

**EFFICACY OF INVESTIGATIVE LAWS IN KENYA: THE CASE OF THE
DIRECTORATE OF CRIMINAL INVESTIGATIONS**

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DEDICATION

I dedicate this dissertation to the Almighty God whose mercy and grace have followed me throughout.

I also dedicate this dissertation to my family and friends. A special feeling of immense gratitude to my loving parents whose sacrifice, prayers, words of encouragement and push for tenacity ring in my mind.

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DECLARATION

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

Signed:JNK.....

Date:29th January 2021.....

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

Signed:CAO.....

Claire Adionyi

ABSTRACT

Reports from Kenyan courts show an increasing number of acquittals due to poor and/or lack of evidence. This is the situation in Kenya despite the establishment of the Directorate of Criminal Investigations(DCI) that has branches in all the counties in Kenya.

The present study, therefore, seeks to establish the laws that guide investigations in Kenya, the pretrial rights of individuals and whether the DCI should be an autonomous institution to enhance its operations. Human rights law and Criminal law in Kenya have variously constituted regimes for the enhancement of proper investigations but they have both arguably done a sub-optimal job. The basic reason for this failure has been the failure to adequately protect the pretrial rights of the suspects.

Pre-trial rights are critically important components of the justice process because a majority of cases can be solved at this stage and hence reduce the case backlog in courts. Statements made by the suspect and by witnesses or other evidence obtained during the pre-trial stage often carry considerable weight. The African Commission on Human and Peoples' Rights in its recent Resolution on the Right to Recourse Procedure and Fair Trial has equally recognized that the fair trial principle applies to the pre-trial proceedings as well.

The research also looks into how the independence of the DCI can make it a stronger enforcement entity. Institutional independence, operational independence, functional independence and financial independence are of fundamental importance to the Directorates' investigative mandate. Top investigation agencies such as the Federal Bureau of Investigations (FBI) in the United States and South Africa's former agency Scorpions, which had a 94 percent conviction rate, succeed for reasons such as independence and autonomy

This study has been done using primary sources and secondary sources and it concludes that the legal framework that guides investigations in Kenya are inadequate, the pretrial rights of the suspects are not protected and the DCI should be an independent institution to enhance its investigations. The study also provides some recommendations on how to enhance proper investigations in Kenya.

LIST OF STATUTES

1. Evidence Act, Chapter 80 of 2014.
2. Criminal Procedure Code Chapter 75 of 2014.
3. Prisons Act, (CAP 90 of 2009).
4. National Police Service Act No 84 of 2014.
5. Universal Declaration of Human Rights.
6. International Convention on Civil and Political Rights.

LIST OF CASES

1. Anthony Muriti v The OC Meru and two others [2012] eKLR
2. Boyd v United States (1886).
3. Director of Public Prosecution v Kilbourne (1973)
4. Geoffrey K. Sang v Director of Public Prosecutions&4 others [2020] eKLR.
5. Kuruma s/o Kaniu v Queen [1955]1 All ER 236
6. Miranda v Arizona (1966), The Supreme Court of the United States.
7. Republic v Elly Waga Omondi [2015] eKLR
8. R v Sang (1979), England Law Reports.
9. Republic v National Police Service Commission exparte Daniel Chacha, 2016 eKLR
10. Olmstead v United States (1928), The Supreme Court of the United States.

LIST OF ABBREVIATIONS

DCI- Directorate of Criminal Investigations

DNA- Deoxyribonucleic Acid

FBI- Federal Bureau of Investigations

NPS- National Police Service

DPP- Director of Public Prosecutions

ODPP- Office of the Director of Public Prosecutions

CHAPTER ONE

INTRODUCTION TO THE RESEARCH

1.1 Introduction

Proper investigations are certainly important and the role of the Directorate of Criminal Investigations(DCI) in the carrying out of investigations is heavily relied on by both the witnesses and the victims of the crime.¹ Kenya relies heavily on conventional ways of collecting evidence which are witness testimonies and confessions.² In certain cases, investigations rely on forensic science evidence as the use of technology is heavily relied on in the modern world.³ These ways of gathering information are made possible by the law, as the Constitution of Kenya (2010) protects human rights in the criminal justice system.⁴ The National Police Service Act establishes and lays down the functions of the DCI,⁵ the Evidence Act of 2014 lays down the rules of evidence and the Criminal Procedure Code lays down the procedures that are to be followed when prosecuting offences.⁶

Evasion of accountability by perpetrators of crime is very common in Kenya.⁷ Owing to the lack of adequate evidence to complete prosecution of cases and ensure justice, a variety of cases have either been acquitted, dismissed or are still pending in court.⁸ This is the situation in Kenya despite the presence of an established DCI whose mandate is to investigate crimes.⁹ In fighting crime, proper investigations are key.¹⁰

It is for this reason that this research in chapter one lays the background that precedes an in-depth approach to the research objectives. Chapter two will be an assessment of the adequacy of the existing laws that relate to investigations in Kenya based on the hypotheses that an inadequate

¹Oulo L and Moige B. 'Legal Tenets and Structural Confines of Witness Protection in Kenya Judicial System' The Platform,2018,1.

²Republic v Elly Waga Omondi [2015] eKLR

³Muriuki P, 'Pathological Truth: The Use of Forensic Science in Kenya's Criminal Justice System' 6(7) World Academy of Science, Engineering and Technology, International Journal of Law and Political Sciences, 2013,1.

⁴Article 50, Constitution of Kenya (2010).

⁵Section 28, National Police Service Act (CAP 84 of 2014).

⁶Criminal Procedure Code(No 75 of 2014)

⁷Human Rights watch, 'Turning Pebbles, Evading Accountability for Post- Election Violence in Kenya'2011,4.

⁸The National Assembly, Twelfth Parliament on Justice and Legal Affairs, 'Departmental Committee on Justice and Legal Affairs,2019,16.

⁹< <http://www.cid.go.ke/index.php/aboutus/our-functions>> on 22nd July 2020.

¹⁰BCampus, 'Introduction' Introduction to Criminal Investigation: Processes, Practices and Thinking, 2.

legal and regulatory framework leads to improper investigations. Chapter three will analyse the legal pretrial standards that enhance proper investigations based on the hypotheses that pretrial procedures are critically important in the enhancement of proper investigations. Chapter four will analyse whether the DCI should be an autonomous institution based on the hypotheses that the DCI should be an autonomous body to enhance its operations. Chapter five will provide the conclusion and recommendations of the study.

1.2 Background of the study

In criminal cases, the standard required to convict a defendant of a crime is beyond reasonable doubt.¹¹ When the facts to be proved are not straightforward an investigation has to be carried out, an investigation refers to the process of making a legal inquiry into an accusation.¹²

Article 247 of the Kenyan Constitution (2010) established the DCI by stating that, 'Parliament may enact legislation establishing other police services under the command of the Inspector-General.'¹³ This was actualised by the establishment of the Directorate.¹⁴

During criminal proceedings, legal laws governing human rights must be protected.¹⁵ Some of the most difficult issues presented by the application of the fair trial principle include its application in the early stages of criminal trials which is the investigation stage.¹⁶

Some legal principles that are violated at the investigative stage are that, unless proven guilty, the suspect should be deemed innocent.¹⁷ This principle is violated in that Kenya acknowledges the disruption of civil order a legitimate ground for arrest and allows the competent authorities to enforce pre-trial detention on petty offenders in order to safeguard public security.¹⁸ Other rights that are typically abused are the rights to legal counsel, privacy, the right to refuse to include information that is self-incriminating and right not to be detained for an unnecessary long period.¹⁹

¹¹Mbobu K, *The Law and Practice of Evidence in Kenya*, Law Africa Publishing limited, Nairobi, 2011,109.

¹²Black Law's Dictionary, 2nd edition.

¹³Article 247, Constitution of Kenya 2010.

¹⁴Section 28, National Police Service Act,2011.

¹⁵Chapter 6, The right to a fair trial- From Investigation to trial, 213.

¹⁶ Chapter 6, The right to a fair trial- From Investigation to trial, 216.

¹⁷Article 50(2), Constitution of Kenya.

¹⁸National Council on the administration of justice, 'Understanding pre-trial detention in respect to case flow management and conditions of detention,' Resource Oriented Development Studies, 2015,54.

¹⁹Chapter 4, Part 1: Rights of the Suspect and the accused,104-129.

Investigators also have to adhere to the technicalities of the legal processes. The rules that govern evidence include admissibility and relevancy rules,²⁰ burden and standard of proof which is beyond reasonable doubt in criminal cases,²¹ rules against the admissibility of hearsay evidence and the exceptions,²² opinion evidence rules,²³ and the compellability and privileges of witnesses.

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Several successes have been accomplished by the DCI, including the creation of new divisions such as a tech-savvy unit that uses technology to unravel complex crimes. ²⁵George Kinoti's Crime Research and Intelligence unit is credited with investigating crimes using deoxyribonucleic acid (DNA), forensic science and ballistics.²⁶

However, numerous problems have been faced by the Directorate such as lack of conformity with the law, corruption, continuing impunity, lack of enough resources, lack of public trust, abuse of powers and interference from the executive and legislative arms of government.²⁷

1.3 Statement of the problem

The nature of crime demands an in-depth investigation to take place so that the perpetrators of the crime can be held accountable. For proper investigations to happen, adequate laws, modern technology and an efficient investigative agency are very important. The laws would lay down the procedure to be followed, modern technology would help in analysing the evidence that is collected and the investigative agency would carry out the investigations.

Investigations are a significant part of the justice system since the decision to prosecute relies largely on the investigative report and whether there is sufficient evidence in the report to create a prima facie case against the individual.²⁸

²⁰Section 5 Evidence Act (CAP 80 of 2014).

²¹Section 111 Evidence Act (CAP 80 of 2014).

²²Sections 33-47 Evidence Act (CAP 80 of 2014).

²³Sections 48-54 Evidence Act (CAP 80 of 2014).

²⁴Sections 128-143 Evidence Act (CAP 80 of 2014).

²⁵Wabala D, ' Tech-Savvy unit at the Directorate of Criminal Investigations resolves over 50 cold cases, Daily Nation, 18 January 2020-< <https://www.nation.co.ke/kenya/news/tech-savvy-unit-at-the-dci-resolves-over-50-cold-cases-242254>> on 18 January 2020.

²⁶ Wabala D, ' Tech-Savvy unit at the Directorate of Criminal Investigations resolves over 50 cold cases, Daily Nation, 18 January 2020-< <https://www.nation.co.ke/kenya/news/tech-savvy-unit-at-the-dci-resolves-over-50-cold-cases-242254>> on 18 January 2020.

²⁷Human Rights Watch, 'Turning Pebbles, Evading Accountability for Post-Election Violence in Kenya '2011,54.

²⁸Mwalili J, The role and function of prosecution in criminal justice, una fei organization, 2012, 19.

However, reports from judiciary reviews indicate that the number of acquittals has risen due to the lack of evidence. This is the case in Kenya despite the existence of the DCI. A case in point is the increase of cold-blooded killings of influential individuals such as the Independent Electoral and Boundaries Commission, Information Communication Technology director Chris Msando.²⁹

Without a robust legal framework to guide the DCI, the aim of the establishment of the Directorate will not be achieved.

1.4 Justification of the study

The need for proper criminal investigations has been highlighted by the many cases that have either been acquitted, dismissed or are still pending in court due to a lack of evidence to complete the prosecution. Kenya being an adversarial system the role of the police in criminal investigations is an important one as the collection of evidence is left to the police while the judiciary only deals with the determination of the facts that have been presented before it. Often, prosecutions have not been completed because of lack of evidence or because of legal procedural technicalities.

1.5. Significance of the study

This study aims to address the effectiveness of investigations in Kenya. Since the lack of evidence to complete the prosecution process is widespread in Kenya, the study seeks to prove the significance of investigation laws and the loopholes that lead to the lack of evidence in the investigation framework.

1.6 Statement of aim and objectives

The study aims to investigate how the law enhances and limits the implementation of good investigations in Kenya and the underlying causes.

The specific objectives were:

- i. To assess the adequacy of the existing laws that relate to investigations in Kenya.
- ii. To analyse the limitations and possibilities that legal standards impose on investigations.

²⁹Owino H, 'Who Killed Chris Msando? An unfinished investigation in Kenya,' The Africa Paper, 2018.

- iii. To establish whether the Directorate of Criminal Investigations should be an autonomous institution to enhance its operations.

1.7 Research Questions

- i. Is the legal and regulatory framework that guides investigations adequate?
- ii. Whether the limitations and possibilities that legal standards place on investigations enhances investigations?
- iii. Should the Directorate of Criminal Investigations be an autonomous institution to enhance its operations?

1.8 Hypotheses

The research is based on the following hypotheses:

- i. An inadequate legal and regulatory framework leads to improper investigations.
- ii. Legal Procedures enhance investigations as human rights are guaranteed although proper investigations are hindered by some aspects of the law.
- iii. The Directorate of Criminal Investigations should be an autonomous body to enhance its operations.

1.9 Theoretical framework

The study will be based on the rational choice theory, the theory of deterrence and the natural justice theory.

The theory of rational choice is based on the basic tenets which hold that people freely choose their actions and are driven by avoidance of pain and the quest for pleasure.³⁰ Its core idea is that people are rational creatures whose actions can be regulated by a fear of punishment. By intensifying the fear of punishment, it is believed that offenders will be induced to desist from offending.³¹

The study will also focus on the theory of deterrence which relies on three individual components: severity, certainty, and celerity of punishment.³² Advocates of this theory claim that after

³⁰Ministry of Children, Community and Social Services, ' Rational Choice and Routine Activities Theory' 5 (3), Review of the Roots of Youth Violence: Literature Reviews, 2016,1.

³¹Ministry of Children, Community and Social Services, ' Rational Choice and Routine Activities Theory',1.

³²Onwudiwe I, Odo J, Onyeozili E, 'Deterrence Theory,' 235

measuring the benefits and risks of their acts people choose to follow or break the law.³³ The study will focus on the certainty of punishment which basically means ensuring that punishment happens if a criminal act is committed.³⁴ Proper investigations are key to ensuring that the punishment takes place.

Further, Beccaria believed that individuals would refrain from offending if they knew that for sure their criminal actions would be punished.³⁵ According to this thinking, swift investigations are important to prevent the perpetrator from committing the same offence again in the believe that they will get away with the crime again.

A study carried out by criminologist Charles Tittle found support for the theory and concluded that the certainty of imprisonment deters crime and that severity can only discourage crime when certainty of punishment is guaranteed.³⁶

The natural justice theory is the rule against bias and the right to a fair hearing that requires that a person receive a fair and unbiased hearing before a decision is made that will negatively affect them.³⁷ The ingredients of fairness or natural justice that should guide all administrative and quasi-judicial actions are persons are to be allowed adequate opportunity to present their case, decision-maker should be unbiased, and the administrative decision be based on evidence.³⁸

1.10 Research methodology

The study will use a doctrinal methodology. These will involve an interpretation of primary sources which include Kenyan and foreign caselaw and statutes and secondary sources which include books, journals, research papers and reports.

1.11 Literature Review

There is a wide spectrum of literature on the protection of the human rights of an arrested person. However, the protection accorded to the suspects of a crime is not very clear. The DCI is the body

³³Onwudiwe I, Odo J, Onyeozili E, 'Deterence Theory,' 235

³⁴Lumen Criminal Justice, Section 2.5 'Theories of Punishment,' 2.

³⁵Onwudiwe I, Odo J, Onyeozili E, 'Deterence Theory,' 235

³⁶ Nagin D, 'Deterrence in the twenty first: A review of the Evidence' 4.

³⁷Kumar M, Principle of Natural Justice in South Africa, 1.

³⁸Republic v National Police Service Commission exparte Daniel Chacha, 2016 eKLR.

that deals with suspects in the process of gathering evidence plays a vital role in the protection of the rights of the suspects.

The National Council on Administration of Justice (NCAJ) conducted an audit study on Kenya's Criminal Justice System. The focus was on pretrial detention with specific emphasis on conditions of detention and case-flow management. The study found that the only available safeguard for the pre-trial detainees at the moment is the requirement that they be produced in the magistrate's Courts at least once in 14 days for a mention.³⁹ This paper also looked into the bail and bond process and the importance of legal representation in the justice system with an emphasis on how the vulnerable in the society, especially the poor, cannot afford bail and bond or legal representation.⁴⁰

The Geoffrey K. Sang case played a major role in the interpretation of the functions of the Directorate of Criminal Investigations. This is because there has been a long running supremacy war as to whether the DCI has the legal powers to start and sustain criminal prosecution. The court held that the DCI cannot institute criminal proceedings against an individual without the consent of the Director of Public Prosecutions. However, the laws on private prosecutions in Kenya raise issues that in practice are likely to provide challenges for the Director of Public Prosecutions (DPP) and the courts.⁴¹ Article 157 (6)(b) of the Kenyan Constitution provides that the DPP may take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the approval of the person or authority.⁴² This means that private prosecutions are provided for in the Constitution of Kenya 2010 though in practice it is very hard to institute a proceeding mainly because of financial resources and the lack of prosecutors to enforce the proceedings.

Walter Ochieng in his paper on the independence, accountability and effectiveness of constitutional commissions and independent offices in Kenya dealt with the autonomy of constitutional commissions and offices.⁴³ He discussed five factors as necessary to ensure

³⁹National Council on the administration of justice, 'Understanding pretrial detention in respect to case flow management and conditions of detention,54.

⁴⁰National Council on the administration of justice, 'Understanding pretrial detention in respect to case flow management and conditions of detention,44.

⁴¹Geoffrey K. Sang v Director of Public Prosecutions & 4 others [2020] eKLR

⁴²Article 157(6)(b), Constitution of Kenya,2010.

⁴³Ochieng W, The Independence, Accountability and Effectiveness of Constitutional Commissions and Independent Offices in Kenya,2020.

institutional independence which are functional, operational and financial, perception of independence, and collaboration and consultation with other State organs. He concluded that without a considerable degree of independence, constitutional commissions and independent offices cannot hold the legislature and the executive accountable.⁴⁴ This paper shows the importance of independent institutions and the DCI being the organ tasked with undertaking specialized criminal investigative services should be free from any interference when its conducting is functions. Though the DCI has not been recognized as an independent institution and this paper shows why it should be recognized as one.

Andrew Kent in his paper on the Congress and the Independence of Federal Law Enforcement dealt with the independence of the Department of Justice and of the Federal Bureau of Criminal Investigations. The paper identified one way that Congress could attempt to protect the autonomy and impartiality of the Department of Justice and Federal Bureau of Investigations is by setting qualifications or eligibility rules for the persons whom the President may select for agency leadership.⁴⁵ This paper showed the importance of having the Director of Criminal Investigations be free from political interference.

As detailed above there are no laws that explicitly protect the rights of the suspects in the justice system. There has also been no research as to whether the Directorate of Criminal Investigations should be an autonomous body.

1.12 Limitations of the study

The main limitation of the study is inadequate time and resources to commit to interaction with investigators in the different branches of the DCI at the county level.

1.13 Chapter breakdown

Chapter 1: Introduction.

Chapter 2: Contextual Analysis of the Statutory Laws in Kenya that guide Investigations

Chapter 3: Legal Pretrial Standards that enhance Proper Investigations

⁴⁴Ochieng W, The Independence, Accountability and Effectiveness of Constitutional Commissions and Independent Offices in Kenya,2020.

⁴⁵Kent A, Congress, and the Independence of Federal Law Enforcement 52 (1927) the Fordham Law Archive of Scholarship and History,2019, 1982.

Chapter 4: Should the Directorate of Criminal Investigations be an autonomous institution?

Chapter 5: Findings, Conclusions and Recommendations

CHAPTER TWO

CONTEXTUAL ANALYSIS OF THE STATUTORY LAWS IN KENYA THAT GUIDE INVESTIGATIONS

2.1 Introduction

This chapter looks into the legal and regulatory framework that guides investigations in Kenya. Consequently, it is intended to address the first research question of this study which is whether the legal and regulatory framework that guides investigations in Kenya is adequate. The existing laws that govern the process of investigations are the Constitution of Kenya (2010), the Evidence Act, the Criminal Procedure Code, the National Police Act and International Law treaties that protect the rights of the victims and the suspects.

2.2 The Existing Legal Framework

2.2.1 Constitutional Provisions

The preamble of the Kenyan Constitution respects the protects the aspirations of all Kenyan's for a government founded on the basic values of human rights, freedom, liberty, democracy, social justice and the rule of law.⁴⁶ Thus the DCI should endeavor to fulfil the aspirations of the citizens of Kenya.

Article 10 of Kenya's constitution lays down national values and principles of governance which include human dignity, equity, social justice, equality and human rights.⁴⁷ National values bind all state organs, state officers, public officers whenever any of them applies or interprets the constitution or implements public policy decisions.⁴⁸ The DCI is a state organ that is bound by the values of Article 10.

The Constitution of Kenya provides for access to justice and states that the, 'State shall ensure access to justice for all persons and shall be fair and if any fee is required it shall be reasonable and shall not impede access to justice.'⁴⁹ Article 159 builds upon Article 48 by providing that justice shall be served to all irrespective of status and procedural technicalities are administered without

⁴⁶ Preamble, Constitution of Kenya, 2010.

⁴⁷ Article 10(2), Constitution of Kenya, 2010.

⁴⁸ Article 10(1), Constitution of Kenya, 2010.

⁴⁹ Article 48, Constitution of Kenya, 2010.

undue regard.⁵⁰ To end widespread impunity and ensure that people access justice, the DCI should ensure that proper investigations are carried to avoid having cases in the courts that deal with procedural technicalities instead of substantial issues.

The DCI can apprehend offenders,⁵¹ the Kenyan Constitution in Article 29 also provides for the rights and protection of an individual, including the right not to be unlawfully deprived of liberty or without just cause.⁵² The Directorate has been charged with the abuse of power in cases such as the *Geoffrey K. Sang v Director of Public Prosecutions & 4 others* whereby the petitioner's arrest by officers of the DCI was malicious.⁵³ Thus the Directorate should ensure that it does not misuse its powers.

The right to a fair hearing which is an absolute right as specified in article 25(c) of the Constitution which states that in view of any other provision in this Constitution, the right to a fair trial cannot be restricted.⁵⁴ Article 50 2(a) provides that a person is to be presumed innocent until the contrary is proven and hence the DCI should promote the right to a fair trial by striving to ensure that they collect the evidence needed.

The DCI should align its activities with the Kenya Constitution regarding the rights of an arrested person. The Directorate should also strive to protect the rights of the suspects even though it has not been expressly stated in the Constitution.

2.2.2 The Evidence Act

The Evidence Act CAP 80 of 2014 which governs evidence in Kenya. The general rule is that evidence must be relevant to the fact in issue.⁵⁵ In *Director of Public Prosecution v Kilbourne* the holding was that evidence is relevant if it is logically probative/ disprobative of a matter that requires proof.⁵⁶

⁵⁰ Article 159(2), Constitution of Kenya, 2010.

⁵¹ Section 35, National Police Service Act, 2012.

⁵² Article 29, Constitution of Kenya, 2010.

⁵³ *Geoffrey K. Sang v Director of Public Prosecutions & 4 others* [2020] eKLR

⁵⁴ Article 25(c), Constitution of Kenya, 2010.

⁵⁵ Section 5 Evidence Act (CAP 80 of 2014).

⁵⁶ *Director of Public Prosecution v Kilbourne* (1973), *The Kenyan Legal Scholar*.

The Evidence Act provides for the admissibility of statements forming part of the *res gestae*,⁵⁷ the rule against admissibility of statements of hearsay evidence and the exceptions thereto,⁵⁸ the preference of primary evidence over secondary evidence and the exceptions thereto.⁵⁹ The Act also provides for the rules governing the compellability and privileges of witnesses,⁶⁰ burden and standard of proof which is beyond reasonable doubt in a criminal case⁶¹ and opinion evidence rules.⁶²

Though according to the Evidence Act, it would seem that electronic evidence is admissible even if it is not in its original form.⁶³ The same legislation then goes on to state that for this evidence to be admissible, the computer that produces it should be working properly and doing what it was designed to do, and that a certificate can be evidence of this.⁶⁴ This does not imply that without a certificate, the evidence shall not be admissible. However, courts have interpreted it to mean just that.⁶⁵ Section 106 B of the Evidence Act is very important as electronic evidence can be easily manipulated and in the modern era, most information is stored and communicated online. Though it is in contradiction with section 78A (2) of the Act.

The Evidence Act should be amended to avoid this clash so that the Directorate can be in a position to deal with cybercrimes effectively.

2.2.3 The Criminal Procedure Code

Criminal procedures are safeguards against the indiscriminate enforcement of criminal legislation and inhuman prosecution of offenders.⁶⁶ They are specifically designed to uphold civil rights of the offenders and defendants starting from the initial contact with the police and going through detention, investigation, conviction, sentencing and appeals.⁶⁷

⁵⁷Res gestae means all of the things done, including words spoken in the course of a transaction or event.

⁵⁸ Sections 33,34 Evidence Act (CAP 80 of 2014).

⁵⁹Sections 35-106 Evidence Act (CAP 80 of 2014).

⁶⁰ Section 128-143 Evidence Act (CAP 80 of 2014).

⁶¹Section 111 Evidence Act (CAP 80 of 2014).

⁶²Sections 48-54 Evidence Act (CAP 80 of 2014).

⁶³ Section 78A (2), Evidence Act (CAP 80 of 2014).

⁶⁴ Section 106B, Evidence Act (Act No 46 of 1963).

⁶⁵ Republic v Mark Lloyd Steveson [2016] eKLR; Stegma Enterprises Limited v Viktor Maina Ngunjiri [2016] eKLR.

⁶⁶Criminal Procedure, Law Library American Law and Legal Information <<https://law.jrank.org/pages/5873/Criminal-Procedure-Introduction.html>> on 12th October 2020.

⁶⁷Criminal Procedure, Law Library American Law and Legal Information <<https://law.jrank.org/pages/5873/Criminal-Procedure-Introduction.html>> on 12th October 2020.

Before they may make a lawful arrest, there are many procedures that must be followed so that the rights of the defendant remain secure.⁶⁸ Firstly, they ascertain the facts and circumstances of the case later on apprehend the suspected offender.⁶⁹

The gathering of evidence may consist of the examination of different persons (including the suspect) and the reduction of their statements into writing and search the places and seizure of objects deemed appropriate at the trial stage.⁷⁰ Finally, formation of an opinion as to whether the material collected is enough to place a case before a magistrate for trial and taking the necessary steps for the same by the filing of a charge-sheet.⁷¹

The DCI officers should adhere to the procedure in the Criminal Procedure code when apprehending a person for interrogation to avoid derogating their rights.

2.2.4 The National Police Service Act

The DCI is established by the National Police Service Act,⁷² which is mandated with criminal investigation.⁷³

The National Police Act also lays down the qualifications of the Director,⁷⁴ procedure of appointment of the director,⁷⁵ and procedure for removal of the director.⁷⁶ The director of the Directorate holds the most important seat in the Directorate and him being appointed by the president opens up the Directorate to a lot of interference from the executive.

The National Police Service Act also provides for the funds of the Directorate which consist of monies provided by Parliament for purposes of the Directorate, such monies or assets as may accrue to the Directorate in the performance of its functions or the exercise of its powers under this Act or any other written law and all monies from any other source provided or donated to the Directorate.⁷⁷

⁶⁸Pantekoeck K, 'What Procedures must the police follow while making an arrest? Find Law, 2nd June 2020, 2.

⁶⁹Srinivasa Y, Investigation Process: Role of Courts, 6th November 2017, 3.

⁷⁰Srinivasa Y, Investigation Process: Role of the Courts, 6th November 2017, 3

⁷¹Srinivasa Y, Investigation Process: Role of the Courts, 6th November 2017, 3

⁷²Section 28, National Police Service (Act No 84 of 2014).

⁷³Section 35, National Police Service (Act No 84 of 2014).

⁷⁴Section 29, National Police Service (Act No 84 of 2014).

⁷⁵Section 30, National Police Service (Act No 84 of 2014).

⁷⁶Section 31, National Police Service (Act No 84 of 2014).

⁷⁷Section 36, National Police Service (Act No 84 of 2014).

The National Police Service Act provides for the funds, leadership and functions of the Directorate of Criminal Investigations.

2.2.5 International Instruments

The general rules of international law are part of Kenya's law.⁷⁸ Any treaty or convention ratified by Kenya forms part of the law of Kenya under the Kenyan Constitution.⁷⁹ This shows that international instruments form part of Kenya law. The study will look into the Universal Declaration of Human rights and the International Covenant on Civil and Political Rights.

i. The Universal Declaration of Human Rights

Article 9 of the Universal Declaration of Human Rights (UDHR) provides for the right against arbitrary arrest, detention, or exile.⁸⁰ Article 10 provides for full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.⁸¹ Article 11(1) provides for the right to be presumed innocent until proven guilty according to the law in a public trial at which he has had all the guarantees necessary for his defence.⁸²

The Universal Declaration of Human Rights is part of the Kenyan Law and hence the rights that are enshrined in the Declaration must be protected by the state and all state organs.

ii. The International Convention on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) undertakes to promote conditions within states to allow the enjoyment of civil and political rights.⁸³ Countries that have ratified the Covenant are obligated to protect and preserve the basic human right and are compelled to take administrative, judicial, and legislative measures to protect the rights enshrined in the treaty and to provide an effective remedy.⁸⁴ Article 9 – Right to liberty and security of the

⁷⁸Article 2(5) Constitution of Kenya 2010.

⁷⁹Article 2(6) Constitution of Kenya 2010.

⁸⁰Article 9, Universal Declaration of Human Rights.

⁸¹Article 10, Universal Declaration of Human Rights.

⁸²Article 11, Universal Declaration of Human Rights.

⁸³Purpose, International Covenant on Civil and Political Rights.

⁸⁴Article 3, International Covenant on Civil and Political Rights.

person.⁸⁵ Article 10 – Rights of detainees.⁸⁶ Article 14 – Equality before the courts and tribunals. Right to a fair trial.⁸⁷ Article 15 – No one can be guilty of an act of a criminal offence which did not constitute a criminal offence.⁸⁸ Article 17 – Freedom from arbitrary or unlawful interference.⁸⁹ These provisions also form part of the Kenyan laws and should be protected by the state all state organs.

2.8 Conclusion

The study found out that there is a legal framework put forth to protect human rights of arrested persons is adequate though the laws that have been put in place to protect the rights of the suspects is inadequate leaving the suspects vulnerable to being abused by the criminal justice system.

⁸⁵Article 9, International Covenant on Civil and Political Rights.

⁸⁶Article 10, International Covenant on Civil and Political Rights

⁸⁷Article 14, International Covenant on Civil and Political Rights.

⁸⁸Article 15, International Covenant on Civil and Political Rights.

⁸⁹Article 17, International Covenant on Civil and Political Rights.

CHAPTER THREE

LEGAL PRETRIAL STANDARDS THAT ENHANCE PROPER INVESTIGATIONS

3.1 Introduction

This chapter intends to address the second research question of this study which is to ascertain whether the limitations and possibilities that legal standards place on investigations enhance proper investigations. This is based on the hypotheses that legal standards enhance proper investigations as human rights are protected.

The primary duty of an investigating officer is to perform proper investigations.⁹⁰ This chapter will look into the criminal justice standards that affect the Directorates' officer's while conducting their mandate which is the detection, prevention, and the investigation of crime.⁹¹ These standards include but are not limited to innocent until proven guilty; searches and seizures; illegally obtained evidence; pre-trial detention; bail and bond standards; legal representation and self-incriminating evidence.

3.2 Legal standards that affect investigations

3.2.1 Innocent until proven guilty

Whenever a crime is committed, investigations and court proceedings take place before a final decision is made.⁹² The Kenyan Constitution, states that each person is entitled to a fair trial, which includes the right to be presumed innocent until proven otherwise.⁹³ A complete and proper understanding of this should lead to a more humane and dignified treatment of the suspect.⁹⁴

Innocent until proven guilty is a crucial standard as its limitation on the powers of the investigating officers ensure that the rights of the suspects are protected. When the suspect is treated as if they are guilty and in actual sense, they are not it leads to socio-economic problems such as loss of jobs and eviction from their residences.⁹⁵

⁹⁰ American Bar Association, 'Standards on Prosecutorial Investigation,' 9th October 2020,1.

⁹¹ Section 35, National Police Service (Act No 84 of 2014).

⁹² Buhungiro E, 'Know your rights: You are innocent until proven guilty' The New Times,2018,1.

⁹³ Article 50(2)(a) Constitution of Kenya (2010).

⁹⁴ Kiage P, "Essentials of criminal procedure in Kenya", Law Africa, Nairobi,2010,64.

⁹⁵ Criminal Justice System Report, Understanding pre-trial detention in respect to case flow management and conditions of detention, 55.

This standard enhances investigations as it protects the suspects of a crime from being arrested and imprisoned without the due process being followed.

.3.2.2 Searches and seizures

Evidence can be obtained by way of search and seizures. In Kenya, the law acknowledges two types of searches: search with a warrant and search without a warrant.⁹⁶

Searches and seizures entail interference with the right of a person to privacy and it is therefore necessary to conceptualise privacy in order to examine both legal and policy debates.⁹⁷

We all have some innate sense that certain aspects of our lives are private but what does this 'private' part really mean? Justice Louis Brandeis spoke of the basic essence of the establishment and defence of the right to privacy, defining such a right as 'the most comprehensive of rights and the right most valued by civilized men'.⁹⁸ The dedication of a society to privacy means limiting or even sacrificing freedom of speech and of the press, effective law enforcement and access to data. Therefore, it is necessary to understand why the idea of privacy is so vital so as to establish such important tradeoffs.⁹⁹

The Kenyan constitution protects the right to privacy.¹⁰⁰ One of the major privacy debates focuses on the right of the individual to privacy as a restriction on government interference with an individual's liberty. Judge Bradley and in *Boyd v United States* case expressly ruled that:

The very essence of constitutional liberty and security is affected by all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal liberty, personal security, and private property.¹⁰¹

⁹⁶ Kiage P, "Essentials of criminal procedure in Kenya", Law Africa, Nairobi, 2010, 23.

⁹⁷ Solove D, "'I've got nothing to hide' and other misunderstandings of privacy" 44 San Diego Law Review 745 2008, 254.

⁹⁸ *Olmstead v United States* (1928), The Supreme Court of the United States.

⁹⁹ Solove D, 'Conceptualizing privacy' 90 California Law Review 4, 2002, 1092.

¹⁰⁰ Article 31, Constitution of Kenya (2010).

¹⁰¹ *Boyd v United States* (1886), The Supreme Court of the United States.

In Kenya, a police officer may search premises without a warrant if they record the grounds on which the officer feels that obtaining a warrant will cause unreasonable delays.¹⁰² This excessive power that is given to the search without a warrant can lead to abuse of power by the Directorate's officers.

Searches and seizures enhance investigations as the officers can search and seize property or people to obtain the evidence they need.

3.2.3 Illegally obtained evidence

Illegally obtained evidence is characterized as evidence gained by breaching the constitutional rights of an individual against illegal searches and seizures of evidence without a probable cause.¹⁰³ Some of the ways in which evidence may be obtained illegally include illegal searches and seizures, the commission of a crime, a tort, giving a bribe, issuing a threat, deception, or unfair inducement.¹⁰⁴

The problem of admissibility of illegally obtained evidence raises certain issues of striking a balance between suppressing crime and guaranteeing fundamental human rights; between efficiency and fairness; crime control and respect for individual freedom and between the need to search for truth and the need to safeguard certain basic values.¹⁰⁵

Under Article 50(4) of the Kenya Constitution, evidence that is collected in a manner that violates any fundamental freedom in the Bill of Rights shall be excluded if the admission of the evidence will make the trial unfair or would otherwise prejudice the admission of justice.¹⁰⁶ This article seems to place limitations on the collection of evidence by the police that would render the trial unfair.¹⁰⁷

However, there are consequences of excluding illegally obtained evidence as the suspect may be set free and this could negatively affect the work of law enforcement officers undertaking the

¹⁰² Section 20(1), Police Act, (2010).

¹⁰³ Black's Law Dictionary, 2nd ed.

¹⁰⁴ Kenya Legal Resources, 'Illegally obtained evidence' on - <http://www.kenyalawresourcecenter.org/2011/07/illegally-obtained-evidence.html> on 9th October 2020.

¹⁰⁵ Evidence Project of the Law Reform Commission of Canada, 'The exclusion of illegally obtained evidence', 1974, 4.

¹⁰⁶ Article 50(4) Constitution of Kenya (2010).

¹⁰⁷ Getanda M, 'Illegally obtained evidence: Which way for Kenya courts?' 7(11) International Journal of Liberal Arts and Social Science, 2019, 61.

investigations.¹⁰⁸ One of the most fiercely debated issues in the Kenyan Jurisprudence is whether and under what conditions courts can exclude unlawfully or inappropriately obtained information. While allowing the courts to receive evidence obtained weakens the very foundations of justice, projects a bad image of the administration of justice and consequently erodes public confidence in it.¹⁰⁹

This dilemma is seen in the cases of *Kuruma s/o Kaniu v Queen* and in the *Anthony Murithi v The OCS Meru* and two others. In the *Kuruma s/o Kaniu v Queen*, Lord Goddard claimed that the criteria to be applied when deciding whether the evidence is admissible is whether it is applicable to the matters in the issue, if it is admissible, how the evidence was collected is not a matter for the court.¹¹⁰ However, in *Anthony Murithi v The OCS Meru Police Station* and two others, the court stated that if proof is corrupted by illegality, the evidence cannot be included in any proceedings against the applicant.¹¹¹

In Kenya, it remains to be seen whether the Evidence Act or the Criminal Procedure Code will be amended to be in accordance with the provisions of the Kenyan Constitution about illegally obtained evidence. This standard enhances investigations as the discretion given to the magistrate allows the courts to admit or disallow evidence so that justice can be served.

3.2.4 Bail and Bond

Bail is the release, awaiting a criminal trial, of an accused or a suspected person from jail on the condition that if he absconds, money will be paid.¹¹² Unless there are compelling grounds for not being released, the defendant the right to be released on bail or bond, on fair terms pending a charge or trial, unless there are compelling grounds for not being released.¹¹³

Therefore, all decisions about whether to issue bail involve important issues regarding the balance of interests. Unless proven guilty a person is presumed to be innocent of a criminal charge, thus, refusing a defendant bail can mean depriving an innocent person of liberty.¹¹⁴ However, allowing

¹⁰⁸ Getanda M, 'Illegally obtained evidence: Which way for Kenya courts?' 7(11) *International Journal of Liberal Arts and Social Science*, 2019, 66.

¹⁰⁹ Cote J, 'The exclusion of illegally obtained evidence', 22.

¹¹⁰ *Kuruma s/o Kaniu v Queen* [1955] 1 All ER 236

¹¹¹ *Anthony Murithi v the O.C.S of Meru Police Station & 2 others* [2012] eKLR

¹¹² Kiage P, "Essentials of criminal procedure in Kenya", *Law Africa*, Nairobi, 2010, 111.

¹¹³ Article 49(1)(h), *Constitution of Kenya* (2010).

¹¹⁴ Kiage P, "Essentials of criminal proceedings in Kenya," *Law Africa*, Nairobi, 2010, 2011.

a suspected person to be released pending prosecution could be encouraging the suspect to abscond, to interfere with witnesses, to manipulate evidence, to commit more crimes or allowing the suspect to participate in behavior that prejudices the cause of justice.¹¹⁵

The bond and bail decision-making process is governed by principles such as: the right of the a person to be presumed innocent unless proven guilty, a person's right to liberty, the obligation to the attend trial, the right to fair bail and bond terms, bail determination must balance the rights of the suspected persons and the interests of justice and the consideration of the rights of the victims.¹¹⁶

The bail and bond process ensures that persons appear in court and it also protects those defendants' rights to remain innocent while awaiting trial.

3.2.5 Self-incriminating evidence

The exclusionary law as observed in the case of R v Sang, helps to protect the rights of the suspect at the pretrial stage, that is, the person's immunity against self-incrimination. Since the defendant has a right against self-incrimination at the trial, it would only be fair to extend the protection against self-incrimination to the pretrial stage.¹¹⁷ It would be hypocritical to grant the suspect the right not to provide self-incriminating evidence at the trial stage and not at the pretrial stage.

This right ensures freedom from torture and inhuman treatment, thereby enhancing investigations.

3.2.6 Pretrial detention

Pretrial detention means the confinement of convicted and suspected persons in custody until their cases are investigated, heard and determined.¹¹⁸

The National Police Service Act provides that pretrial detainees are to be held in police lock-up facilities.¹¹⁹ However, not all police stations in the country have such facilities, in spite of the fifth schedule and pretrial detainees are still held in prisons.¹²⁰

¹¹⁵ Kiage P, "Essentials of criminal proceedings in Kenya," Law Africa, Nairobi, 2010, 2011.

¹¹⁶ National Council on the Administration of Justice, 'Bail and Bond Policy Guidelines,' 2015.

¹¹⁷ R v Sang (1979), England Law Reports.

¹¹⁸ Kenya Law Reform Commission, 'Definitions,' -< <https://www.klrc.go.ke/index.php/mandate/bail-and-bond-policy-guidelines/618-definitions>> on 9th October 2020.

¹¹⁹ Paragraph 10, Fifth Schedule, National Police Service Act, 2011.

¹²⁰ Section 32, Prisons Act, (CAP 90 of 2009).

Although detainees appear in court, many remain in detention.¹²¹ From a rule of law and civil rights viewpoint, the ease with which courts are now detaining suspected criminal offenders is a cause for concern.¹²² It is now typical for courts to allow suspects to be held in pretrial custody for up to 30 days before they can formally plead to a charge, supposedly to allow investigators to carry out further investigations.¹²³ Furthermore, the extensions are granted without prosecutors breaking a sweat.¹²⁴ It should be noted that pretrial detainees make up almost half of the prison population.¹²⁵

Pretrial detention enhances investigations as it prevents the suspects from eloping though the Directorate should strive to collect evidence expeditiously to avoid confining people for long periods unnecessarily.

3.2.7 Legal representation

According to Article 50 (2) (g) of the constitution, provides for the right to a fair trial, including the right to choose to be represented by a lawyer.¹²⁶ Further sub-clause (h) provides for an advocate assigned by the state to the convicted person and at the expense of the state if serious injustice would occur.¹²⁷

Pre-trial detainees have the right, properly and without unreasonable hinderance to be assisted by legal counsel to prepare their defence.¹²⁸ Ensuring legal aid is available as soon as possible allows for money to be used efficiently as cases are dealt with at the front end of the criminal justice system.¹²⁹

Counsel provides the suspect with the technical skills to exercise his or her rights in the criminal proceedings.¹³⁰ The suspect, who is usually a common person without expertise in substantive and

¹²¹ The Socio- Economic Impact of Pre-Trial Detention in Nairobi, Kenya, 53.

¹²² The Socio- Economic Impact of Pre-Trial Detention in Nairobi, Kenya, 53.

¹²³ The Socio- Economic Impact of Pre-Trial Detention in Nairobi, Kenya, 53

¹²⁴ Kahuthia E, Judiciary at fault to issue long pre-trial detention orders' The Standard, 11th October 2020-<
<https://www.standardmedia.co.ke/commentary/article/2001314544/judiciary-wrong-on-lengthy-pre-trial-detention-orders>> on 11th October 2020.

¹²⁵ National Council on the Administration of Justice, 'Bail and Bond Policy Guidelines,' 2015, 6.

¹²⁶ Article 50(2)(g), Constitution of Kenya (2010).

¹²⁷ Article 50(2)(h), Constitution of Kenya (2010).

¹²⁸ Criminal Justice System Report, Understanding pre-trial detention in respect to case flow management and conditions of detention, 63.

¹²⁹ Criminal Justice System Report, Understanding pre-trial detention in respect to case flow management and conditions of detention, 63.

¹³⁰ Ginter J and Soo A, The right of the suspect to counsel in the pre-trial criminal proceedings, 174.

procedural law, does not have full awareness of his or her rights and lacks skill in exercising them.¹³¹ Here counsel contributes to the principle of equality of arms.¹³² In the context of pre-trial proceedings, it is very difficult to exclude the right to counsel based on an argument that the proceedings are not yet adversarial.¹³³

The right to appear with one's counsel applies to every critical step of the proceedings, i.e., not only to the trial stage but also to the pre-trial proceedings. It begins as soon as one is questioned about the crime. The decision in *Miranda v Arizona* requires a suspect to be told about the right to an attorney when he/she is placed under arrest and before interrogation.¹³⁴

The importance of legal presentation is seen in the human craving for justice is evident from public reaction whenever a criminal evades capture and punishment and whenever an innocent is wrongfully convicted and sent to prison.¹³⁵ The DCI should endeavor to have legal presentation afforded to the suspect to avoid derogation of his rights as this would enhance investigations as people would have faith in the justice system as no side would feel as if they were being victimized.

Conclusion

Pretrial rights are important so as to safeguard justice. Legal standards enhance investigations as it allows the investigators to carry out their mandate as they can carry out searches and seizures. Legal standards also enhance investigations as they ensure that the rights of the suspects are protected and as a result, the citizens have faith in the criminal justice system.

¹³¹Ginter J and Soo A, The right of the suspect to counsel in the pre-trial criminal proceedings, 174.

¹³²Ginter J and Soo A, The right of the suspect to counsel in the pre-trial criminal proceedings,174.

¹³³ Ginter J and Soo A, The right of the suspect to counsel in the pre-trial criminal proceedings,174.

¹³⁴ *Miranda v Arizona* (1966), The Supreme Court of the United States.

¹³⁵ Ginter J and Soo A, The right of the suspect to counsel in the pre-trial criminal proceedings, its content, and the extent of application,2012, 175

CHAPTER 4

SHOULD THE DIRECTORATE OF CRIMINAL INVESTIGATIONS BE AN AUTONOMOUS INSTITUTION?

4.1 Introduction

Independence of the Directorate of Criminal Investigations refers to freedom from executive, judicial, legislative powers, or any other institutions and persons¹³⁶ It refers to the autonomy of the Directorate to make its own decisions. The establishment of independent bodies concerns itself with the principle of separation of powers which goes beyond the separation of powers between the three arms of government. ¹³⁷The scheme of separation of powers involves a quasi-federal structure of government and the provision for independent offices and commissions. The Constitution of Kenya established 10 independent commissions and 2 independent offices,¹³⁸ whose goal is to promote accountability and uphold constitutional democracy. ¹³⁹

The Directorate's primary function is to collect and provide criminal intelligence. This function directly ties to Article 50 of the Constitution of Kenya on the right to a fair trial which is a non-derogable right as stated in Article 25 of the Constitution of Kenya.¹⁴⁰ This shows that the mandate of the Directorate is crucial hence its operations should not be interfered with by third parties. This research will focus on institutional independence, operational independence, functional independence and financial independence.

4.2 Institutional Independence

Institutional Independence refers to independence from other branches of power.¹⁴¹ The DCI is established as a semi-autonomous directorate of the National Police which is responsible for investigating complex cases.¹⁴² Therefore it is not an independent institution.

¹³⁶Uberi M, 'An independent investigative mechanism: Identifying ways to combat impunity in Georgia,2018,1.

¹³⁷Ochieng W, 'The Independence, Accountability and Effectiveness of Constitutional Commissions and Independent Offices in Kenya,2020, 142.

¹³⁸Article 248, Constitution of Kenya 2010.

¹³⁹ Ochieng W, 'The Independence, Accountability and Effectiveness of Constitutional Commissions and Independent Offices in Kenya,2020, 142.

¹⁴⁰Article 25, Constitution of Kenya 2010.

¹⁴¹ International Commission of Jurists, 'International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors, 2007, 21.

¹⁴²< <http://www.nationalpolice.go.ke/2015-09-21-17-23-32/dci.html>> on 27th July 2020.

The President of the Republic of Kenya appoints the director of the Directorate. The current director is George Maingi Kinoti who was appointed by President Uhuru Kenyatta on 5th January 2018. The appointment of the director by the president opens up the DCI to direct control from the executive as there is no provision for approval by the parliament.¹⁴³ Furthermore, there is no provision on the tenure of office of the director of criminal investigations as section 29(2) of the National Police Act states that the National Police Commission shall set the term of office of the Director of Criminal Investigations which has not being expressly specified.¹⁴⁴ This lack of clarity brings a lot of uncertainty as the director is treated as an employee at will and this may hinder proper investigations. A term longer than that which any President might serve should be provided for as this would both symbolically and practically remove the director from political whirlwinds.¹⁴⁵

The DCI Department is under the direction, command and control of the Inspector-General.¹⁴⁶ Even though this would ensure accountability it would lead to interference if the roles the inspector general performs regarding the DCI are not well defined.

There should be structural safeguards in the Constitution and other legislation to protect the DCI from political pressures and manipulation. This would also protect detectives from impermissible or unlawful pressure.¹⁴⁷ The Directorate should be established as an independent institution both in practice and in theory.

4.3 Functional Independence

Functional Independence implies that independent institutions should enjoy independence by only being subject to the constitution and the law.¹⁴⁸ They should not be directed or controlled by any interests or person external to these bodies.¹⁴⁹ Section 35 of the National Police Service Act lays down the functions of the DCI¹⁵⁰

Even with its specialties, the DCI needs expertise in terms of prosecution preparedness. This is because internal prosecutors would analyse files and advise on the need for further investigations.

¹⁴³Directorate of Criminal Investigations, Background of the Directorate of Criminal Investigations,1.

¹⁴⁴Section 29 (2), National Police Act, 2012.

¹⁴⁵Kent A, Congress, and the Independence of Federal Law Enforcement 52 (1927) the Fordham Law Archive of Scholarship and History,2019, 1982.

¹⁴⁶Section 28, National Police Act,2011.

¹⁴⁷Wainaina N, Make DCI astute law enforcement agency, Nation, 2018,1.

¹⁴⁸Article 249(2) Constitution of Kenya,2010.

¹⁴⁹Article 249 (2) Constitution of Kenya,2010.

¹⁵⁰Section 35, National Police Service,2012.

¹⁵¹ The DCI does not have internal prosecutors as they are under the Office of the Director of Public Prosecutions. The result of this has been a long running supremacy war on whether the DCI has the powers to institute any criminal charges without the approval of the ODPP.¹⁵²

The duties and functions of the DCI do not include any prosecutorial functions. It is arguable that for the DCI to purport to exercise powers that he does not have in law would be ultra vires and would also be punishable criminally as an abuse of office under Section 101 of the Penal Code.¹⁵³

The laws on private prosecutions in Kenya raise issues that in practice are likely to provide challenges for the Director of Public Prosecutions and the courts. Article 157 (6)(b) of the Constitution provides that the Director of Public Prosecutions may take over and continue any criminal proceedings commenced in any court (other than a court martial) that have been instituted or undertaken by another person or authority, with the permission of the person or authority. This means that private prosecutions are provided for in the Constitution of Kenya 2010.

This dilemma has been seen in cases such as the *Geoffrey K. Sang v Director of Public Prosecutions & 4 others* [2020] eKLR where it was held that the DCI cannot institute criminal proceedings against an individual without the consent of the Director of Public Prosecutions.¹⁵⁴

The right to private prosecution should be enshrined in the constitution and should not be subordinated to the powers of the DPP. There should be set procedures to access the consent of the Director of Public Prosecutions to enhance the separation of powers principle in Kenya.

The DCI must be legally empowered to pursue powerful individuals without fear, favor or prejudice.

4.4 Operational Independence

Operational independence speaks to the need for ensuring that independent institutions are shielded from interference and manipulation.¹⁵⁵ This can be guaranteed by ensuring that an

¹⁵¹ Wainaina N, Make the Directorate of Criminal Investigations astute law enforcement agency.' Nation, 2018,1.

¹⁵² What the Law Says, 'Does the Directorate of Criminal Investigations have Legal Powers to Start and Sustain a Criminal Prosecution.' The Star, 3rd December 2020-< <https://www.the-star.co.ke/news/big-read/2020-07-27-does-dci-have-legal-powers-to-start-and-sustain-a-criminal-prosecution>> on 3rd December 2020.

¹⁵³ What the Law Says, 'Does the Directorate of Criminal Investigations have Legal Powers to Start and Sustain a Criminal Prosecution.' The Star, 3rd December 2020-< <https://www.the-star.co.ke/news/big-read/2020-07-27-does-dci-have-legal-powers-to-start-and-sustain-a-criminal-prosecution>> on 3rd December 2020.

¹⁵⁴ *Geoffrey K. Sang v Director of Public Prosecutions & 4 others* [2020] eKLR

¹⁵⁵ Ochieng W, The Independence, Accountability and Effectiveness of Constitutional Commissions and Independent Offices in Kenya, 2020, 148

institution has control over the day –to –day running of their affairs and in the execution of their mandate.¹⁵⁶ In this context, independence refers to the right to make decisions free of government intervention and having the organisational infrastructure necessary to operate effectively and efficiently.¹⁵⁷

It is essential that investigators be subject to overall regulation and accountability for their activities.¹⁵⁸ However, oversight does not extend to interference with operational decisions such as whether a particular individual should be investigated, the methods to be used, or whether a case should be the subject of further action.¹⁵⁹

4.5 Financial Independence

Financial Independence means that the executive branch should not have absolute funding for an institution.¹⁶⁰ With devolution, the DCI devolved certain aspects of its functions to the counties to tackle local context crimes and only seek reinforcement on a need basis.¹⁶¹

The DCI has really tried to improve and even cope with the dynamics in technology in terms of communications and examination of evidence. However, there is still a need to improve existing technology.¹⁶² This is possible if the Directorate has adequate funds.

The commitment of significant resources also sends a powerful signal that the highest levels of government are strongly committed to the prevention and elimination of corruption, which both deters offenders and encourages informants.¹⁶³

The funds of the Directorate consist of monies provided by parliament for purposes of the Directorate and monies or assets as may accrue to the Directorate in the performance.¹⁶⁴ When the funds allocated to the Directorate are inadequate it negatively affects its operations.

¹⁵⁶Ochieng W, The Independence, Accountability and Effectiveness of Constitutional Commissions and Independent Offices in Kenya, 2020, 148

¹⁵⁷Ochieng W, The Independence, Accountability and Effectiveness of Constitutional Commissions and Independent Offices in Kenya, 2020, 148.

¹⁵⁸Anti- Corruption Tool Kit, Enforcement: Tool 28 Guidelines for successful investigations into corruption’ 2011, 186.

¹⁵⁹ Anti- Corruption Tool Kit, Enforcement: Tool 28 Guidelines for successful investigations into corruption’ 2011, 186.

¹⁶⁰Ochieng W, The Independence, Accountability and Effectiveness of Constitutional Commissions and Independent Offices in Kenya, 2020, 151.

¹⁶¹Wainaina N, Make DCI a state law enforcement agency, Nation, 2018, 1.

¹⁶²Wainaina N, ‘Make the Directorate of Criminal Investigations a state Enforcement Agency,’ Nation, 2018, 1.

¹⁶³Anti- Corruption Tool Kit, Enforcement: Tool 28 Guidelines for successful investigations into corruption’ 2011, 185.

¹⁶⁴Section 36 National Police Service Act, 2012.

4.6 Conclusion

An independent investigative agency with robust safeguards for independent and impartial investigation is desired. Structural, operational, institutional and financial independence is the backbone of appropriate performance by an institution. Not only does independence shield it from meddling, but also enables it to perform well. The DCI should be removed from the National Police Service and it must be legally empowered to pursue powerful individuals without fear, favor or prejudice. Though there should be an oversight institution to prevent uncontrolled operations.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

This chapter provides a conclusion of the study as developed and broken down in the previous chapters. It proceeds to offer some recommendations geared towards making the Kenyan legal environment on the protection of human rights at the investigative stage more receptive towards the rights of the suspects.

5.2 Conclusion

This study has investigated the phenomenon of proper investigations in particular investigations that are carried out by the Directorate of Criminal Investigations.

Chapter one laid out the background of the scene of the investigations that is in Kenya and gave a brief background of the DCI. The chapter also laid out the objectives of the research and the specific questions to be researched.

Firstly, the research sought to answer the question of whether the legal and regulatory framework that guides investigations is adequate. The second research question was whether pretrial standards enhance investigations. Thirdly, the research considered the question of whether the Directorate of Criminal Investigations should be an autonomous institution to enhance its operations.

Chapter two analyzed the statutory laws that guide investigations in Kenya. It looked into the Constitution of Kenya (2010), the Evidence Act, the Criminal Procedure Code, the National Police Act and International Law treaties. It was established that laws that have been put in place to protect the rights of the suspects are inadequate leaving the suspects vulnerable to being abused by the criminal justice system.

This chapter explored the idea that an adequate legal and regulatory framework leads to proper investigations as the procedures that are set in the law prevent abuse of powers by the officers of the Directorate. Usually, an adequate legal framework sets out the rights and obligations of the parties that are involved in the investigations and it safeguards the rights of the suspects. By providing this assessment the chapter answered the first research question in the negative by establishing that the legal and regulatory framework that guides investigations in Kenya is inadequate.

Chapter three entailed an inquiry into whether legal pretrial standards enhance proper investigations or limit them. . The specific standards that were researched on were innocent until proven guilty, searches and seizures, illegally obtained evidence, bail and bond, self-incriminating evidence, pretrial detention and legal representation.

The discussion in this chapter disclosed that the defendant's rights are not adequately protected at the pretrial stage as much as they protected at the trial stage. In ensuring analysis of pretrial rights the chapter answered the second research question in the affirmative pretrial procedures are critically important in the enhancement of proper investigations.

Chapter four explored whether the DCI should be an autonomous institution. The DCI is the main investigative agency in Kenya whose primary function is to collect and provide criminal intelligence. The research focused on institutional independence, operational independence, functional independence and financial independence.

This chapter demonstrated that an independent investigative agency with robust safeguards for independent and impartial investigation is desired. Structural, operational, institutional and financial independence is the backbone of appropriate performance by an institution. Not only does independence shield it from meddling, but also enables it to perform well. The DCI should be removed from the National Police Service and it must be legally empowered to pursue powerful individuals without fear, favor or prejudice. Though there should be an oversight institution to prevent uncontrolled operations.

The present chapter will be providing some recommendations.

5.3 Recommendations

The study proposes the following measures to remedy the gaps located:

1. The enactment of a Criminal Investigation Act that will ensure that the rights of the suspects, the injured party, witnesses and minors are protected.

The rights of the suspects remain highly unregulated as compared to the rights of an arrested person. Therefore, the Act would specify the powers and responsibilities of the participants in the criminal investigation. The Act would also lay the procedure for investigating a criminal act and the period of conducting the criminal investigation. Further, the act would also specify the principles that the

investigators are supposed to adhere to when investigating. The Act would also have the procedure of cooperation between the criminal investigation authority and the public prosecutor so as to know who is accountable for failing to adhere to procedural technicalities.

2. The Directorate of Criminal Investigations should be an autonomous institution.

Having an independent DCI will ensure that there is a distribution of power within the Kenyan state and will democratize governance as independent institutions play a significant role in a credible culture and accountability of governance. Financial, functional, operational and institutional independence would promote the effectiveness of the DCI.

3. The enactment of a code of conduct for criminal investigations to ensure that all appropriate measures are taken for the investigation.

The code of practice would ensure that all reasonable steps are taken for the purposes of the investigation and that information which is obtained in the course of the investigations is recorded. The code would also include the form in which the information is to be recorded and also ensure that the information that is collected is revealed to the suspect and to any other person involved in the investigation. The code should also have a liability clause for the failure of a police officer to comply with the provisions of the code.

4. The Directorate should have internal prosecutors who would analyse files and advise on the need for further investigations.

The FBI employs prosecutors as special agents and they ensure that the bureau complies with all the legal standards and this avoids the delaying of justice because of procedural technicalities. The DCI should also have internal prosecutors as coordination within the same department would be easier and faster.

5. The laws on private prosecution in Kenya should be clarified.

The DCI should have the power to institute private prosecutions if substantial damage would occur if the suspect were not prosecuted. Private prosecutions impose legal controls on the government by checking the powers of the DPP and it also counteracts the attempts by the influential people to interfere with the prosecutions.

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