contradicted.

### 2.4 Who is an Expert?

According to Black's Law Dictionary, an expert is *'A person that has knowledge and skills learned over years of experience in a subject.'*<sup>81</sup> and expert evidence as *'Testimony related to a professional or scientific subject.'*<sup>82</sup> Merriam Webster adds to the conversation by defining an expert as *'having, involving, or displaying special skill or knowledge derived from training or experience'*.<sup>83</sup> Statute does not define who an expert is,<sup>84</sup> therefore, the definition for which is left unto the court to determine who an expert is.<sup>85</sup>

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<sup>77</sup> *Helen Suzman Foundation v President of the Republic of South Africa* (1782), King's Bench of England.

<sup>78</sup> Section 48, Evidence Act, 1963.

<sup>79</sup> Joubert Scholtz Attorneys, 'THE ADMISSIBILITY OF OPINION EVIDENCE' [The admissibility of opinion evidence – Joubert Scholtz Attorneys \(joubertscholtzinc.co.za\)](https://www.joubertscholtzinc.co.za) on 14th November 2023.

<sup>80</sup> (1953) SC 34 Court of Session (Scotland).

<sup>81</sup> Black's Law Dictionary, 3 ed.

<sup>82</sup> Black's Law Dictionary, 3 ed.

<sup>83</sup> Merriam Webster Dictionary, 4 ed.

<sup>84</sup> Section 48, Evidence Act, 1963.

<sup>85</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 323.

Various cases contribute to defining an expert. For instance, the court in *Gatheru s/o Njagwara v R*,<sup>86</sup> stated that special skills are not limited to the knowledge or skills acquired academically but also includes those acquired through practical experience. In *Charles Ng'ang'a v R*,<sup>87</sup> where a policeman gave his opinion as a witness against a charge of causing death by dangerous driving, the court cautioned against allowing the policeman to give opinion evidence unless proof as to the witness's experience in inspecting motor vehicle accidents for several years can be provided. It is then safe to say that the court not only considers the training of witnesses to determine whether they are an expert or not, but also the practical experience of the witness. And even then, the training of the witness may not be as relevant as their experience as ascertained in *R v Stockwell*,<sup>88</sup> where the court upheld the expert opinion evidence provided by an artist despite their lack scientific qualifications or training, emphasising the relevance of practical experience. A witness can only testify as an expert once granted expert status by the court.<sup>89</sup> It is thus determined on a case by case basis. Occasionally, the court would hold a *voir dire* in which the court would determine whether the purported experts should be allowed to give evidence. However, usually, the court would rely on written material to decide if the expert may present their evidence.<sup>90</sup>

Experts should base their opinion on matters of fact presented in court, as stated in the case of *R v Kupikandimu*,<sup>91</sup> where a medical expert gave his opinion without stating reasons from which his opinion was informed, thus his opinion was inadmissible. After the court has established the witness before it to be an expert, the court assesses the weight to attach to the expert testimony. As mentioned earlier, the expert's opinion is purely intended to furnish the court, therefore the court is not bound to the expert's testimony.<sup>92</sup> Therefore, establishing that the witness before the court is an expert is not enough to guarantee the admissibility of their opinion evidence.

Various safeguards have been outlined for the admission of expert opinion evidence by the courts. Such are those in the case of *Holtzhausen v Roodt*,<sup>93</sup> where the court established principles that would aid courts in admission of expert evidence. These include the following;

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<sup>86</sup> (1954) 21 EACA 384.

<sup>87</sup> High Court Crim Case number 66 of 1980. (Unreported)

<sup>88</sup> (1993), Court of Appeal of England.

<sup>89</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 324.

<sup>90</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 324.

<sup>91</sup> (1946) 7 ZLR 90.

<sup>92</sup> (1953) SC 34 Court of Session (Scotland).

<sup>93</sup> (1997), South African Case Law.

the witness must only give evidence on matters calling for special skill or knowledge, the expertise of the expert should not be overstated to the point that the court's own capabilities and responsibilities are disregarded, the witness must be a qualified expert with sufficient skill or expertise and the court also prohibits experts from opining on legal matters and from addressing questions that fall under the court's decision-making jurisdiction, known as the "ultimate issue" doctrine.<sup>94</sup> Finally, experts should base their opinion on matters of fact presented in court, as held by the court in *R v Kupikandimu*,<sup>95</sup> where a medical expert's opinion was deemed inadmissible as he gave his opinion without stating reasons for which, thus his opinion was rendered inadmissible.

### **2.5 Non-expert Opinion Evidence**

Non-expert opinion evidence is a category of evidence that a non-expert may provide in court when it's impractical to separate the witness's opinion from the facts perceived upon which those inferences are based.<sup>96</sup> Despite the general rule against opinion evidence,<sup>97</sup> there are exceptions where non-expert opinion evidence may be deemed admissible. Such as evidence of intoxicity, identity, health, age, insanity, speed and value.<sup>98</sup> In these specific situations, the court recognizes that non-experts may be better positioned to offer insights or opinions due to the nature of the subject matter.

### **2.6 Identification Parades**

An identification parade as per Black Laws dictionary is a police identification procedure involving the presentation of a criminal suspect and other individuals physically to the suspect to the victim or a witness to a crime for a potential identification.<sup>99</sup>

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<sup>94</sup> (1997), South African Case Law.

<sup>95</sup> (1946) 7 ZLR 90.

<sup>96</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 322.

<sup>97</sup> The general rule is that opinion evidence is inadmissible, meaning that a witness can only testify to the facts that he has directly perceived.

<sup>98</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 333.

<sup>99</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 333.

For this method of identification to be satisfactory, the courts mandate specific procedure to be followed during the investigating phase by the investigating officer.<sup>100</sup>

Identification may occur in many ways such as through the identification evidence of a witness, use of prior statements made by a witness to demonstrate consistency in identification, identification made by a co-accused, fingerprint, footprints, corroboration by police dogs, intoxication, evidence on one's age, health and emotional state.<sup>101</sup>

## 2.7 Canine Evidence

This is the evidence obtained through the utilisation of sniffer dogs and their olfactory skills to detect certain scents.<sup>102</sup> Dogs are known to possess great olfactory skills,<sup>103</sup> that have been employed by man to track scents for thousands of years.<sup>104</sup> Historical records dating back to 300-272 BC<sup>105</sup> recount an incident where a king's slave was found dead, and the only witness, his dog, was discovered near the body. When the slave's body was found the King ordered for his burial and adopted the dog as his new owner. Later, when the King was in the process of reviewing his troops, the dog flew at 2 soldiers and attacked them. The soldiers confessed to their guilt and it was concluded that no further evidence was needed for a conviction to be made against them, illustrating the dog's role in identifying the perpetrators.<sup>106</sup>

The range within which the dog's olfactory senses operate is very broad, stretching from sniffing out accelerants, explosives and illegal drugs<sup>107</sup> to contraband,<sup>108</sup> and even aiding in the identification of suspects.<sup>109</sup> Specially trained police dogs known as K9s have since 2022 been

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<sup>100</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 334.

<sup>101</sup> Mbobu K, *The Law and Practice of Evidence in Kenya* Law Africa Publishing, Kampala, 2011, 335-347.

<sup>102</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, *Hastings Law Journal* 1, 1990, 17.

<sup>103</sup> Meslow C, 'Scent as Forensic Evidence and its Relationship to the Law Enforcement Canine' *Academia.edu*, 2002, 2.

<sup>104</sup> Meslow C, 'Scent as Forensic Evidence and its Relationship to the Law Enforcement Canine' *Academia.edu*, 2002, 5.

<sup>105</sup> Meslow C, 'Scent as Forensic Evidence and its Relationship to the Law Enforcement Canine' *Academia.edu*, 2002, 5.

<sup>106</sup> Chapman S, 'Police Dogs in North America' Springfield Charles C Thomas-Publisher, Illinois, 2002.

<sup>107</sup> Bowles C, 'What Can Drug Dogs Smell?' eHow, June 10, 2010 What Can Drug Dogs Smell? | Cuteness-on 9th January 2023.

<sup>108</sup> Jenkins A, 'Dogs Used to Sniff Out Cell Phones in NW Prisons' KPLU Local News, 2009 KPLU: Dogs Used to Sniff Out Cell Phones in NW Prisons (2009-07-22) (archive.org) on 10th January 2023.

<sup>109</sup> Meslow C, 'Scent as Forensic Evidence and its Relationship to the Law Enforcement Canine' *Academia.edu*, 2002, 5.

used to locate cell phone contraband such prisons, in Washington state.<sup>110</sup> This innovative approach serves as an alternative to the more costly and inconvenient move to jam cell phone signals within prisons and has proven to be highly successful in detecting and preventing illegal activities.<sup>111</sup>

## **2.8 Position of Canine Evidence in Law**

The identification of suspects or certain scents through canine evidence is currently categorised as non-expert opinion evidence,<sup>112</sup> for a myriad of reasons. One key factor is the absence of universally acknowledged standards for training these dogs or their involvement in investigations, leading to occasional hesitance in accepting their evidence as conclusive.<sup>113</sup>

The use of dogs to produce canine evidence is not common in Kenyan courts.<sup>114</sup> In the few cases in which it has been adduced as evidence, its effectiveness is often contingent on corroboration of the dog's training.<sup>115</sup>

The general rule for canine evidence is that it is purely circumstantial, and cannot independently lead to a conviction.<sup>116</sup> Consequently, burdening the prosecution with the task of adducing additional evidence to support the findings of the canine evidence.<sup>117</sup> This stems from the assumption that the dog is unreliable, due to the impossibility of cross-examining the canine and the possibility of the evidence being fallible.<sup>118</sup>

In *R v Pieterston*,<sup>119</sup> the courts stated that canine evidence should be accompanied by the evidence of the dog trainer who should describe the manner of assessment used. Safeguards were thus outlined that should be administered before admitting canine evidence. First, the foundation of detailed evidence establishing the reliability of the dog and second, the court should be wary of placing too much weight on such evidence due to the fact that dogs cannot be cross-examined and may not always be reliable.<sup>120</sup>

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<sup>110</sup> [KPLU: Dogs Used to Sniff Out Cell Phones in NW Prisons \(2009-07-22\) \(archive.org\)](#) on 14th November 2023.

<sup>111</sup> [KPLU: Dogs Used to Sniff Out Cell Phones in NW Prisons \(2009-07-22\) \(archive.org\)](#) on 14th November 2023.

<sup>112</sup> Mbobu K, *The Law and Practice of Evidence in Kenya*, Law Africa Publishing, Kampala, 2011, 344.

<sup>113</sup> 10 February 2016, [Forensic odorology scientifically validated - Inseem Newsroom](#) on 15th November 2023.

<sup>114</sup> *Kennedy Maina v Republic* [2008] eKLR.

<sup>115</sup> *Julius Mugambi Njeri and 2 others v Republic* (2017); *Mbae Maijani and Timothy Kimani v Republic* (2006), eKLR.

<sup>116</sup> *John Njogu Weru v Republic* (2016) eKLR.

<sup>117</sup> *Julius Mugambi Njeri v Republic* (2017) eKLR.

<sup>118</sup> *Omondi and Anor v Republic* (1967), East African Court of Justice.

<sup>119</sup> 1994, The Court of Appeal of British Columbia.

<sup>120</sup> 1994, The Court of Appeal of British Columbia.

The Ugandan High court as well, sought to address the reliability concerns of canine evidence in the case against Muheirwe and another<sup>121</sup> by providing guiding principles that the court should consider in determining admissibility, exclusion of and weight attached to canine evidence.<sup>122</sup> Among them, is the principle that evidence should be provided as to the training of the dog.

## 2.9 The Anatomy of the Canine Olfaction

How exactly do dogs have this superior olfactory skill? Why dogs over other animals, such as the salmon who after years in the high seas are able to return precisely to their spawning grounds?<sup>123</sup>

Dogs are first of all unique due to their relationship and long common history with humans.<sup>124</sup> Archeological and biological dating back 35000 plus years demonstrates that dogs are by far the first species to have been domesticated.<sup>125</sup> This familiarisation bridged communication between the human and the dog, making dogs ideal for hunting.<sup>126</sup>

The science behind it:

Most mammals possess two primary components of the olfactory system: the main olfactory epithelium (MOE) and the vomeronasal organ (VNO).<sup>127</sup> The MOE is situated in the pigmented

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<sup>121</sup> Uganda v Muheirwe and Anor (2012), High Court of Uganda.

<sup>122</sup> Uganda v Muheirwe and Anor (2012), High Court of Uganda. The guiding principles on admissibility are:

1. Caution must be exercised by the court when the evidence is presented and given the fullest dourt of explanation by the prosecution.
2. There must be material before the court that speaks to the experience of the dog handler.
3. The dog handler should prove the reputation, skill and training of the tracker dog before the court.
4. The circumstances relating to the actual trailing must be demonstrated and proven that the trail has not become stale.
5. The human handler must not try to explore the inner workings of the animal's mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behaviour of the dog and give an expert opinion as to the inferences which might properly be drawn from a particular action by the dog
6. The court should direct its attention to the conclusion which it is minded to reach on the basis of the tracker evidence and the perils in too quickly coming to that conclusion from material not subject to the truth-eliciting process of cross-examination.
7. It should be noted by the trial judge that according to the circumstances otherwise deposed in evidence, the canine evidence might be at the forefront of the prosecution case or a lesser link in the chain of evidence.

<sup>123</sup> Galibert F, Azzouzi N, Quignon P, Chaudieu G, 'The genetics of Canine Olfaction' Journal of Veterinary Behaviour, 2016, 86-93- [The genetics of canine olfaction - ScienceDirect](#) on 15th November 2023.

<sup>124</sup> Galibert F, Azzouzi N, Quignon P, Chaudieu G, 'The genetics of Canine Olfaction' Journal of Veterinary Behaviour, 2016, 86-93- [The genetics of canine olfaction - ScienceDirect](#) on 15th November 2023.

<sup>125</sup> Galibert F, Azzouzi N, Quignon P, Chaudieu G, 'The genetics of Canine Olfaction' Journal of Veterinary Behaviour, 2016, 86-93- [The genetics of canine olfaction - ScienceDirect](#) on 15th November 2023.

<sup>126</sup> Galibert F, Azzouzi N, Quignon P, Chaudieu G, 'The genetics of Canine Olfaction' Journal of Veterinary Behaviour, 2016, 86-93- [The genetics of canine olfaction - ScienceDirect](#) on 15th November 2023.

<sup>127</sup> Dziecol M et al., 'MRI Features of the Vomeronasal Organ in Dogs (*Canis Familiaris*)' PubMed Central, 24 March 2020 [MRI Features of the Vomeronasal Organ in Dogs \(Canis Familiaris\) - PMC \(nih.gov\)](#) on 15 November 2023.

section of the mucosa in the caudo-dorsal part of the nasal cavity, while the VNO is positioned between the nasal and oral cavities, near the vomer bone, just above the roof of the mouth.<sup>128</sup> When a dog sniffs, the inhaled air divides into two distinct pathways. A portion goes directly to the olfactory region where odour molecules accumulate, while the rest is expelled through the lower pathway into the pharynx and lungs during inhalation and exhalation, respectively.<sup>129</sup> This airflow pattern prolongs the exposure of inspired air to the olfactory epithelium's chemoreceptor area, enhancing scent detection.<sup>130</sup>

Notably, dogs exhibit sniffing lateralization,<sup>131</sup> akin to auditory and visual perception.<sup>132</sup> Initially, there's a strong right nostril bias, which shifts to the left nostril upon familiar or non-aversive scents.<sup>133</sup> However, novel or threatening scents prompt the dog to persist with the right nostril.<sup>134</sup> The olfactory epithelium comprises olfactory receptor cells (ORCs), bipolar neurons that extend into the airspace to interact with odorants.<sup>135</sup> Olfactory glands within the mucosa produce secretions to dissolve odorants.<sup>136</sup> Dogs can detect significantly smaller odorant concentrations than humans due to factors such as olfactory neuron density, nasal airflow modifications, and central processing specificity.<sup>137</sup>

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<sup>128</sup> Dzieciol M et al., 'MRI Features of the Vomeronasal Organ in Dogs (*Canis Familiaris*)' PubMed Central, 24 March 2020 [MRI Features of the Vomeronasal Organ in Dogs \(Canis Familiaris\) - PMC \(nih.gov\)](#) on 15 November 2023.

<sup>129</sup> Craven B et al. 'The fluid dynamics of canine olfaction: unique nasal airflow patterns as an explanation of macrosmia' PubMed Central, 6 June 2010 [The fluid dynamics of canine olfaction: unique nasal airflow patterns as an explanation of macrosmia - PubMed \(nih.gov\)](#) on 16th November 2023.

<sup>130</sup> Craven B et al. 'The fluid dynamics of canine olfaction: unique nasal airflow patterns as an explanation of macrosmia' PubMed Central, 6 June 2010 [The fluid dynamics of canine olfaction: unique nasal airflow patterns as an explanation of macrosmia - PubMed \(nih.gov\)](#) on 16th November 2023.

<sup>131</sup> Siniscalchi A et al. 'Hemispheric Specialization in Dogs for Processing Different Acoustic Stimuli' PubMed Central, 9 October 2008 [Hemispheric Specialization in Dogs for Processing Different Acoustic Stimuli - PMC \(nih.gov\)](#) on 16 December 2023.

<sup>132</sup> Siniscalchi A et al. 'Hemispheric Specialization in Dogs for Processing Different Acoustic Stimuli' PubMed Central, 9 October 2008 [Hemispheric Specialization in Dogs for Processing Different Acoustic Stimuli - PMC \(nih.gov\)](#) on 16 December 2023.

<sup>133</sup> Vallortigara G et al. 'Possible evolutionary origins of cognitive brain lateralization' PubMed Central, 30 August 1999 [Possible evolutionary origins of cognitive brain lateralization - PubMed \(nih.gov\)](#) on 16 December 2023.

<sup>134</sup> Vallortigara G et al. 'Possible evolutionary origins of cognitive brain lateralization' PubMed Central, 30 August 1999 [Possible evolutionary origins of cognitive brain lateralization - PubMed \(nih.gov\)](#) on 16 December 2023.

<sup>135</sup> Liang F 'Sustentacular Cell Enwrapment of Olfactory Receptor Neuronal Dendrites: An Update' PubMed Central, 11 May 2020 [Sustentacular Cell Enwrapment of Olfactory Receptor Neuronal Dendrites: An Update - PMC \(nih.gov\)](#) on 16 November 2023.

<sup>136</sup> Jenkins E et al. 'When the Nose Doesn't Know: Canine Olfactory Function Associated With Health, Management, and Potential Links to Microbiota' PubMed Central 29 March 2018 [When the Nose Doesn't Know: Canine Olfactory Function Associated With Health, Management, and Potential Links to Microbiota - PMC \(nih.gov\)](#) on 19 November 2023.

<sup>137</sup> Jenkins E et al. 'When the Nose Doesn't Know: Canine Olfactory Function Associated With Health, Management, and Potential Links to Microbiota' PubMed Central 29 March 2018 [When the Nose Doesn't Know:](#)

The olfactory bulb (OB), located beneath the frontal lobes,<sup>138</sup> plays a crucial role in initial processing, filtering olfactory information, discriminating between odours, and enhancing sensitivity and filtration of background odours.<sup>139</sup> Unlike other senses, olfactory pathways lead ipsilaterally from detection to perception areas in the brain.<sup>140</sup>

Compared to other senses, where the sensory track is crossed, olfactory pathways lead ipsilaterally from the detection area located in the nasal cavity to the perception area in the brain, which means that the signals from the right nostril reach the right brain hemisphere and receptors located in the left nostril transmit impulses to the left hemisphere.<sup>141</sup> The olfactory signals then travel to the thalamus and frontal cortex with the entorhinal cortex influencing memory recognition in the hippocampal formation.<sup>142</sup>

The MOE and VNO operate independently, collecting and reacting to distinct smell signals, with separated pathways leading to the brain.<sup>143</sup> The VNO specialises in pheromone recognition and volatile substance identification.<sup>144</sup>

While humans detect odours through both the olfactory and trigeminal systems, dogs rely solely on the olfactory neuroepithelium, surpassing humans in odour detection and identification, highlighting the exceptional nature of dogs' sense of smell,<sup>145</sup> surpassing humans in their ability

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[Canine Olfactory Function Associated With Health, Management, and Potential Links to Microbiota - PMC \(nih.gov\)](#) on 19 November 2023.

<sup>138</sup> Kokocinska-Kusiak A et al. 'Canine Olfaction: Physiology, Behavior, and Possibilities for Practical Applications' PubMed, 21 August 2021 [Canine Olfaction: Physiology, Behavior, and Possibilities for Practical Applications - PMC \(nih.gov\)](#) on 16th November 2023.

<sup>139</sup> Jenkins E et al. 'When the Nose Doesn't Know: Canine Olfactory Function Associated With Health, Management, and Potential Links to Microbiota' PubMed Central 29 March 2018 [When the Nose Doesn't Know: Canine Olfactory Function Associated With Health, Management, and Potential Links to Microbiota - PMC \(nih.gov\)](#) on 19 November 2023.

<sup>140</sup> Jenkins E et al. 'When the Nose Doesn't Know: Canine Olfactory Function Associated With Health, Management, and Potential Links to Microbiota' PubMed Central 29 March 2018 [When the Nose Doesn't Know: Canine Olfactory Function Associated With Health, Management, and Potential Links to Microbiota - PMC \(nih.gov\)](#) on 19 November 2023.

<sup>141</sup> Jia H et al. 'Functional MRI of the Olfactory System in Conscious Dogs' PubMed Central, 23 Jan 2014 [Functional MRI of the Olfactory System in Conscious Dogs - PMC \(nih.gov\)](#) on 13 November 2023

<sup>142</sup> Kokocinska-Kusiak A et al. 'Canine Olfaction: Physiology, Behavior, and Possibilities for Practical Applications' PubMed, 21 August 2021 [Canine Olfaction: Physiology, Behavior, and Possibilities for Practical Applications - PMC \(nih.gov\)](#) on 16th November 2023.

<sup>143</sup> Kokocinska-Kusiak A et al. 'Canine Olfaction: Physiology, Behavior, and Possibilities for Practical Applications' PubMed, 21 August 2021 [Canine Olfaction: Physiology, Behavior, and Possibilities for Practical Applications - PMC \(nih.gov\)](#) on 16th November 2023.

<sup>144</sup> Swaney W et al. 'The evolution of pheromonal communication' PubMed Central 25 June 2009 [The evolution of pheromonal communication - PubMed \(nih.gov\)](#) on 22 November 2023.

<sup>145</sup> Jenkins E et al. 'Effects of oral administration of metronidazole and doxycycline on olfactory capabilities of explosives detection dogs' PubMed Central August 2016 [Effects of oral administration of metronidazole and doxycycline on olfactory capabilities of explosives detection dogs - PubMed \(nih.gov\)](#) on 21 November 2023

to detect and identify odours, underscoring the extraordinary nature of dogs' sense of smell. Additionally, the mechanism of olfactory detection and ensuing innate canine olfactory abilities make them more sensitive detectors than man made analytical instruments.<sup>146</sup>

## 2.10 The Practicality of the Dog's Skill

A tracking dog of the Belgian Malinois breed was used to track suspects after the body of an injured rhino was found at the Kruger National Park, South Africa. The dog was successful as the suspects were found with in their possession, a rhino horn which belonged to the injured rhino. The evidence was presented to court but rejected by the South African Appellate Division in 1920. At that point in time, the judge opined the canine evidence adduced could not be relied on for the sole reason that sufficient scientific knowledge to prove that certain breeds were able to follow the scent without error, was absent. Later, the Supreme Court of Appeal revisited this position, providing the final say that the evidence produced by tracking dogs would be considered inadmissible unless a proper foundation for this evidence had been laid. If the court considered this evidence admissible, it would be considered with caution. Therefore evidence was provided by the dog's tracker as to the reliability of the tracker dog, Killer; his induction into the training program, family history, the period of the training and the manner in which the scent identification was made.<sup>147</sup> The suspects further appeared in the Nelspruit Regional Court, where the Magistrate commended a Belgian Malinois dog for its role in tracking down two poachers.<sup>148</sup> Consequently, the suspects were convicted of the crimes of killing and dehorning a white rhino, as well as being responsible for the killing of a second rhino in the N'wanetsi area in Kruger National Park.<sup>149</sup>

In Kenya, 2 cases stand out here, where the evidence of a tracker dog was highly relied upon. The appellants were convicted for robbery with violence after being accused of threatening two security guards with dangerous weapons and harvesting 30 pineapple fruits. The identification of these two assailants and the issue of contention was made by a trained guard dog which was set

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<sup>146</sup> Kokocinska-Kusiak A et al. 'Canine Olfaction: Physiology, Behavior, and Possibilities for Practical Applications' PubMed, 21 August 2021 [Canine Olfaction: Physiology, Behavior, and Possibilities for Practical Applications - PMC \(nih.gov\)](#) on 16th November 2023.

<sup>147</sup> Eloff H, 'Tracking Dogs' Lowvelder, 8 December 2014 [Tracking dogs - can it be admissible evidence in court? | Lowvelder \(citizen.co.za\)](#) on 9 February 2024.

<sup>148</sup> Hogg A, 'Killer, Belgian Malinois Rhino Poacher Hunter Nabs 2 Victims' BizNews, 30 September 2015. ["Killer". Belgian Malinois rhino poacher hunter nabs 2 victims \(biznews.com\)](#) on 10 February 2024.

<sup>149</sup> [Rhino poachers get 14 years in prison thanks to tracking dog | OFM](#) on 10 February 2024.

loose on them. The court found that the evidence of identification was adequate to uphold their conviction after relating that evidence to the fact that the appellants were found with the stolen pineapples, bore the bite marks and the dog suffered a cut arising from a panga, which was among the weapons in the appellants possession asserting that the dog was well trained following the testimony of the dog handler.<sup>150</sup>

In a similar case, the appellant was charged with robbery with violence contrary that while being armed with dangerous weapons, the appellant robbed the complainant cash Ksh.26,000/- and other items and used personal violence on the said complainant. Among the grounds of appeal was the manner in which the suspect identification was done. The appellant contended that since the offence happened at night the witness could not have possibly been able to identify the accused. However, the dog handler testified to how the tracking was conducted and the court was satisfied that the evidence of the dog handler was sufficient to complement the identification of the dog. Thus upholding the judgement of the trial court and convicting the appellant.<sup>151</sup>

## **2.10 Conclusion**

The use of dogs to produce canine evidence is not common in Kenyan courts, and even when adduced it is held to be inadmissible without corroboration of the dog's training. This excludes so much evidence from the courts and delays justice. Looking at the technicality of the physiological processes that occur from when the dog first makes contact with the scent to when it makes an identification, clearly depicts its expert nature at scent identification. A dog's identification should not be questioned on grounds of its training, due to the natural skill they are endowed with as trackers. Therefore, the categorisation of the dog as an expert and the application of the court's ruling in *R v Stockwell*<sup>152</sup> might change the perception of the courts to consider the admissibility of the canine evidence without placing a strict requirement on the training of the dog.

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<sup>150</sup> Julius Mugambi Njeri and 2 others v Republic [2017] eKLR.

<sup>151</sup> Patrick Nyaga Muratha v Republic [2010] eKLR.

<sup>152</sup> (1993), The Court of Appeal of England.

‘where the court upheld the expert opinion evidence provided by an artist despite their lack scientific qualifications or training’

## CHAPTER 3: EXPERT REPORT VS CANINE REPORT

### 3.1 Introduction

This chapter ventures into the intricate realm of expert testimony within legal proceedings, with the aim of establishing a convergence of human expertise and training of canines. At its core, this chapter will discuss the content of an expert report and those of a canine report and analyse whether they can be found so similar that the canine report will be classified as an expert report and experience the same rules as the latter.

Expert opinion evidence intervenes when an issue in court relates to a topic outside the knowledge of the court.<sup>153</sup> Therefore, necessitating the testimony of an expert in the matter. Making the next key issue determining whether the witness presented before the court is an expert in the issue they are testifying on. A witness has to be granted expert status to testify on a matter requiring expertise. Typically, courts would require formal qualifications, academic training or professional experience to recognise a witness as peritus in a specific field.<sup>154</sup> In England, the courts are cognisant of the fact that expertise can be achieved through private study and private interest,<sup>155</sup> hence very generous in granting expert status.<sup>156</sup>

Nevertheless, there exist limits to this broad mindedness, such as presented in the case of *R v Inch*<sup>157</sup> where a medical orderly was deemed insufficiently qualified to offer an opinion on whether a cut resulted from a martial arts instrument or a head butt. This suggests that as long as the witness speaks to matters pertaining to his expertise, then he would qualify as an expert. Further the court in *Charles Ng'ang'a v R*,<sup>158</sup> ruled that a policeman was not qualified to testify on the point of impact on a charge of dangerous driving for the reason the court was not satisfied with his expertise in the matter. The appellate court held that unless the policeman can show that he has had several years of experience in inspecting motor vehicle accidents then he should not give opinion evidence on such matters.

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<sup>153</sup> Mbobu K, *The Law and Practice of Evidence in Kenya*, Law Africa Publishing, Kampala, 2011.

<sup>154</sup> [What is an expert witness - The Academy of Experts](#) on 20 November 2023.

<sup>155</sup> [What is an expert witness - The Academy of Experts](#) on 20 November 2023.

<sup>156</sup> [What is an expert witness - The Academy of Experts](#) on 20 November 2023.

<sup>157</sup> (1989) The Court of Appeal in England and Wales.

<sup>158</sup> (1980), High Court, (unreported).

### 3.2 Types of Experts

In England and Wales, there are three recognized types of experts: a party-appointed expert, appointed and instructed by one party in the dispute; a single joint expert, appointed and instructed by all parties involved in the dispute; and an expert adviser, appointed by one party to advise in the dispute.<sup>159</sup> The first two types have a duty to the court that supersedes any obligation to the party or parties who appointed or paid them. However, the expert adviser, not governed by the Civil Procedure Rules, lacks a duty to the court and typically does not provide testimony.<sup>160</sup>

### 3.3 Expert Report

Once granted expert status, the expert is required to give his testimony together with the expert report.<sup>161</sup> Failure to submit the report exposes the risk of having the testimony excluded, unless instructed by the court to do so.<sup>162</sup> What then is an expert report and why is it so relevant to the admission of the expert's evidence? An expert report is a report of the expert's opinion on the issue posed to him, it also contains his qualifications, and most importantly, the facts that he has relied on to reach his conclusion.<sup>163</sup> Its ultimate importance lies in informing the court about matters beyond its expertise and the basis upon which the expert forms an opinion on.<sup>164</sup> Additionally, the report informs and gives notice to the instructing party and opposing parties, respectively, on the opinion evidence of an expert that will be orally given in court, in order for them to prepare for cross-examination and reexamination and enable them each to determine the strength of their legal case.<sup>165</sup> In this way, trial by ambush is avoided.

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<sup>159</sup> 'Users of Experts' The Academy of Experts [What is an expert witness - The Academy of Experts](#) on 15 January 2024.

<sup>160</sup> 'Users of Experts' The Academy of Experts [What is an expert witness - The Academy of Experts](#) on 15 January 2024.

<sup>161</sup> 'Users of Experts' The Academy of Experts [What is an expert witness - The Academy of Experts](#) on 15 January 2024.

<sup>162</sup> Evans J, 'Drafting Expert Witness Reports: Pitfalls and Best Practices' Expert Witness, 7 September 2022 [Drafting Expert Witness Reports: Pitfalls and Best Practices \(expertinstitute.com\)](#) on 24 January 2024.

<sup>163</sup> Little A, 'Writing an Effective Expert Report' [Writing-an-Effective-Report-Adam-Little.pdf \(mcleishorlando.com\)](#) on 16 January 2024.

<sup>164</sup> 'Users of Experts' The Academy of Experts [What is an expert witness - The Academy of Experts](#) on 15 January 2024.

<sup>165</sup> Little A, 'Writing an Effective Expert Report' [Writing-an-Effective-Report-Adam-Little.pdf \(mcleishorlando.com\)](#) on 16 January 2024.

The contents of the expert report are very crucial, as the report can be discounted for failure to include the contents required.<sup>166</sup> Such as in the case of *Kagina v Kagina*,<sup>167</sup> the court ruled out the expert's evidence on account of failing to tender any proof to academic testimonials on his training or his expertise. Therefore, without proof and submission of the witnesses' credentials, there was nothing to substantiate his expertise. This applies whether or not controversial expert testimony is adduced.

The Kenyan Evidence Act,<sup>168</sup> does not state the structure of the expert report nor the contents thereof, nor do the Civil Procedure Codes Act<sup>169</sup> and Rules and the Criminal Procedure Code Act.<sup>170</sup> Hence reliance on how to write an expert report is placed in the hands of various non-legal articles that give theoretical requirements for the content of an expert report, such as using an active voice as opposed to passive voice to sound sure of your claims and to only state opinion and not argue the counsel's case for him.<sup>171</sup> However, this only goes to guide the expert on writing a good report that makes him sound knowledgeable and independent.

Nevertheless, a holy grail exists in the Federal Rules of Civil Procedure, specifically Rule 26 (a) (2)<sup>172</sup> which governs the requirements for expert reports in civil cases in detail. It provides that an expert report must contain '*(i) a complete statement of all opinions the witness will express and the basis and reasons for them; (ii) the facts or data considered by the witness in forming them; (iii) any exhibits that will be used to summarise or support them; (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years; (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and (vi) a statement of the compensation to be paid for the study and testimony in the case.*' As for criminal cases, the Federal Criminal Rule of Procedure provides for the content of the expert report in Rule 16.<sup>173</sup> The disclosure for each expert witness must contain: '*(i) a complete statement of all opinions that the government will elicit from the witness in its case- in-chief, or during its rebuttal to counter testimony that the defendant has timely disclosed under (b)(1)(C);*

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<sup>166</sup> *Kagina v Kagina* [2021] KECA 242 (KLR).

<sup>167</sup> [2021] KECA 242 (KLR).

<sup>168</sup> Evidence Act, 1963.

<sup>169</sup> Civil Procedure Act, Chapter 21, 2012.

<sup>170</sup> Criminal Procedure Code, Chapter 75, 2012.

<sup>171</sup> 'How to Draft a Powerful, Persuasive and Understandable Expert Witness Report' The Expert Witness Training Company [How-to-Draft-a-Powerful-Expert-Witness-Report-3-14-2019.pdf \(testifyingtraining.com\)](https://www.testifyingtraining.com/How-to-Draft-a-Powerful-Expert-Witness-Report-3-14-2019.pdf) on 22 January 2024.

<sup>172</sup> Federal Rules of Civil Procedure, (United States) 1937.

<sup>173</sup> Federal Criminal Rule of Procedure, (United States), 2023.

*(ii) the bases and reasons for them; (iii) the witness's qualifications, including a list of all publications authored in the previous 10 years; and (iv) a list of all other cases in which, during the previous 4 years, the witness has testified as an expert at trial or by deposition.'*

### **3.4 Canine Expert Report**

Among the strict requirements that have to be met for canine evidence to be adduced and admitted in court, is the skill, reputation and training of the dog that speak to his reliability, presented in form of a canine report.<sup>174</sup> In Kenya, very many courts have failed to rely on dog evidence adduced against an accused due to the absence of evidence as to the dog's training and manner in which the tracking was carried out.<sup>175</sup> However, in each of those cases, the court recognises that a competent experienced dog could very well distinguish between scents and identify the right scent<sup>176</sup> and clearly states that it is fully conscious of the assistance that can be rendered by trained police dogs in tracking and pursuit of suspects.<sup>177</sup> Nevertheless, hesitation exists in the admissibility of such evidence without corroboration and evidence establishing the reliability of the dog.<sup>178</sup> Thus introducing the canine's report which is expected to detail the dog's training, experience and test used to make the identification in a bid to prove his reliability. Kenyan statute, including the Evidence Act does not state what the canine report should entail,

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<sup>174</sup> Uganda v Muheirwe and Anor (2012), High Court of Uganda. The guiding principles on admissibility are:

1. Caution must be exercised by the court when the evidence is presented and given the fullest dorf of explanation by the prosecution.
2. There must be material before the court that speaks to the experience of the dog handler.
3. The dog handler should prove the reputation, skill and training of the tracker dog before the court.
4. The circumstances relating to the actual trailing must be demonstrated and proven that the trail has not become stale.
5. The human handler must not try to explore the inner workings of the animal's mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behaviour of the dog and give an expert opinion as to the inferences which might properly be drawn from a particular action by the dog
6. The court should direct its attention to the conclusion which it is minded to reach on the basis of the tracker evidence and the perils in too quickly coming to that conclusion from material not subject to the truth-eliciting process of cross-examination.
7. It should be noted by the trial judge that according to the circumstances otherwise deposed in evidence, the canine evidence might be at the forefront of the prosecution case or a lesser link in the chain of evidence.

<sup>175</sup> David Njeru Kibuthu & others v Republic, (2005) eKLR, Mbae Maijani and Timothy Kimani v Republic (2006), eKLR,

Kennedy Maina v Republic [2008] eKLR and Julius Mugambi Njeri & 2 others v Republic (2017), eKLR.

<sup>176</sup> David Njeru Kibuthu & others v Republic, (2005) eKLR.

<sup>177</sup> Abdallah bin Wendo & Another v. R (1953) EACA.

<sup>178</sup> Kennedy Maina v Republic (2008) eKLR.

let alone mention the canine report.<sup>179</sup> However, case law does provide guidelines on what would be required of a canine report.

The case of Abdallah bin Wendo<sup>180</sup> has been heavily relied upon when it comes to canine evidence presented before the court. It addresses two issues in regard to canine evidence; the admissibility of that evidence and second, its evidential value, the court held that the evidence tendered by dogs can only be admitted if it is accompanied by the person who trained the dog and who can accurately describe the nature of the test employed.

However, the court in Samuel Karani v Republic<sup>181</sup> made reference to the holding above and found it too onerous for cases where the person who trained the dog may not be readily available. Thus the requirement to have the trainer present to give evidence shifted to the dog handler as demonstrated in Regina v Pieterston,<sup>182</sup> where the court provided two safeguards to the admission of canine evidence: “First, *the proper foundation must be laid by detailed evidence establishing the reliability of the dog in question. Secondly, the learned judge must, in giving his directions to the jury, alert them to the care that they need to take and to look with circumspection at the evidence of tracker dogs, having regard to the fact that the dog may not always be reliable and cannot be cross-examined.*” The court placed the burden of establishing the reliability of the dog on the dog handler.<sup>183</sup> The court further stated that the reliability of the dog could be demonstrated through evidence of the training of the dog and tests carried out on the dog in controlled condition to see whether the training of the dog could produce a reliable response. The same has been upheld in subsequent cases.<sup>184</sup>

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<sup>179</sup> Evidence Act, 1963.

<sup>180</sup>[1953], 20 EACA 166

*“We are fully conscious of the assistance which can be rendered by trained police dogs in the tracking down and pursuit of fugitives, but this is the first time we have come across an attempt to use the actions of a dog to supply corroboration of an identification of a suspect by (a human). We do not wish it to be thought that we rule out absolutely evidence of this character as improper in all circumstances but we certainly think that it should be accompanied by the evidence of the person who trained the dog and who can describe accurately the nature of the test employed. In the instant case the dog master was not called and the evidence as to what the dog did and how they did it is most scanty.”*

<sup>181</sup> [2009] eKLR.

<sup>182</sup> (1994) EWCA.

<sup>183</sup> *Supra* (1994) EWCA.

‘If a dog handler can establish that a dog has been properly trained and that over a period of time the dog’s reactions indicate that it is a reliable pointer to the existence of a scent from a particular individual, then that evidence should properly be admitted.’

<sup>184</sup> Patrick Nyaga Muratha v Republic [2010] eKLR, Mbae Marijani & another v Republic [2008] eKLR-, Vitalis Obonyo Onya v Republic [2008] eKLR and Kennedy Maina v Republic [2008] eKLR.

The case of *Godfrey v Republic*<sup>185</sup> contributed to this discussion by outlining the manner in which evidence as to the training of the dog and the handlers should be provided. The court stated it was insufficient for the two handlers to testify that they were trained as dog handlers and that their dogs had undergone training, without proof of said training by way of documentary evidence.<sup>186</sup> Thus placing upon the obligation to submit a report on the training of both the dog and the handler. *David Weru v R*,<sup>187</sup> upheld this holding when the court disregarded the evidence of the dog due to lack of evidence as to the experience of the dog. The court also required evidence as to the ability of the tracker dog to distinguish between the scents of a number of persons. Thus introducing the scientific element of canines and the inner workings of their olfactory skills. In *Rex v Trupedo*,<sup>188</sup> the court further established the importance of the dog handler's testimony when it held that, "*We have no scientific or accurate knowledge as to the faculty by which dogs of certain breeds are said to be able to follow the scent of one human being, rejecting the scent of all others ... there is too much uncertainty as to the constancy of his behaviour and as to the extent of the factor of error involved to justify us in drawing legal inference therefrom.*" In line with Andrew Taslitz' opinion that canine evidence is highly scientific and that there is inadequate research in the matter.<sup>189</sup> For that reason, he advises the courts to apply a high level of scrutiny, lest the idea of convictions being based upon myth rather than rational belief become reality.<sup>190</sup> Nevertheless, this paper will try and debunk this notion, by providing insight into the science behind the tracking of the dog.

Other cases go into more detail, of what the court would prefer the canine report to comprise of. In *John Weru v Republic*,<sup>191</sup> the court found the prosecution's evidence wanting following the absence of evidence as to how long the handlers in the case had handled or worked with the dog and how the dog had been trained to identify a person using a scent and how it would

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<sup>185</sup> [2017] eKLR.

<sup>186</sup> *Supra* [2017] eKLR.

'The two dog handlers who testified other than stating that they were trained as dog handlers did not prove that training by way of documentary evidence. Similarly there was no evidence presented on the type of training the dogs had undertaken and whether their tracking had a proved record of reliability.'

<sup>187</sup> (2005), eKLR.

<sup>188</sup> (1920) App Div 58 (S Africa).

<sup>189</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, *Hastings Law Journal* 1, 1990, 134.

<sup>190</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, *Hastings Law Journal* 1, 1990, 134.

<sup>191</sup> [2016] eKLR.

communicate with the handler. The court added that the prosecution should have produced evidence speaking to previous cases of tracking and the result of such cases.

Still, the requirement of the dogs previous cases of tracking, could be quite restrictive and unfair. An instance is where the canine in question has brought forth its first identification, would that not bias the court negatively towards attaching weight to the evidence, regardless of the dog's skill? As demonstrated in *Omondi vs. R*,<sup>192</sup> Judge Ainley found it unconvincing to say that the dog has had a thousand arrests to its credit, rather clear evidence that a dog has repeatedly and faultlessly followed a scent over a difficult terrain would be much more preferred.

Since canine evidence needs to be interpreted, the qualifications of the handler become the next most important aspect of canine evidence. To ensure that the handler is well equipped to testify on the dog's behalf and read the dog's cues, his training, certification and experience will be required.<sup>193</sup> The handler must maintain objectivity and not attempt to do the counsel's job on his behalf, nor should the handler attempt to explore the inner workings of the dog's mind.<sup>194</sup> Thus the handler should submit a report on his training, expertise<sup>195</sup> and how long the handlers in the case had handled or worked with dogs.<sup>196</sup>

Lastly the, canine report should comprise of the following; name of the handler, training of the handler, the dog's training, experience of the handler and dog, previous identification cases and their results, the method in which that specific tracking was done, the manner of communication of the dog to the handler and the results thereof. All without impinging on the ultimate issue rule.

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<sup>192</sup> [1967] EA 802.

<sup>193</sup> Didiwamukoya, 'Admissibility of Canine Evidence in Wildlife Crime Cases' Evidence, Law enforcement, 20 November 2019 [Admissibility of Canine Evidence in Wildlife Crime Cases | Wildlife Law Africa | Legislation and Cases](#) on 20 January 2024.

<sup>194</sup> Didiwamukoya, 'Admissibility of Canine Evidence in Wildlife Crime Cases' Evidence, Law enforcement, 20 November 2019 [Admissibility of Canine Evidence in Wildlife Crime Cases | Wildlife Law Africa | Legislation and Cases](#) on 20 January 2024.

<sup>195</sup> *Godfrey Mugambi Gikundi v Republic* [2017] eKLR.

<sup>196</sup> *John Njogu Weru v Republic* [2016] eKLR.

### **3.5 Conclusion**

In conclusion, the chapter has delved into the critical aspects of expert testimony in legal proceedings, and has underscored the recognition of expertise as contingent upon formal qualifications, academic training, or professional experience, which are demonstrated through expert reports. The chapter has emphasised the parallelism between the qualifications of a human expert and the training of a canine expert, thus establishing the similarity in both their reports. The details of each report have been found to be the same and even where they differ, they still serve their role in establishing their expertise and reliability and informing the court on specific matters outside the court's scope.

## CHAPTER 4: TRAINING OF THE DOG?

### 4.1 Introduction

In the case of R v Stockwell,<sup>197</sup> the court admitted the evidence produced by an expert witness, despite the witness not having any qualifications or training in the matter. The court reasoned that the evidence procured was admissible on the basis of his experience and the fact that it provided the jury with evidence it would have otherwise lacked. Following this train of thought, this chapter will examine whether the requirement of producing the training of the dog for canine evidence to be admissible should be as strictly applied.

As established in chapter two and three the canine should be classified in the same category as an expert, meaning that canine evidence should have the rules of evidence applied to it, including the exception that evidence of the qualifications and training of the dog need not be produced to determine reliability of the dog.

### 4.2 Training of the Canine and the Handler

There are various canine training institutions in Kenya, some are; the Kenya Police Service Dog Unit,<sup>198</sup> the National Guard,<sup>199</sup> K9 Alligators Security,<sup>200</sup> Ultimate K9 Solutions Limited,<sup>201</sup> and the Canine Force Dog House<sup>202</sup> among others.

These institutions are equipped to train dogs in a variety of skills such as personnel for scent identification,<sup>203</sup> tracking,<sup>204</sup> search and rescue,<sup>205</sup> mobile patrols,<sup>206</sup> safety services,<sup>207</sup> and military and private sector security.<sup>208</sup> K9Xtreme Security Limited is another training institute

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<sup>197</sup> (1993), Court of Appeal of England.

<sup>198</sup> [Kenya Police Dog Unit](#) on 20 January 2024.

<sup>199</sup> [\(7\) K9 HANDLERS AND TRAINING BY... - National Guard Security Service | Facebook](#) on 21 January 2024.

<sup>200</sup> [Security Guards | K9 Services | VIP Close Protection | Security Consultancy \(k9alligatorssecurity.co.ke\)](#) on 23 January 2024.

<sup>201</sup> [About Ultimate K9 dog Services in Nairobi Kenya - UK9 Solutions](#) on 23 January 2024.

<sup>202</sup> Nyabuto J, 'List of the Best Dogs' VictorMatara.com 23 January 2024 [List Of The Best Dog Trainers In Kenya \(victormatara.com\)](#) on 22 January 2024.

<sup>203</sup> AKC Staff, 'What Do K9 Police Dogs Do?' American Kennel Club 22 January 2024 [What Do K-9 Police Dogs Do? – American Kennel Club \(akc.org\)](#) on 24 January 2024.

<sup>204</sup> [\(7\) K9 HANDLERS AND TRAINING BY... - National Guard Security Service | Facebook](#) on 21 January 2024.

<sup>205</sup> AKC Staff, 'What Do K9 Police Dogs Do?' American Kennel Club 22 January 2024 [What Do K-9 Police Dogs Do? – American Kennel Club \(akc.org\)](#) on 24 January 2024.

<sup>206</sup> [K9Xtreme Security Ltd – Built with Sasahost](#) on 23 January 2024.

<sup>207</sup> [Security Guards | K9 Services | VIP Close Protection | Security Consultancy \(k9alligatorssecurity.co.ke\)](#) on 23 January 2024.

<sup>208</sup> [About Ultimate K9 dog Services in Nairobi Kenya - UK9 Solutions](#) on 23 January 2024.

based in Kenya and the United Kingdom, that specialises in dog and handler training and supply of both canine and security guarding through civil agitation and defence work in a realistic environment.<sup>209</sup>

How exactly is the training done?

There are several types of dog training, depending on the purpose the dog is expected to serve. For the purpose of this paper, the training that matters is not that of house dogs or dogs used as pets, rather police dogs or dogs intended to track scents. The training used is referred to as K9 training, which specifically trains for law enforcement, military, search and rescue operations and other forms of assistance.<sup>210</sup> A K9 dog can perform numerous jobs, and they are trained to do many different jobs. Their job encompasses protecting their handlers, sniffing certain scents such as drugs and bombs, security, search and rescue operations and patrol areas sensitive to crime<sup>211</sup>. K9 dogs were first established in Europe in the late 19th Century and were initially used to track criminals and in their apprehension. Overtime, their roles expanded to include search and rescue operations, drug and bomb detection and even crowd control.<sup>212</sup>

Police dogs are trained in many different skills, and some are better suited for one job than another.<sup>213</sup> However at the very beginning all K9 dogs receive the same training. There are typically four steps to dog training.<sup>214</sup> The first step is selecting the breed, since not all dog breeds are suitable for police work, and only a few breeds are commonly used for this purpose.<sup>215</sup> Choosing the right breed and using his naturally inbred talents, is the first step to successful K9 dog training.<sup>216</sup> The most common breeds used for police works are German Shepherds, Belgian Malinois, Dutch Shepherds<sup>217</sup> and Labrador Retrievers.<sup>218</sup> Other popular breeds are Belgian

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<sup>209</sup> [K9Xtreme Security Ltd – Built with Sasahost](#) on 23 January 2024.

<sup>210</sup> Crowley A, ‘What is a K9’ Vet Ranch, 23 June 2023, [What Is A K9? K9 Dog Breeds, Training & Duties - VetRanch](#) on 25 January 2024.

<sup>211</sup> Crowley A, ‘What is a K9’ Vet Ranch, 23 June 2023, [What Is A K9? K9 Dog Breeds, Training & Duties - VetRanch](#) on 25 January 2024.

<sup>212</sup> Crowley A, ‘What is a K9’ Vet Ranch, 23 June 2023, [What Is A K9? K9 Dog Breeds, Training & Duties - VetRanch](#) on 25 January 2024.

<sup>213</sup> Frank, ‘What is K9 Dog Training’ The Dog Central, 29 June 2024 [What is K9 Dog Training? | The Dog Central](#) on 25 January 2024.

<sup>214</sup> Olivia C, ‘How are K9 Dogs Trained’ Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](#) on 26 January 2024.

<sup>215</sup> Olivia C, ‘How are K9 Dogs Trained’ Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](#) on 26 January 2024.

<sup>216</sup> [K9 dog training: How police dogs are trained for duty \(puppyinstitute.com\)](#) on 27 January 2024.

<sup>217</sup> Olivia C, ‘How are K9 Dogs Trained’ Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](#) on 26 January 2024.

<sup>218</sup> Crowley A, ‘What is a K9’, Vet Ranch, 23 June 2023, [What Is A K9? K9 Dog Breeds, Training & Duties - VetRanch](#) on 25 January 2024.

Tervueren, BloodHound, Boxer Dog, Doberman Pinscher, German Short-haired Pointer, Giant Schnautzer and the Rottweiler.<sup>219</sup> These breeds are known for their incredible working ability, cooperation with their handlers and tenacity in fighting criminals.<sup>220</sup> These breeds are known for their intelligence, loyalty, and physical abilities, which make them ideal for police work.<sup>221</sup> More specifically, the German Shepherds are genetically wired for protection and strolling tasks. Labradors and Bloodhounds are naturally more talented for tasks such as searching and detection of certain goods.<sup>222</sup> Some police dogs are single-purpose, therefore have one task to perform while others are dual purpose, meaning that they are trained to do a variety of tasks.<sup>223</sup> These K9 dogs serve one of two purposes. One is patrol, where these dogs are used to provide officer protection, suspect apprehension, area or building clearance, security or two, in the performance of their detection duties such as tracking, search and rescue or scent detection.<sup>224</sup> Nevertheless, there are also dual purpose dogs that are trained to combine these duties.<sup>225</sup> The selection process for K9 dogs is rigorous and involves various tests to determine the dog's suitability for police work.<sup>226</sup> The tests include temperament tests, which tests their personality and behaviour, physical ability tests, and aptitude tests, which analyses their ability to learn and perform tasks.<sup>227</sup> Once the breed has been selected, the second step followed is the basic training,<sup>228</sup> which comprises obedience training and socialisation.<sup>229</sup> Dog training process usually begins within 3 months of birth, from there the pup learns its surroundings as it develops under the close monitoring of the trainer.<sup>230</sup> Obedience training forms the foundation of K9 training and involves teaching basic obedience commands, which manifest in three ways: ability to exercise full

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<sup>219</sup> 'What is a K9 Dog? K9 Dog Breeds, Training & Duties' Mek Security, 5 April 2017 [What is a K9 Dog? K9 Dog Breeds, Training & Duties | MEC Security](#) on 27 January 2024.

<sup>220</sup> AKC Staff, 'What Do K9 Police Dogs Do?' American Kennel Club 22 January 2024 [What Do K-9 Police Dogs Do? – American Kennel Club \(akc.org\)](#) on 24 January 2024.

<sup>221</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](#) on 26 January 2024.

<sup>222</sup> [K9 dog training: How police dogs are trained for duty \(puppyinstitute.com\)](#) on 27 January 2024.

<sup>223</sup> AKC Staff, 'What Do K9 Police Dogs Do?' American Kennel Club 22 January 2024 [What Do K-9 Police Dogs Do? – American Kennel Club \(akc.org\)](#) on 24 January 2024.

<sup>224</sup> [About K-9s - National Police Dog Foundation](#) on 26 January 2024.

<sup>225</sup> [About K-9s - National Police Dog Foundation](#) on 26 January 2024.

<sup>226</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](#) on 26 January 2024.

<sup>227</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](#) on 26 January 2024.

<sup>228</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](#) on 26 January 2024.

<sup>229</sup> [K9 dog training: How police dogs are trained for duty \(puppyinstitute.com\)](#) on 27 January 2024.

<sup>230</sup> [K9 Unit Services - Total Security Surveillance \(totalsecuritykenya.com\)](#) on 27 January 2024.

control over the dog, familiarising the dog with its name, its handler and language commands such as ‘sit’, ‘stay’, ‘come’ and ‘heel’ and distance control which is the ability to give the dog instructions both verbally and non-verbally through hand signals, from a far and have it obey.<sup>231</sup> Basic training is usually conducted by a professional dog trainer who has experience in training police dogs.<sup>232</sup> In relation to obedience training, equipping the dog with discipline is equally vital in shaping the behaviour of the police dog in teaching it self control and making correct decisions in various scenarios.<sup>233</sup> From this the dog learns to understand boundaries and cultivates a calm and focused temperature so as to further learn to maintain composure and follow instructions even when faced with distractions such as loud noises or potential dangers or unpredictable environments.<sup>234</sup> The trainer uses positive reinforcement or reward based techniques<sup>235</sup> such as treats and praise to encourage the K9 dog to learn and perform the commands.<sup>236</sup> This cultivates a well mannered dog and a good relationship between the dog and the handler.<sup>237</sup> He is also trained to respond to the trainer's voice and body language.<sup>238</sup> Alongside obedience training, is socialising the dog with its surroundings. While some think of socialising as simply allowing your dog to roam free around other people and dogs, socialised training is specific and targeted.<sup>239</sup> Rather, it entails teaching the dog proper social skills and setting a foundation for further training in its life.<sup>240</sup>

Concurrently conducted with basic training is attack training, which is done with special equipment. The actual training does not encompass teaching it to actually attack, rather bringing out its natural aggression following the fact that it is a territorial animal.<sup>241</sup> Upon completing each step at K9 dog training, the dog will be evaluated to see if he has passed the test and if he has not he will not move forward into the next training program.<sup>242</sup> Thus it is only after passing

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<sup>231</sup> [K9 Unit Services - Total Security Surveillance \(totalsecuritykenya.com\)](https://totalsecuritykenya.com) on 27 January 2024.

<sup>232</sup> Frank, ‘What is K9 Dog Training’ The Dog Central, 29 June 2024 [What is K9 Dog Training? | The Dog Central](https://thetdogcentral.com) on 25 January 2024.

<sup>233</sup> [The Basics of Police Dog Training - Dog Dedicated](https://thetdogcentral.com) on 28 January 2024.

<sup>234</sup> [The Basics of Police Dog Training - Dog Dedicated](https://thetdogcentral.com) on 28 January 2024.

<sup>235</sup> [The Basics of Police Dog Training - Dog Dedicated](https://thetdogcentral.com) on 28 January 2024.

<sup>236</sup> Frank, ‘What is K9 Dog Training’ The Dog Central, 29 June 2024 [What is K9 Dog Training? | The Dog Central](https://thetdogcentral.com) on 25 January 2024.

<sup>237</sup> Frank, ‘What is K9 Dog Training’ The Dog Central, 29 June 2024 [What is K9 Dog Training? | The Dog Central](https://thetdogcentral.com) on 25 January 2024.

<sup>238</sup> Olivia C, ‘How are K9 Dogs Trained’ Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](https://petzooie.com) on 26 January 2024.

<sup>239</sup> [K9 Training: 5 Types of K9 Training Methods \(customcanineunlimited.com\)](https://customcanineunlimited.com) on 27 January 2024.

<sup>240</sup> [K9 Training: 5 Types of K9 Training Methods \(customcanineunlimited.com\)](https://customcanineunlimited.com) on 27 January 2024.

<sup>241</sup> [K9 Unit Services - Total Security Surveillance \(totalsecuritykenya.com\)](https://totalsecuritykenya.com) on 27 January 2024.

<sup>242</sup> [K9 dog training: How police dogs are trained for duty \(puppyinstitute.com\)](https://puppyinstitute.com) on 27 January 2024.

obedience training that the dog would be allowed to proceed on to the next level of training, advanced training.

Advanced training requires the dog to maintain their skills over time and introduces multi-command skills that require consistent maintenance, which involves teaching specific skills such as tracking, searching, scent detection<sup>243</sup> and apprehension.<sup>244</sup> K9s are also trained to work in different environments, such as buildings, vehicles, and open spaces.<sup>245</sup> Tracking is one of the most important skills that K9 dogs are trained for. They are trained to track suspects by following their scent.<sup>246</sup> This is through nose work training, the course leverages a dog's inherent desire to hunt while directing their urges towards a specific objective to find an object or substance.<sup>247</sup> The dog is also trained to differentiate between different scents and how to track it.<sup>248</sup> Searching is another important skill that K9 dogs are trained for, thus these dogs are trained to search for drugs, explosives, and other contraband and how to search for missing persons and evidence.<sup>249</sup> With the use of their 225 million scent receptors in their nose compared to humans' 5 million,<sup>250</sup> K9 dog training sharpens and refines this natural skill to learn how to detect objects such as drugs, explosives, hidden objects like weapons and ammunition and other contraband, as part of their training.<sup>251</sup> Suspect apprehension is the most popular discipline of the police dog.<sup>252</sup> Since dogs are in most situations the first to put their lives on the line in the pursuit of a suspect and go in against a potentially armed suspect, they must be taught how to attack and apprehend

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<sup>243</sup> [K9 Training: 5 Types of K9 Training Methods \(customcanineunlimited.com\)](https://www.customcanineunlimited.com) on 28 January 2024.

<sup>244</sup> AKC Staff, 'What Do K9 Police Dogs Do?' American Kennel Club 22 January 2024 [What Do K-9 Police Dogs Do? – American Kennel Club \(akc.org\)](https://www.akc.org) on 24 January 2024.

<sup>245</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](https://www.petzooie.com) on 26 January 2024.

<sup>246</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](https://www.petzooie.com) on 26 January 2024.

<sup>247</sup> [K9 Training: 5 Types of K9 Training Methods \(customcanineunlimited.com\)](https://www.customcanineunlimited.com) on 28 January 2024.

<sup>248</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](https://www.petzooie.com) on 26 January 2024.

<sup>249</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](https://www.petzooie.com) on 26 January 2024.

<sup>250</sup> AKC Staff, 'What Do K9 Police Dogs Do?' American Kennel Club 22 January 2024 [What Do K-9 Police Dogs Do? – American Kennel Club \(akc.org\)](https://www.akc.org) on 24 January 2024.

<sup>251</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](https://www.petzooie.com) on 26 January 2024.

<sup>252</sup> AKC Staff, 'What Do K9 Police Dogs Do?' American Kennel Club 22 January 2024 [What Do K-9 Police Dogs Do? – American Kennel Club \(akc.org\)](https://www.akc.org) on 24 January 2024.

without caution.<sup>253</sup> They are additionally taught how to discern threats and act upon them.<sup>254</sup> Most apprehension dogs are herding breeds such as the Belgian Malinois, German Shepherd Dogs, and Dutch Shepherds.<sup>255</sup> The qualities of physical strength and intelligence used to herd livestock, also prove useful in restraining dangerous suspects.<sup>256</sup> That said, they must also be stable dogs, which is ascertained through the aptitude test.<sup>257</sup>

Lastly is specialised training for specialised tasks such as search and rescue, bomb detection, and arson investigation. These dogs undergo specialised training that is tailored to their specific tasks. Every job requires different skill sets and thus a different type of training.<sup>258</sup> Search and rescue dogs are trained to locate missing persons in disaster stricken areas such as in earthquakes, floods, and hurricanes.<sup>259</sup> These canines are trained to work in different environments and conditions, such as rubble, water, and snow,<sup>260</sup> some even locating the bodies of drowned victims underwater in oceans and lakes, all within a relatively short period of time.<sup>261</sup> Bomb detection dogs are trained to detect explosives in a variety of environments, including airports, train stations, and public gatherings<sup>262</sup>. They are trained to differentiate between different types of explosives and detect hidden explosives. Arson investigation dogs are trained to detect accelerants such as gasoline and kerosene in fire scenes.<sup>263</sup> They are trained to work in different environments, such as buildings, vehicles, and open spaces.<sup>264</sup> Depending on the function the dog is required to serve, the dog's training goes into deeper specialisation.<sup>265</sup>

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<sup>253</sup> AKC Staff, 'What Do K9 Police Dogs Do?' American Kennel Club 22 January 2024 [What Do K-9 Police Dogs Do? – American Kennel Club \(akc.org\)](#) on 24 January 2024.

<sup>254</sup> AKC Staff, 'What Do K9 Police Dogs Do?' American Kennel Club 22 January 2024 [What Do K-9 Police Dogs Do? – American Kennel Club \(akc.org\)](#) on 24 January 2024.

<sup>255</sup> AKC Staff, 'What Do K9 Police Dogs Do?' American Kennel Club 22 January 2024 [What Do K-9 Police Dogs Do? – American Kennel Club \(akc.org\)](#) on 24 January 2024.

<sup>256</sup> AKC Staff, 'What Do K9 Police Dogs Do?' American Kennel Club 22 January 2024 [What Do K-9 Police Dogs Do? – American Kennel Club \(akc.org\)](#) on 24 January 2024.

<sup>257</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](#) on 26 January 2024.

<sup>258</sup> [K9 dog training: How police dogs are trained for duty \(puppyinstitute.com\)](#) on 27 January 2024.

<sup>259</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](#) on 26 January 2024.

<sup>260</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](#) on 26 January 2024.

<sup>261</sup> [What Do K-9 Police Dogs Do? – American Kennel Club \(akc.org\)](#) on 26 January 2024.

<sup>262</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](#) on 26 January 2024.

<sup>263</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](#) on 26 January 2024.

<sup>264</sup> Olivia C, 'How are K9 Dogs Trained' Petzooie, 15 October 2023 [How are K9 Dogs Trained \(petzooie.com\)](#) on 26 January 2024.

<sup>265</sup> [K9 dog training: How police dogs are trained for duty \(puppyinstitute.com\)](#) on 27 January 2024.

The dogs must be able to perform their duties under stress in loud chaotic environments over a variety of terrain and long distances and sometimes with minimum guidance.<sup>266</sup> As a result their training involves simulations that are regularly conducted, creating as realistic situations as possible.<sup>267</sup>

Of the above mentioned training institutions, the National Guard, which provides the best dogs trained in tracking and security, conducts quarterly assessments and certification following weekly training of the dog and the handler, maintaining effectiveness of both.<sup>268</sup>

The Certification Council for Professional Dog Trainers offers two different kinds of certification, knowledge-based certification that requires 300 hours of training in three years and skills-based certification that requires continuing education credits to keep certification current.<sup>269</sup> To earn a CCPDT certificate, the dog must first have a certification from a legitimate certifying body, which can be achieved through completing a certificate course or enrolling in a training program.<sup>270</sup>

### **4.3 Beyond Police Work**

The training undergone by dogs equips them with skills essential for various fields beyond law enforcement, including the wildlife sector where the incorporation of canine units has emerged as a crucial strategy in reducing poaching cases and in aiding search and rescue missions.

#### **4.3.1 Wildlife Sector**

Rhinos in South Africa die at a dwindling rate at the hands of poachers, resulting in the death of 1,215 rhinos.<sup>271</sup> However, the South African government has effectively addressed this issue by deploying K9 dogs in key locations such as Kruger National Park and Johannesburg's O.R. Tambo Airport.<sup>272</sup> Where notable success in achieving the objective has been realised that 100 dogs have been employed at other key locations to chase after suspected poachers and sniff out

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<sup>266</sup> [K9 dog training: How police dogs are trained for duty \(puppyinstitute.com\)](#) on 27 January 2024.

<sup>267</sup> [K9 dog training: How police dogs are trained for duty \(puppyinstitute.com\)](#) on 27 January 2024.

<sup>268</sup> [\(7\) K9 HANDLERS AND TRAINING BY... - National Guard Security Service | Facebook](#) on 21 January 2024.

<sup>269</sup> [K9 dog training: How police dogs are trained for duty \(puppyinstitute.com\)](#) on 27 January 2024.

<sup>270</sup> Frank, 'What is K9 Dog Training' The Dog Central, 29 June 2024 [What is K9 Dog Training? | The Dog Central](#) on 25 January 2024.

<sup>271</sup> [Poachers kill 24 rhinos in just two weeks in South Africa | Animals | The Guardian](#) on 8 February 2024.

<sup>272</sup> Findlay S, 'South Africa's Anti-Poaching Effort Goes to the Dogs' Toronto Star, 24 January 2015 [South Africa's anti-poaching effort goes to the dogs \(thestar.com\)](#) on 10 February 2024.

wildlife contraband.<sup>273</sup> Killer, the most famous dog at this work, has made a big contribution to this success, having caught 40 poachers in the last 4 years.<sup>274</sup> Other countries have embraced this strategy with dogs being used to hunt elephant poachers in Tanzania to tracking gorilla poachers in the Democratic Republic of Congo.<sup>275</sup>

Paramount K9 Solutions' Anti-Poaching and K9 Training Academy situated in Rustenburg, South Africa specialises in the training tracker/sniffer dogs and their handlers for anti-poaching operations, for the purpose of protecting endangered wildlife species such as elephants, rhinos, pangolins, and abalones.<sup>276</sup> The Academy offers comprehensive training programs, including anti-poaching reaction unit training, handler training, and deployment of detection dogs at key access points to game reserves and borders. Additionally, they train tracking dogs for field rangers and specialise in training special operations dogs for rapid deployment teams.<sup>277</sup>

The integration of dogs into anti-poaching efforts has not only been effective in reducing poaching but has also contributed to the growth of the tourism industry and increased revenue for countries.<sup>278</sup> Julian Rademeyer, author of *Killing for a Profit*<sup>279</sup> has acknowledged the usefulness of dogs in the reduction of poaching cases by attributing most seizures of poachers to dogs. The impact that dogs have had in the wildlife sector has been likened to machine work, emphasising their irreplaceable value in crime prevention.<sup>280</sup> That being said, there are challenges associated with employing K9 dogs, such as the considerable cost, which can start at \$10,000 per dog, particularly in areas where park rangers earn relatively low salaries. This cost includes not only the procurement of the dog but also the trainer's salary, food, and housing for the dog.<sup>281</sup>

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<sup>273</sup> Findlay S, 'South Africa's Anti-Poaching Effort Goes to the Dogs' Toronto Star, 24 January 2015 [South Africa's anti-poaching effort goes to the dogs \(thestar.com\)](#) on 10 February 2024.

<sup>274</sup> Findlay S, 'South Africa's Anti-Poaching Effort Goes to the Dogs' Toronto Star, 24 January 2015 [South Africa's anti-poaching effort goes to the dogs \(thestar.com\)](#) on 10 February 2024.

<sup>275</sup> Findlay S, 'South Africa's Anti-Poaching Effort Goes to the Dogs' Toronto Star, 24 January 2015 [South Africa's anti-poaching effort goes to the dogs \(thestar.com\)](#) on 10 February 2024.

<sup>276</sup> [Specialist K9 Units deployed at Table Mountain National Park in response to illegal wildlife poaching \(paramountgroup.com\)](#) on 7 February 2024.

<sup>277</sup> [Specialist K9 Units deployed at Table Mountain National Park in response to illegal wildlife poaching \(paramountgroup.com\)](#) on 7 February 2024.

<sup>278</sup> Findlay S, 'South Africa's Anti-Poaching Effort Goes to the Dogs' Toronto Star, 24 January 2015 [South Africa's anti-poaching effort goes to the dogs \(thestar.com\)](#) on 10 February 2024.

<sup>279</sup> Rademeyer J, *Killing for a Profit*, Penguin Random House Struik, South Africa, 2012.

<sup>280</sup> Findlay S, 'South Africa's Anti-Poaching Effort Goes to the Dogs' Toronto Star, 24 January 2015 [South Africa's anti-poaching effort goes to the dogs \(thestar.com\)](#) on 10 February 2024.

<sup>281</sup> Findlay S, 'South Africa's Anti-Poaching Effort Goes to the Dogs' Toronto Star, 24 January 2015 [South Africa's anti-poaching effort goes to the dogs \(thestar.com\)](#) on 10 February 2024.

### 4.3.2 Search and Rescue Missions

Cyclone Idai, described by the United Nation as one of the most devastating climate related catastrophes in Africa’s history, claimed the lives of about 200 people in Zimbabwe, with 180 unaccounted for and feared buried in the rubble, while about 270,000 find themselves in urgent need of humanitarian aid as of 2019.<sup>282</sup> The storm’s death toll extended beyond Zimbabwe, reaching 700 people in Sub Saharan.<sup>283</sup> In response, the charitable foundation of the Paramount group commissioned and funded the deployment of two specialised Search and Rescue Units to the areas most affected.<sup>284</sup> Through the efforts of 2 highly trained border-collies with the help of 4 handlers, undiscovered bodies were found buried under thick layers of rock and mud.<sup>285</sup> Their remarkable efforts, carried out under extremely challenging conditions, led to the miraculous discovery of these individuals, a task that would have otherwise been impossible.<sup>286</sup>

This contribution towards disaster and offering humanitarian relief efforts in an innovative way.

Through the rigorous training the Paramount Group has given its dogs, they have been able to carry out a wide array of tactical assignments, anti-poaching activities, weapons and ammunition detection<sup>287</sup> and wildlife contraband detection.<sup>288</sup> Throughout history, K9 dogs have played a vital role in search and rescue operations, thanks to their specialised training in scent detection and their ability to adapt to challenging environments. The unwavering dedication and bravery of the K9 Unit in navigating the harsh conditions in Eastern Zimbabwe is commendable, particularly during nighttime operations when human trackers face significant limitations without the support of K9 units.<sup>289</sup>

Even other private entities have seen the contribution of dogs and have made significant donations to aid in achieving these objectives. With efforts from the Ichikowitz Family

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<sup>282</sup> [South African K9 Units Embolden Search And Rescue Efforts Amid Cyclone Idai Aftermath In Zimbabwe \(paramountgroup.com\)](#) on 6 February 2024.

<sup>283</sup> [South African K9 Units Embolden Search And Rescue Efforts Amid Cyclone Idai Aftermath In Zimbabwe \(paramountgroup.com\)](#) on 6 February 2024.

<sup>284</sup> [South African K9 Units Embolden Search And Rescue Efforts Amid Cyclone Idai Aftermath In Zimbabwe \(paramountgroup.com\)](#) on 6 February 2024.

<sup>285</sup> [South African K9 Units Embolden Search And Rescue Efforts Amid Cyclone Idai Aftermath In Zimbabwe \(paramountgroup.com\)](#) on 6 February 2024.

<sup>286</sup> [South African K9 Units Embolden Search And Rescue Efforts Amid Cyclone Idai Aftermath In Zimbabwe \(paramountgroup.com\)](#) on 6 February 2024.

<sup>287</sup> [Specialist K9 Units Deployed To South East Asia In Response To Surge In Illegal Wildlife Trafficking \(paramountgroup.com\)](#) on 8 February 2024.

<sup>288</sup> [South African K9 Units Embolden Search And Rescue Efforts Amid Cyclone Idai Aftermath In Zimbabwe \(paramountgroup.com\)](#) on 6 February 2024.

<sup>289</sup> [South African K9 Units Embolden Search And Rescue Efforts Amid Cyclone Idai Aftermath In Zimbabwe \(paramountgroup.com\)](#) on 6 February 2024.

Foundation (IFF), anti-poaching initiatives can be seen through the donation of the surveillance aircraft and critical equipment to national parks, training programs to enhance the capabilities of counter-poaching units, awareness campaigns highlighting the plight of endangered species and establishment of one of Africa's largest anti-poaching skills and Canine Training Academies.<sup>290</sup>

The utilisation of these highly trained dogs in such critical situations underscores their exceptional capabilities and effectiveness in fulfilling these essential tasks.

#### **4.4 Conclusion**

The detailed exploration of the dog training process serves to liken the training of the dog to the educational journey of a human that leads up to being an expert. This chapter has so far established that a dog undergoes very serious training to equip it with the skills necessary to perform the tasks prescribed for it. In the same breadth, human experts undergo specialised education and training tailored to their respective fields, equipping them with the necessary expertise. Just as only certain breeds of dogs are chosen and trained for specialised tasks, educational institutions select students who meet certain criteria for admission into their programs. The initial training phase for dogs evaluates their adaptability, much like how schools conduct interviews to assess the suitability of prospective students. Dogs start with learning basic commands and concepts, progressing to more advanced training, mirroring the educational journey of students who begin with foundational knowledge before advancing to more complex subjects. As dogs undergo progressively challenging training, students similarly face increasing difficulty in their courses as they advance through their education. Regular assessments during a dog's training regiment resembles the periodic tests and evaluations students undergo throughout their academic terms. Dogs receive training from skilled human trainers, paralleling how students acquire knowledge and skills from expert educators. The duration required for a dog to become certified mirrors the varying lengths of educational programs, ranging from a few months to several years, depending on the complexity of the skill being acquired. Certification obtained by dogs upon passing assessments is akin to the qualifications students earn upon completing exams or graduating from educational programs. Both dogs and professionals in certain fields require ongoing training and assessments to maintain their proficiency, ensuring

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<sup>290</sup> [Specialist K9 Units Deployed To South East Asia In Response To Surge In Illegal Wildlife Trafficking \(paramountgroup.com\)](https://www.paramountgroup.com) on 8 February 2024.

that their skills remain sharp and up-to-date. The purpose of training for dogs, like for students, is to enable them to become proficient experts in their respective domains. Additionally, both dogs and students may undergo specialised training or pursue further education beyond initial certification to enhance their expertise and capabilities. These parallels highlight the similarities between canine training and human education, underscoring that the dog is an expert even in the learning and skill development processes.

## **CHAPTER 5: RECOMMENDATIONS AND CONCLUSIONS**

### **5.1 Introduction**

This chapter summarises the chapters and highlights key findings. It then makes pertinent recommendations and concludes the study.

### **5.2 Summary and Findings**

#### **5.2.1 Chapter One**

Chapter one introduces the chapeau of the dissertation. The chapter provides the basis of the discussion by outlining the current position of canine evidence in legal proceedings, particularly in Kenya and proposing a link between canine evidence and expert opinion evidence with the aim of having the rules of expert opinion evidence apply to canine evidence. By listing the requirements required in court for canine evidence to be admissible, the chapter singles out the training requirement and challenges the strict application of this requirement based on the exception allowed to expert opinion evidence, which does not strictly require the production of the qualifications of an expert for the admissibility of the expert's testimony. The chapter concludes by laying the groundwork for classifying canine evidence under expert opinion evidence and revising the criteria for assessing reliability.

#### **5.2.2 Chapter Two**

In answering whether the olfactory skills of a dog are a result of training or are inherently acquired, this chapter delves into the legal realm and makes an even deeper dive into the scientific world, attempting to reconcile them. The chapter analysed the definition of an expert by looking at both expert and non-expert evidence as per the law and came to the conclusion that a dog is an expert due to his specialised knowledge. However, from looking at the dog's anatomy, and analysing the technicality of the physiological process that occurs with the nose, the chapter found that indeed the dog is an expert but not due to his training, rather his inherently acquired skill. The training just sharpens skills that already exist. Thus concluding that a dog's identification should not be questioned on grounds of its training, due to the natural skill they are

endowed with as trackers. Establishing the rationale for categorising canine evidence as expert opinion evidence in the recognition of the dog's natural abilities.

### **5.2.3 Chapter Three**

This chapter recognises that it may not be enough for the courts to admit canine evidence based on the natural skill rationale, thus it went to analyse the similarities between the qualifications of a human expert versus the training of the dog. This is through the expert report, which provides the criteria for witnesses to be recognized as expert witnesses and a canine report, finding them similar in essence. The criterion under each report of each report have been found to be the same and even where they differ, they still serve their role in establishing their expertise and reliability and informing the court on specific matters outside the court's scope.

### **5.2.4 Chapter Four**

Chapter 4 delves into the training of the dogs attempting to find similarities between human education and canine training. In this way, the chapter listed various training institutions in Kenya and outlined their method of training. It was found that the training dogs receive equips them to perform various functions within law enforcement and beyond such as wildlife conservation through catching poachers and performing search and rescue missions. In conclusion, the chapter concludes by likening the training of the dog to the educational journey of humans, highlighting the parallels between canine training and human education in terms of progression, assessment, and ongoing skill development. olice work, dogs contribute to wildlife conservation efforts and search and rescue missions. The chapter concludes by likening the training of dogs to the educational journey of humans, highlighting the parallels between canine training and human education in terms of progression, assessment, and ongoing skill development.

## **5.3 Recommendations**

### **5.3.1 Removing the strict application of training as requirement for canine evidence admissibility**

This paper has done a fine job at providing sufficient basis for the categorisation of canine evidence as expert opinion evidence. Following that conclusion, it would only be fair to apply

the rules of expert opinion evidence to canine evidence, among them relaxing the strict requirement of the dog's training to prove his reliability. As was established in *R v Stockwell*<sup>291</sup> where the evidence of a witness was held as expert witness evidence and admitted notwithstanding the absence of the expert's scientific qualifications and training.

On top of that this paper has made a deep dive into scientific data so as to prove that even without the training, dogs can still perform those functions of tracking and scent identification due to their natural skill. Therefore, given that canine evidence could very well qualify as the highest form of expert opinion evidence, its admissibility should not be so highly restricted by the training qualifications of the dog.

This also provides space for evidence of tracking and identification by house dogs to be included and considered in a court of law, thus expediting and ensuring justice for all.

### **5.3.2 Placing a higher priority on the other requirements for attaching weight to canine evidence**

Trusting solely in the dog's abilities without questioning the manner in which the training was done is a fallible approach that may potentially produce a fallible verdict. For that reason, this paper recommends that more weight be placed on other factors surrounding how the tracking, or scent line up was performed. First the parties intending to produce canine evidence must lay down strong foundations for such use.<sup>292</sup> The stronger foundation laid, the more weight the canine evidence would be held to. Second, the court must exercise care and caution when looking at the evidence admitted due to the fact that they cannot be cross-examined.<sup>293</sup> Third, the circumstances relating to the actual trailing must be demonstrated and proven that the trail has not become stale.<sup>294</sup> Granted dogs having the ability to track scents up to 6 months<sup>295</sup> after the crime, with some European researchers claiming a higher limit of three years if certain standardised procedures are followed.<sup>296</sup> Their training further strengthens their ability to cover

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<sup>291</sup> (1993), Court of Appeal of England.

<sup>292</sup> *R v Pieterse* 1994, The Court of Appeal of British Columbia.

<sup>293</sup> *R v Pieterse* 1994, The Court of Appeal of British Columbia.

<sup>294</sup> *Uganda v Muheirwe and Anor* (2012), High Court of Uganda. The guiding principles on admissibility are: Principle 4. The circumstances relating to the actual trailing must be demonstrated and proven that the trail has not become stale.

<sup>295</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, *Hastings Law Journal* 1, 1990, 38.

<sup>296</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, *Hastings Law Journal* 1, 1990, 72.

longer distances through various terrain.<sup>297</sup> In spite of these, providing the court with details of the tracking or scent line-up would help the court know what weight to attach the canine evidence. Just as Judge Ainley found it unconvincing to say that the dog has a thousand arrests to its credit, and much preferred clear evidence that a dog has repeatedly and faultlessly followed a scent over difficult terrain would be much more preferred.<sup>298</sup> Four, the handler must not try to explore the inner workings of the animal's mind in relation to the conduct of the trailing.<sup>299</sup> This reservation apart, he is free to describe the behaviour of the dog and give an expert opinion as to the inferences which might properly be drawn from a particular action by the dog.

### 5.3.4 Further study on canine evidence

In Kenya, very little literature let alone discussion on canine evidence exists, therefore by more researchers venturing into this field, the manner in which canine evidence comes about will become more widespread. The majority of legal persons lack scientific knowledge for determining when tracking is accurate<sup>300</sup> hence placing an overwhelming burden on the training of the dog, when they do not even know what exactly the training encompasses.

Through the examination of the science of scenting better guidelines for design of fair dog scent lineups, could be raised.<sup>301</sup>

Thus further research needs to go into whether human scents are unique and if so, on how dogs can be better trained to discriminate among those scents and whether there is core scent that remains the same despite changes in mood, diet and clothing.<sup>302</sup> The courts need to know that a well trained dog can easily discriminate between the scents of identical twins based solely on differences in the twins' diet or environment.<sup>303</sup>

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<sup>297</sup> [K9 dog training: How police dogs are trained for duty \(puppyinstitute.com\)](https://puppyinstitute.com) on 27 January 2024.

<sup>298</sup> Omondi and Anor v Republic (1967), East African Court of Justice.

<sup>299</sup> Uganda v Muheirwe and Anor (2012), High Court of Uganda. The guiding principles on admissibility are: Principle 5: The human handler must not try to explore the inner workings of the animal's mind in relation to the conduct of the trailing. This reservation apart, he is free to describe the behaviour of the dog and give an expert opinion as to the inferences which might properly be drawn from a particular action by the dog.

<sup>300</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, Hastings Law Journal 1, 1990, 38.

<sup>301</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, Hastings Law Journal 1, 1990, 43.

<sup>302</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, Hastings Law Journal 1, 1990, 67.

<sup>303</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, Hastings Law Journal 1, 1990, 69.

### 5.3.5 Incorporating Technology

Police dogs have always helped human counterparts through their eyes and nose and now some of the dogs are yet to get cameras that transmit live video footage.<sup>304</sup> By attaching the camera device to the dog's back on a vest, video footage is transmitted to a handler watching from a screen, possibly on their wrist or around their necks.<sup>305</sup> The footage from the helmet-mounted cameras can be streamed live to officers from up to 500 metres away. It was originally designed for use in firearms situations to improve safety for the public, officers and dogs, such that the camera provides a visual to a firearms team of what the dog actually sees so the team is cautioned as to what to expect when going into a room.<sup>306</sup> K9 academies abroad have begun training dogs with vests and cameras so they get accustomed to devices.<sup>307</sup> Unfortunately, fewer than 5 percent of police agencies have the cameras due to the high cost that comes with purchasing these devices, with most ranging between \$6,000 and \$20,000.<sup>308</sup> When it comes to providing evidence, video footage of how the scent identification or tracking was done would aid the court in properly assessing the weight to attach.

### 5.3.6 Using a control object

To further test the reliability of a dog, the court could implore control tests, through which the party relying on the evidence, would place similar objects before the dog and release the dog to identify the murder weapon or the object in question. This test could be done with the real object in display or without it. The use of a control object in the test acts as a check on the accuracy of the dog's scenting.<sup>309</sup>

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<sup>304</sup> 'Police Dogs Getting Cameras That Transmit Live Video' Crime Report 25 October 2018 [Police Dogs Getting Cameras That Transmit Live Video - The Crime Report](#) on 15 February 2024.

<sup>305</sup> 'Police Dogs Getting Cameras That Transmit Live Video' Crime Report, 25 October 2018 [Police Dogs Getting Cameras That Transmit Live Video - The Crime Report](#) on 15 February 2024.

<sup>306</sup> 'Head cam technology for police dogs trialled in Cumbria' ITV News, 28 October 2022 [Head cam technology for police dogs trialled in Cumbria | ITV News Border](#) on 14 February 2024.

<sup>307</sup> Antlfinger c, 'Some Police Dogs Now have Cameras Too', CTV News, 24 October 2018 [Some police dogs now have cameras, too | CTV News](#) on 13 February 2024.

<sup>308</sup> Antlfinger c, 'Some Police Dogs Now have Cameras Too', CTV News, 24 October 2018 [Some police dogs now have cameras, too | CTV News](#) on 13 February 2024.

<sup>309</sup> Taslitz A, 'Does the Cold Nose Know-The Unscientific Myth of the Dog Scent Lineup?' 42, Hastings Law Journal 1, 1990, 69.

## **5.5 Conclusion**

Dogs are inherently endowed with a natural skill that equips them with the ability to perform these great tasks. This natural skill has been recognized and further sharpened by various K9 training institutions for the purpose of incorporating dogs in law enforcement. Their impact on the apprehension of criminals and identification of objects has had such a great success that even other areas such as wildlife have introduced the services of dogs in the apprehension of poachers thus conserving wildlife, in which the effect of canines has had a great significance. Owing to the expert nature of dogs in performing their functions, it would be unfair to not categorise them as experts. Thus qualifying their evidence as expert opinion evidence.

Under expert opinion evidence, expert witnesses are required to produce evidence as to their qualifications in the field they are testifying on, however the case of *R v Stockwell* introduced an exception to this rule. It states that witnesses are not barred from being recognized as expert witnesses nor is their evidence considered inadmissible, on account of the absence of educational qualifications and training. Following the discussion, the educational qualifications of a human expert have been sufficiently likened to the training of a dog. For that reason, the training of dogs should not be a requirement strictly applied by courts for the admissibility of canine evidence.

Indeed however, this is an emerging field that would require more scientific and legal research, nevertheless, that should not bar courts from recognizing dogs as experts subject to the same rules as those applied to expert opinion evidence. Further research into this area could define circumstances in which canine evidence can be directly admissible and other instances where more evidence asserting the canine's position would be required for the canine's evidence to be admissible.

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