A DEMAND FOR EXCELLENCE: THE GENERAL ASPIRATIONS OF THE PUBLIC ON ETHICAL EXCELLENCE IN ADVOCATES' CONDUCT IN KENYA: A VIRTUE ETHICS PERSPECTIVE

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DECLARATION

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the proposal contains no material previously published or written by another person except where due reference is made in the proposal itself.

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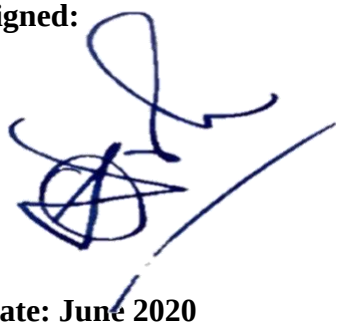

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Approval

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ABSTRACT

Complaints against advocates for unethical conduct are lodged by the public at the Disciplinary Tribunal under section 60 of the Advocates Act, Chapter 16 of the Laws of Kenya. The Disciplinary Tribunal is the body that is empowered by the law in matters of discipline of advocates.

From the nature and content of the complaints lodged at the Disciplinary Tribunal, it is discernible that there is an expectation of virtuous conduct and excellence of character in advocates by the public.

An analysis of the provisions of the Advocates Act and the Advocates Practice Rules that deal with matters of ethics and conduct of advocates reveals that the kind of virtuous conduct and excellence of character that the public expects of advocates is not provided for.

This study explores and concludes that applying a virtue ethics approach as the philosophical underpinning of the Advocates Act and the Advocates Practice Rules would result in the conduct of advocates becoming more virtuous and their achieving excellence of character.

To achieve this, this study recommends firstly, the education of advocates in virtue with special emphasis on the virtues of justice, prudence, integrity and fortitude. Secondly it recommends fostering of a culture of virtue in legal practice by the Law Society of Kenya. Thirdly, it recommends the enforcement of virtue ethics in legal practice by way of legislation and lastly it recommends modifications to the Advocates Act and Advocates Practice Rules with rules that are imbued with a virtue ethics approach.

Table of Contents

TABLE OF CASES

1. Githunguri Dairy Farmers Co-operative Society Limited vs Mary Njoki Mbugua [2006] eKLR
2. Shelly Beach Hotel Limited and Another vs Kenya Revenue Authority [2006] eKLR
3. Willesden Investments Limited vs Kenya Hotel Properties Limited, High Court Civil Case Number 367 of 2000.
4. Emmanuel Chubahiro Imaishimwe vs Republic, [2006] eKLR
5. Jones vs National Coal Board [1957] 2 QB 55
6. Daniel Ndungu vs The Director of Public Prosecutions and Another, [2012], eKLR.
7. In the Matter of Charles Munga Advocate vs The Law Society of Kenya and the Advocates Disciplinary Committee [High Court Misc. Civil Application No. 1456 of 2004].

TABLE OF STATUTES

8. Advocates Act, Chapter 16 Laws of Kenya
9. Advocates Practice Rules
10. Civil Procedure Act, Chapter 21 of the Laws of Kenya
11. Constitution of Kenya Review Act, Chapter 3A of the Laws of Kenya

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Dedication

To my wife, Cathy and children, Charles, John Paul, Adrian, Anuarite, Terence and Eleanor

CHAPTER 1: INTRODUCTION

1.1 Introduction

This chapter explores the broad negative perception that exists about lawyers both in Kenya and around the world. It looks at the possible reasons for the said perceptions. This Chapter looks at the said reasons as the launchpad for the problem statement. The problem statement is on whether the provisions of the Advocates Act and the Advocates Practice Rules meet the threshold of the aspirations of the public on advocates' ethical conduct. To set the stage of how data is obtained for purposes of the research, this Chapter briefly discusses complaints against advocates' conduct in Kenya and the mechanisms that address such complaints as set out in the provisions of the Advocates Act.

1.1.1 Negative perceptions about lawyers

Lawyers all over the world, since time immemorial, have not been amongst the most admired professionals in society. Common street jokes and memes paint lawyers as heartless and greedy.

Even in the earliest of times, the public perceived lawyers to be dishonest people. This perception was at times cast in stone, literally. For example upon the death of St Yves, the patron saint of Brittany's lawyers and abandoned children, his family inscribed the following words on his tombstone: ***Sanctus Ivo erat Brito/Advocatus et non latro/Res miranda populo***. This translates as: "Saint Yves was a Briton /He was a lawyer and not a thief/Which is a marvellous thing to the people". This was the 13th century when this holy man lived and his family found it necessary to clarify that being a lawyer, he did not carry the appendage of thief that usually went with such a profession.

In a way, lawyers have brought this situation unto themselves. A Google search of the sentence *"complaints against advocates in Kenya"* results in a sizable number of hits. The local newspaper reports found on the internet show that the Kenyan public views lawyers in general and lawyers who practice in Kenya as a bunch of crooks to whom one goes for want of an alternative. The public views lawyers as people with no ethical code or moral spine.

This perception is not unique in Kenya. Even in the United States of America which, according to the American Bar Association National Lawyer Population Survey (https://www.americanbar.org/about_the_aba/profession_statistics/), has the highest number of lawyers in the world, (1.35 million in 2019) this perception is also there.

A poll taken by the American Bar Association in 2015 amongst members of the public (https://www.americanbar.org/about_the_aba/profession_statistics/) found that 74% of those surveyed agreed that lawyers are more interested in winning than getting justice. 69% believed that lawyers are more interested in making money than in serving their clients. 57% claimed that lawyers are more concerned with their self-promotion than their client's best interests. Surprisingly more than half (51%) agreed that society would be better off with fewer lawyers.

Paradoxically, the people, the subject of the survey had at one time or other been a client of a lawyer. They had needed the services of a lawyer due to some legal problem in their day to day lives.

The American Bar Association's poll also reflects the perception of lawyers in Kenya. In the Kenya Parliamentary Debates of 1995 (reported in the Hansard of 29th November 1995), Parliament discussed lawyers' conduct during the debate on the then Council for Legal Education Bill. Members of Parliament opined that justice is elusive for the average person since lawyers are wont to overcharge their clients. They also opined that criminals go scot-free because lawyers manipulate the system. Members of Parliament had very little regard for lawyers in insurance practice whom they accused of engaging in ambulance chasing and corrupting doctors and hospital attendants as they sought work from accident victims. Lastly all the Members of Parliament thought generally that lawyers routinely steal money held in trust for their clients.

1.1.2 What is the cause of this negative perception?

Did lawyers bring this perception on themselves by their conduct? Have lawyers failed to live up to what is expected of their conduct by the public and hence this perception? Could this perception be engendered by the disconnect between the expectation of the public and

the actual conduct of lawyers? Does the public expect lawyers to be of excellent character and conduct and lawyers fail to live to that expectation?

Evans (2014) observes, correctly, that these negative perceptions are not unfair as lawyers are wont to claim. They are brought about by lawyers not observing high ethical standards. He goes on to hold that what society needs is not more lawyers but good lawyers; lawyers of high moral character. Fried (1976), adopting the same line of argument, says that it is sad that the act of being a lawyer seems to conflict with the possibility of being ethically good.

Globalisation in the context of the legal profession and the pressure that comes with it has been touted as one of the causes leading to the failure by lawyers to live ethically. (Shroff, 2012). Globalisation leads to the integration of economic activities across different borders. When the legal profession is globalised, the focus shifts from rendering legal services locally to entering new markets to make high profits in these markets (Shroff, 2012). Lawyers in globalised legal practices get involved in the rat race of the business world leading to the view that legal practice is more of a business than the noble profession that was supposed to be in the days of old. This aligns itself with Friedman's (1970) view that "the social responsibility of business is the business of making profits". When lawyers forget that their calling has aspects of social responsibility independent of making money, they fall squarely into the parameters described by Friedman. They then start falling foul with ethics.

Evans (2014) complains that over time the principal concern for lawyers in active practice has slowly become about making money and about the running of their law firms as profitable business ventures and not about service to their clients and attainment of justice for them. The legal profession as a purely business venture has led to an uncanny obsession with billable hours and profit per partner to the detriment of the ideal of justice that the legal profession and lawyers were supposed to aspire to in the first place (Shroff, 2012).

The danger of the business approach to the legal profession is that to maximise profits, cutthroat business practices creep in. This inevitably leads to unethical behaviour on the part of advocates.

Luban (1983) says that firstly, the approach of the legal profession as a business contributes to unethical conduct on the part of lawyers, and secondly, lawyers' professional role exposes

them to great moral risk which at times, due to the frailty of human nature, corrupts them and they end up acting in a corrupt manner. In their professional role, lawyers can control, by their conduct, the outcome of cases and hence influence the outcome of a case. This could happen when a lawyer forgets ethics and gets carried away in his endeavour not only to win his client's case but also to make a lot of money because of the said win. Sometimes the cost involves acting unethically, hiding evidence, being brusque and rude in court, lying to the court etc. The foregoing scenario, when perceived by the common person, engenders the belief that lawyers really are unethical.

Ojwang and Salter (1990) observe that the position of advocates in Kenya is that of an intermediary between the formal machinery of justice that is technical and bureaucratic and the public that must deal with the said machinery of justice. This machinery of justice is represented by the courts. They argue that because of the social trust and monopoly that is entrusted to advocates in their role as such intermediaries, there arises an ideal climate for abuse which in turn leads to grave injustice. Abuse can be in the form of sacrificing justice for money or playing dirty to win the case at all costs.

It is this unethical conduct of advocates or abuse that causes complaints to be made by the public to the Disciplinary Tribunal. The complaints reveal the nature of the aspirations of the public on the excellence in character and ethical conduct of advocates. The relationship of these aspirations with the applicable law is the subject of this research.

1.1.3 Complaints against advocates in Kenya and the Disciplinary Tribunal

The law in Kenya establishes a mechanism that the public can use when a lawyer or advocate engages in unethical conduct in the course of his profession. This mechanism is found in the provisions of the Advocates Act. The said Act establishes the Advocates Complaints Commission and the Disciplinary Tribunal.

The purpose of the Advocates Complaints Commission is to inquire into complaints against any advocate, firm of advocates or employees thereof. Once the Advocates Complaints Commission has finished its enquiry into a complaint, it can mediate the same and have it settled out of court and if that is not possible, and the investigations reveal the existence of a

prima facie complaint against the advocates, it will make a formal complaint against the advocate to the Disciplinary Tribunal.

The Disciplinary Tribunal's role is to hear and determine complaints against advocates. In exercising its mandate, the Disciplinary Tribunal is guided by the provisions of the Advocates Act and the Advocates Practising Rules. These two instruments (the Advocates Act and the Advocates Practice Rules) set out what is considered unethical conduct on the part of advocates. A breach of the provisions set out in the said Act and Practice Rules as embodied in the complaint to the Disciplinary Tribunal would lead to sanctions against the concerned advocate.

A comparison of the nature of the complaints against advocates with the provisions of the Advocates Act and the Advocates Practice Rules reveals a disparity. The complaints by the public show an expectation of ethical excellence that is not captured in the Advocates Act and the Advocates Practice Rules. This comparison is set out in Table 2 of Chapter 4. The upshot of this is that the Advocates Act and the Advocates Practice Rules do not adequately protect the public when it comes to enforcing ethical conduct for advocates: the public has an expectation of ethical excellence on the part of the conduct of advocates which is not demanded of advocates by the Advocates Act and the Advocates Practice Rules.

1.2 The main objective or dissertation aim

This study aims at coming up with ways of improving advocates' ethical behaviour in Kenya so that it becomes more virtuous and it attains the high degree of ethical excellence that is expected of advocates by the aspirations of the public. The specifics of this aim will be explained in the problems statement, research objectives and research questions that follow here below.

1.3 Problem Statement

Members of the public, who are the clients served by advocates in Kenya, expect a high threshold in the ethical excellence of the conduct of advocates. The provisions of the Advocates Act and the Advocates Practice Rules do not seem to meet this threshold of ethical

excellence – which brings in the mismatch between what the public expects vis a vis what is provided for in the law.

1.4 General and Specific Objectives

The general objective of this research is to show that the public has an extremely high threshold in its expectations on the ethical conduct of advocates. The objective is to show that this threshold is equal to excellence of character and virtuous conduct.

The specific objectives are three in number. The first one is to critically examine the aspirations of the public on ethical excellence in advocates' conduct in Kenya. The second one is to study the Advocates Act and the Advocates Practice Rules with emphasis on the provisions relating to ethical conduct for advocates. The third objective is to suggest a virtue ethics approach as the proper basis of ethical excellence in advocates' conduct and also as the basis for the modifications that can be included in the Advocates Act and the Advocates Practice Rules.

1.5 Research Questions

The following are the research questions that this study will strive to answer:

(i) What are the general aspirations of the Kenyan public on ethical excellence in advocates' conduct?

(ii) Are the aspirations of the Kenyan public on ethical excellence in advocates' conduct provided for in the Advocates Act and the Advocates Practice Rules?

(iii) If the aspirations of the Kenyan public on ethical excellence in advocates' conduct are not adequately provided for in the Advocates Act and the Advocates Practice Rules, would a virtue ethics approach be able to align the Advocates Act and the Advocates Practice Rules with the said aspirations of the Kenyan public?

1.6 Scope and limitations of study

Geographically the scope of this study will be limited to critically looking at and analysing the aspirations of the public on ethical excellence in the conduct of advocates in Kenya.

The historical scope of the research is from 2007 to 2018. The research is based on this historical period since this is the period for which the complaints made by the public to the Advocates Complaints Commission are documented and published in the Kenya Gazette.

The study will also focus on what the Advocates Act and the Advocates Practice Rules provide and any case law relating to ethical conduct of advocates and the implications of such case law.
This study will propose modifications to the Advocates Act and the Advocates Practice Rules.

The foundation of the modifications that will be proposed will be based on a virtue ethics approach. Other normative schools of ethics, namely the Kantian school of ethics and the utilitarian school of ethics will also be considered albeit briefly. It is beyond the scope of this study to delve deeper into the pros and cons of the Kantian and utilitarian schools of ethics.

Lastly this study will strive to show that a virtue ethics approach, with its emphasis on virtues and moral character, is the best choice as a foundation for the ethical rules and regulations for Advocates in Kenya.

1.7 Significance of the study

The central place of ethics in the life of any human being, including advocates, cannot be gainsaid. Advocates are held in high esteem in the Kenyan society. From Parliament, private practice and in the corporate world, the position of advocates as the influencers of society is not in dispute. The legal departments of all corporations, big or small, are headed by Advocates. The number of advocates in the country has also been rising steadily and from the data in the Law Society of Kenya's website (www.lsk.or.ke) as at 2019 there were close to fourteen thousand (14,000) practising advocates in Kenya serving the entire population which

is currently estimated at 47 million. The significance and importance of a study of the ethical conduct of this number of professionals cannot be gainsaid.

The importance of the intended study flows from the number of advocates practising in Kenya and the nature and position of advocates in the Kenyan society. If advocates acted ethically, Kenya would be a better place to live in. There would be better laws (fronted by the many advocates who are members of Parliament) and the cause of justice would be well served.

The research questions proposed in this study aim at firstly, finding out the aspirations of the Kenyan public with regard to ethical excellence in the conduct of advocates, secondly, what the Advocates Act and the Advocates Practice Rules provide and thirdly, whether a virtue ethics approach would suffice to inform modifications in the law to meet the said aspirations.

This study will propose modifications to the law and an approach to ethics for advocates that will try to align the written law with the aspirations of the Kenyan public with regard to ethical excellence in the conduct of advocates.

CHAPTER 2: LITERATURE REVIEW

2.1 Introduction

The first part of this chapter looks at the theoretical framework of this dissertation. In the theoretical framework this researcher argues that based on what the aspirations of the Kenyan public are regarding ethical excellence on the part of advocates' conduct, a virtue ethics approach is the school of ethics that would adequately answer and fill the gap that exists between the said aspirations and the provisions of the Advocates Act and the Advocates Practice Rules.

The theoretical framework also explores, albeit briefly, two other normative schools of ethics, namely Kantian school of ethics and utilitarian school of ethics. At the end of the theoretical framework this researcher strives to show that the ethical system that best answers and fosters the main and specific objectives of this dissertation is virtue ethics.

The second part of this chapter is the empirical review which seeks to highlight what various authors have said about the research questions whilst at the same time identifying any gaps present in the existing literature.

The last part of this chapter is the conceptual framework. Following Miles and Huberman's (1994) approach this researcher will, in the conceptual framework, explain the main parameters of study in this dissertation together with the existing variables, both dependent as well as independent. Miles and Huberman make the caveat that analysis of data in the social sciences is not straightforward since social processes are ephemeral, fluid phenomena without a perfect and independent way of construing and describing them. This fluidity is considered in the conceptual framework where the actions of advocates are listed as an independent variable. Human actions fall within the ephemeral and fluid phenomena that are not straightforward to predict and there is no perfect or independent way of construing or describing them.

2.2 Theoretical Framework

2.2.1 Introduction

The nature of the aspirations of the Kenyan public regarding advocates' conduct can be gleaned from the complaints lodged with the Advocates Disciplinary Tribunal. These complaints are presented in the research findings in Chapter 4.

What is gleaned from the complaints is that the aspirations of the public are that advocates should, in their conduct, exhibit virtues or good habits and excellence of character. Excellence of character is therefore a fundamental and cornerstone principle for what is expected in advocates' conduct by the public.

The research findings presented in Chapter 4 also show that the provisions of the Advocates Act and the Advocates Practice Rules are not worded in a manner that promotes the practice of virtue or achievement of excellence of character. This research seeks to provide an answer to what can be done so as to imbue the Advocates Act and the Advocates Practice Rules with the aim of promoting virtue and excellence of character in the conduct of advocates in Kenya.

For any meaningful change to be effected to the Advocates Act and the Advocates Practice Rules so as to imbue them with promotion of virtue and excellence of virtue as a central purpose, a philosophy of ethics or moral philosophy that is in tandem with the promotion of excellence of character and promotion of virtue will have to be applied.

To arrive at the most adequate school of ethics to be proposed as the basis for achieving the promotion of virtue and excellence of character in the Advocates Act and the Advocates Practice Rules, this researcher discusses three schools of ethics, namely the Kantian school of ethics, the utilitarian school of ethics and the virtue ethics school of ethics.

The researcher has chosen these three schools as they broadly represent the various ethical schools currently in existence. The Kantian school of ethics is the culmination of a rationalist based ethical approach. The Utilitarian school of ethics represents the philosophers who take a consequentialist approach in doing their ethics and the virtue ethics approach represents the Aristotelian/Thomistic approach to ethics.

This researcher then shows that the Kantian and Utilitarian schools of ethics fall short in their recommendations. Ultimately, Kantian and Utilitarian school of ethics cannot be of assistance as a foundation of ethical principles whose aim is to promote virtue and excellence of character in the conduct of advocates.

This researcher settles for the virtue ethics school of ethics as the most appropriate school that could be used as a foundation for the Advocates Act and Advocates Practice Rules so as to achieve the aspirations of the Kenyan public with regard to virtue and excellence of character in the conduct of advocates in Kenya.

2.2.2 The Kantian School of Ethics

Bourke, MacIntyre and Hooft (Bourke, 1968), (MacIntyre, 1967), (Hooft, 2006) posit that Kantian ethics are centred on two things. Firstly, action out of a sense of duty and secondly, a knowable but an unachievable ideal standard of action (the categorical imperative) that the acting individual always strives to achieve but never manages to achieve due to his shortcoming as a human being. The categorical imperative is a product of the rational will which creates it, and which also understands that it (the categorical imperative) is binding on it. The categorical imperative is the law (created by the rational will of man) and the understanding of its binding nature is the duty that impels man to act.

Kant himself says the following in the *Critique of Pure Reason*:

Virtue and wisdom in their perfect purity are ideas. But the wise man of the Stoics is an ideal, that is to say, a human being existing only in thought and in complete conformity with the idea of wisdom. As the idea provides a rule, so the ideal serves as an archetype for the perfect and complete determination of the copy. Thus, the conduct of this wise and divine man serves us as a standard of action, with which we may compare and judge ourselves, which may help us to reform ourselves, although the perfection it demands can never be attained by us.

For Kant therefore, human perfection cannot be achieved. For him pure virtue is primarily an idea whose attainment we can aspire to but never achieve. As an idea, it serves as the standard which is to guide our action though the perfection it demands can never be reached.

Pure virtue is not an objective reality but always an idea that we use as a standard to reform our conduct. This idea presents itself to man's reason and man's reason can estimate the degree of incompleteness of a purported "virtuous" action. Man, therefore, is always dilly dallying with incompleteness vis a vis the exercise and practice of virtue.

The idea of pure virtue aside, man, for Kant, does not enjoy and cannot enjoy practice of virtue. The idea of pure virtue that is posited by Kant, as the standard by which we measure our actions is, for man, the law. The law is the ideal. Virtue on the other hand is the strength of will that man exercises to overcome temptations to go against the law. Whereas it is true that at times to acquire virtue one must struggle and go against the grain, reducing virtue to the mere act of struggle is not to accurately portray the nature of virtue. Virtue is not a negative prescription. It is not correct to portray man as always inclined to do the wrong thing and then struggling and going against his inclinations when he wants to act virtuously.

Would a Kantian approach to virtue and ethics fulfil the aspirations of the Kenyan public on excellence in the ethical conduct of advocates in Kenya? For Kant, man can have the perfect idea of what excellence of character demands. After having such an idea, man would have the duty to try and achieve the said excellence, but he cannot achieve it however much he tries.

In its own schema of reasoning and approach, Kantian ethics would posit that excellence and perfection are not possible to achieve. If such a school of ethics were to be used to imbue and influence amendments to the Advocates Act and the Advocates Practice Rules, its emphasis would be to encourage observance of the law as a duty. Its emphasis would also be that full observance of the law is not possible. The law would therefore set ideals that it knew a priori to be unachievable.

Advocates, in addition to not achieving the ideal set by the categorical imperative, would not be impelled to excellence for its own sake or to virtue for its own sake. The motivator would be a duty to obey the law. Such a school of ethics makes it impossible for an advocate to achieve excellence and hence fulfil the aspirations of the Kenyan public.

2.2.3 The Utilitarian School of Ethics

Utilitarianism judges the goodness or badness of an action based on its consequences or results. Hence an action is adjudged good if its consequences or results are good and an action is bad if the consequences are bad. The motive and disposition of the acting person are not questioned.

If therefore a person gives money in a fundraiser for the sole purpose of showing off and assuaging his ego, from a utilitarian ethics' perspective, his actions would be good if the fund raiser is successful and his contribution goes into assisting the purpose of the fundraiser. His motives would be irrelevant in judging his action.

John Stuart Mill in his Treatise, *Utilitarianism*, argues that virtue is a consequence of any action which can be judged to be good. It is a utility, like happiness, that human action aims for. Classifying virtue as a utility poses a conceptual problem. Being a consequence of action, in the utilitarian scheme of ethics, an action will only be counted as being virtuous if the result is adjudged good according to what the acting agent had wanted.

There is therefore no objective standard for what is virtuous conduct and what is not leading us to the cliché often associated with utilitarianism that the end justifies the means. In addition to this, since the consequences are what determine whether an action is good or bad, from a utilitarian perspective we cannot have an objective standard by which action can be judged since the goodness or badness of an action can only be known after analyzing the consequences of action.

In the context of this study, virtuous conduct of an advocate will be that type of conduct that secures a client a win in his case irrespective of the bad tactics used by the advocate to secure the win. This scheme of ethics would encourage an overthrow of the concept of justice in legal practice. However unjust a decision is, provided it is in favour of my client as an advocate, then it would be good and the advocate achieving the said decision for his client would be deemed "virtuous".

This school of ethics would not satisfy the general aspirations of the public with regard to excellence of ethical conduct on the part of advocates. It is not the aim of utilitarianism to promote excellence in character.

2.2.4 Virtue Ethics

"Virtue Ethics" connotes a virtue-based branch of ethics where the emphasis is the study of human action (ethics) which human action constitutes a good habit (virtue). The main thrust if virtue ethics is excellence of character.

Owing to its focus on excellence of character and practice of virtue, this researcher argues that applying a virtue ethics approach in the conduct of advocates would result in a realisation of the aspirations of the Kenyan public with regard to the conduct of advocates in Kenya.

A virtue ethics approach would imbue advocates' conduct with the excellence in character that the common man in the street and indeed the general public expects. A result of applying such an approach in the conduct of advocates and using such an approach as the fundamental philosophy imbuing the Advocates Act and the Advocates Practice Rules would mean a reduced number of complaints with regard to conduct of advocates that is not virtuous. It would ultimately also result in satisfied clients.

Interest in Virtue Ethics was arguably heralded by Elizabeth Anscombe in her famous article, *"Modern Moral Philosophy"* (Anscombe, 1958). Even though the said article is said to be the starting point of the modern appreciation of virtue ethics, the concept of "virtue ethics" explained as a school of ethics together with its structure and connotations is not easily discernible in Anscombe's article. Anscombe's article starts off as a criticism of modern moral philosophy with special emphasis on the errors contained in the teachings of modern British philosophers namely, Sidgwick, Butler, Mill, Bentham and Hume. Kant also comes under some criticism.

Anscombe argues that modern moral philosophy has failed. To get it back on track there is a need to return to Aristotle and Plato. Anscombe then develops arguments, attributable to Aristotle's scheme of ethics, in favour of an ethics based on virtue by positing that for actions to hit the correct mark in the objective standard of good or bad, the acting agent should act in

such a manner that his actions promote excellence of character and virtue in him. In so acting, the acting agent's actions will not only be perfective of him, but the end of the actions will also be good. She explains that moral excellence should be understood as acting well or doing things well: echoing Aristotle's philosophy of virtue as "the mean" between two excesses, Anscombe says that moral excellence is to be defined as that which "must have the quality of aiming at the intermediate" where there is neither excess nor defect. Moral excellence is therefore possession of virtue.

The foundations of virtue ethics can be traced back to Aristotle. In the *Nichomachean Ethics* Aristotle refers to the study of the dispositions for actions that are necessary for a life that turns out well or a life that achieves *eudaimonia.* He calls this study the "philosophy of human nature". For him therefore, Ethics is the same as the philosophy of human nature.

According to Aristotle, all voluntary actions of man are teleological in nature. They are done for a reason, an end. No voluntary action is done without an end in mind. This is explained by Aristotle in the opening line of the Nichomachean Ethics, where he states as follows:

> "*EVERY art and every inquiry, and similarly every action and pursuit, is thought to aim at some good; and for this reason, the good has rightly been declared to be that at which all things aim.*

The Aristotelian approach is a fact of experience. When one thinks of any action, you notice that there is always the "why?" or "for what?" that is embedded in the action. One does not act "for the sake of acting". Man does not act in vain. He always strives for something in every action and this something that man strives for is "the good". There is therefore a necessary link between action and the good that it aims at – a relation that is always be there. Action alone cannot, in the Aristotelian scheme, be judged independently of the good and similarly the good on its own is not as important in this scheme: it only acquires its importance when it is the object of action.

Aristotle goes on thereafter to explain that some actions are performed for an end which is a means to some other end. Since all actions cannot be for an end which is a means to another end as that would require an infinite regression of ends which is not possible, Aristotle concludes that there must be ultimately an end that is sought for its own sake. He calls this

the chief or supreme good or *eudaimonia* which is translated as happiness or flourishing. MacIntyre (1998) translates *eudaimonia* to also include the notion of behaving well and the notion of faring well.

The focus of ethics, from an Aristotelian perspective, should be to answer the question "how should I live?". ("Living" construed as living in the long term and not a momentary exercise of a good deed). It is only in answering this question with a positive affirmation or with an answer that suggests the quest of a life well lived can one's life can be said to have attained *eudaimonia* or be on the road to attaining *eudaimonia.* Only then can one's life be said to flourish. *Eudaimonia* is therefore the end to which virtue ethics aims.

Just like Aristotle, Aquinas did not lay out explicitly a theory of virtue ethics. This is not to say that a virtue ethics theory is not present in his writings. Excellence of character and virtue (which is what virtue ethics is about) as a central core of his system of ethics can be gleaned from what he (Aquinas) writes about virtues and ethics.

Aquinas starts with the explanation of what reason is. For him reason has two powers: a cognitive power and an appetitive power. The cognitive power is what we call the intellect and the appetitive power is what we call the will. The will is ordered towards the good and the intellect towards truth. Simply put the movement of the will towards the good comes after the intellect has known and presented to the will what is the good. As the will moves towards the good presented to it by the intellect, there is a process of deliberation by the will on whether or not to accept the good or to reject the good that is presented to it. This process of deliberation and its exercise is the freedom that is enjoyed by the will.

The more the will chooses the good and moves towards it, the easier it becomes for it to do so. If the good towards which the will moves frequently and with ease is an objective good, we say that the individual has acquired a virtue or a good habit. If the good towards which the will moves frequently and with ease is not an objective good, we say that the individual has acquired a vice or a bad habit.

A virtue, therefore, according to Aquinas, is a habit that *"disposes an agent to perform its proper operation or movement"*. In reference to the will, a virtue is a disposition of the will

that inclines a person to act in one way as opposed to another. It is the quality of the will that makes it easy for the will to choose what is the good.

Where do virtues come from? In the *Commentary on Aristotle's Nichomachean Ethics*, Aquinas holds that virtues come from the actions of the person. They are engendered in man by the actions of man moving his will towards the good. The more often that man exercises his will by moving it towards the good the easier it becomes to move the will towards the same good since this motion of the will becomes a habit.

The movement of the will, as the principle that engenders virtue, can also engender its deterioration or vice. Aquinas gives the example of a harpist or a builder and states that a good builder becomes a good builder by building well. And similarly, a bad builder becomes a bad builder by building badly. What makes a good builder is that constant and arduous movement of his will to exert himself to build well. Conversely what makes a bad builder is that easy sloppy movement of his will to take shortcuts and to build badly.

Aquinas also lays out the argument for the perfective nature of virtue. He states that when we act virtuously, we become "more perfect" human beings since virtue makes its possessor good and renders his work good. The converse also applies – when we act viciously, we degrade ourselves and become more imperfect. Just as perfection grows when we grow in virtue, imperfection also grows when we grow in vice.

He asserts that in addition to virtues being perfective of the human agent, they are also exemplifications of general ideals of praiseworthy behaviour. Human perfection, acquired through the exercise of virtue, exemplifies what human nature aspires to and hence is of its itself beautiful, attractive and praiseworthy.

Polo (1997) in line with Aquinas' reasoning, explains how virtues are perfective of the human agent. He says that virtues strengthen the will and in so doing they strengthen the capacity of adherence of the will, that is the capacity to love, ultimately bringing happiness to the human agent.

Following Anscombe closely on a virtue ethics approach to moral philosophy was MacIntyre (1981). MacIntyre, like Anscombe, criticises the current state of the language of morality

arguing that the current state of the language of morality is steeped in confusion and disorder. The current language of morality, MacIntyre argues, has lost both the "theoretical" as well as the "practical" of morality. By losing the theoretical as well as the practical of morality, current language and approach of morality has lost the teleological conception of moral agency: actions, according to this current language and approach, do not necessarily aim to the good, as was observed by Aristotle. This argument resonates well with the criticism of modern moral philosophy levelled by Anscombe in 1958.

MacIntyre argues that the best foundation of ethics is to be found in Aristotle and St Thomas Aquinas. He says that a system of ethics that is based on the philosophies of Aristotle and St Thomas Aquinas shows man how to be a man and enables man to move from the state of "man as he happens to be" to "man as he could be if he realised his essential nature". The concept of "man as he could be if he realised his essential nature" advanced by MacIntyre looks at man aspiring to a state of perfection - man aspiring to be without defects, perfect in all aspects of his nature. This concept is related to virtue ethics from the point of view of excellence of character.

To be able to move from a state of "man as he happens to be" to "man as he could be if he realised his essential nature", man must observe the precepts that promote various virtues and prohibit vices. For MacIntyre, these precepts consist of teleological directives derived from the intrinsic nature of man and divine law. The teleological precepts are part and parcel of how man is wired – all men understand the basic and first principle of moral law – do good and avoid evil. MacIntyre's teleological precepts are equivalent to the good that man's action aims at in the manner that is expounded by Aristotle in the *Nichomachean Ethics.* Continuous struggle to achieve the teleological precepts engenders virtue and excellence of character. The converse engenders vice.

When commenting about the Nichomachean Ethics, MacIntyre says that *eudaimonia* ***"is the state of being well and doing well in being well, of a man's being well-favoured himself and in relation to the divine".*** Connecting *eudaimonia* and virtue, MacIntyre argues that it is only upon acquisition of virtue that an individual can achieve this state of being well and doing well in being well. The converse is also true – that vice leads to a failure in achieving eudaimonia and a person full of vice would not be well and do well in being well.

McIntyre's approach to virtue fits in the scheme of virtue ethics and the excellence of character. This is borne by the fact not only of the Artistotelic foundations of his understanding of virtue but also by his assertion that when man practices virtue he chooses to do the right thing in the right place at the right time in the right way. That is excellence of character.

Other virtue ethicists include Rosalind Hursthouse who looks at virtue ethics as that system of ethics that judges the goodness or badness of actions based on an objective good. Her approach presupposes an objective good which is the standard for measuring the "goodness" or "badness" of action. For her an action like killing is wrong not because it takes away somebody else's life, but because it goes contrary to the virtue of charity. In this case then the objective good that must be met by an action is the virtue of charity: any action that goes contrary to this virtue will be wrong (Hursthouse 1999). Hurshouse's scheme fits in the argument of virtue ethics as excellence of character since an action that attains an objective good must of itself be a good action. Such an action engenders excellence of character.

Slote (1997), on the other hand, invites us to look at the wider picture and not to focus on minute details of action. His approach looks at the whole of the character of the acting individual –and asks whether he manifests excellence in character. This approach understands that to err is human and once in a while the human being will act in a manner that is not virtuous. Individual actions that could go against a virtue might not in themselves mean that the individual is not of excellent character. He therefore argues that virtue ethics is more concerned with the virtuous character of virtuous individuals than with the minutiae actions of such individuals. According to him virtue ethics is grounded in the concepts of goodness and excellence rather than in deontic concepts of right, wrong, ought or obligatory.

Rhonheimer's (2011) argument is close to that of Hursthouse by which actions are judged by an objective standard. Rhonheimer says that we cannot talk about virtue ethics without considering the metaphysics of man since for him virtue ethics is akin to moral realism. Virtue ethics, he explains, is grounded on a sound understanding of who man is and that man's intellect is capable of grasping truth that is not based on subjective preference. This objective truth that is grasped by man shows man his end in relation to himself and in relation to others. It is therefore not dependent on what man feels or his subjective interpretation of what he should do. What he should do is already "out there" cut out for him and reachable by him

through his practical intellect. Rhonheimer's approach emphasizes the fact that moral judgements can correspond to something real and outside the acting person.

In summary, virtue ethics as the system of ethics that this researcher has assumed will best answer the aspirations of the general public with regard to the ethical excellence in the conduct of advocates, is chiefly concerned with the promotion of virtue in the acting agent. Once virtue is acquired, it follows that what we get is excellence in character. Excellence in character on the part of advocate would lead to fewer complaints to the Disciplinary Tribunal by their clients and the public and in the end, it would lead to satisfied clients.

2.3 Empirical Review

2.3.1 Research Question 1:

What are the general aspirations of the Kenyan public on ethical excellence in advocates' conduct?

Legal scholar Yash Pal Ghai says that there is public interest in the legal profession due to the influence that lawyers have in public affairs and to the visibility that lawyers have both in court as well as in public fora and tribunals. (Ghai and Ghai, 2014). Luban (2007) also expresses this view. His view is that lawyers are the first point of contact between the public and the law which makes them the primary administrators of the rule of law. This in turn generates public interest in the legal profession.

Lumumba (2014) echoes Luban in his view of why there is such interest about lawyers in society. For Lumumba, interest in the legal profession is because law is now a tool of social order and lawyers are needed to interpret this tool. Being knowledgeable in the law, lawyers are called upon to represent parties in disputes or at times to arbitrate disputes with a view to resolving them by the correct application of the law. Society is thus beholden to lawyers in that regard (Lumumba, 2014).

For Fuller (1981), public interest in the profession is generated because lawyers are not just people who are learned in matters of the law. Their principal role is to be architects of the

social structure. The fabric of society is therefore quite dependent on lawyers and what they do. The public also has expectations on them owing to this.

For Rhode (1995) interest in the legal profession is generated by the fact that it is one of the professions in the world that offers its members a sure route to economic success.

Fuller's views and Rhode's vies are also replicated in the state of Advocates in Kenya. Advocates are some of the main movers of society. Advocates are also generally speaking well-endowed economically. They are very visible in public circles and their conduct is therefore always scrutinized sharply and looked at as from a microscope. In addition to being movers and influencers in society, advocates are a very necessary component in the dispensation of justice. They are the ones who represent those in need of justice and access to the courts in Kenya.

In the draft constitution of the Constitution of Kenya Review Commission (CKRC) the following provision regarding the legal profession had been proposed with a view to having it entrenched in the constitution that was to be promulgated (Ghai and Ghai, 2014):

The profession of law

The privilege of practicing law in Kenya is a public trust. It is a fundamental duty of every legal practitioner to -

a) *uphold the Constitution;*
b) *observe, respect, protect and promote the rights and freedoms set out in the Bill of Rights;*
c) *conduct the practice of law with integrity, and to be scrupulously honest in all dealings with clients, other legal practitioners, the courts, and any public office or officer;*
d) *represent each and every client to the best of that legal practitioner's ability;*
e) *advocate fearlessly before the court or any tribunal on behalf of, and in the best interests of, the client;*
f) *assist the court in the development of the law, by presenting well- reasoned, innovative and challenging arguments, such as will advance the objects and purpose of the Constitution and the rule of law;*

g) *scrupulously protect the confidentiality of a client's business and communications, subject to paragraph (h); and*
h) *draw to the attention of the appropriate authority, any actual or apprehended violation of the Constitution or any law."*

This provision though proposed at the Constitution of Kenya Review Commission drafts of the constitution was not accepted at the Bomas Conference and was eventually dropped from the final Constitution that we now have.

The Constitution of Kenya Review Commission established under the Constitution of Kenya Review Act (Chapter 3A of the Laws of Kenya) had as one of its objectives, the task of getting the views of Kenyans on the type of Constitution that they wanted. The foregoing recommendation on entrenchment of the profession of law in the Constitution reflects the aspirations of the Kenya public.

Had the recommendation been included in the final Constitution that was promulgated, lawyers would have had a constitutional duty to firstly, conduct the practice of law with integrity, secondly, to work diligently and thirdly to be honest. These duties have ingrained in them the concept of virtue and excellence which, as shall be seen in Chapter 4, is what the Kenyan public aspires to see in the conduct of advocates.

Contrary to what the public aspires to, the state of the ethical conduct of advocates was not up to standards. Yash Pal Ghai in his analysis of the history of the legal profession prior to the promulgation of the 2010 Constitution says that "*nor was the private legal profession without blame. Many of them did not honour the calling of their profession, failed their clients and stole their money. Nor did many of them uphold basic principles of justice and human rights. Some flourished under the patronage of the president, collecting huge fees from the Treasury for work of no effort or significance. Some of them became an integral part of the system of judicial corruption, colluding with particular judges*" (Yash Pal Ghai and Jill Cottrell Ghai, 2014)

Mwangi (2001) decries the fall of the standards that had accosted the legal profession in the 1990s and early 2000s to the extent that the then Chairman of the Law Society of Kenya, GBM Kariuki was quoted as saying that "*professional standards have fallen so low that*

unless the society urgently devices a way of arresting the situation, the public is going to lose confidence completely in the Law Society members" . In saying so, GBM Kariuki was comparing the ethical conduct of advocates then with what the public expected of advocates.

The following are excerpts from newspaper reports that show the complaints against advocates as reported in the local newspapers:

a) the *Daily Nation* of 19th October 2015:

The Advocates Complaints Commission received 225 complaints against lawyers between July 1 and September 30 this year. The complaints saw one lawyer struck off the roll of advocates for life while another 38 were forwarded to the disciplinary committee for action.

A report published in this week's Kenya Gazette and signed by Commissioner Naomi Wagereka said 20 lawyers were accused of withholding clients' money while another 10 allegedly failed to represent their clients adequately.

The report said three lawyers were also accused of issuing dud cheques to clients while another two deliberately failed to keep their clients informed regarding their cases. Another lawyer was accused of withholding a client's documents. Of the 39 complaints received, which were marked as classified, 11 were disposed of, three were abandoned, four were settled, two were dismissed and one was withdrawn.

b) the *Daily Nation* of 11th March 2017. It reads as follows:

In one case adjudicated by the Law Society of Kenya (LSK) Disciplinary Tribunal in 2015, lawyer Japheth Chidzipha Chijumba who had received Sh60,000 in legal fees to file a suit wrote to his client, claiming to have filed the suit at the Malindi Law Courts and requesting Sh400,00 in additional fees. It later emerged that the suit had not been filed and the case number he had given the client was fictitious.

Last year, 20 lawyers were struck off the roll of advocates and another 12 suspended.

c) The *Standard* 14th March 2017

(Advocates Complaints) *Commission chairperson Beauttah Siganga said they had received more than 600 complaints against the over 13,000 advocates practising in the country annually.*

"Seventy-two per cent of the complaints we receive involve advocates' remunerations and other costs that arise from the case and this implies that there is no clear communication between the lawyer and his client," he said.

Cognizant of the fact that there existed a problem manifested by the many instances of unethical conduct on the part of advocates, in 2002 the Law Society of Kenya in conjunction with the International Bar Association commissioned Mr. Mark Stobbs to carry out a review of the advocates' disciplinary system.

At the end of the review Mark Stobbs submitted a report to the Law Society of Kenya. The said report is entitled **"Review of the Effectiveness of the Disciplinary Committee of The Law Society of Kenya and the Complaints Commission".** The Mark Stobbs Report looked at the effectiveness of the Disciplinary Committee from the point of view of turnaround times from the moment a member of the public made a complaint regarding the conduct of an advocate to the point that the Disciplinary Committee (now known as the Disciplinary Tribunal) made its decision. The conclusion of the report was that the process of the Disciplinary Committee was slow and that the Committee lacked capacity to deliver on its mandate due to shortage of staff.

This report eventually led to the amendment of the Advocates Act to include more members of the Disciplinary Tribunal (Section 57 of the Advocates Act) and the creation of Regional Disciplinary Tribunals (Section 58A of the Advocates Act).

Subsequent to the publication of the Mark Stobbs report, in 2007, the Law Society of Kenya, through the Governance, Justice, Law and Order Sector Reform Programme ("GJLOS") of Kenya, undertook a review of the disciplinary machinery of the legal profession. This review led to the publication of a report known as ***The Enforcement of Professional Ethics and***

Standards in the Kenyan Legal Profession. This report was in 2010 published as a book bearing the same title by Noel Cox and Tom Odhiambo Ojienda.

In the said report it is observed that the provisions relating to ethics of advocates in the Advocates Act and the Advocates Practice Rules are *"woefully sketchy and inadequate"* and that the said provisions do not comprehensively deal with modern day problems of practice. This report further recommends the inclusion of **certain ethical requirements** to the Advocates Act and the Advocates Practice Rules. Though these certain ethical requirements are not defined, the trajectory that the argument contained in the report takes is that there is more than what is in the written law that is required to fix the problem of discipline among advocates.

This trajectory is a recognition that the Kenyan public demands excellence in the ethical conduct of advocates. From what is seen above, excellence in the ethical conduct of advocates in Kenya has been in the decline and hence the studies and observations of writers that have been seen hereinabove.

2.3.2 Research Question 2:

Are the aspirations of the Kenyan public on ethical excellence in advocates' conduct adequately provided for in the Advocates Act and the Advocates Practice Rules?

The rules and regulations that govern lawyers' ethics are to be found in the provisions of the Advocates Act, Chapter 16 of the Laws of Kenya and in the Advocates Practice Rules, subsidiary legislation within the said Act.

In summary the Advocates' Practice Rules are guidelines on conduct that should not be undertaken by advocates or the way advocates should conduct themselves in certain situations. These guidelines are general prescriptions and prohibitions such as prohibition from holding oneself as able to offer legal services at a lower fee than that provided for in the Advocates Act; prohibition from sharing fees with unqualified persons; prohibition from ambulance chasing; conflict of interest matters; situations of instructing leading counsel and the obligation to pay the fees of leading counsel; prohibition from acting in a matter where

the advocate may be called as a witness; conduct of advocates in trials and the manner in which advocates describe themselves in their practice.

The Advocates Act, on the other hand, prohibits certain behaviour on the part of advocates and provides sanctions against advocates who engage in such behaviour. It proscribes practicing without a practicing certificate (Section 31 of the Advocates Act); masquerading by an unqualified person as an Advocate; undercutting and charging fees less than the prescribed fees; champerty (sharing of fees with unqualified persons); touting by virtue of which a person actively engages in procuring business for an advocate and failure to disclose the fact that one has been struck off the roll of advocates and hence not licenced to practice law.

These offences and their concomitant penalties for breach are meant to ensure that Advocates conduct themselves within the confines of law.

As will be seen in more detail in Chapter 4, there is a disparity between what the public aspires to regarding advocates' conduct and the matters that are canvassed and provided for in the Advocates Act and the Advocates Practice Rules. The Kenyan public aspires to excellence in such behaviour. The provisions of the Advocates Act and Advocates Practice Rules only set out rules that Advocates are supposed to obey and that is it. These provisions do not encourage the practice of virtue or excellence in behaviour on the part of advocates.

2.3.3 Research Question 3:

If the aspirations of the Kenyan public on ethical excellence in advocates' conduct are not adequately provided for in the Advocates Act and the Advocates Practice Rules, would a virtue ethics approach be able to align the Advocates Act and the Advocates Practice Rules with the said aspirations of the Kenyan public?

In GITHUNGURI DAIRY FARMERS CO-OPERATIVE SOCIETY LIMITED VS MARY NJOKI MBUGUA [2006] eKLR Justice O.K. Mutungi dealt with a situation where an Advocate had deliberately lied under oath. In so doing, the said Advocate had misled the court into granting certain interlocutory orders in favour of his client. Upon discovery of the lies, an application was made to set aside the orders that the concerned advocate had obtained in favour of his client.

The main ground relied upon for the setting aside of the orders that had been obtained was the unethical conduct of the concerned advocate. In his judgement, the Learned Judge said:

"the court operates on the basis that its officers – advocates – observe the oath they took and abide by the ethical conduct binding on them…… the foregoing are serious infractions of the code of conduct expected of an officer of this court. They deserve severe reprimand.

A more fitting punishment would be striking off Mr. Murugu Muthui from the Roll of Advocates, which this court is empowered to do in the firm belief and conviction that this court deserves better officers than the caliber of Mr. Murugu Muthui."

In SHELLY BEACH HOTEL LIMITED AND ANOR VS KENYA REVENUE AUTHORITY [2006] EKLR the Honourable Mr. Justice Sergon alluding to the existence of some other standard of ethics (other than the written law) that binds advocates in their day to day conduct, observed that there are both written as well as **unwritten rules** that govern the ethical conduct of advocates. He went further to observe that:

"In order that the judiciary may be respected as a pure foundation of justice and the bar may be trusted as a fearless trustee of the client's cause, they have to submit to some ethical regulations. There is an established code of conduct written or unwritten for regulating the behaviour of a practicing lawyer towards himself, his client, his adversary in law and towards the court. His behaviour must not display any double-dealing or the act of a trickster. An advocate should be frank, reasonable and his attitude should be that of an ardent advocate for a cause, but not that of a personal enemy of the adversary".

Looking closely at the matters set out by Justice Sergon in the **Shelly Beach case** and comparing the same with the express provisions of the Advocates Act and the Advocates Practice Rules, we see a disconnect. The qualities set out by the learned Judge are not contained in the Advocates Act or the Advocates Practice Rules. There is no reference in the Advocates Act and the Advocates Practice Rules to being "frank", "reasonable" and not behaving as if opposing counsel was a personal enemy. Yet the Learned Judge was of the view that this is required of advocates. In the "unwritten rules" that the Judge is referring to, there is an implied acknowledgement of excellence of character, and hence virtue ethics, as being a core component of such unwritten rules. These unwritten rules are a reflection of the

aspirations of the Kenyan public vis a vis the ethical conduct of advocates. It is what a virtue ethics approach to the legal profession would demand of advocates?

Similarly, in the case of WILLESDEN INVESTMENTS LIMITED VS KENYA HOTEL PROPERTIES LIMITED, HIGH COURT CIVIL CASE NUMBER 367 OF 2000**,** the court was faced with a situation in which an advocate was making false submissions to persuade the court to agree with his client's side of the story. The presiding judge, the Hon Justice Mutungi whilst castigating the advocate for his transgressions observed as follows:

"I need not stress that Learned Counsel for the Defendant owes it to this Court, his client, and his own conscience, not to be so economical with the truth, and the ethical rules that bind him as an officer of this Court."

In this case, just as in the **Shelly Beach** case seen above, the court is stressing that there is a requirement that advocates go beyond the mere written rules that govern their conduct. The **Shelly Beach** case refers to unwritten rules that govern the conduct of advocates. The **Willesden Investments** case refers to a duty that an advocate owes his own conscience in telling the truth always even when his client's case would be weakened because of the said truth. This duty to one's conscience can be equated to the public aspirations with regard to advocates' conduct and the excellence in character that these aspirations demand.

Rhode sees the unwritten rules that govern the conduct of lawyers as some form of tension between moral aspirations and pragmatic constraints both for the lawyers as professionals as well as the public (Rhode, 1995). On the one hand there exist laws and regulations that tell and require lawyers to act in one way and on the other hand there is an aspiration from the public that demands conduct that is way beyond the written letter of the law. The law and the aspirations form some sort of tension and the lawyer will have to navigate this tension so as to act well and do good in the course of his professional life. In navigating this tension, the lawyer needs a guide – this guide is identified as virtue ethics with its stress on excellence of character. If a lawyer strives to be virtuous and by extension have an excellent character, he will have no problem in navigating the tension that exists between what the law wants him to do and what the public expects him to do.

In the cases cited above and in the observations by Rhodes, there is a running thread of argument that there is more that is needed on the part of advocates' conduct than is contained in the written word of the law. The assumption of this study is that this observation points to a requirement of excellence in the character or conduct of advocates and such excellence can be acquired through a virtue ethics approach to the conduct of advocates.

2.2.4 Gaps observed

This researcher did not find any literature where the writers tried to find out what exactly are the aspirations of the Kenyan public with regard to ethical excellence in advocates' conduct. The existing literature states that there is a problem, but it does not go into depth in trying to find out why the general public thinks there is a problem and what it is that the public would expect so as to solve the problem.

The Mark Stobbs Report (2002) which was commissioned after the realisation of the problem in the ethical conduct of advocates fell short in its analysis of the root causes of the complaints against advocates. It looked at structural changes and increase in the capacity of the Disciplinary Committee. The said report did not look at the variance that exists between the public aspirations or expectations in the conduct of advocates and what the Advocates Act and the Advocates' Practice Rules provide. It also failed to appreciate that the stress or result that the public wanted from such a report was a stress on the ethical excellence in the conduct of advocates.

Cox and Ojienda (2010) admit that the provisions relating to ethics of advocates in the Advocates Act and the Advocates Practice Rules are woefully sketchy and inadequate. They also admit that the provisions of the Advocates Act and the Advocates Practice Rules do not deal with modern day ethical problems that advocates encounter. Save for recommending inclusion of certain ethical requirements into the law, they do not give specific recommendations on what should be included and what the ethical requirements are.

This researcher did not also find any literature online or otherwise that explored the reason why there was a disparity between what the aspirations of the Kenyan public are with regard to the ethical conduct of advocates and the provisions of the Advocates Act and the Advocates Practice Rules.

2.3 Conceptual Framework

The theoretical framework of this dissertation is based on the assumption that a virtue ethics approach is the proper basis for the ethical excellence in advocates' conduct. The theoretical framework then suggests that such an approach should be the basis for the modifications that can be included in the Advocatess Act and the Advocates Practice Rules. The growing body of literature on virtue ethics with reference to legal practice shows the widespread interest and recognition of its importance.

In this study, this researcher has examined the following:

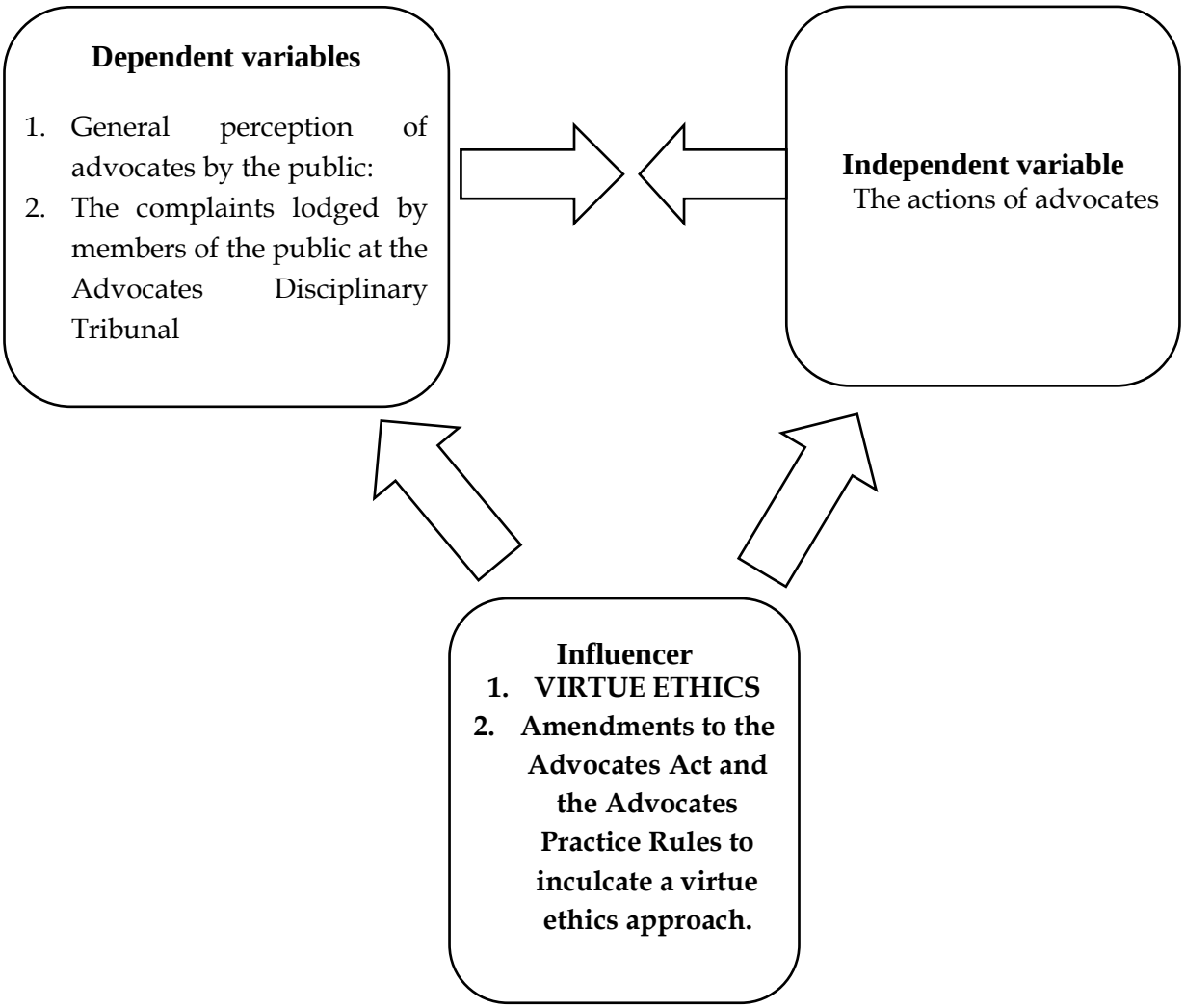
a) The general perceptions of advocates by the public: these are reported in the newspapers, the Hansard of the National Assembly of Kenya and publications of bar associations. In these reports, members of the public, advocates' clients and members of parliament have expressed their views on what they think about advocates;

b) The complaints lodged by the public at the Advocates Disciplinary Tribunal with respect to unethical conduct of advocates;

c) The law: principally the Advocates Act and the Advocates Practice Rules and the provisions in those laws and rules that relate directly to ethics for advocates.

By studying the parameters set out above the researcher was able to test whether the assumption made in the theoretical framework, that virtue ethics would offer the best basis for the ethical excellence in advocates conduct, was plausible.

This researcher established the relationship set out in the diagram below between the parameters that were studied.



In the above captioned model, the actions of advocates and the provisions of the Advocates Act and the Advocates Practice Rules are set out as independent variables. A change in the actions of advocates through excellence in character will result in the dependent variables being affected. Excellence in character on the part of advocates will lead to more positive perception of advocates by the public and a reduction in the complaints lodged against advocates at the Disciplinary Tribunal.

The influencer of the change is primarily virtue ethics. Imbuing a virtue ethics approach to the actions of advocates will lead to a change to the better in their behaviour since they will

strive for excellence in character. Such excellence in character will then lead to the changes in the dependent variables.

Virtue ethics also influences the dependent variable since it is the prism with which the general public judges the actions of advocates.

An amendment to the Advocates Act and the Advocates Practice Rules to include a virtue ethics approach will similarly act as an influencer. When the applicable law contains provisions that extol advocates to act in a virtuous manner and hence strive for excellence in character, the behaviour or actions of advocates (the independent variable) will be forced by the provisions of law to change, leading to an effect on the dependent variables.

2.4 Conclusion

The growing body of literature on virtue ethics with reference to legal practice shows the widespread interest and recognition of its importance. There are still, however, gaps that need to be filled in the body of literature in this field. There is still need for further research and literature to address the issue of why the general public or the common man in the street, naturally aspires for excellence in the character of advocates from an ethical perspective.

There is also further need for research and literature on why there is a disparity between what the Advocates Act and the Advocates Practice Rules provide and the aspirations of the general public with regard to excellence in the ethical conduct of advocates. Is the disparity accidental or by design?

CHAPTER THREE: RESEARCH METHODOLOGY

3.1 Introduction

This chapter explains the methodology used in this research. It covers the approach used in the research, the design of the research, the mode of data collection and the method used to analyze the data.

According to Mouton and Marais (1996) the aim of research methodology is to develop and articulate strategies and methods through which the validity and credibility of research results in the social sciences is maximized.

The methodology adopted in this research, therefore, had the aim of maximizing the validity and credibility of the research results while at the same time appreciating that what the research was about was only a small aspect of social reality.

The research was exploratory. It asked both the questions of "what?" and "why?". This kind of exploratory research is commonly used when new knowledge is sought from the observation of certain behaviour which can be compared with a prior known or accepted standard of behaviour (Wisker, 2007).

The exploration in this research sought to inquire, answer and gather new knowledge from the following questions:

a) what the aspirations of the public on ethical excellence in advocates' conduct are;
b) whether the aspirations of the Kenyan public on ethical excellence in advocates' conduct are adequately provided for in the Advocates Act and the Advocates Practice Rules;
c) if the said aspirations are not adequately provided for in the Advocates Act and the Advocates Practice Rules, whether a virtue ethics approach in these pieces of legislation would be adequate to achieve the said aspirations.

This exploration led to the investigation as to what the aspirations of the Kenyan public on the ethical conduct of advocates were and where the said aspirations could be found.

In this regard, this researcher decided to look at documented instances where those aspirations have been spelled out, that is, the quarterly notices published by the Advocates Complaints Commission in the Kenya Gazette.

Since the documentation of these aspirations was from complaints made primarily by advocates' clients, this researcher took into account the fact that such complaints only proffered a negative outlook of such an aspiration. By studying the complaints from the aspect of what vice made up the complaint complained and inquiring into what virtue would have assuaged the complainant, this researcher was able to further cement Virtue Ethics as the philosophical foundations of this research.

3.2 Philosophical rationale and assumptions

This researcher has used Virtue Ethics as the rationale and the philosophical theory underpinning this research. This researcher has distinguished Virtue Ethics from other normative schools of ethics, namely the Kantian School and the Utilitarian School to conclude that virtue ethics is the school of ethics that correctly captures the aspirations of the Kenyan public on the ethical excellence of the conduct of advocates in Kenya.

This researcher arrives at this conclusion after looking at the complaints made by the Kenyan public in relation to the conduct of advocates and noting therefrom that the main content of the complaints stems from the presence of vice or vices in the conduct of the said advocates. Presence of virtue or ethical excellence as espoused by virtue ethics in the conduct of advocates would address the complaints and meet the aspirations of the general public.

3.3 Research Design

This researcher proceeded from the point of view that the aim of research design is to align the aims and objectives of the research with practical considerations and limitations of the research. (Mouton and Marais, 1996).

The aim of research design is also to help the researcher to integrate the various aspects of the research logically so that the research aims and objectives are addressed (Creswell, 2014). Creswell is also of the view that in crafting a design, the researcher needs to think through the philosophical worldview assumptions that the study will entail. In line with this observation, in designing this research, this researcher adopted a virtue ethics approach as the

theoretical framework that represents the philosophical world view adopted in the interpretation of data and the drawing of conclusions therefrom.

The aims of this research were threefold: firstly to look at what the aspirations of the Kenyan public vis a vis the ethical excellence of advocates are, secondly to inquire on whether those aspirations are captured or provided for in the Advocates Act and the Advocates Practice Rules and if so, whether they are in conflict with, contrary to or in tandem with the said Act and Rules and thirdly to suggest proposals and or modifications to the Advocates Act and the Advocates Practice Rules to include these aspirations if they are not in the said Act and Rules.

In addition to this aim, the objective of the research was to reach a conclusion from the research that a virtue ethics approach would be the most suitable approach in any suggested amendments to the Advocates Act and to the Advocates Practice Rules to align this law and practice rules with the general aspirations of Kenyans with regard to ethical conduct of advocates.

The limitations of this research were that it was not going to be possible to interview the public or advocates' clients about their views on the ethical conduct of advocates'. Interviewing the public or advocates' clients on matters concerning advocates' conduct would pose a danger of infringing on aspects of advocate – client confidentiality because some of the answers proffered might make reference to actions of particular advocates that are not in the public domain hence exposing the researcher to claims of defamation by the said named advocates.

For this reason, this researcher limited the scope of the data collected to the public reports in the media on the conduct of advocates and to the documented complaints contained in the quarterly notices published in the Kenya Gazette by the Advocates Complaints Commission, Kenyan case law, and other documents from the Law Society of Kenya, International Bar Association and the American Bar Association.

The work of Bechhofer and Paterson (2000) informed the research design. They opine that research in social sciences can have a model that starts with the analysis of individual choices. These choices are thereafter collectivized and are for purposes of the study taken to be the general trend in individuals sharing the same or some common identity.

Applying this model to the present research, the researcher found that the complaints to the Advocates Complaints Commission about the conduct of advocates relate to individual persons complaining about the conduct and hence the choices of individual advocates. The researcher thereafter analyses the choices of the individual advocates and generalizes them to apply to advocates generally. Making the jump from these individual choices of an advocate to a generalization of advocates' conduct follows the design and model proposed by Bechhofer and Paterson (2000).

3.4 Data Collection Methods

3.4.1 Primary Sources

This being a research in social sciences it has relied on the following documents for its primary sources:

a) the Kenya Gazette Notices published by the Advocates Complaints Commission;
b) the Advocates Act;
c) the Advocates Practice Rules;
d) case law.
e) the case files of the Disciplinary Tribunal.

The National Council for Law Reporting Act (Act No. 11 of 1994, Laws of Kenya) mandates the National Council for Law Reporting to prepare and publish law reports containing judgements and rulings of the superior courts of Kenya. Such law reports are known as the Kenya Law Reports. The National Council for Law Reporting also serves as a digital repository of all the laws of the Republic of Kenya, the regulations made thereunder, and the Kenya Gazette Notices published weekly by the Government Printer. The Kenya Law Reports and the said digital repository are hosted in the public website known as www.kenyalaw.org.

All the documents that make up the primary sources cited above, save for the case files of the Disciplinary Tribunal were accessed through this website. The case files of the Disciplinary Tribunal were accessed at the secretariat of the Tribunal which is at the offices of the Law Society of Kenya.

3.4.2 Secondary Sources

This research has also relied on the following documents as secondary sources.

a) The Law Society Code of Ethics and Conduct for Advocates, 2016
b) the International Code of Ethics of the International Bar Association
c) the Model Rules of Professional Conduct of the American Bar Association
d) newspaper reports

The documents that served as secondary sources of data and information were derived from the websites set out below. The days that the said websites were accessed are indicated in the bibliography:

a) www.lsk.or.ke the official website of the Law Society of Kenya
b) www.ibanet.org the official website of the International Bar Association
c) www.americanbar.org the official website of the American Bar Association
d) www.nation.co.ke the official website of the *Daily Nation*
e) www.standardmedia.co.ke the official website of *the Standard*

3.5 Data Analysis

The data that the researcher used in this research was qualitative data or non-metric data obtained primarily from the primary and secondary sources set out above.

Reliance on primary and secondary sources as set out above is the accepted norm in research in humanities and social sciences (Wisker, 2007).

Data analysis proceeded by way of comparing the following data:

DATA	**COMPARED WITH**
The complaints against advocates as set out in the Kenya Gazette Notices published by the Advocates Complaints Commission	The provisions of the Advocates Act and the Advocates Practice Rules relating to ethical conduct on the part of Advocates
The vices exhibited in the complaints set out above	The corresponding virtues

The vices exhibited in the complaints contained in the reports on advocates conduct in the media	The corresponding virtues
The vices exhibited in the complaints referred to in reported case law	The corresponding virtues

From these comparisons the researcher drew the inference that had the actions of the advocates comprised the virtues that correspond to what they actually did, there would have been no complaint against them in the first place. Lastly, this researcher concluded that the aspirations of the Kenyan public vis a vis the conduct of advocates was what was represented by the virtues that were missing in the actions of the advocates that they had complained about.

3.6 Research quality – validity, reliability and objectivity

3.6.1 Research Quality

According to Mouton and Marais (1996) *"the quality of research findings is directly dependent on the accountability of the research methodology followed. For this reason, researchers should fully describe the way in which their research has been planned, structured and executed in order to comply with scientific criteria."*

The data collection methods and the data analysis seen above ensure that the data the researcher relied upon is accurate. The veracity of the primary sources of data has the backing of the Government of Kenya. These sources consist of notices found in the Kenya Gazette (which is the official publication of the Government of the Republic of Kenya). They are also made up of the laws of Kenya and reported Kenyan case law. The Gazette Notices are available at the Government Printers and are also found in a website known was www.kenyalaw.org which is sanctioned by the National Council for Law Reporting Act (Act No. 11 of 1994, Laws of Kenya). The laws of Kenya and Kenyan case law are also found at the said website www.kenyalaw.org.

The secondary sources are derived from reputable Bar Associations. The Law Society of Kenya is the local bar association which all advocates must be members of. It is mandated by section 4 of the Law Society of Kenya Act to *inter alia*:

(i) *ensure that all persons who practise law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide;*

(ii) *protect and assist the members of the public in Kenya in matter relating to or ancillary or incidental to the law;*

(iii) *set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya;*

(iv) *determine, maintain and enhance the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya.*

3.6.2 Research reliability, validity and objectivity

This research used a set of documents that are readily available on the internet. The data contained in these documents was analysed against virtues proposed from the virtue ethics school of ethics.

The purpose of this research and the way it is designed is to get new knowledge from comparing one set of data with an objective, well known, existing standard of virtues.

The validity of this research rests on virtue ethics as the theoretical framework of this research. This research is founded on the assumption that if virtue ethics were to be the foundation of advocates' ethics in Kenya, the aspiration of the Kenyan public towards the conduct of advocates would be realised and the kinds of complaints lodged against advocates at the Disciplinary Tribunal would be greatly minimized.

3.6.3 Research Ethics

The concern of this researcher has been to re-produce the data as obtained from the primary and secondary sources without any alteration. All ideas that are not of the researcher have been ascribed to their proper sources.

The researcher has sought the approval of the Ethics Committee of Strathmore University.

There is no need to seek NACOSTI approval because the research does not require any interview or experiment that could influence people's behaviour.

CHAPTER 4: RESEARCH FINDINGS

4.1 Introduction

This chapter presents the findings from the research that this researcher carried out. It discusses in detail the ethical provisions contained in the Advocates Act and the Advocates Practice rules and the complaints made by the public to the Advocates Complaints Commission and the Disciplinary Tribunal. It also discusses, in brief, the statutory roles of the Advocates Complaints Commission and the Disciplinary Tribunal.

This researcher has looked at the vices represented in the advocates' conduct complained of through the prism of the virtues that are lacking therein. This researcher has used this approach since the theoretical framework of this study is that a virtue ethics approach would be best suited to achieve the aspirations of the public vis a vis advocates' conduct.

4.2 The Advocates Act and the Advocates Practice Rules

In Kenya, the rules and regulations that govern lawyers' ethics are found in the provisions of the Advocates Act, Chapter 16 of the Laws of Kenya and in the Advocates Practice Rules, subsidiary legislation within the said Act.

In summary the Advocates' Practice Rules are guidelines on conduct that should not be undertaken by advocates or the way advocates should conduct themselves in certain situations. These guidelines are general prescriptions and prohibitions such as prohibition from holding oneself as able to offer legal services at a lower fee than that provided for in the Advocates Act; prohibition from sharing fees with unqualified persons; prohibition from ambulance chasing; conflict of interest matters; situations of instructing leading counsel and the obligation to pay the fees of leading counsel; prohibition from acting in a matter where the advocate may be called as a witness; conduct of advocates in trials and the manner in which advocates describe themselves in their practice.

The Advocates Act, on the other hand, prohibits certain behaviour on the part of advocates and provides sanctions against advocates who engage in such behaviour. It proscribes practicing without a practicing certificate (Section 31 of the Advocates Act); masquerading by an unqualified person as an Advocate; undercutting and charging fees less than the prescribed fees; champerty (sharing of fees with unqualified persons); touting by virtue of which a person actively engages in procuring business for an advocate and failure to disclose the fact that one has been struck off the roll of advocates and hence not licenced to practice law.

These offences and their concomitant penalties for breach are meant to ensure that Advocates conduct themselves within the confines of law.

4.3 The Advocates Complaints Commission

The Advocates Complaints Commission is a department within the office of the Attorney General established under Part X of the Advocates Act. The purpose of the Advocates Complaints Commission is to inquire into complaints made by the public against any advocate, firm of advocates or employees thereof.

The Advocates Complaints Commission does not make any decisions regarding complaints against Advocates. It is a public body set up to assist members of the public who may have a complaint against any advocate and who might not know the procedure of referring their complaints to the Disciplinary Tribunal. Its role is therefore to receive complaints from members of the public relating to advocates conduct, investigate the complaints and if it is satisfied that a complaint has merit, to lodge the complaint on behalf of the members of the public with the Disciplinary Tribunal for hearing and determination.

Section 53 (9) of the Advocates Act requires the Advocates Complaints Commission to publish in the Kenya Gazette quarterly reports detailing the number and the nature of the complaints it has received and dealt with. The published reports are required to contain information such as the total number of the complaints received, the number of complaints that were resolved amicably and settled as between the complainant and the advocate and the complaints that were lodged with the Disciplinary Tribunal for hearing and determination.

The Advocates Complaints Commission has, however, not been very consistent with the statutory requirement to publish the aforesaid reports. From the year 2007 to 2018, there should have been forty-four (44) quarterly reports published. By the last quarter of 2018 there were only thirty-eight (38) such reports that had been published.

A summary of the nature or type of complaints published in the said reports is as follows:

a) Failure to account to clients for funds held in their clients' account;
b) Failing to inform clients of the progress of their cases;
c) Failing to render professional services;
d) Issuing dishonoured cheques;
e) Delays in prosecuting clients' cases;
f) Withholding clients' documents;
g) Withholding client's funds;
h) Grossly overcharging clients;
i) Failing to attend court;
j) Deliberately delaying the handling of a client's case;
k) Rude and abusive conduct;
l) Theft and fraud;
m) Corruption;
n) Not disclosing conflict of interest matters;
o) Gross indecency;
p) Acting in a manner likely to pervert the course of justice.

The examples given in (a) to (j) above are stated in a manner that is similar to the wording contained in the reports. The offences set out in (k) to (p) above are referred to as "others" in the reports. The classification stated in (k) to (p) was obtained from a perusal by this researcher of the actual complaint files in the Disciplinary Tribunal at the offices of the Law Society of Kenya.

4.4 Analysis of the Complaints Received by the Advocates Complaints Commission from 1st July 2007 to 31st December 2018

TABLE 1

Report Number	Period Covered	Number of Complaints	Complaints referred to Disciplinary Tribunal after investigation
67th Quarterly report	1st July 2007 to 30th September 2007	341	148
68th Quarterly report	1st September 2007 to 31st December 2007	111	84
69th Quarterly report	1st January 2008 to 31st March 2008	141	38
70th Quarterly report	1st April 2008 to 30th June 2008	243	23
71st Quarterly report	1st July 2008 to 30th September 2008	330	62
72nd Quarterly report	1st October 2008 to 31st December 2008	235	36
73rd Quarterly report	1st January 2009 to 31st March 2009	238	31
74th Quarterly report	1st April 2009 to 30th June 2009	230	32
75th Quarterly report	1st July 2009 to 30th September 2009	297	73
76th Quarterly report	1st October 2009 to 30th December 2009	182	27
77th Quarterly report	1st January 2010 to 31st March 2010	206	40

78th Quarterly report	1st April 2010 to 30th June 2010	323	27
79th Quarterly report	1st July 2010 to 30th September 2010	309	77
80th Quarterly report	1st October 2010 to 31st December 2010	285	15
81st Quarterly report	MISSING		
82nd Quarterly report	MISSING		
83rd Quarterly report	MISSING		
84th Quarterly report	1st October 2011 to 31st December 2011	241	45
85th Quarterly report	1st January 2012 to 31st March 2012	274	38
87th Quarterly report	1st July 2012 to 30th September 2012	309	41
88th Quarterly report	1st October 2012 to 31st December 2012	287	42
89th Quarterly report	1st January 2013 to 31st March 2013	206	21
90th Quarterly report	MISSING		
91st Quarterly report	1st July 2013 to 30th September 2013	266	45
92nd Quarterly report	1st October 2013 to 31st December 2013	287	28
93rd Quarterly Report	1st January 2014 to 31st March	232	23
94th Quarterly Report	1st April 2014 to 30th June 2014	218	17

95th Quarterly Report	1st July 2014 to 30th September 2014	208	17
96th Quarterly Report	1st October 2014 to 31st December, 2014	197	3
97th Quarterly Report	1st January 2015 to 31st March 2015	188	5
98th Quarterly Report	1st April 2015 to 30th June 2015	205	71
99th Quarterly Report	1st July 2015 to 30th September 2015	225	38
100th Quarterly Report	1st October 2015 to 31st December 2015	226	0
101st Quarterly Report	1st January 2016 to 31st March 2016	280	1
102nd Quarterly Report	1st April 2016 to 30th June 2016,	231	3
103rd Quarterly Report	MISSING		
104th Quarterly Report	MISSING		
105th Quarterly Report	1st January 2017 to 31st March 2017	376	0
106th Quarterly Report	1st April 2017 to 30th June 2017	281	38
107th Quarterly Report	1st July 2017 to 30th September 2017	191	32
108th Quarterly Report	MISSING		
109th Quarterly Report	1st January 2018 to 31st March 2018	234	0

110th Quarterly Report	1st April 2018 to 30th June 2018	215	5
111th Quarterly Report	1st July 2018 to 30th September 2018	279	4
112th Quarterly Report	1st October 2018 to 31st December 2018	289	40
Totals		**9416**	**1270**

TABLE 2

Nature of Complaint	**Total Number in the quarterly reports from 2007 to 2018**
Failure to account	**190**
Failure to keep the client informed	**85**
Failure to render professional services	**303**
Withholding documents	**3**
Acting without instructions	**6**
Overcharging	**17**
Withholding funds	**448**
Issuing bad cheques	**38**
Conduct unbecoming	**7**
Failure to attend court	**1**
Misleading a client	**3**
Delay	**17**
Acting contrary to instructions	**6**
Others	**83**

The express guidelines and offences set out in the Advocates Act and the Advocates Practice Rules do not contain the complaints set out in Table 2 above. It, therefore, seems from the foregoing that the Advocates Act and the Advocates Practice Rules do not provide expressly what the public expects on the ethical conduct of advocates.

The provisions of the Advocates Act and the Advocates Practice Rules, though relevant to advocates in that they are meant to guide and regulate advocates' conduct, do not seem to concern or matter much to the general public. One can therefore conclude that inasmuch as the Advocates Act and the Advocates Practice Rules make ethical provisions for the conduct of advocates, there is a disparity between these provisions and the situation on the ground, being what the public is concerned about in the ethical conduct of advocates.

The public for example expects an advocate to be honest in handling client's funds: The Advocates Practice Rules omit a specific provision in this regard. Similarly, diligence is expected of and demanded of advocates by the public: diligence is not provided for specifically by the Advocates Act and the Advocates Practice Rules. This applies to most of the complaints that are received by the Advocates Complaints Commission.

4.5 Analysis of the complaints against advocates from a virtue perspective:

The complaints lodged against advocates are a reflection of conduct that is lacking in virtue. The table below contains an analysis of the vice contained in the conduct complained of and the virtue that corresponds to the said vice.

Nature of Complaint	**Vice represented in the conduct complained of**	**Corresponding Virtue**
Failure to account to clients for funds held on their account	Dishonesty	Honesty
Failing to inform clients of the progress of their cases;	Laziness	Diligence
Failing to render professional services	Laziness Injustice Cowardice	Diligence Justice Fortitude
Issuing dishonoured cheques	Dishonesty	Honesty
Delay in prosecuting clients' cases	Laziness	Diligence
Withholding client's documents	Dishonesty Injustice	Honesty Justice
Withholding clients' funds	Dishonesty Injustice	Honesty Justice
Grossly overcharging clients	Dishonesty	Honesty
Failing to attend court	Laziness Injustice	Punctuality Justice
Deliberately delaying the handling of a client's case	Dishonesty	Honesty
Rude and abusive conduct	Pride	Humility
Theft and fraud	Dishonesty	Honesty
Corruption	Dishonesty	Honesty
Conflict of Interest	Dishonesty Injustice	Honesty Justice
Gross Indecency	Impurity	Purity Chastity
Perverting the course of justice	Dishonesty	Integrity

Advocates' clients and the public in general expect advocates to possess and exercise the above virtues in the conduct of their work. The fact that the complaints like what is set out above have been made is testament to this.

Advocates' clients and the Kenyan public also expect advocates to have diligence, justice and fortitude in the discharge of their work. They expect their advocates to be honest, to show some humility, to have integrity, to be diligent and to exercise the virtue of chastity at least in the context of their work. The aspirations of the public point to an expectation of excellence in character on the part of advocates. When such excellence in character is missing, vice prevails, and the advocates engage in the conduct that is complained of above.

In manifesting such excellence in character, advocates will not misappropriate clients' money since doing so is lacking in virtue. They will honour their professional undertakings since a person of excellent character keeps his word. They will keep and observe the Advocates Practice Rules; they will not overcharge their clients; they will behave with the decorum expected of gentlemen (women); they will not steal or engage in fraudulent activities; they will be diligent in prosecuting their clients' cases; they will have a good conscience and disclose and recuse themselves from matters where they would have conflict of interest. They will not engage in corrupt activities; and they will uphold the oath of their office and not engage in acts that seek to pervert the course of justice. The expectation of the members of the public, in short, is that advocates should act in a virtuous manner.

4.6 The Disciplinary Tribunal

Part XI of the Advocates Act establishes the Disciplinary Tribunal. This is the body that is given jurisdiction to listen to complaints against advocates and to punish such advocates as it finds guilty of having engaged in the conduct comprised in the complaints before it.

More importantly, it provides for the making of a complaint against an advocate to the Disciplinary Tribunal by any person. This person can be the Advocates Complaints Commission or any member of the public who is aggrieved.

Complaints are lodged to the Disciplinary Tribunal under the provisions of Section 60 of the Advocates Act. Section 60 of the Advocates Act states that any person may complain against an Advocate *for professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate*. The said section then proceeds to set out the various levels of orders or punishment that the Tribunal can make against an advocate who is found guilty of professional misconduct or dishonourable conduct incompatible with the status of an advocate.

4.7 Lack of definition of the terms "professional misconduct" and "conduct unbecoming of an advocate" in the Advocates Act: resort to virtue ethics to define them?

Unfortunately, the Advocates Act does not define the terms "professional misconduct" or "disgraceful or dishonourable conduct incompatible with the status of an advocate". It is therefore left to the interpretation of the Disciplinary Tribunal if certain conduct of an advocate constitutes "professional misconduct" or "disgraceful or dishonourable conduct incompatible with the status of an advocate".

In the absence of a clear definition of what constitutes "professional misconduct" or "disgraceful or dishonourable conduct incompatible with the status of an advocate" what would the Disciplinary Tribunal use to find out whether particular conduct is either professional misconduct or disgraceful and dishonourable conduct incompatible with the status of an advocate? Is there an objective standard that the Disciplinary Tribunal can use to determine whether or not certain conduct is actually "professional misconduct" or "disgraceful or dishonourable conduct incompatible with the status of an advocate"? What, on the other hand, is the status of an advocate against which the Disciplinary Tribunal should use to measure what conduct is compatible or incompatible with the same?

The Advocates Act and the Advocates Practice Rules as currently worded would not help the Disciplinary Tribunal to clearly discern, from the written law, what is "professional misconduct" or "disgraceful or dishonourable conduct incompatible with the status of an advocate". The Advocates Act and the Advocates Practice Rules do not also set out what is the proper status of an advocate.

Consequently, to make a proper discernment, the Disciplinary Tribunal would have to resort to concepts and conceptions that are beyond the written word of the law. The Disciplinary Tribunal is thus called upon to set some standard of what the status of an advocate should be. Anybody who acts contrary to that status is then be found to have engaged in unbecoming or dishonourable conduct incompatible with the status of an advocate.

The complaints set out in Table 2 exhibit certain vices that the Kenyan public was of the view should not be there in the conduct of advocates. Looked at from a positive angle, these complaints reflected virtues that the Kenyan public wants to see in the conduct of advocates. These virtues and aspirations from the Kenyan public must be the standard that the Disciplinary Tribunal is called upon to look at when deciding what constitutes "professional misconduct" or "disgraceful or dishonourable conduct incompatible with the status of an advocate".

Looking at what would constitute virtuous conduct in every circumstance would adequately guide the Disciplinary Tribunal in determining what the expected conduct of an advocate would be in every circumstance. Adoption of a virtue ethics approach would adequately guide the Disciplinary Tribunal when deciding what constitutes professional misconduct or conduct unbecoming of an advocate. Such an approach would, as stated above, require the Disciplinary Tribunal to look at what the virtue that corresponds to the vice complained of is to determine what the appropriate conduct complained of should have been.

4.8 Conclusion

The research findings presented in this chapter show that what the public wants to see in the conduct of advocates in Kenya is virtue or excellence in character. The said findings also show that the Advocates Act and the Advocates Practice Rules do not provide for what the Kenyan public aspires to in the ethical conduct of advocates. The research findings have also shown that most of the complaints lodged by the public with the Disciplinary Tribunal are expressly provided for in the Advocates Act and the Advocates Practice Rules: the complaints emanate from the public aspiration of virtue which is lacking in the conduct of the advocates that is complained of.

CHAPTER 5: DISCUSSION

5.1 Introduction

The complaints lodged with the Disciplinary Tribunal emanate from the conduct of advocates in their day to day practice of law. This chapter, therefore, discusses the three research questions of this dissertation in the context of the day to day practice of law by advocates.

The discussion on the 3rd research question is slightly longer since it touches on what should be done to bridge the gap between the aspirations of the public and the provisions of the Advocates Act and the Advocates Practice Rules.

In discussing the 3rd research question on whether a virtue ethics approach would align the Advocates Act and the Advocates Practice Rules with the aspirations of the public, this research delves into the ethical dilemmas posed by the adversarial system of advocacy promoted by the Advocates Act and the Advocates Practice Rules. It also looks at how a virtue ethics approach can be inculcated into the adversarial system of advocacy.

This chapter culminates the discussion of the 3rd research question with a brief consideration of promotion of virtue in advocates conduct and in the provisions of the Advocates Act and the Advocates Practice Rules.

5.1.1 Research Question 1:

What are the general aspirations of the Kenyan public on ethical excellence in advocates' conduct?

In Chapter 4, this researcher has analysed the complaints that the members of the public lodge with the Advocates Disciplinary Tribunal and the Advocates Complaints Commission. What is gleaned from the said complaints is that what Kenyans want in the conduct of advocates is twofold: virtue and as a result of the possession of virtue, excellence of character.

According to the findings presented in Table 2 of Chapter 4, the highest number of complaints that were lodged between 2007 and 2018 relate to advocates' withholding of funds (448 complaints). Withholding of funds was followed closely by failure to render professional services (303 complaints) and failure to account (190 complaints).

The other complaints were failure to keep the client informed of the progress of their cases (85 complaints), others (83 complaints), issuing bad cheques (38 complaints), delay in prosecuting cases (17 complaints), overcharging (17 complaints), conduct unbecoming (7 complaints), acting contrary to instructions (6 complaints), withholding documents and misleading a client (3 complaints each).

Failure to account, withholding of funds, overcharging clients, and issuing bad cheques point at a lack of honesty and integrity in the conduct of the advocates concerned. When an advocate withholds funds belonging to a client or he fails to account to a client for sums of money that he has received or holds in trust for the client, he acts dishonestly and what he does is steal from the client. This is also the case when an advocate issues a bad cheque or overcharges a client.

Failure to render professional services, delay in prosecuting cases and failure to keep the clients informed of the progress of their cases point at a lack of the virtue of diligence on the part of the advocates concerned.

Chapter 4 delved into the category of complaints that were, in Table 2 thereof, classified as "others". These are the complaints, the nature of which, is not expressly provided for in the provisions of the Advocates Act and the Advocates Practice Rules. They include rude and abusive conduct; theft and fraud; corruption; not disclosing conflict of interest matters; gross indecency and acting in a manner likely to pervert the course of justice

The case of IN THE MATTER OF CHARLES MUNGA ADVOCATE VS THE LAW SOCIETY OF KENYA AND THE ADVOCATES DISCIPLINARY COMMITTEE (UNREPORTED) [HIGH COURT MISCELLANEOUS CIVIL APPLICATION NUMBER 1456 OF 2004] is an example of one such instance of a complaint relating to an offence of a clear lack of virtue that is expected of all people in everything that they do in life.

This case is discussed in more depth at the discussion of the 3rd research question. Its facts relate to an advocate writing a rude and abusive letter to the spouse of his client ostensibly at the instructions of his client. Rude and abusive behaviour and lack of decorum was found by the Advocates Disciplinary Tribunal to be conduct unbecoming of an advocate and hence, contrary to what the advocate put forth as his defence, punishable by way of a fine.

What prompts the clients and the public to lodge the complaints set out in Table 2 of Chapter 4? Chapter 4 finds that when an advocate engages in the actions that are complained of, his conduct is deemed by the public to lack what a human being should have by the very fact of his nature and that is virtue. It is clear to the public that the vices exhibited in the conduct complained of are not normal and cannot be taken as normal and hence the public is emboldened to complain to the Advocates Disciplinary Tribunal for redress. The aspirations of the public are therefore that advocates exhibit virtue in their conduct and by so doing, achieve excellence of character.

5.1.2 Research Question 2:

Are the aspirations of the Kenyan public on ethical excellence in advocates' conduct adequately provided for in the Advocates Act and the Advocates Practice Rules?

The findings in Chapter 4 show that whereas the provisions of the Advocates Act and the Advocates Practice Rules contain provisions relating to ethics, they miss out on the real issues that concern the public and hence the disparity in the aspirations of the public with regard to the ethical excellence in advocates conduct and the provisions of the law.

The literature presented in the empirical review of Chapter 2 shows that there has been a realization in the courts (the Githunguri Dairy Farmers case, the Shelly Beach case and the Willesden Investments Limited case) that the Advocates Act and the Advocates Practice Rules are missing something when it comes to ethical conduct of advocates. Faced with a situation where there was no law to resort to, the judges in the said cases held, in one way or another, that there are other ethical rules that bind advocates in their conduct without placing their fingers on what these rules were.

Similarly, Cox and Ojienda (2010) admit that the provisions relating to ethics in the Advocates Act and the Advocates Practice Rules are woefully sketchy and inadequate as they do not deal with the modern-day problems of legal practice.

Ojwang and Slatter (1990) observe, correctly, what informs the Advocates Act and the Advocates Practice Rules is the intention to protect the public interest by ensuring sound professional work on the part of advocates.

This research did not find other research or literature that answered the question of why there was such a disparity. The reasons underpinning the disparity between what the Advocates Act and the Advocates Practice Rules provide on the one hand and the aspirations of the public on the other hand is a lack of a philosophical foundation in the ethical provisions of the Advocates Act and the Advocates Practice Rules. The ethical provisions in the two pieces of legislation are put forth as prescriptions to guide conduct without a foundation of what will inform the conduct that is prescribed therein.

5.1.3 Research Question 3:

If the aspirations of the Kenyan public on ethical excellence in advocates' conduct are not adequately provided for in the Advocates Act and the Advocates Practice Rules, would a virtue ethics approach be able to align the Advocates Act and the Advocates Practice Rules with the said aspirations of the Kenyan public?

The theoretical framework of this dissertation takes virtue ethics as the philosophical school of ethics, which if used and imbued into the Advocates Act and the Advocates Practice Rules, would align the said legislation with the aspirations of the Kenyan public.

Virtue ethics as a school of ethics has been discussed extensively in Chapter 2. However, how would virtue ethics be inculcated in the day to day legal practice of advocates? One of the cornerstone pillars of legal practice in Kenya is the practice of an adversarial system of advocacy. This system is promoted by the Advocates Act and the Advocates Practice Rules. The adversarial system of advocacy is premised on the principle that an advocate when acting as such must act, within the constraints of professional behaviour, in a manner that will

maximize the likelihood that his client's case will prevail (Schwartz, 1978). In such a system, an advocate is required to represent the interests of his or her client with the maximum zeal permitted by law. That zeal might go too far, but as long as it is not forbidden by the written law, it would be allowable.

5.1.3.1 The quandary of the adversarial system of advocacy

Within the context of applying a virtue ethics approach to the provisions in the Advocates Act and the Advocates Practice Rules, the adversarial system presents unique challenges.

There are actions of an advocate that the adversarial system would not frown upon since they are not forbidden by the Advocates Act or the Advocates Practice Rules, yet from the layman or common man, the said actions would be reprehensible or unethical since they would be lacking in virtue.

For example, one of the complaints contained in Table 2 of Chapter 4 is a complaint regarding rude and abusive conduct on the part of the advocate. In an adversarial system of advocacy, if such conduct is, a) on instructions from the client, b) in furtherance of the client's case and c) not in conflict with any law, it would be permissible. Yet, from a virtue ethics perspective, rude and abusive behaviour cannot be permissible even if it furthers the client's case. Rude and abusive behaviour does not represent excellence in character.

In an adversarial system of advocacy, the presiding judge sits as an impartial arbiter as the warring advocates present their client's cases to the best of their ability each of them trying to persuade the judge that their client's case should carry the day.

After listening to the evidence adduced by both sides and to the legal arguments presented thereafter by each side, the judge weighs the evidence that each side has presented together with the closing arguments of the Advocates as to the applicable law and thereafter makes a decision.

The judge does not "meddle" in the case. He or she does not make unnecessary inquiries as if he or she was an interested party in the case. This requirement is so key to the proper

functioning of the adversarial system that in EMMANUEL CHUBAHIRO IMANISHIMWE VS REPUBLIC [High Court Miscellaneous Criminal Application Number 836 of 2006 eKLR] Lady Justice H.A. Omondi was of the view that it was contrary to the adversarial system of law that is practiced in Kenya to expect a judge to make inquiries as to the length of time that an accused person had been held in custody. Her view was that it was the duty of the accused person or his advocate to make a direct complaint to the court for infringement of his constitutional rights and not for the court to inquire from the prosecutor on whether or not the accused person's constitutional rights had been infringed. The playing field of the game is therefore left entirely to the Advocates.

Similarly and in reference to the adversarial system of advocacy, in the case of JONES VS. NATIONAL COAL BOARD [1957] 2 QB 55 Lord Denning was of the view that:

> *"In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries."*

In an adversarial system the only constraint placed on an advocate is that he should not break the law. Consequently if an advocate has in his possession exculpatory evidence that can aid his opponent's case, he is not under any obligation to disclose it unless the opponent specifically requests for it by means of a legal technique known as Discovery and Interrogatories which is provided for under the provisions of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.

This technique enables an advocate to request the opposing advocate for specific disclosure of all material documents in his custody and to answer under oath certain specific questions posed by the requesting advocate. If an advocate ignorant of this technique does not obtain the exculpatory information in the possession of his opposing advocate, the opposing advocate is not under a legal obligation to disclose it. This at times results in a judgement in favour of an advocate's client who in reality only obtained the judgement owing to failure in disclosing material evidence to a party that was incompetent enough not to ask for it.

Would an advocate who has deliberately failed to disclose such exculpatory evidence that is not requested for be in breach of the law? The answer, unfortunately, is in the negative. It follows then that such an advocate would not have any sanctions imposed on him even if it was later discovered that he was in possession of such evidence, but he deliberately refused to disclose it to the other party. From a virtue ethics perspective, such conduct would be reprehensible.

In other forms of jurisdictions, such as the International Criminal Court the duty to disclose exonerating evidence is placed squarely on each side. Article 54 of the Rome Statute imposes an obligation on the Office of the Prosecutor to investigate both incriminating as well as exonerating circumstances in equal measure. If the Prosecutor failed to do so he would be in breach of the law and he would be deemed to have acted unethically. If the Prosecutor discovered exonerating evidence and failed to disclose it to the Defence, that would form a ground for the defence to apply for the termination of the charges owing to the misconduct of the Office of the Prosecutor.

In an adversarial system of advocacy, there is no such imposition on disclosure. The damage that failure to disclose crucial information to the other side can cause has already been discussed. If an advocate deliberately fails to disclose such information just because it is not his legal duty to do so, he would be acting unethically even though he would not be in breach of any of the rules and regulations contained in the Advocates Act and the Advocates Practice Rules.

Owing to this, in an adversarial system of advocacy, as long as an advocate does not cross the boundaries set by the law when acting for or representing his client, his conduct while so acting is taken to be “ethical”.

Ethical action is, therefore, equated with acting within the confines of the law. However, as seen above, even when an advocate acts within the law, his actions may cause grave injustice to others. These actions, even if they are within the law, if looked at objectively, would not pass the test of being objectively “good” actions. An advocate who acts in such a manner cannot be said to be of excellent character or virtuous. The public frowns upon such conduct of an advocate.

The role of a lawyer or an advocate towards his client cannot, therefore, be amoral as is argued by Pepper (1986). All their actions *qua* advocates must at all times be seen through the prism of ethics, of what is good or bad, of what is right or wrong, of conduct that is virtuous or full of vice.

It follows from the foregoing that there are some actions of advocates (such as the ones referred to above on disclosure of exonerating evidence) which are unethical in nature even though they are totally permissible by the law. These actions even though totally permissible by law, cannot pass muster of what is a good action that the common man in his understanding sets for an advocate.

The illogical extent to which ethical issues in an adversarial system are clouded is manifested in IN THE MATTER OF CHARLES MUNGA ADVOCATE VS THE LAW SOCIETY OF KENYA AND THE ADVOCATES DISCIPLINARY COMMITTEE (UNREPORTED) [HIGH COURT MISCELLANEOUS CIVIL APPLICATION NUMBER 1456 OF 2004]. The brief facts of the case are that the Applicant in the case, an advocate of the High Court of Kenya, had written an expletive and abusive letter to the husband of his client. The letter, in addition to containing abuses and expletives, was a general threat of instituting divorce proceedings on behalf of his client with all the attendant consequences unless the husband immediately addressed certain demands set out in the letter. The demands related to payment of alimony and custody of the sole child of the marriage.

Upon receipt of the said letter, the husband was furious at being abused and referred to in explicit terms by a lawyer whom he did not know and who purported to represent his estranged wife. He immediately lodged a complaint with the Disciplinary Tribunal. After a somewhat lengthy hearing the Disciplinary Committee found that in writing the letter, the subject of the complaint, the advocate had engaged in dishonourable and disgraceful conduct incompatible with the status of an advocate. He was found guilty and was ordered to pay a fine of the sum of Kshs 40,000/- and costs to the Law Society of Kenya.

The advocate appealed to the High Court of Kenya against the decision of the Disciplinary Tribunal. His main ground of appeal was that he was acting on the instructions of his client and the Disciplinary Tribunal had erred in law and in fact in finding him guilty of disgraceful conduct incompatible with the status of an advocate yet all he was doing was carrying out the wishes of his client. According to the advocate, in an adversarial system of advocacy the

client was king and instructions from a client were paramount. In any event, he argued, what he wrote to the husband of his client were true facts supported by averments from his client. In that regard, he had not broken any law and his conduct could therefore not be termed as dishonourable. Consequently, he argued, the Disciplinary Tribunal was totally wrong in imputing disgraceful conduct on his part.

The advocates representing the Law Society of Kenya and the Disciplinary Tribunal argued that advocates are not blind agents of their clients. Consequently, they argued, advocates who carry out instructions of their client that have the effect of injuring third parties stand to suffer personal liability for the injury they cause.

Unfortunately, the appeal was not heard and determined on merits as the advocate entered into a plea bargain with the Disciplinary Tribunal's advocate and recorded an agreement in court by which he accepted to pay a paltry fine and to unreservedly withdraw the offensive letter that he had written.

Even though the High Court did not get an opportunity to enunciate its views on whether or not conduct that was clearly offensive but within the parameters of the law in an adversarial system was ethical or unethical, this case serves as a good illustration of the deficiencies in the provisions of the Advocates Act and the Advocates Practice Rules when it comes to making provisions on what is and what is not ethical conduct on the part of advocates.

The adversarial system of advocacy has proponents who take it to the extreme in their interpretation of the role of an advocate in such a system. Sharswood (1854) holds that the adversarial system is sacrosanct and *"the lawyer, who refuses his professional assistance because in his judgment the case is unjust and indefensible, usurps the functions of both judge and jury."* In his interpretation, a lawyer is duty bound to accept a morally repugnant case whose cause he does not believe in. Can a virtuous advocate, excellent in character reconcile himself with taking up a morally repugnant case? The aspirations of the Kenyan public with regard to the virtues that an advocate should have would feign upon such conduct.

Contrary to what Sharswood holds and in light of the aspirations of the Kenyan public with regard to advocates conduct that is discussed in this study, the correct position of the place of adversarial advocacy can be summarised in the words of Samuel T Coleridge:

"There is undoubtedly a limit to the exertions of an advocate for his client, for the advocate has no right, nor is it his duty, to do that for his client which his client in "foro conscientiae" has no right to do for himself." (Coleridge, 1888)

The adversarial system with its emphasis on following the law to the letter and to the instructions of a client to an advocate does not promote excellence of character – rather, it promotes a positivistic approach to the practice of law.

A proper system of practice of law should go beyond what the letter of the law and what the instructions of the clients are. It should instead encourage the advocate placed in a quandary to query whether a person of excellent character would do what he is doing or about to do.

Chapter 6 suggests various recommendations that aim at addressing the quandary posed by the adversarial system of advocacy that is practised in Kenya. It proposes:

a) Educating in virtue with specific reference to justice, prudence, integrity and fortitude. Training in these virtues is sorely lacking in law schools which, following the old tradition of Holmes (1897), focus their training of lawyers to the law as it is written in legal text books and legislation followed by logic and processes of analogy, discrimination and deduction.
b) Fostering a culture of virtue with the aim of helping advocates to change their attitudes towards their legal practice and to appreciate that excellence of character is something worth pursuing and emulating. With such an attitude an advocate, when confronted with a moral dilemma such as is posed by adversarial advocacy, will ask himself "what kind of a person should I be?" before asking himself the question, "what should I do in this or that situation?".
c) Enforcement of virtue in the practice of law;
d) Modification of the Advocates Act and Advocates Practice Rules and has proposed amendments borrowed from the International Code of Ethics of the International Bar Association and Model Rules of Professional Conduct of the American Bar Association. This proposal flows from the works of Luban (2007) and McGinnis (2011). For them, good codes of conduct for advocates can enhance good character formation that is needed for ethical practice of law.

With virtue ethics in the background as the guiding principle, the adversarial system of advocacy would not only see advocates acting in a more ethical way but also in a more professional way hence raising the standards of the practice of law.

5.2 Conclusion

The aspirations of the public innately expect advocates to act in a virtuous manner which unfortunately is not expressly provided for in the Advocates and the Advocates Practice Rules.

Imbuing a virtue ethics approach to the Advocates Act and the Advocatess Practice Rules and ultimately to the adversarial system of advocacy practiced in Kenya will be the solution to the quandary of advocates who want to do and act in a virtuous manner. The beacon of excellence of character will provide them with the answers of what is the right thing to do in each and every circumstance even in cases where the advocate is confronted with what would be a morally repugnant case.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

The philosophical assumption made in this dissertation is that virtue ethics applied to advocates' conduct would help in meeting the aspirations of the general public on the ethical excellence of the conduct of advocates.

A virtue ethics approach to the conduct of advocates in Kenya would shift the focus from the rules contained in the Advocates Act and the Advocates Practice Rules to the character of the advocates. It is not inconceivable that under the Advocates Act, an advocate, by observing the rules of the Advocates Act and Advocates Practice Rules, would be ethical even if he was of the foulest character in his private life. From a virtue ethics perspective, such an advocate would not be ethical.

The recommendations covered in this chapter proceed with the above philosophical assumption in mind and they suggest modifications to the approach in the training of advocates and to the rules that govern advocates to imbue the same with virtue ethics.

6.2 Summary of key findings and conclusions

6.2.1 The main objective or dissertation aim

The main aim of this research was to come up with ways of improving advocates' ethical behaviour in Kenya so that it becomes virtuous and it attains the high degree of ethical excellence that is expected of advocates by the aspirations of the general public.

6.2.2 Summary of findings and conclusions

The research findings discussed extensively in Chapter 4 were:

a) The aspirations of the general public concerning the ethical excellence of the conduct of advocates can be gleaned from the complaints made by the public to the Advocates

Complaints Commission and the Disciplinary Tribunal. The complaints are about negative conduct which reflects the existence of certain vices therein. Investigating what virtue corresponds to the vice complained of shows what the aspirations of the public on advocates' conduct are. From the said investigation, it has come out clearly that what the public aspires to in the conduct of advocates is virtuous conduct and excellence in character on the part of advocates.

b) The aspirations of the general public are not been adequately provided for in the Advocates Act and the Advocates Practice Rules. The Advocates Act and the Advocates Practice Rules do not specifically encourage or provide for virtue and excellence of character on the part of advocates.

c) There is, therefore, need for a radical change in the approach to advocates ethics and the provisions relating to ethics that are contained in the Advocates Act and the Advocates Practice rules to align them with the aspirations of the general public and the advocates' clients in particular.

6.3 Recommendations

6.3.1 First Recommendation: Educating in virtue

The first recommendation of this researcher is that to be able to enforce a virtue ethics approach in the conduct of advocates and to ensure that there is a change towards excellence in the character of advocates, there should be education in virtue in law schools before advocates start their legal practice.

This position is supported by Luban and Evans, who stress that it is imperative to **teach correct ethics** to lawyers. For them, knowledge of ethics and what virtue is and especially what virtues lawyers need to have, is key to starting the journey of enforcing a virtue ethics approach to the practice of law. Hence, know first, then practice thereafter is the motto (David Luban, 1983) (Adrian Evans, 2014).

Maritain (1962) had, many years before Luban and Evans also observed the same thing: that to acquire moral virtue, ethical knowledge is indispensable. For Maritain to know ethical truths does a great deal for virtue. He then explains that even though virtue is not a by-product of knowledge, true moral knowledge is a condition sine qua non for virtue.

The teaching of correct ethics in law schools must, therefore, be taken as a necessary and first step towards achieving excellence in character in lawyers and subsequent thereto, realising the aspirations of the general public on the same.

Regarding the teaching of ethics in law schools, Kwenjera (2016) decries the dearth of such teaching in Kenya and argues, from his research findings, that most local law schools only concentrate on the legal courses that are required to attain a degree in law. Kwenjera agrees with Maritain and holds that the few law schools that have introduced a course on ethics in their curricula have a taken a step in the right direction. His view is that intellectual formation of a person in matters of ethics has an impact on individual behaviour and the character of the individual.

Carr and Steutel (1999) are of the view that as a starting point, any virtue-based moral education should have as its aim the promotion of virtue. They define virtue as 'some character trait that is for some important reason desirable or worth having'. Hence moral education will aim to promote those character traits that are desirable or worth having. Examples such as honesty and integrity will be character traits that are promoted as worth having. Mendacity, cowardice, insincerity, impoliteness etc will be character traits that are promoted as not worth having.

Carrying out moral education in the manner suggested by Carr and Steutel in law schools will see in the end, lawyers knowing which character traits are worth having and they will as a result of the knowledge of these character traits try to acquire some of them. What will be extolled in this education will be virtuous conduct.

Kronman (1995) also tackles the issue of moral education from the perspective of legal ethics education. He argues that legal ethics education is akin to induction into a culture and a distinct way of life. He compares induction into the said culture or way of life to learning a new language. In learning a new language, knowing the rules of the language is not enough.

One must acquire the habits or form of life of the language to be able to speak and understand it and ultimately communicate effectively in it. Similarly, in matters of legal ethics, it is not just about knowing the rules of ethics but being inducted into the culture of an ethical life, which then translates into a way of life.

Borrowing from Kronman, Law Schools can also start at the commencement of legal training, to teach a culture of ethical excellence so that it becomes, by the time the lawyers are qualifying from law school to start their legal practices, a distinct way of life. In this regard, this researcher recommends that law schools in universities teach some of the following virtues:

a) **The virtue of <u>Justice</u>**. Kohlberg (1981) is of the view that the apex of all moral education is education in the virtue of justice. But what is justice? In the Summa Theologica, Secunda Secundae (II-II, Q. 58, Art. 1), Aquinas defines justice as *ius suum cuique tribuere* – give each one his own or due.

   Hervada (2006) explains that the virtue of justice defined as aforesaid requires knowing and wanting: knowing what is just and wanting to give to each what is his own or due. Knowing is the art of the law or what is just. Wanting is an act of the will. When the act of the will acquires the permanent willingness of giving to each what belongs to him, it possesses the virtue of justice.

   Whilst teaching this virtue, law schools should inculcate in students the habit of questioning whether what is at stake is due to the person claiming it. It should then instil in the students the habit as lawyers (when they graduate with their degrees in law) to ensure that their clients do not steal a match from a person to whom justice demands that a particular right be accorded even if it means that they lose the client.

   In order to teach the virtue of justice well, law schools will have to teach and train students to understand that even if they have to defend their client's case to the best of their ability, they must also inform their clients what justice in particular circumstances entails. It also requires teaching students that it is virtuous to desist from acting for a client who insists on pursuing a course of action that will cause manifest injustice to another party.

This does not mean teaching the students how to lose cases, not at all, for where the due lies with their client (that is, that the virtue of justice demands that their clients get what is their own), the students will be taught to fight to the end to ensure that their client gets justice (what is their own or due to them).

b) **The virtue of Prudence**: in the Prima Secundae, Article 47 (I-II, Art 47) of the Summa Theologica, Aquinas defines prudence as "wisdom concerning human affairs" or "right reason with respect to action". He also describes it as the mother of all virtues.

Prudence has to do with reason and then subsequent to the said reason, action. For one to be prudent, he or she needs to know general principles of what is good or bad and secondly how to apply these principles to a decision that he or she is required to make.

Education in prudence will help lawyers in their decision-making processes. Lawyers make decisions all the time in the course of their practice of law. They need to know what is right or wrong in particular circumstances and apply it to their actions and decisions, even complex decisions.

c) **The virtue of Integrity:** the virtue of Prudence leads to another virtue that is very important for lawyers and their excellence in character, and that is integrity. Integrity is the inclination of man to seek unity within himself, to be one: a person of integrity has unity of life. His private life and his public life are balanced and guided by the same moral beacon of always trying to do the right thing.

Integrity, as far as the practice of law is concerned, implies honesty when dealing with client's funds even when one has the opportunity of pilfering the same because it will not be discovered. Educating in the virtue of integrity will entail showing lawyers that integrity is an attractive character trait that is worth emulating and having.

Some of the complaints seen in Chapter 4 refer to a lack of integrity on the part of advocates. If the virtue of integrity is taught well and acquired, the incidents of actions that go against this virtue will be greatly reduced.

d) **The virtue of Fortitude:** in the Summa Theologica Secunda Secundae (II-II, Q 139, art 1), Aquinas defines the virtue of fortitude as **a certain firmness of mind which is required both in doing good and enduring evil especially with regard to goods or evils that are difficult.**

   In the context of educating in virtue, law schools can teach the virtue of fortitude not as an abstract virtue related to courage but in the context of the sub-virtues of diligence, industriousness and perseverance. Diligence, industriousness and perseverance relate to the firmness of mind required to do good and endure evil when the going is difficult. Educating in diligence and industriousness helps lawyers to work well, aiming to be professional and as perfect as possible in their work. Educating in perseverance helps lawyers not to give up when the going gets tough.

6.3.2 Second Recommendation: Fostering a culture of virtue

The recommendation that follows the recommendation on education in virtue is fostering a culture of virtue. This ensures that virtuous conduct continues when the advocates have finished law school and started their legal practices.

The Law Society of Kenya should make enabling rules so that in its continuous professional development programmes a culture of ethics is ingrained in all advocates. This culture can be ingrained by giving sessions on virtue ethics as applied to advocates and what excellence of character in advocates entails.

There could also be a reward and recognition system where, in addition to recognizing advocates for their contribution to the advancement of law and legal practice, advocates who exhibit excellence in character could also be recognized and rewarded.

To further foster the culture of virtue, the Law Society of Kenya can start using an assessment tool on advocates on a frequent basis to assess their awareness of ethics in legal practice and what is virtuous conduct on the part of an advocate in any given situation. This tool could have various scenarios that are reflected in the complaints made by the public against advocates' conduct. It would then ask the advocate to analyse the vice that is posed by the conduct complained of and the virtue that should be exhibited to avoid such complaints. The fact of such frequent assessment could promote good behaviour and virtue in advocates and avoid future poor behaviour.

6.3.3 Third Recommendation: Enforcement of Virtue Ethics to the practice of law

How can we go about enforcing a virtue ethics approach to the practice of law? Is it even possible to enforce a virtue ethics approach to the practice of law? Many a time, virtue ethicists whilst trying to grapple with the issue of virtue ethics in legal practice, face the criticism that it is impossible to codify ethical conduct for lawyers. They often come across the assertion that there already exist rules and regulations, such as those that are contained in the Advocates Act and the Advocates Practice Rules, that govern the ethical issues relating to the conduct of advocates.

This criticism, as observed by Parker and Evans (2007), is borne out of the view that has persisted over the years that it is only advocates who are knowledgeable enough to set ethical standards for their practice. This view is forcefully enunciated by Smith (1990) when addressing the question of whether lawyers should listen to the views of philosophers and defer to philosophers' claims about moral principles. His view is that firstly, that philosophers do not have adequate training and experience to teach lawyers ethics and secondly that nothing substantive has come out of philosophers' attempts to teach lawyers ethics.

These kinds of views fly in the face of the complaints that are received by the Advocates Complaints Commission and the Disciplinary Tribunal discussed in Chapter 4. The complaints from the public show an aspiration by the public for excellence in the conduct of advocates that is not contained in the provisions of the Advocates Act or the Advocates Practice Rules. The discussion in Chapter 5, shows that the provisions of the Advocates Act

or the Advocates Practice Rules are inadequate. The said discussion has also shown that there is need to resort to principles outside the province of legislation. These principles are found in virtue ethics.

Nicolson (2005) agrees with Smith (1990) that it is impossible to codify ethical conduct for advocates and hence enforce virtue ethics in legal practice with the force of law. According to him professional codes of conduct such as the Advocates Act and the Advocates Practice Rules cannot effectively ensure that advocates uphold high ethical standards. His view, a little different from Smith, is that what is necessary is to develop positive behavioral attributes (good character) that is relevant to legal practice.

This researcher has taken the position that it is possible to educate in virtue and has provided literature to that effect, namely the works of Luban (2007), Evans (2014), Carr and Steutel (1999) and Kronman (1995).

A consequence of being able to educate in virtue is that one can put down in writing what the exercise of virtues entails for ease of reference by anybody who wishes to know how to exercise any virtue given the circumstances in which he or she finds himself or herself. This can be done by legislation or codification of virtue ethics by imbuing codes of ethics of advocates with a virtue ethics approach. Once this is done, there can be sanctions for those who do not abide by the standards set out in the codes of conduct.

6.3.4 Fourth Recommendation: Modifications to the Advocates Act and the Advocates Practice Rules

The Advocates Act and the Advocates Practice Rules imbued with excellence of character and the promotion of virtue on the part of advocates would stipulate to advocates that the most important thing in their practice would be their clients, but not their clients in isolation but their clients within the objective of good actions that pursue an end that is good. The most important thing would be practice of law that is imbued with virtue.

This would not mean a moralistic approach to the practice of law. It would mean first and foremost a careful and diligent practice of law at which the advocate gives his best for his client within the ethical confines of the law.

A virtuous approach to legal practice would not allow an advocate to be indolent or ignorant of the law. It would also not allow an advocate to be pusillanimous with respect to his client's cause. It would demand from an advocate a full application of his mind and strength towards his client's case and cause.

More importantly, a virtuous approach to legal practice would mean a practice of law where the virtue of justice is respected. In this regard, a situation as seen above where an advocate pursues his client's case vigorously and to the best of his ability and as a result of such pursuit injustice is caused to the other side would not occur.

An attempt at this approach is found in the Law Society of Kenya's Code of Standards of Professional Practice and Ethical Conduct ("LSK's Code") that was passed by the Law Society of Kenya in June 2016.

The LSK's Code appreciates that there is a regulatory framework made up of the Advocates Act and the Advocate Practice Rules that govern the legal profession. This is in addition to guidelines issued by the Law Society of Kenya from time to time. In passing the LSK's Code, the Law Society of Kenya was cognisant of the fact that the same was not legislation and that it was not enforceable by the Disciplinary Tribunal as if it had legislative force.

The LSK's Code focuses on what it terms professional misconduct, defined as "conduct in breach of the rules, standards and ethics of the profession". It also focuses on what it refers to as unsatisfactory professional conduct defined as "conduct that falls below the standard of conduct or behaviour that is expected of a practising advocate."

The LSKs Code admits that its intention is only to set minimal benchmarks for professional practice and ethical conduct. This is in contrast with the aims of this dissertation which is to come up with ways of improving advocates' ethical behaviour in Kenya so that it becomes more virtuous and so that it attains the high degree of ethical excellence that is expected of advocates by the aspirations of the public.

Lastly, the LSK's Code, akin to the Advocates' Practice Rules, comes up with twelve Standards of Professional Practice and Ethical Conduct ("SOPPEC"). Save for SOPPEC 10 (on Social Media) and SOPPEC 12 (on Honesty and Integrity) the LSK's Code does not directly aim at promoting exercise of virtue and excellence of character in advocates.

The foregoing notwithstanding, the Advocates Act and Advocates Practice Rules, which do not refer to the LSK's Code, could borrow SOPPEC 6 (on Conflict of Interest), SOPPEC 10 (on Social Media) and SOPPEC 12 (on Honesty and Integrity) and have them as part of the legislation.

The Advocates Act and the Advocates Practice Rules could also borrow from some of the provisions of International Code of Ethics of the International Bar Association or the Model Rules of Professional Conduct of the American Bar Association.

These two codes of conduct attempt to go to some depth to define clear actions of lawyers that are not permissible due to their unethical nature. In this way, the Advocates Act and the Advocates Practice Rules will be in tandem with the proposal by Nicolson (2000) in relation to ethical norms for lawyers in that they will contain both the "what" of the ethics to be practiced by advocates in the form of content and the "how" of the ethics to be practiced by advocates in the form of the manner of implementation of ethical practices.

The Advocates Act and the Advocates Practice Rules should therefore shift from both the general regulatory provisions that they contain and the undefined caveats directing Advocates to avoid professional misconduct or disgraceful or dishonourable conduct incompatible with the status of an advocate to a structure that focuses more on virtue and excellence of character on the part of advocates in the conduct of their business as advocates.

Some of the provisions in the International Code of Ethics of the International Bar Association that mirror the aspirations of the public on ethical excellence in the conduct of advocates that could be included in the Advocates Practice Rules include the following:

a) *Lawyers shall at all times maintain the honour and dignity of their profession*
b) *Lawyers shall preserve independence in the discharge of their professional duty.*

c) *Lawyers shall treat their professional colleagues with the utmost courtesy and fairness.*
d) *Lawyers should never represent conflicting interests in litigation.*
e) *In pecuniary matters lawyers shall be most punctual and diligent. They should never mingle funds of others with their own and they should always be able to refund money they hold for others. They shall not retain money they receive for their clients for longer than is necessary.*
f) *Lawyers shall never forget that they should put first not their right to compensation for their services, but the interests of their clients and the exigencies of the administration of justice.*

Some of the provisions of the Model Rules of Professional Conduct of the American Bar Association that could be included in the Advocates Practice Rules are:

a) *A lawyer shall act with reasonable diligence and promptness in representing a client*
b) *A lawyer shall not represent a client if the representation involves a concurrent conflict of interest.*
c) *A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.*

d) *A lawyer shall not knowingly:*

    (i) *make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;*
    (ii) *fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or*
    (iii) *offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the*

testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

e) *A lawyer shall not unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.*

Once amendments to the Advocates Act and the Advocates Practice Rules are in place as recommended in this dissertation, it will create a situation where there is legislation relating to the ethics for lawyers which contains good content with respect to ethics. Such legislation will in turn be able to manage to control and enhance ethical behaviour on the part of advocates and ultimately meet the aspirations of the Kenyan public with regard to ethical excellence in the conduct of advocates.

6.4 Limitations

This researcher encountered limitations in this research owing to the limited research in this area in Kenya. This researcher did not find any research that has addressed why the aspirations of Kenyans on advocates' conduct sets the bar of excellence as the guiding principle for those aspirations. Is this desire to see excellence innate in the human person, acquired through training or taught in schools? This is an area where this researcher thinks future research should be carried out.

There was also little or no research at all that this researcher could find that addressed in depth the issue of the disparity between what the Advocates Act and the Advocates Practice Rules provide on the one hand and the aspirations of the Kenyan public with regard to the ethical excellence of the conduct of advocates on the other hand. Is it by design or is it because of lack of a proper school of ethics as the foundation of the legislative texts of the Advocates Act and the Advocates Practice Rules? This is also an area where this researcher thinks future research should be carried out.

6.5 Conclusion and demonstration that the purpose of the research has been achieved.

This research has shown that the public's aspirations in relation to the ethical excellence of advocates' conduct are founded on an objective standard or common man's understanding of what ethical excellence is. In this understanding, ethical excellence is represented by the possession of virtue which the public expects advocates to exhibit in their daily conduct and in the practice of their profession from day to day.

This research has also shown that what the Advocates Act and the Advocates Practice Rules provide is a set of rules where advocates are told what to do and what not to do. The said Act and Rules therefore lack depth when it comes to the real issue of virtue and excellence in character. This researcher has shown that as a result of the foregoing, there is a disparity between what the general aspirations of the Kenyan public with regard to ethical excellence in advocates' conduct and what the Advocates Act and Advocates Practice Rules provide. On the one hand the public yearns for virtuous conduct and on the other hand the law provides a set of rules that do not necessarily promote virtue in the conduct of advocates.

Lastly, owing to the centrality of virtue in the aspirations of the Kenyan public on the ethical excellence of advocates' conduct, this researcher has proposed that a virtue ethics approach be adopted. In this regard he has proposed that the teaching of virtue commences at law schools, that the Law Society of Kenya strives to inculcate a culture of virtue in the practice of law in Kenya and that a virtue ethics approach be imbued in amendments to the Advocates Act and the Advocates Practice Rules.

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Appendices

Appendix I: Turnitin Report on this Dissertation

A DEMAND FOR EXCELLENCE THE GENERAL ASPIRATIONS OF THE PUBLIC ON ETHICAL EXCELLENCE IN ADVOCATES' CONDUCT IN KENYA A VIRTUE ETHICS PERSPECTIVE

ORIGINALITY REPORT

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Appendix II: Strathmore University Institutional Ethics Review Committee Approval

Strathmore UNIVERSITY

28th July 2020

Mr Nyiha, James
jnyiha@strathmore.edu

Dear Mr Nyiha,

RE: A critical study of the philosophical foundations of the ethical rules and regulations contained in the Advocates Act and the Advocates Practice Rules

This is to inform you that SU-IERC has reviewed and **approved** your above research proposal. Your application approval number is **SU-IERC0856/20.** The approval period is **28th July 2020 to 27th July 2021.**

This approval is subject to compliance with the following requirements:

i. Only approved documents including (informed consents, study instruments, MTA) will be used
ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
iii. Death and life threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 72 hours of notification
iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 72 hours
v. Clearance for export of biological specimens must be obtained from relevant institutions.
vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology and Innovation (NACOSTI) https://oris.nacosti.go.ke and also obtain other clearances needed.

Yours sincerely,

f/r Dr Virginia Gichuru,
Secretary; SU-IERC

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28 JUL 2020
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Cc: Prof Fred Were,
Chairperson; SU-IERC

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