THE RIGHT TO APPEAL IN TRADITIONAL DISPUTE RESOLUTION MECHANISMS IN KENYA

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DECLARATION

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

Signed: .....

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

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Table of Contents

DECLARATION ii
ACKNOWLEDGEMENT v
ABSTRACT vi
LIST OF ABBREVIATIONS vii
LIST OF CASES viii
LIST OF INTERNATIONAL STATUTES x
LIST OF NATIONAL STATUTES xi
CHAPTER ONE 1
INTRODUCTION TO THE STUDY 1
1.0 INTRODUCTION 1
1.1 BACKGROUND 1
1.2 STATEMENT OF THE PROBLEM 3
1.3 JUSTIFICATION OF THIS STUDY 3
1.4 HYPOTHESIS 3
1.5 OBJECTIVE OF THE STUDY 3
1.6 THEORETICAL FRAMEWORK 4
1.6.1 Natural Justice Theory 4
1.7 LITERATURE REVIEW 5
1.7.1 Nature of TDRMs 6
1.7.2 The Right to Fair Hearing 7
1.8 RESEARCH METHODOLOGY 8
1.9 CHAPTER BREAKDOWN 8
Chapter 1: Introduction 8
Chapter 2: The right of appeal in Kenya 9
Chapter 3: The nature of TDRMs in Kenya and whether they encompass the right of appeal 9
Chapter 4: The importance of the right of appeal for TDRMs 9
Chapter 5: Conclusions, Findings and Recommendations 9
CHAPTER TWO 10
THE RIGHT OF APPEAL IN KENYA 10
2.1 INTRODUCTION 10
2.2 THE DEVELOPMENT OF THE RIGHT OF APPEAL 10
2.3 THE RIGHT OF APPEAL UNDER INTERNATIONAL INSTRUMENTS 13
2.3.1 The Right to Appeal under the International Covenant on Civil and Political Rights 14

2.3.2 Right of Appeal under the European Convention 16
2.3.3 Right of Appeal under the Universal Declaration of Human Rights 17
2.3.4 Right of Appeal under the African Charter on Human and Peoples' Right 17
2.4 THE RIGHT OF APPEAL UNDER THE KENYAN LAWS 18
2.4.1 COLONIAL PERIOD 18
2.4.2 POST-COLONIAL PERIOD 19
2.4.3 RECENT DEVELOPMENT 20
2.5 NATURE OF THE RIGHT OF APPEAL 23
2.6 CONCLUSION 24
CHAPTER THREE 25
THE NATURE OF TDRMS IN KENYA 25
3.1 INTRODUCTION 25
3.2 NATURE OF TDRMs 25
3.2.1 AGIKUYU COMMUNITY 26
3.2.2 POKOT COMMUNITY 27
3.2.3 SOMALI COMMUNITY 28
3.2.4 AGIRIAMA COMMUNITY 29
3.3 CHALLENGES FACING TDRMs 30
3.4 WHETHER TDRMs ENCOMPASSES THE RIGHT OF APPEAL 31
3.7 CONCLUSION 32
CHAPTER FOUR 33
THE IMPORTANCE OF THE RIGHT OF APPEAL IN TDRMs 33
4.1 INTRODUCTION 33
4.2 FUNCTIONS OF APPEALS IN FORMAL JUSTICE 33
4.2 THE IMPORTANCE OF RIGHT OF APPEAL IN TDRMS 34
4.3 CRITICISM OF THE RIGHT OF APPEAL 36
4.4 CONCLUSION 37
CHAPTER FIVE 38
FINDINGS, RECOMMENDATION AND CONCLUSION 38
5.0 INTRODUCTION 38
5.1 FINDINGS 38
5.2 RECOMMENDATIONS 38
5.3 CONCLUSION 39
BIBLIOGRAPHY 40

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ABSTRACT

Traditional Dispute Resolution Mechanisms (TDRMs)have been used to resolve disputes from time immemorial. These mechanisms are still vibrant to date despite the advent of the formal justice system through the courts of law. TDRMs are preferred on the premise that they are cost-effective, easily accessible, flexible and offer expeditious resolution of cases. This is contrasted to the formal justice system which is deemed as rigid, expensive, has procedural technicalities and backlog of cases. However, despite the merits of TDRMs, there are weaknesses characterizing the use of these mechanisms. The purpose of this study therefore was to demonstrate whether the use of TDRMs does not encompass the right of appeal. The study employed Rawls's theory of procedural justice in identifying the inadequacies of TDRMs in dispute resolution. This research employs a qualitative method of data analysis using both primary and secondary sources and inductive reasoning. It reveals that some communities have the right of appeal however, there is no well-defined structure in appealing, while other communities do not have this right. The study concludes that this weakness impairs the use of TDRMs as effective mechanisms of dispensing justice. The study recommends that there should be a legal framework to align TDRMs to reflect the constitutional right of appeal which part of the right of fair hearing.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples Rights
ACmHPR	African Commission on Human and Peoples Rights
ACL	African Customary Law
ADR	Alternative Dispute Resolution
CoK	Constitution of Kenya
EALR	East Africa Law Report
ECmHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights.
ICJ	International Court of Justice
KLR	Kenya Law Reports
eKLR	Electronic Kenya Law Reports
NLC	National Land Commission
No	Number
TDRMs	Traditional Dispute Resolution Mechanisms
TJS	Traditional Justice Systems
UDHR	Universal Declaration of Human Rights

LIST OF CASES

Lubaru M'imanyara v Daniel Murugi (2013) eKLR.

Seth Michael Kaseme v Selina K Ade (2013) eKLR.

Republic v Mohamed Abdow Mohamed (2013) eKLR.

Republic v Juliana Mwikali Kiteme & 3 others (2017) eKLR.

Republic v Abdulahi Noor Mohamed (alias Arab) (2016) eKLR.

Erastus Gitonga Mutuma v Mutia Kanuno and Others (2011) eKLR.

Republic v Adan Kenyan Wehliye Criminal (2003) eKLR.

Joseph Ndungu Kagiri v Republic of Kenya, Criminal Appeal (2012) eKLR.

The Judicial Service Commission and Hon. Mr. Justice Mbalu Mutava and The Attorney General, (2014).

Bushell's Case (1670) The Supreme Court of the United States.

David Njoroge Macharia v Republic (2011) eKLR.

Rono v Rono (2005) eKLR.

Republic v Amkeyo (1917) EALR.

Republic v Danson Mgunya, (2016) eKLR.

Bernard Kimani Gacheru v Republic, (2000) eKLR.

Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone, (2013) eKLR.

Dry Associates Limited v Capital Markets Authority & Another, Interested Party Crown Berger (K) Ltd (2012) eKLR.

Ndeto Kimomo v Kavoi Musumba, (1977) eKLR.

Evitts v. Lucey (1985) The Supreme Court of the United States.

Vazquez v. Spain, CCPR Comm. No /69/D/701/1996 (20 July 2000).

Rodriguez v. Spain, CCPR Comm. No 94/D/1489/2006 (30 October 2008).

Kharkhal v. Belarus, CCPR Comm. No 95/D/1161/2005 (31 October 2007).

Krombach v. France ECtHR Judgment 13 February 2001.

Lantto v. Finland, ECtHR Judgement 12 July 1999.

Gurepka v. Ukraine, ECtHR Judgment 6 September 2005.

Loewenguth v. France, ECtHR Judgement 30 May 2000.

Galstyan v. Armenia, ECtHR Judgment 15 November 2007.

Laaksonen v. Finland, ECtHR Judgement 7 September 1999.

Poulsen v. Denmark, ECtHR Judgement 29 June 2000.

Malawi African Association and Others v Mauritania, ACmHPR Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000).

Constitutional Rights Project and Others v Nigeria, ACmHPR Comm.140/94,141/94,145/95, Activity Report (1999).

LIST OF INTERNATIONAL STATUTES

- African Charter on Human and Peoples Rights, 21 October 1986, CAB/LEG/67/3.
- European Convention on Human Rights, 3 September 1953, 1999-II.
- International Covenant on Civil and Political Rights, 23 March 1976, 999 UNTS171.
- Universal Declaration of Human Rights, UN General Assembly, 10 December 1948, 217 A (III).
- United Nations Charter, 24 October 1945, 1 UNTS xvi.

LIST OF NATIONAL STATUTES

- *Constitution of Kenya* (2010).
- *Environment and Land Court Act* (Act No. 19 of 2011).
- *Judicature Act Chapter* [No.8 of 2016].
- *Marriage Act* (Act No.4 of 2014).
- *National Land Commission Act* (No. 5 of 2012).
- *Criminal Procedure Code* CAP 75 2015.
- *Supreme Court Act* (Act No. 7 of 2011)
- *Appellate Jurisdiction Act*.
- *Civil Procedure Act* (CAP 21).

CHAPTER ONE

INTRODUCTION TO THE STUDY

1.0 INTRODUCTION

This chapter discusses an introduction to the study with a view to provide information based on the study. The chapter will provide information on the background to the study with the aim of explaining the need for carrying out the research. This part of the study details the statement of the problem, a justification for the study, the theoretical framework, the objectives and hypothesis of the study. Finally, the chapter explains the research methodology, the chapter breakdown and provides a timeline in which the study was conducted.

1.1 BACKGROUND

Before the colonization of Kenya and the adaptation of the foreign laws, Africans had their own way of resolving conflicts not only those civil in nature but also criminal cases.[1] Traditional dispute resolution mechanisms (TDRMs) are the methods used by the people in the rural areas to settle disputes since a long time and has passed from one generation to another.[2]

TDRMs as a form of alternative dispute resolution (ADR) are provide for under the 2010 Constitution.[3] However, the TDRMs should not contravene the Bill of Rights, repugnant to justice and morality or be inconsistent with the Constitution or any other written law.[4] The Criminal Procedure Code provides that in all cases the court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault or for any other offence not amounting to a felony, and not aggravated in degree on terms of payment of compensation or on other terms approved by the court, and may thereupon order the proceedings to be stayed or terminated.[5]

The 2010 Constitution provides for the use of TDRMs in resolving environmental and land disputes.[6] The 2011 Environment and Land Act also allows for the use of ADR which includes TDRMs.[7] In the case of *Lubaru M'imanyara v Daniel Murugi*[8] the court allowed the use of

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[1] Coldham S, 'Criminal justice policies in Commonwealth Africa, trends and prospects, 44 *Journal of African Law* 2, 2000, 220.
[2] Kariuki F, 'Applicability of Traditional Dispute Resolution Mechanisms in criminal cases in Kenya*: Case* study of *Republic v Mohamed Abdow Mohamed* (2010) eKLR, 2 *Alternative Dispute Resolution* 1, (2014), 226.
[3] Article 159 (2) (c), *Constitution of Kenya* (2010).
[4] Article 159 (3), *Constitution of Kenya* (2010).
[5] Section 176, *Criminal Procedure Code* CAP 75 2015.
[6] Article 60 (g), 67(2) (f), *Constitution of Kenya* (2010).
[7] Section 20, *Environment and Land Act* (2011).
[8] *Lubaru M'imanyara v Daniel Murugi*, (2013) eKLR.

TDRMs where the parties had consented to have the matter transferred to the Meru council of elders known as the *Njuri Ncheke*. The court adopted it as it was consistent with Article 60 (g) and Article 159 (2) (c). Also, the Court of Appeal in the case of *Seth Michael Kaseme v Selina K Ade*,[9] took notice of the role of the Gasa Council of Elders to listen and resolve a land dispute. The 2014 Marriage Act allows parties who have celebrated their union under Part V of the Act to undergo a process of conciliation before the court can determine the dissolution of their marriage.[10]

The Constitution does not expressly provide for a limit in the application of TDRMs in criminal cases. The courts have taken different stands on the use of TDRMs in resolving criminal cases. In the case of *Republic v Mohamed Abdow Mohamed,*[11] the accused was charged with murder, the family of the accused and the deceased person and agreed on compensation with included camels and goats. There was also a ritual performed to pay for the blood of the deceased according to Islamic law and religion. The accused was discharged by the court. Also, in the case of *Republic v Juliana Mwikali Kiteme & 3 others*,[12] the High Court allowed the of TDRMs in a murder case. However, in the case of *Republic v Abdulahi Noor Mohamed (alias Arab)*,[13] the accused was charged with murder. He submitted through his lawyer that they had reconciled with the deceased according to the Somali culture, law and religion. The court held that the charge of murder was a felony and therefore TDRMs could not be used.

The 2010 Constitution provides that every person has the right to fair trial which include the right to appeal or apply for a review by a higher court as provided for under the law.[14] The right of appeal provides a way to hold the judges and the magistrates accountable.[15] Appeal helps to correct errors by the lower courts if any and ensure that the decision the court arrives at is the correct decision.[16]

In most communities, TDRMs rules and procedure do not allow for the right to appeal.[17] Once the decision is made for example by the council of elders the decision is final, and one cannot appeal the decision anywhere. The law does not provide for any form in which the decision

[9] *Seth Michael Kaseme v Selina K Ade,* (2013) eKLR .
[10] Section 68(1), *Marriage Act*, 2014.
[11] *Republic v Mohamed Abdow Mohamed*, (2013) eKLR.
[12] *Republic v Juliana Mwikali Kiteme & 3 others*, (2017) eKLR.
[13] *Republic v Abdulahi Noor Mohamed (alias Arab),* (2016) eKLR.
[14] Article 50(2)(q), *Constitution of Kenya* (2010).
[15] Court and Tribunal Judiciary https://www.judiciary.uk/ on 28 February 2019.
[16] Court and Tribunal Judiciary https://www.judiciary.uk/ on 28 February 2019.
[17] Kariuki F, *African Traditional Justice Systems* < http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf> on 10 February 2019.

made in traditional dispute resolution can be appealed or reviewed by the court.[18] The only time the court can intervene is before the decision is made as in the case of *Erastus Gitonga Mutuma v Mutia Kanuno and Others*.[19] Where the judge issued an injunction against the defendants from using TDRMs as the plaintiff proved that the council of elders breached the constitutional requirements.[20] The plaintiff successfully demonstrated the uncouth and unfair nature of the *Njuri Ncheke* trial, amounting to repugnancy to justice and morality.

This study will examine the nature of TDRMs with respect to the right to appeal and access whether there a need to have clear law and policies which one can appeal decisions made when using TDRMs.

1.2 STATEMENT OF THE PROBLEM

Whereas the 2010 Constitution provide for the right to a fair hearing which includes the right to appeal or apply for a review by a higher court as prescribed by law,[21] TDRMs do not encompass this right. There is a need to integrate the right to appeal in TDRMs so as to ensure access to justice, hence this study.

1.3 JUSTIFICATION OF THIS STUDY

Article 159 of the constitution provides for the use of TDRMs to help enhance access to justice. They have also been promoted by courts in certain cases for example *R v Mohamed Abdow Mohammed* [22] where the court allowed the use of TDRMs stating that it would help attain the ends of justice. TDRMs are becoming more common and therefore it is important to integrate the right to appeal in order to attain justice.

1.4 HYPOTHESIS

TDRMs does not provide for the right of appeal in dispute resolution.

1.5 OBJECTIVE OF THE STUDY

1. To examine the nature of TDRMs and whether they engender the right of appeal in Kenya.
2. To examine what the right of appeal entails under the Kenya law.
3. To make recommendations on how to integrate the right of appeal in TDRMs.

[18] Kariuki F, *African Traditional Justice Systems*, 3.
[19] *Erastus Gitonga Mutuma v Mutia Kanuno and Others* (2011) eKLR.
[20] Article 159(3), *Constitution of Kenya* (2010).
[21] Article 50(2), *Constitution of Kenya* (2010).
[22] *Republic v Mohamed Abdow Mohammed* (2010) eKLR.

1.6 THEORETICAL FRAMEWORK

1.6.1 Natural Justice Theory

Aristotle defines justice as fairness as injustice brings about a state of lawlessness.[23] According to John Rawls in the Theory of Justice, he defines justice as fairness.[24] He states that in the situation where there was no division and no one thought themselves to be better than others, a contract would be arrived at would be equal.[25] The principle of justice for the basic structure of the society is the object of the original agreement. These principles are free, and any rational person would not refuse in an initial position of equality as defining the fundamental terms of their association. The principles specify the kind of social co-operation that can be entered and the forms of government that can be established.

There are two principles of natural justice which are: *audi alteram partem* (the right to a fairing hearing) and *nemo judex in parte sua* (no person may judge their own case).[26] As a result of the theory, common law rules have been formulated to include; the hearing rule, the bias rule and the evidence rule.[27]

The hearing rule states that a person ought to be given adequate time to present their case, especially where their interests and rights may be negatively affected by an adjudicator. The rule goes to the extent of allowing a person adequate opportunity to prepare and adduce evidence as well as challenge evidence produced by the adverse party and to challenge rebuttals against them. The alleged wrongdoer also ought to be afforded the chance to be informed of the allegations before them.[28]

The bias rule states that no one ought to be judge in their trial. The rule requires that an adjudicator be completely impartial in adjudicating the matters before him. The rule extends to investigators who should guard against conflict of interest, in conducting investigations and collecting evidence. The rule also extends to any appearance of actual or apparent bias, in which if found to exist on the part of a decision maker, deprives them of the credibility to adjudicate the matter.[29]

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[23] Ross W.D, *Aristotle Nicomachean Ethics book V*, Batoche Books, Kitchener, 1999.
[24] Rawls J, *A theory of justice*, Harvard University Press, Cambridge, 1971, 52-55.
[25] Rawls, '*A theory of justice*' 52-55.
[26] Wade H.W.R, Forsyth C.F, *Administrative Law*, Oxford University Press, Oxford, 2014, 12.
[27] Natural Justice-: Rule of Fair Hearing https://gaurlaw.wordpress.com/2015/05/01/natural-justice-rule-of-fair-hearing/ on 28 February 2019.
[28] Natural Justice-: Rule of Fair Hearing https://gaurlaw.wordpress.com/2015/05/01/natural-justice-rule-of-fair-hearing/ on 28 February 2019.
[29] Natural Justice-: Rule of Fair Hearing https://gaurlaw.wordpress.com/2015/05/01/natural-justice-rule-of-fair-hearing/ on 28 February 2019.

The evidence rule states that investigators should not base their findings on speculation or suspicion rather it should be clear that their findings are based on logical proof or material evidence. Evidence obtained by one party is also subject to scrutiny by a party against whom it is adduced.[30]

The study shall assume that justice is fairness and the principles of natural justice. Each person needs to be given time to present their case and the law and other institutions should ensure they promote these principles of natural justice.

1.7 LITERATURE REVIEW

In 'ADR, Access to Justice and Development in Kenya' by Kariuki Francis and Kariuki Muigua, they talk about how there is a need to have ADR and TDRMs as forms of dispute resolution in order to ensure access to justice especially for the poor. The article argues that the alternative form of dispute resolution promotes the Rule of Law which is important to foster development. The article proposes that TDRMs should be recognised within the Kenya legal framework in order to foster development. The article in light of this study is useful as it propagates the need for TDRMs in settling matters as well as its allusion to the nature of the mechanism, however it falls short of providing a rationale for the need for the application of the right of appeal in TDRMs. The article does not discuss the legal framework of the right of appeal in TDRMs which is part of the right of fair hearing.

Kariuki Muigua in the write up 'Traditional Dispute Resolution Mechanisms under Article 159 of The Constitution of Kenya 2010', outlines the recognition of TDRMs under the 2010 constitution. The article focuses TDRMs under Article 159 of the Kenyan Constitution, and advocates for it owing to its effectiveness in managing conflicts. The article further points out the importance of TDRMs to the effect that their role is recognised globally (they not only exist in Africa but also in Sardinia an Island in the Mediterranean Sea) and they lighten the burden of the courts. The author alludes to the need for the TDRMs to be modified to conform to international human rights standards thus enumerating the fact that TDRMs are yet to conform to human rights standards, a part of it being the right to a fair hearing. The article in this light is instrumental in demonstrating the recognition of TDRMs in the Kenyan legal system as a mode of dispute resolution, by its allusion to the fact that they need to conform to international

[30] Natural Justice-: Rule of Fair Hearing https://gaurlaw.wordpress.com/2015/05/01/natural-justice-rule-of-fair-hearing/ on 28 February 2018.

human rights standards it demonstrates the gap sought to be addressed by this study, but however does not talk much about the right of appeal in TDRMs.

1.7.1 Nature of TDRMs

Article 11 of the 2010 Constitution recognises culture to be the foundation of the nation and the cumulative civilization of the nation and the Kenyan people.[31] TDRMs reflect the traditional African norms and values as most of them are embedded in African Customary law.[32] TDRMs vary from one community to another and thus hard to come up with legislation consolidating the different dispute resolution mechanisms.[33]

Some of the main features of TDRMs are: they are adjudicated by chiefs, headmen or a group of council of elders; the authority of the leaders is derived from their status as respected members of the community; the arbitrators are set in a place to hear and resolve disputes specifically; their arbitrators are powerful members of the community; there is no legal representation; the process is voluntary and the decision is based on agreement; penalties are restorative; enforcement of decisions is secured through social pressure or fear of curses; the decision is confirmed through rituals aiming at reintegration; and like cases need not be treated alike.[34]

TDRMs aim mainly to build peace, restore relationships and parties' interest as opposed to allocating rights between disputants.[35] Their key mandate is to promote the harmony and togetherness within the community or society in which they are applied rather than promoting individual interests.[36] TDRMs are contrasted with the Formal Justice System is retributive in nature. Formal Justice System takes a punitive approach which seeks to cause proportionate harm to the offender.[37] However, a major challenge in the application of TDRMs is that there

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[31] Article 11, *Constitution of Kenya* (2010).

[32] Access to Justice in Sub-Saharan Africa, Penal Reform International 2000, 11https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-2001-access-to-justice-africa-en.pdf on 12 February 2019.

[33] Kariuki F 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed [2013] eKLR*.

[34] United Nations Human Rights Office of the High Commissioner, Human Rights and Traditional Justice Systems in Africa https://www.ohchr.org/Documents/Publications/HR_PUB_16_2_HR_and_Traditional_Justice_Systems_in_Africa.pdf on 20 February 2019.

[35] Kinama E, Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010, *Strathmore Law Review*,1 2015, 23.

[36] Muigua K, Traditional Dispute Resolution Mechanisms Under Article 159 Of the Constitution of Kenya 2010, 2.

[37] Kariuki F, Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya, 23.

is no clear legal and policy framework on TDRMs.[38] Even in countries where there is a legal framework like South Africa, they still face challenges and limitations.[39]

1.7.2 The Right to Fair Hearing

The right to a fair hearing is a fundamental human right. Under the Universal Declaration of Human Rights (UDHR), the right to a fair hearing is provided under Articles 7, 9, 10, and 11. Under these provisions, equality before the law without discrimination is protected, arbitrary arrests, detentions and exile are listed as actions illegal against persons.[40]

The African Charter on Human and Peoples Rights (ACHPR) provides that everyone has the right to have his case heard and this include the right to an appeal to competent national organs against acts violating his fundamental rights as recognised and guaranteed by conventions, laws, regulation and customs in force.[41]

The Human Rights Committee provides for the right to a fair hearing.[42] The General Comment explains that the right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. This ensures the proper administration of justice, and further guarantees a series of specific rights.[43]

The 2010 Constitution provides for the right of a fair hearing.[44] In the case of *Joseph Ndungu Kagiri v Republic of Kenya*,[45] the accused was charged with the offence of stealing. The judge stated the accused rights of fair hearing were not upheld and therefore the verdict of guilty by the trial court occasioned a miscarriage of justice. Also in the case of *The Judicial Service Commission and Hon. Mr. Justice Mbalu Mutava and The Attorney General*,[46] the court explained fair hearing under Article 50 (1) to apply where any dispute can be resolved by the application of the law and applies to proceedings before a court or, if appropriate, another independent and impartial tribunal or body and further stated that the right cannot be limited by law or otherwise as under Article 25 (c) of the Constitution.

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[38] Kariuki F, Africa Traditional Justice System, 4.
[39] Rautenbach C, 'Traditional Courts as Alternative Dispute Resolution (ADR)-Mechanisms in South Africa' *SSRN, 312-315.*
[40] Article 7, *Universal Declaration of Human Rights, UN General Assembly*, 10 December 1948, 217 A (III).
[41] Article 7, *African Charter on Human and Peoples Rights*, 21 October 1986, CAB/LEG/67/3.
[42] *CCPR, General Comment No. 32, Right to equality before courts and tribunals and to a fair trial*, 27 July 2007.
[43] *CCPR, General Comment* 32, 2.
[44] Article 50, *Constitution of Kenya* (2010).
[45] *Joseph Ndungu Kagiri v Republic of Kenya, criminal appeal* (2010) eKLR.
[46] *The Judicial Service Commission and Hon. Mr. Justice Mbalu Mutava and The Attorney General,* (2014) eKLR.

The structure of TDRMs poses a question as to whether this right can be fulfilled, as they appear in some ways to be incompatible with these standards, at least as they are conventionally defined.[47] The arbitrators of TDRMs rarely have the legal training and often lack an understanding of the written law.[48]

In order to ensure many people, have access to justice, TDRMs should engender the right of appeal. There has been no research done on the importance of the right of appeal in TDRMs or whether the communities using TDRMs encompass this right. This research therefore aims to fill this gap.

1.8 RESEARCH METHODOLOGY

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

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

The data collected is analysed in light of the statement of the problem, hypothesis and research objectives including examining the nature of TDRMs and whether they engender the right of appeal, what the right of appeal entails and make recommendations how the law can integrate the right of appeal in TDRMs.

1.9 CHAPTER BREAKDOWN

Chapter 1: Introduction

The chapter provides a concise background to the problem. It also includes a brief statement of the research problem, a justification for the study as well as the objectives of the study and including the hypothesis and the literature review. Furthermore, the chapter provides a theoretical framework of the study a window through which the literature on the study will be

[47] United Nations Human Rights Office of the High Commissioner, Human Rights and Traditional Justice Systems in Africa, 49.
[48] United Nations Human Rights Office of the High Commissioner, Human Rights and Traditional Justice Systems in Africa, 49.

analysed. The chapter finally records the research design and methodology providing a guide in the conduct of the research.

Chapter 2: The right of appeal in Kenya

This chapter examines the nature of the right of appeal, considering the legal framework in Kenya as well as the international instruments providing for the right. It will consider the history of the right of appeal in England and the history of the TDRMs from the colonial period to the recent development.

Chapter 3: The nature of TDRMs in Kenya and whether they encompass the right of appeal

The focus of this chapter is to discusses the nature of TDRMs in Kenya. The communities discussed under this chapter are the Agikuyu, Pokot, Agiriama and Somali. This purpose of this discussion is to outline the context within which TDRMs are being applied.

Chapter 4: The importance of the right of appeal for TDRMs

This chapter will examine whether the right to appeal is essential in achieving justice. It will also discuss the importance of the right of appeal in TDRMs. The chapter will conclude by discussing the criticism of the right of appeal.

Chapter 5: Conclusions, Findings and Recommendations

This portion of the study provides for the findings of the study in a bid to form the conclusion of the study. The findings are in relation to the, objectives of the study, and the hypothesis of the study. This chapter draws the reader to recommendations based on the findings of the study.

CHAPTER TWO

THE RIGHT OF APPEAL IN KENYA

2.1 INTRODUCTION

The right of appeal is an important right put in place to avoid deprivation of other basic rights and freedoms. This chapter examines the development of the right of appeal in England. It will also discuss the right as provided under the international instruments. The chapter concludes by discussing the right of appeal in Kenya and the nature of the right of appeal.

2.2 THE DEVELOPMENT OF THE RIGHT OF APPEAL

In the 12th century, in the common law jurisdiction is when there was a suggestion that those convicted of crimes should have a chance to appeal their convictions.[49] Even though criminal appeals were not familiar to the common law, there were various obsolete forms of reviews available.[50] The earliest method of review was on the jury. During the medieval period, a process known as 'attaint' was used to nullify the jury decisions.[51] A second jury could be composed with twice as many members to review the decision.[52] Members of the original jury would be penalized if the verdict was reversed. However, this process was seldom used in criminal cases and was not available to criminal defendants.[53]

In the late 15th and 16th centuries, fining the members of the jury became a norm. This was done by the Star Chamber, which oversaw safeguarding the legal system against abuse. Habitually, the Star Chamber fined the members of the jury for acquitting against the weight of the evidence.[54] It was presumed that the jurors could only reach such a decision as a result of corruption or bribery.[55] In the *Bushell's case*[56] where Bushel and other members of the jury acquitted prisoners, were fined and imprisoned as they gave their verdict against the full evidence. In this case the practice of fining jurors ended as the Star Chamber was abolished.[57]

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[49] Marshall P.D, A Comparative Analysis of the Right to Appeal, 22 *Duke Journal of Comparative and International Law* 1, (2011), 2.
[50] Benjamin B.L, Criminal Appeals as Jury Control: Anglo-Canadian Historical Perspectives on the Rise of Criminal Appeals, 10 *Canadian Criminal Law Review* 1, (2005), 34
[51] Langein J.H, *History of the Common Law, The Development of Anglo-American Legal Institution*. 2ed Aspen Publishers, England, 2009, 51.
[52] Orfield L.B, History of Criminal Appeal in England, 1 *Missouri Law Review* 4, 1936, 325.
[53] Langein, History of the Common Law, The Development of Anglo-American Legal Institution, 418.
[54] Langein, History of the Common Law, The Development of Anglo-American Legal Institution, 420.
[55] Orfield, History of Criminal Appeal in England, 328
[56] *Bushell's Case*, (1670) The United Kingdom Court of Common Pleas.
[57] Orfield, History of Criminal Appeal in England, 330.

In the 17th century, the option to order a new trial became available in some criminal cases. At this point in time, the right of appeal was well established in civil cases.[58] Some of the grounds to order for a new trial were if the verdict was against the evidence and misdirection.[59] Felonies were entirely excluded from being appealed and only a few misdemeanours were allowed.[60] Another method of review was the writ of error; however, it was somehow powerless.[61] The writ of error was the only way in which a higher court could consider a criminal case after judgment.[62] It was issued by a superior court to review and correct the record of proceedings in a lower court. The writ of error was only limited to errors that could been seen on the face value of the trial. One could not challenge the factual basis for conviction, jury instructions or rulings on the evidence.[63]

In 1848, after the establishment of the Court for Crown Cases Reserved the writ of error became outdated.[64] The court normalised a norm where judges of superior court met informally to consider questions of law reserved by the trial judges. The judge's reasons were not required as their decision was treated as that of a trial judge as they were not sitting as a court.[65] However, the difference was that judges sat in public and gave reasoned decisions in the Court of Crown Cases Reserved.[66] Review remained only to questions of law and the trial judge had the authority to decide to state a case for the court's opinion.[67] The court was not used frequently because of the limitations and only heard about eight cases in a year.[68]

In the 19th century, mostly in the second half, people were pressuring for the right of appeal in criminal cases. Thirty-one bills were brought to parliament between the period of 1844 to 1906, but only one bill which limited appeals to the question of law was passed.[69] Jeremy Bentham wanted the right of appeal to be included in criminal cases so as to realise rationalisation of

[58] Berger, Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals, 7-8.
[59] Orfield, History of Criminal Appeal in England, 331.
[60] Langein, History of the Common Law, The Development of Anglo-American Legal Institution, 122-123.
[61] Benjamin, Criminal Appeals as Jury Control: Anglo-Canadian Historical Perspectives on the Rise of Criminal Appeals, 6-7.
[62] Orfield, History of Criminal Appeal in England, 333.
[63] Arkin M, Rethinking the Constitutional Right to a Criminal Appeal, 39 *UCLA Law Review*, 1992, 503.
[64] Western P, Drubel R, Towards a General Theory of Double Jeopardy, Supreme Court Review, 1978 *University of Chicago Press* 1, 1978, 456.
[65] Orfield, History of Criminal Appeal in England, 335.
[66] Ashworth A, *English Criminal Appeals, 1844-1994: Appeals Against Conviction and Sentence in England and Wales*, Oxford University Press, Oxford, 1996, 20.
[67] Orfield, History of Criminal Appeal in England, 336.
[68] Berger, Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals, 12.
[69] Ashworth, *English Criminal Appeals, 1844-1994: Appeals Against Conviction and Sentence in England and Wales*, 22.

common law. Bentham stated that it was unreasonable to allow appeal in civil matters where money was the only thing at stake but deny the right of appeal in criminal cases where life and freedom were in danger.[70] Others supported the right of appeal to be allowed because there were many wrongful convictions.[71] However, the English judges did not support, arguing that it was extremely rare to find people who were convicted wrongfully.

In the 20th century, the courts convicted Adolf Beck and George Edalji wrongfully.[72] In 1891, Adolf Beck was convicted for fraud committed by Thomas Smith and sentenced for seven years.[73] The prosecution relied on the claim that fourteen years ago Beck had committed similar fraud. However, the judge did not allow the defence to challenge the claim by the prosecutor even though it was Thomas Smith who was convicted. Also, the judge rejected to reserve the question of law for the Court for Crown Cases Reserved. Beck requested the Home Office sixteen times unsuccessfully while in prison to review his convictions. Beck was again wrongfully sentenced of Smith's fraud three years after his release. This time round, he was lucky as Smith was arrested trying to pawn a stolen ring and admitted to all his offences. The government compensated Beck and pardoned him.[74]

In 1903, on the grounds of anonymous letters, George Edalji, a long-standing target of racial prejudice, was convicted of disembodiment of a horse. He was sentenced for three years despite substantial evidence suggesting his innocence. Home Office pleas were ineffective, and a petition signed by ten thousand people. However, public pressure built up, Sir Arthur Conan Doyle took up the case and published two lengthy articles advocating the innocence of Edalji. Edalji was finally pardoned in 1907 after a special inquiry and further pressure.[75]

After these two cases and many other controversial convictions, there was finally political support for the right of appeal in criminal cases. At this point in history, retrials by newspaper had become so common that the public lost its confidence in courts.[76] There was an urgent need

[70] Berger, Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals, 13.
[71] Ashworth, *English Criminal Appeals, 1844-1994: Appeals Against Conviction and Sentence in England and Wales*, 25.
[72] Ashworth, *English Criminal Appeals, 1844-1994: Appeals Against Conviction and Sentence in England and Wales*, 28.
[73] Ashworth, *English Criminal Appeals, 1844-1994: Appeals Against Conviction and Sentence in England and Wales*, 28.
[74] Ashworth, *English Criminal Appeals, 1844-1994: Appeals Against Conviction and Sentence in England and Wales*, 28-31.
[75] Ashworth, *English Criminal Appeals, 1844-1994: Appeals Against Conviction and Sentence in England and Wales*, 28-31.
[76] Ashworth, *English Criminal Appeals, 1844-1994: Appeals Against Conviction and Sentence in England and Wales*, 31.

for appeals on questions of facts. The Home Office and the ad hoc committees of inquiry proved to be ineffective.[77]

Finally, the Criminal Appeal Act was passed in 1907.[78] It established the Court of Criminal which took the role of the Court for Crown Cases Reserved and abolished the power of the High Court to grant new trials and writ of errors.[79] The Act was broad; questions of law and fact could be reviewed, trial judges remained with the powers to state cases for the opinion of the court and persons convicted on indictment could now appeal.[80]

However, the right to appeal development in England was strongly challenged. Appeals undermined the finality of the criminal process was the frequent feud. The only people who were deemed appropriate to make the final determination were the members of the jury. The argument was that the juries were the only people to get a chance to interact with the evidence and the witnesses first-hand. On the other hand, judges listening to appeals only dealt with printed records and did not get a chance to deal with living witnesses.[81]

Other arguments were further cost was incurred as a result of the right to appeal in criminal cases.[82] Appellate judges needed to be appointed and support stuff. Delay was another argument, during the 19th century delay was considered as a great evil in solving criminal cases.[83] This is because any delay to foist a sentence risked diminishing the effect of deterrence of the criminal law. Also delay undermined the confidence in the reality of verdicts.[84] The final argument was that juries would be more likely to make an error. The logic was that appeals would undermine the responsibility felt by the members of the jury.[85]

2.3 THE RIGHT OF APPEAL UNDER INTERNATIONAL INSTRUMENTS

The Constitution provides that generals rules of international law shall be part of the Kenyan law,[86] and any treaty ratified by Kenya.[87] In the case of *David Njoroge Macharia v Republic*[88]

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[77] Ashworth, *English Criminal Appeals, 1844-1994: Appeals Against Conviction and Sentence in England and Wales*, 31.
[78] *Criminal Appeal Act*, 1907, (England).
[79] Section 20 (1), *Criminal Appeal Act* (England).
[80] Attenborough L, *Principles of the Criminal Law*, 485-86, 12ed, 1912, 493.
[81] Berger, Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals, 14.
[82] Sibley W, *Criminal Appeal and Evidence*, Gale, Making of Modern Law, 1908, 19.
[83] Berger, Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals,16.
[84] Sibley, Criminal Appeal and Evidence, 23.
[85] Sibley, Criminal Appeal and Evidence, 23.
[86] Article 2 (5), *Constitution of Kenya (2010)*.
[87] Article 2 (6), *Constitution of Kenya (2010).*
[88] *David Njoroge Macharia v Republic* (2011) eKLR.

the court held that for the international laws to be part of the national laws, they have to be incorporated by the existing, amended or new legislation. Before the 2010 Constitution in the case of *Rono v Rono*[89] the court held that, even though international law can only be part of the municipal law where it has been specifically incorporated, international laws can be applied by the courts even without implementing legislations as long as they don't conflict with the municipal laws.

The following are the international instruments that provide for the right of appeal.

2.3.1 The Right to Appeal under the International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) provides that everyone convicted of a crime shall have the right to appeal his conviction and sentence to a higher tribunal according to the law.[90] Mr. Baror, who was a delegate from Israeli, was the first one to advocate for the right of appeal.[91] He anticipated a more general right of review and did not have a definite remedy in mind. With an appeal you can challenge the court's decision at a higher court, however a review is applied at the same court where the original decision was made.[92]

Article 14 guarantees the right of hearing and its aim is to ensure that justice is properly administered.[93] Article 14 provides for a few fair trial rights which are directly applicable to the right of appeal. For example, the right to be tried without undue delay can be violated by appellate delay. Hearings to be public and fair also, applies the same on appeals.[94]

The states which are party to the ICCPR given significant freedom to determine the modalities by which they can secure Article 14 (5).[95] However, the United Nation Human Rights Committee has outlined the indispensable features of the right to appeal.

The first important feature concerns the nature of review of the right of appeal. For there to be compliance with Article 14 (5) the Committee insists that the conviction and sentence must be

[89] *Rono v Rono* (2005) eKLR.
[90] Article 14 (5), *International Covenant on Civil and Political Right,* 19 December 1996, 999 UNTS.
[91] Trechsel S, *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2005, 362.
[92] Trechsel, *Human Rights in Criminal Proceedings*, 363.
[93] *CCPR General Comment No 32, Right to equality before courts and tribunals and to fair trial*, 23 August 2007, 2.
[94] *CCPR General Comment No 13, Equality before the courts and the right to a fair and public hearing by an independent court established by law*, 13 April 1984, 17.
[95] *CCPR General Comment No 32*,45.

reviewed substantively.[96] Both on the premise of sufficiency of the proof and of the law. The Committee is not focused on the name given the remedy but the substance of the review.[97]

In the case of *Vazquez v Spain*,[98] the Committee found the remedy in issue by the Spanish appellate went against Article 14 (5) as it was only limited to the formal aspects of the convictions. Spain responding to this decision introduced legislative amendments which expanded the number of cases available for full appellate review. Also, in the case of *Rodriguez v Spain*[99] the Committee stated that the right of appeal had become broader and decision on evidence could be corrected.

The obligation to ensure the right of appeal is accessed effectively is the second feature. The Committee tries to clarify Article 14 (5) which on face value could suggest that there is a right for every conviction and sentence imposed to be reviewed. However, the right of appeal must be claimed personally by a person who is convicted. The state is required to put in place measures that allow one to exercise this right when he wants to. Such obligation include that one is entitled to have access to the transcript of the trial and a well-reasoned, judgement.[100]

The Committee finally accepts that on appeals reasoned conditions may be imposed. In the case of *Kharkhal v Belarus*,[101] the author complained that the Supreme Court without considering the merits dismissed his grounds of appeal. The committee observed that:

> ''the right to a review of a criminal conviction by a higher tribunal, as secured by article 14, paragraph 5, implies that the tribunal of review adequately addresses those issues that are pertinent, having regard to such reasonable conditions as are applicable to appeals under the State party's laws. Where, as in the present case, the review allows for a re-examination of facts and evidence, the same principle guides the Committee as in other proceedings, namely that it is generally for the courts of States parties to the Covenant to evaluate facts and evidence in a particular case, unless it can be ascertained that the conduct of the trial or the evaluation of facts and evidence or interpretation of legislation was clearly arbitrary or amounted to a denial of justice.''

[96] *CCPR General Comment No 32,* 45.
[97] *Vazquez v. Spain,* CCPR Comm. No /69/D/701/1996 (20 July 2000).
[98] *Vazquez v. Spain,* CCPR.
[99] *Rodriguez v. Spain,* CCPR Comm. No 94/D/1489/2006 (30 October 2008).
[100] *CCPR General Comment No 32,* 49.
[101] *Kharkhal v. Belarus,* CCPR Comm. No 95/D/1161/2005 (31 October 2007).

2.3.2 Right of Appeal under the European Convention

The European Convention does not provide for a system for the right of appeal. However, Article 6 which provides for the right of fair trial will apply in proceedings if the right is granted.[102] Article 2 of Protocol No. 7 to European Convention provides for the right of appeal. This has brought the appellate system of nearly all of continental Europe under the oversight of the European Convention on Human Rights (ECHR).[103]

States which are the part of European Convention have a wide margin of appreciation which was contributed mostly by the various appeals which existed in Europe.[104] A state in the European Convention must grant a defendant the right to apply for leave of appeal so as to comply with Article 2 of Protocol No.7.[105] Furthermore, the countries in the European Convention had the power to foist restrictions that would regulate access to the right of appeal. The restrictions, however, must not infringe on the essence of the right and should pursue a legitimate aim.[106]

The essence of the right is formulated to mean an opportunity to access a fair appellate process. It requires that a convicted person gets a chance to appeal. In the case of *Krombach v France*,[107] he was convicted in absentia and therefore Article 2 of Protocol No. 7 was violated because he was not given a chance to appeal. The state must provide accessible and clear procedure for one to appeal when one requires the permission to appeal.[108]

The states are not required to provide limitless opportunities to the right of appeal.[109] The state can impose reasonable conditions to this right. For example, the state can put a time limit where one can lodge an appeal after which the appeal will not be accepted. The ECHR court has explained that such a rule will help reserve the administration of justice and does not go against Article 2 of Protocol No. 7.[110]

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[102] *Poulsen v. Denmark*, ECtHR Judgment 29 June 2000.
[103] Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, Nov. 22, 1984, E.T.S. No. 117.
[104] *Krombach v. France* ECtHR Judgment 13 February 2001.
[105] *Lantto v. Finland,* ECtHR Judgement 12 July 1999.
[106] *Gurepka v. Ukraine*, ECtHR Judgment 6 September 2005.
[107] Loewenguth v. France, ECtHR Judgement 30 May 2000.
[108] *Galstyan v. Armenia*, ECtHR Judgment 15 November 2007.
[109] *Laaksonen v. Finland,* ECtHR Judgement 7 September 1999.
[110] *Poulsen v. Denmark*, ECtHR Judgement 29 June 2000.

2.3.3 Right of Appeal under the Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) provides the right of fair hearing under Articles 7, 9, 10 and 11. There is equality before the law without any discrimination,[111] one shall not be arbitrary arrested or detained,[112] one is entitled to a public and fair hearing by an independent and impartial tribunal,[113] and to be presumed innocent until proven guilty according to the law.[114] Furthermore, the right to appeal is a guaranteed right that is found in the provisions of Article 8 in UDHR, which states that "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

2.3.4 Right of Appeal under the African Charter on Human and Peoples' Right

The African Charter provides that everyone has the right to have his cause heard. This includes the right to an appeal to competent national organs against acts of violation of the fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force.[115]

In its decision in *Malawi African Association and Others v Mauritania*,[116] the African Commission for Human and Peoples' Rights stated that for an appeal to be effective, the appellate jurisdiction must, objectively and impartially, consider both the elements of fact and of law that are brought before it. Since this approach was not followed in the cases under consideration, the Commission considers, consequently, that there was a violation of Article 7 (1) (a) of the 1981 African Charter on Human and Peoples' Rights.

In the case of the *Constitutional Rights Project and Others v Nigeria*,[117] the Nigerian government promulgated some military decrees proscribing over thirteen newspapers and magazines published by three media houses. The decrees prohibited media houses from publishing and circulating any content for six months, with a possible extension period. At the time the law was passed, the media houses had pending suits in court concerning illegal invasion and closure of their premises. The African Commission for Human and Peoples' Rights held while punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of these rights, to foreclose any avenue of

[111] Article 7, *Universal Declaration of Human Rights*, UN General Assembly, 10 December 1948, 217 A (III).
[112] Article 9, *Universal Declaration of Human Rights.*
[113] Article 10, *Universal Declaration of Human Rights.*
[114] Article 11, *Universal Declaration of Human Rights.*
[115] Article 7(1)(a) *African Commission on Human & Peoples' Rights*, 1986.
[116] *Malawi African Association and Others v Mauritania,* ACmHPR Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000).
[117] *Constitutional Rights Project and Others v Nigeria*, ACmHPR Comm.140/94,141/94,145/95, Activity Report (1999), 227.

appeal to "competent national organs" in criminal cases bearing such penalties clearly violates Article 7 (1) (a) of the 1981 African Charter on Human and Peoples' Rights, and increases the risk that severe violations may go unredressed.

2.4 THE RIGHT OF APPEAL UNDER THE KENYAN LAWS

2.4.1 COLONIAL PERIOD

During this time, all aspects of the customary system were to be abolished if they were repugnant to the English laws. The colonial pioneers proliferated the idea that African Customary Law (ACL) was static and primitive.[118] It was ironical since common law was the English customary law. The indirect rule was used by the British in most of their colonies. Under the indirect rule, the British moderated, formally recognised and utilised the existing legal framework whereas alluding to them as native authorities.[119] Some aspects of the customary laws were perceived as an important part of the system of the indirect rule.

The English Penal Code was made applicable in India in 1860 successfully, and hence the British wanted to apply the Code within the East African Protectorate.[120] In 1930, the Colonial Office Code was introduced after the debates on which law was appropriate.[121] This made the ACL inferior. Article 20 of the East Africa Order in Council introduced the repugnancy clause for the first time in 1897.[122] The clause, however, did not define what repugnancy is. For a custom to meet the threshold of repugnancy, it must be line with the rights and duties underlying the concept of justice and equity as determined by the common law system.[123]

Certain customs which were considered contrary to morality and natural justice could be declared invalid by the central courts, after some of the practices and institutions by the colonialists.[124] The supervising officers and the appellate courts were given the powers by the repugnancy clause, to remove what they did not want from the customary laws.[125] This enabled them to modify the customary laws so as to put them in line with English laws and ideas.[126]

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[118] Sanders G.M, How Customary is African Customary Law*?* 20 *The Comparative and International Law Journal of Southern Africa* 3, 1987, 407.
[119] Allot A.N, What is to be done with African Customary Law*?* The Experience of Problems and Reforms in Anglophone Africa from 1950, 28 *Journal of Africa Law*, 1/2, 1984, 58.
[120] Kinanga Z.M, The Place of African Customary Criminal Law: The Need for Reforms, Unpublished, University of Nairobi, Nairobi, 1982, 4.
[121] Kinanga, The Place of African Customary Criminal Law: The Need for Reforms, 4.
[122] Article 20, *East Africa Order in Council* (1897).
[123] Onyango P, Africa Customary Law System: An Introduction, Law Publishing Ltd, Nairobi, 2013, 43.
[124] Sanders, How Customary is African Customary Law*?* 407.
[125] Allot, What is to be done with African Customary Law*?* The Experience of Problems and Reforms in Anglophone Africa from 1950, 59.
[126] Allot, What is to be done with African Customary Law*?* The Experience of Problems and Reforms in Anglophone Africa from 1950, 59-60.

Judicial supervisors were appointed in some places so as to supervise the African courts.[127] In Kenya, there was a Supreme Court and subordinate courts established and the judges of the supreme Court and resident magistrates were lawyers from the United Kingdom; while the rest of the courts were manned by administrative offices.[128]

The English law was superior to the customary laws. In the case of *Republic v Amkeyo*,[129] the issue was whether a woman who was married under the ACL could testify against the husband. Hamilton C.J stated that a wife married under the ACL was not a legal spouse and could not be compelled to give evidence against the husband.

2.4.2 POST-COLONIAL PERIOD

According to traditions, the African institutions operated freely. However, progressive reforms were implemented, resulting in a largely similar competence, personnel and procedures to those of the formal legal system.[130] The outcome was that, on the brink of liberation, African courts had little or nothing to do with the original, traditional institutions; this was mainly due to the adversarial existence of the established courts, resulting in strongly watered-down TDRMs.[131] For example in the Agiriama community the government did away with the *vaya* which was the most powerful and remained with the *kambi* which helped with the local administration.[132]

Because of the complexity of tribal rules from each ethnic group, a customary law that is applicable for a specific case is difficult to establish and extend to the courts. The boundaries of customary law procedures were also undefined, and this is because customary law is dynamic because it is not coded.[133] In some jurisdictions, only the law 'currently being lived' by its subjects was regarded as true customary law and therefore applicable.[134] In deciding the interpretation of customary law, the Kenyan courts used assessors or even witnesses to be customs experts whose role was to explain the numerous relevant customs provisions.[135]

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[127] Allot, What is to be done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950, 58-59.
[128] Cotran E, The Development and Reforms of the Law in Kenya, *27 Journal of Africa Law*, 1, 1983, 43.
[129] *Republic v Amkeyo* (1917) EALR.
[130] Allot, What is to be done with African Customary Law, *59.*
[131] Muigua K, Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework, 4.
[132] Marguerite J, "Giriama Reconciliation," Afr. L. Std, 16:1978, 96.
[133] Allot A.N, The Judicial Ascertainment of Customary Law in British Africa, 20 *The Modern Law Review* 3, 1957, 244.
[134] Bennett T.W, Re-Introducing African Customary Law to the South African Legal System, 57 *The American Journal of Comparative Law* 1, 2009, 2.
[135] Onyango, African Customary Law System: An Introduction, 56.

2.4.3 RECENT DEVELOPMENT

The 2010 Constitution recognises the use of TDRMs as a form of ADR. TDRMs are one of the principles which should guide the courts and tribunals in exercising judicial authority.[136] However, TDRMs can only be used if they are not repugnant to justice and morality, does not contravene the Bills of Rights and they are not inconsistent with the Constitution or any other written law.[137] The Constitution provides that, the state should ensure everyone access justice and if there is a fee required, then it should be reasonable.[138] TDRMs ensures the poor and the marginalised, who may not be able to access courts cause of their proximity or low levels of literacy access justice.[139]

The Constitution provides that under chapter five on Land and Environment, the use of TDRMs in Kenya is held to be applicable as seen in the case of *Lubaru M"imanyara v Daniel Murungi*,[140] the court provided an interpretation of Articles 60 (1) (g) and 159 (2) (c) of the Constitution. The parties had filed a consent seeking a land dispute resolved by the *Njuri Ncheke* Council of elders of the Meru community. The court granted the application stating that the constitutional provisions legitimized the application of TDRMs in resolving land issues. The Kenyan constitution supports communities to resolve land disputes through local community inventiveness consistent with the constitution.[141]

The Environment and Land Court Act recognises TDRMs as an authentic dispute resolution technique. The Act states that the court is led to implement the traditional, cultural and social principles in the management of the environment or natural resources where it is pertinent and consistent with the written laws.[142] Considering that the customary principles are extracted from TDRMs, the stipulation impliedly acknowledges the implementation of TDRMs in land and environment conservation issues. The Act stipulates an express provision as to the relevance of TDRMs in settling environmental issues. The provision provides courts the discretion to refer matters to (ADR) methods in which TDRMs are categorised as amongst the legitimate ADR methods.[143] Under National Land Commission Act, the National Land Commission is charged with the function to encourage the application of TDRMs in land

[136] Article 159 (2) (c). *Constitution of Kenya* (2010).
[137] Article 159 (3), *Constitution of Kenya* (2010).
[138] Article 48, *Constitution of Kenya* (2010).
[139] Muigua K & Kariuki F, 'ADR, Access to Justice and Development in Kenya', Strathmore Annual Law Conference 2014 on 3 & 4 July 2014 at Strathmore University Law School, 1.
[140] *Lubaru M"imanyara v Daniel Murungi*, (2013) eKLR.
[141] Article 60(1) (g), *Constitution of Kenya* (2010).
[142] Section 18, *Environment and Land Court Act* (Act No. 19 of 2011).
[143] Section 20, *Environment and Land Court Act* (Act No. 19 of 2011).

conflicts.[144] This provision thus provides TDRMs the jurisdiction to adjudicate over land related disputes.

Apart from the Constitution, the Judicature Act provides that the subordinate courts, the High Court and the Court of Appeal are to be guided by African Customary Law in civil cases if it is not repugnant to justice.[145] In the case of *Erastus Gitonga Mutuma v Mutia Kanuno*,[146] the council of elders breached some requirements provided by the constitution. The court order an injunction against instituting a proceeding through TDRMs.

The 2010 Constitution provides that where one is convicted, he can apply to appeal to a higher court as the stated by the law.[147] This right, however, is not only available to an accused person who has been convicted. In case of *Republic v Danson Mgunya*,[148] the state was appealing against the acquittal of Danson. The respondent challenged that the state could not appeal an acquittal, contending that such right does not exist. The court held that, the fact that the Constitution is silent on whether the state can appeal against an acquittal, does not mean that the state has been denied the right of appeal against an acquittal in the Constitution. The judges argued the only way the respondent could sustain his argument is the possible violation of the Constitution on double jeopardy.

Apart from the Constitution, the are other laws which provide for the right of appeal. The Civil Procedure Act provides that appeals shall lie in the High Court on a question of law or fact from part of a decree or original decree.[149] Also, appeals shall lie in the Court of Appeal from decree orders of the High Court.[150] The Act provides that a decree passed by court with consent of the parties it cannot be appealed.[151] Where an appeal is heard by two or more judges, the appeal shall be decided by the opinion of the majority. Where there are two judges and they are divided, the appeal shall be heard by a court with an uneven number of judges.[152]

The Act goes on to give a list of orders under which the appeals lie.[153] An appeal can be summarily dismissed by the judge if he considers that there are no sufficient grounds for

[144] Section 5 (1) (f), *National Land Commission Act* (No. 5 of 2012).
[145] Section 3(2), *Judicature Act* (Act No. 8 of 2018).
[146] *Erastus Gitonga Mutuma v Mutia Kanuno and others* (2011) eKLR.
[147] Article 50 (2) (q), *Constitution of Kenya.*
[148] *Republic v Danson Mgunya, criminal appeal* (2016) eKLR.
[149] Section 65, Chapter 21, *Civil Procedure Act*.
[150] Section 66, Chapter 21, *Civil Procedure Act.*
[151] Section 67, Chapter 21, *Civil Procedure Act.*
[152] Section 69, Chapter 21, *Civil Procedure Act*.
[153] Section 75, Chapter 21, *Civil Procedure Act*.

interfering with the decree.[154] One has only 30 days from the day the decree is made to appeal against except where the court delays to give the copy of the decree or order.[155]

The Criminal Procedure Code provides that the first appeal may be on a matter of law and/or fact.[156] In the case where a plea of guilty is entered, one can only appeal on the extent of the legality of the sentence.[157] In the case of *Bernard Kimani Gacheru v Republic*,[158] it was stated that on appeal, the appellate court will not interfere with the sentence easily unless, is manifestly excessive in the circumstance of a case, or the material factors were overlooked by the trial court, or wrong materials were took into account, or the court acted on a wrong principle. The Director of Public Prosecution can appeal against acquittal or an order in favour of the accused on a point of law and fact.[159] The Code provides that one has fourteen days to appeal after the date of sentencing, which can be extended if the failure to lodge an appeal has not been caused by appellant or the advocate.[160]

Appeals shall be presented by the client or the advocate in written form, accompanied by a copy of the order appealed against.[161] For one who is in prison, an appeal is presented through the officer in charge of the prison who forwards it to the Registrar of the High Court.[162]

An appeal can be dismissed by the court if the judge considers there are no sufficient grounds for interfering with the judgement.[163] However, before the appeal is rejected the appellant or the advocate has had an opportunity to be heard.

The Appellate Jurisdiction Act provides that the Court of Appeal has the jurisdiction to hear and determine appeals from the High Court and other courts or tribunals prescribed by an Act of Parliament.[164]

There is also the Supreme Court Act which provides for appeals which lie in the Supreme Court. The appeals here shall only be heard with the leave of the court however, it does not apply for appeals from the Court of Appeal in respect of matters relating to interpretation of the Constitution. The court has already determined the import, scope, and limits of its appellate

[154] Section 79B, Chapter 21, *Civil Procedure Act.*
[155] Section 79C, Chapter 21, *Civil Procedure Act.*
[156] Section 347, Chapter 75, *Criminal Procedure Code.*
[157] Section 348, Chapter 75, *Criminal Procedure Code.*
[158] *Bernard Kimani Gacheru v Republic*, (2000) eKLR.
[159] Section 348A, Chapter 75, *Criminal Procedure Code.*
[160] Section 349, Chapter 75, *Criminal Procedure Code.*
[161] Section 350, Chapter 75, *Criminal Procedure Code.*
[162] Section 351, Chapter 75, *Criminal Procedure Code.*
[163] Section 352, Chapter 75, *Criminal Procedure Code.*
[164] Section 3, Chapter 9, *Appellate Jurisdiction Act*.

jurisdiction under Article 163 (4) (a) of the Constitution in *Samuel Kamau Macharia and Another v. Kenya Commercial Bank* and 2 Others and many other cases.

The Supreme Court shall grant leave to appeals in the interest of justice, that is; appeal involves a matter of general public importance or a miscarriage of justice will occur if the appeal is not heard.[165] In the case of *Hermanus Phillipus Styen v Giovanni Gnnecch*,[166] it was stated;

> "the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest; …where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest….; mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court."

Direct appeal to the Supreme Court shall not be granted other than the Court of Appeal.[167]

2.5 NATURE OF THE RIGHT OF APPEAL

Rights are entitlement to perform or not to perform certain actions according to the laws of a certain country.[168] These rights can either be express for example, the right to life or they can be rights found in other rights. The right of appeal takes the following forms.

First, the right of appeal is not an express right as it is contained under the right to a fair hearing. The Constitution under the right of fair hearing provides that one can appeal to a higher court as prescribed by law.[169] Under the international instruments, the right of appeal is also found under other rights. The UDHR and ECHR provides this right under the right of fair hearing. The United Nation Charter does not describe basic human rights and freedoms or the right to appeal court judgments. There is also no provision to guarantee compliance with these provisions. The United Nations Charter nevertheless provides an overall idea for recognition, protection and global co-operation in the field of fundamental human rights and freedoms.[170]

Secondly, the Constitution for example, provides that appeals shall lie in the Supreme Court from the Court of Appeal as a matter of right in cases involving interpretation of the

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[165] Section 16, *Supreme Court Act* (Act No. 7 of 2011).
[166] *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone*, (2013) eKLR.
[167] Section 17, *Supreme Court Act* (Act No. 7 of 2011).
[168] T*he Stanford Encyclopaedia of Philosophy, 2005*https://plato.stanford.edu/archives/fall2015/entries/rights/
[169] Article 50 (2) (q), *Constitution of Kenya* (2010).
[170] United Nation Charter, 24 October 1945.

Constitution.[171] The Constitution goes on to state that the Court of Appeal has the jurisdiction to hear appeals from the High Court or any other court or tribunal as provided by an Act of Parliament.[172] Appeals shall lie in the high court on questions of law or fact from a decree.[173]

2.6 CONCLUSION

The right of appeal is provided by both national and international instruments. This right is not an express right and can be found other rights for example the right of fair hearing, and it can be provided as a matter of right. At any stage of a proceeding of a case, mistakes are possible of both legal and factual in nature. It is highly impossible to find a judicial system which is perfect to make judgements without any errors. Appeals have managed to change the decisions of the courts in many cases, since during appeals the courts have managed to find many errors which favour or does not favour the accused.

[171] Article 163 (4) (a), *Constitution of Kenya* (2010).
[172] Article 164, *Constitution of Kenya* (2010).
[173] Section 65, Chapter 21, *Civil Procedure Act*.

CHAPTER THREE

THE NATURE OF TDRMS IN KENYA

3.1 INTRODUCTION

This chapter discusses the nature of TDRMs in Kenya. This will be discussed through different communities including; the Somali community, the Pokot community, the Agikuyu community and Agiriama community. The chapter concludes by discussing whether TDRMS encompasses the right of appeal.

3.2 NATURE OF TDRMs

In the past before colonialism, crime was viewed socially in most African societies such that, any wrongful act done influenced the social relations.[174] Anyone who committed a crime was punished, but imprisonment was unheard of in African Customary Law (ACL).[175] In the Agikuyu community for example, the offenders were punished by being made to pay heavy fines to the *kiama* and compensation to right the wrong done.[176] Customary law was used to settle disputes by placing certain sanctions depending on the crime.[177] The main aim of the sanctions was restitution and punishing the offender.[178]

Criminal cases were treated almost the same way as civil cases.[179] Every community had a different customary law mechanism which they applied.[180] For example, for the Akamba community, if one is found to have stolen someone's property, he would be asked to return the stolen property plus one bull.[181] However, if he continues, his house would be burnt down and he would be driven out of the community.[182] For the Keiyo, if someone stole, the elders would meet and agree on what would be paid back by the thief and if he denies, specialised elders were asked to pronounce a specific curse on him.[183]

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[174] Kinanga Z.M, The Place of African Customary Criminal Law: The Need for Reforms, Unpublished LLB Thesis, University of Nairobi, 1982, 1.
[175] Kinanga Z.M, The Place of African Customary Criminal Law: The Need for Reforms, Unpublished LLB Thesis, University of Nairobi, 1982, 1.
[176] Mushanga T.M, Crime and Deviance: An Introduction to Criminology, LawAfrica Publishing Ltd, 2011.
[177] Onyango P, Africa Customary Law System: An Introduction, Law Publishing Ltd, 2013, 29.
[178] Kinanga Z.M, The Place of African Customary Criminal Law: The Need for Reforms, Unpublished LLB Thesis, University of Nairobi, 1982, 1.
[179] Mushanga T.M, Crime and Deviance: An Introduction to Criminology, LawAfrica Publishing Ltd, 2011.
[180] Kariuki F, Applicability of traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya at 203.
[181] Kinanga Z.M, The Place of African Customary Criminal Law: The Need for Reforms, Unpublished LLB Thesis, University of Nairobi, 1982, 1.
[182] Kinanga Z.M, The Place of African Customary Criminal Law: The Need for Reforms, Unpublished LLB Thesis, University of Nairobi, 1982, 1.
[183] Kinanga Z.M, The Place of African Customary Criminal Law: The Need for Reforms, Unpublished LLB Thesis, University of Nairobi, 1982, 1.

The African communities had a council of elders, which was responsible for overseeing the affairs of the community, including ensuring that there was social order and justice in the community.[184] The trial followed the customs and practices of a particular community, the council of elders or the arbiters were not trained as judges, there was also no recording of the proceedings or legal representation of the offender.[185]

The use of TDRMs in accessing justice and conflict management in Africa is still relevant especially since they are closer to the people, flexible, expeditious, foster relationships, voluntary-based and cost-effective.[186] For this reason, most communities in Kenya still hold onto customary laws under which the application of traditional dispute resolution mechanisms is common.[187] TDRMs mechanisms are also preferable because: they decongest the courts and prisons, respect the traditional cultures and traditions, decisions emanating from such mechanisms are easily acceptable to communities, they promote peace, harmony, co-existence among communities and security, they are expeditious and most cases are resolved by elders who have background knowledge and understanding of cases.[188]

TDRMs are usually ethnic centred functioning among a community sharing the same ethnic language and whose rules are enforced through moral and customary sanctions.[189] The nature of TDRMs in Kenya may be explained based on the Somali community, Pokot community, Agiriama community and Agikuyu community as a representative of the application of TDRMs. some

3.2.1 AGIKUYU COMMUNITY

In the Agikuyu community, disputes between the members of the family were resolved by the father who acted as a judge at the family level.[190] If the dispute was more complex and it could not be solved at the family, heads of families within a kinsfolk know as '*mbari*' came together and acted as the council of elders.[191] The disputes were heard in the family homestead as the '*ndundu ya mocie*' which was the family council, had the right to treat the matter as a family

[184] Muigua K, Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework, 7.
[185] Kariuki F, Conflict Resolution by Elders: Success, Challenges and Opportunities, 6.
[186] Muigua K, Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework, 5.
[187] K. Muigua, Resolving Conflicts through Mediation in Kenya, 22-23.
[188] Muigua K, Legitimising Alternative Dispute Resolution in Kenya: Towards a Policy and Legal Framework, 4-5.
[189] Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya', 9.
[190] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, Clay Ltd, 1974, 214.
[191] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 214.

issue.[192] The presiding elders who acted as arbitrators had the duty to ensure that the parties in dispute reach an agreement without breaking the family.[193]

If the dispute is not resolved at the family level, the next level was the '*kiama*' (public court of elders).[194] It was constituted of only male elders who had undergone the community's rite of passage.[195] The procedure was that the party which was offended was to inform the *kiama* of the dispute the night before and the following day appear before them with the offender.[196] The council of elders sat in open air spaces or under a tree known as '*keharo*'.[197] They had to be served with a special brew which was made out of fermented sugarcane so as to fulfil a ritual oath ceremony.[198] The ceremony was carried out to pray to the ancestors to help them solve the dispute and also to bind the parties to adhere strictly to the judgment of the elders so that they do not get a curse.[199]

After the ceremony, the trial began with each party been given a chance to state their case and could also call witnesses.[200] A committee known as ndundu is appointed by the *kiama* to look at the issues and come up with a verdict.[201] The committee included members of the community apart from the relatives of the parties in dispute.[202] The decision by the committee is read by the senior council elder.[203] The decision can be appealed by the parties which are not satisfied and if not, the decision would be binding. If there is an appeal, the same court would listen to the appeal however, with a different committee. For appeals, the grounds were not easy, as one had to show that the grounds of appeal were serious.[204] The methods of restitution included compensation, ostracism, a curse or confinement.[205]

3.2.2 POKOT COMMUNITY

Like the Agikuyu community, the family was the basic unit of the clan. The main conflict management institutions were the family, the clan and the council of elders.[206] The father was

[192] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 214.
[193] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 214.
[194] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 215.
[195] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 215.
[196] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 215.
[197] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 215.
[198] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 215.
[199] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 215.
[200] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 216.
[201] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 216.
[202] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 216.
[203] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 222.
[204] Kenyatta J, *Facing Mount Kenya*: The Tribal Life of the Gikuyu, 223.
[205] Kenyatta J, Facing Mount Kenya: The Tribal Life of the Gikuyu, 230.
[206] Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, Intermediary Technology Development Group Eastern Africa, January 2004, 23.

the judge for any conflict within the family unit.[207] The clan was formed by extended families and it served as a Court of Appeal for disputes from the family level. At this level, the matter was heard a fresh and sometimes the neighbours were called to hear and decide only the family disputes.[208] The council of elders known as the '*kokwo*' acted as the Supreme Court as they were the highest institution of conflict resolution.[209]

The *Kokwo* was made up of old men who were respected in the society and had knowledge about the community history and the culture.[210] The *Kokwo* used different wisdom phrases and proverbs to resolve conflicts.[211] Something unique about the Pokot community is that the council of elders included women as part of the dispute resolution process.[212] The women who were allowed to sit in the *kokwo* were selected based on their age and were allowed to contribute to the proceedings.[213] The women also helped to provide reference of future meetings as they participated in keeping records.[214] Women were also allowed to advise the council on cultural beliefs or an occurrence and give their opinions before the final verdict.[215] The *kokwo* gave the parties a chance to narrate their case and one could be represented the same way lawyers represent parties in formal justice.[216] The restitution methods here included fines, excommunication, death and public ridicule.[217]

3.2.3 SOMALI COMMUNITY

The Somali community had a customary court known as '*Maslah*' which resolved the disputes.[218] The hearing of these disputes took place in mosques, place of worships in the village or under trees in designated places.[219] The proceedings started after the parties were given a chance to cool down and customary ceremonies have been conducted.[220] In the cases that resulted to death for example, the proceedings of the case would start after the family has

[207] Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 2004, 23.
[208] Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 2004, 23.
[209] Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 2004, 23.
[210] Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 2004, 23.
[211] Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 2004, 23.
[212] Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 2004, 23.
[213] Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 2004, 23.
[214] Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 2004, 23.
[215] Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 2004, 23.
[216] Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 2004, 23.
[217] Kalya P, Adan M, Masinde I, *Indigenous Democracy Traditional Conflict Resolution Mechanisms*, 2004, 23.
[218] Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya', 9.
[219] Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya', 9.
[220] Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya', 9

finished mourning and the burial rituals have been fulfilled.[221] The parties were given a chance to be heard and at the end the party found guilty is required to compensate the other party.[222] The compensation was either animal or blood money calculated on the basis of the injury suffered by the injured party.[223]

3.2.4 AGIRIAMA COMMUNITY

The Giriama had two council of elders who were used to settle disputes in the community.[224] The first set was known as the *kambi* which listened and resolved the day-to-day disputes.[225] The other one was known as the *vaya* and it was the most respected, it consisted of elders who were chosen to operate as a secret society.[226] The *vaya* presided over trials as oracles by ordeals where superstitions and supernatural powers helped in determining the truth during dispute resolution.[227] The ordeals were used mainly in the deciding whether a party was guilty or innocent. The two main ordeals were the ordeal by poison which made the guilty sick and the ordeal by fire which made the guilty party blister.[228] The elders did not have a physical jurisdiction but psychological, the accuser and the accused presented themselves before the ordeal.[229] No one was forced to appear before the elders as the parties had to consent to it, but such acts was treated as admission of guilt.[230] The trial by the ordeal and the council of elders worked hand in hand where the ordeal identified the guilty party and the council of elders enforced those rights.[231]

Some of these communities still use communities TDRMs while others stopped due to urbanization, unclear and inadequate legal framework, TDRMs are regarded inferior to formal justice system, and criticism that TDRMs does not respect and protect fundamental human rights and freedoms.

[221] Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya', 9.
[222] Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya', 9.
[223] Mwimali J, 'Human Rights Perspectives of Informal Dispute Resolution Processes and the Criminal Justice System in Kenya', 9.
[224] Marguerite J, "Giriama Reconciliation," Afr. L. Std, 16:1978, 95.
[225] Marguerite J, "Giriama Reconciliation," Afr. L. Std, 16:1978, 95.
[226] Marguerite J, "Giriama Reconciliation," Afr. L. Std, 16:1978, 95.
[227] Marguerite J, "Giriama Reconciliation," Afr. L. Std, 16:1978, 95.
[228] Marguerite J, "Giriama Reconciliation," Afr. L. Std, 16:1978, 95.
[229] Marguerite J, "Giriama Reconciliation," Afr. L. Std, 16:1978, 95.
[230] Marguerite J, "Giriama Reconciliation," Afr. L. Std, 16:1978, 95.
[231] Marguerite J, "Giriama Reconciliation," Afr. L. Std, 16:1978, 95.

3.3 CHALLENGES FACING TDRMs

TDRMs has been faced by many challenges including disregard for the basic human rights such as women discrimination.[232] Many communities in Kenya, the structure of the council of elders has almost completely excluded women from participation.[233] The main reasons for discrimination are; women are said not communicate well, the negative attitude towards women, limited representation and biased and unfair traditions and cultural practices.[234]

Women are only restricted in participating in settling disputes involving social issues such as HIV/AIDs and matters concerning women sexuality.[235] In the Coastal region where the TDRMs are composed of more women than for example, the *Jomvu Kuu* where there are six women and two men, the women do not attend the TDRMs as they fear their men colleagues due to the cultural beliefs that restrict their interactions with men.[236]

Apart from discrimination against women another challenge facing TDRMs is corruption. The government has been unable to investigate and prosecute corrupt officials despite the various effort that it has put in place to eradicate corruption.[237] TDRMs have no anti-corruption structure to deal with this issue, leading to people not to access justice.[238] The practice of paying the traditional elders to settle disputes has turned out to encourage corruption denying many people justice.[239] The issue of corruption was unheard of during the pre-colonial period as the elders had livestock and held majority of the land making them the wealthiest people in the community.[240] This enabled them to be impartial and independent during settlement of disputes.[241] In the modern day, the young people have accumulated more wealth therefore the

[232] Muigua K, Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice System, 15.
[233] FIDA Kenya, Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya (FIDA Kenya, 2008).
[234] Muigua K, Institutionalising Traditional Dispute Resolution Mechanisms and other Community Justice System, 15.
[235] FIDA Kenya, Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya (FIDA Kenya, 2008), 10.
[236] FIDA Kenya, Traditional Justice Systems in Kenya: A Study of Communities in Coast province of Kenya (FIDA Kenya, 2008), 10.
[237] Otieno H, The Effectiveness of Traditional Dispute Resolution Mechanism in Facilitating Women's Access to Justice in Land Disputes, 2016, 30.
[238] Otieno H, The Effectiveness of Traditional Dispute Resolution Mechanism in Facilitating Women's Access to Justice in Land Disputes, 2016, 30.
[239] Otieno H, The Effectiveness of Traditional Dispute Resolution Mechanism in Facilitating Women's Access to Justice in Land Disputes, 2016, 31.
[240] Kariuki F, Conflict Resolution by Elders: Success, Challenges and Opportunities, 19.
[241] Kariuki F, Conflict Resolution by Elders: Success, Challenges and Opportunities, 19.

older people rely on them. This has led the dispute resolutions to be affected by corruption, bribery and favouritism.[242]

Among the Agiriama community for example, the *Kambi* have been accused of being corrupt by the parties.[243] In a case among the *Gucha* community in the Coast, the elders ask the parties to a dispute to pay what they can afford, however in a case involving a land dispute between a woman with her son, the woman was only able to pay 200 Kenyan shillings while the son was able to pay more than that and the case was decided in his favour.[244] Among the Borana-Oromo, there have been reports that the *Abba Gada* who are the elders have been receiving bribes therefore limiting the people's faith in them.[245]

3.4 WHETHER TDRMs ENCOMPASSES THE RIGHT OF APPEAL

The Agikuyu community have a system of appeal where if one is found guilty, he can appeal, and his appeal would be listened to by a different committee. However, the council of elders are highly respected, and the oaths taken during the trial are highly regarded. This has made people not to appeal because it seems like one is disrespecting the decision of the council of elders. It is believed that this attracted a curse as it is considered as a bad omen to go against the elders.[246]

For the Somalis, they trust the members of their TDRMs so much that they do not trust the formal court process. Therefore, the decisions made by the *Maslah* Court binds the parties in the Somali community.[247] The Somali system of resolving disputes does not provide for a system of appeal, the aggrieved parties have no option but to comply with the decision. The Pokot just like the Agikuyu have a system of appeal. However, the are some cases which are only listened at the *kokwo* level, which acts as the Supreme Court. Serious crimes such as murder and theft are heard at *kokwo,* here the decisions cannot be appealed.[248]

Most TDRMs are concerned with the restoration of relationships (as opposed to punishment), peacebuilding and parties' interests and not the allocation of rights between disputants, unlike

[242] Kariuki F, Conflict Resolution by Elders: Success, Challenges and Opportunities, 19.
[243] Marguerite J, Giriama Reconciliation, Afr. L. Std, 16:1978, 95.
[244] Muigua D, "Resolving Conflicts through Mediation in Kenya" Glenwood Publishers Limited, 2012, 30.
[245] Kariuki F, Conflict Resolution by Elders: Success, Challenges and Opportunities, 19.
[246] Kalya P, Adan M, Masinde I, Indigenous Democracy Traditional Conflict Resolution Mechanisms, 23.
[247] Traditional Dispute Resolution Unit Ministry of Justice and Constitutional Affairs Federal Government of Somalia, 'Policy Paper on the Somali Customary Justice System', 23 November 2014, 19.
[248] Kalya P, Adan M, Masinde I, Indigenous Democracy Traditional Conflict Resolution Mechanisms, 23.

the formal justice system where it focuses on retributive justice.[249] In most of them, decisions are community-oriented with the victims, offenders and the entire community being involved and participating in the definition of harm and in the search for a solution acceptable.[250] This has also made hard for one to appeal in TDRMs.

3.7 CONCLUSION

TDRMs although the use of TDRMs in accessing justice and conflict management in Africa is still relevant especially since they are closer to the people, flexible, expeditious, foster relationships, voluntary-based and cost-effective, it has been faced with many challenges such as women discrimination and corruption as they have no one to check on them. This has led to many not accessing justice. In some communities once the decision has been rendered by the council of elders, it is final, and one cannot appeal. Some communities have the right of appeal. For example, the Pokot, parties involved in serious crimes have no right to appeal however, for the petty crimes and other misdemeanours one can appeal. For the Agikuyu, they have a right to appeal however, the members fear to be cursed if they try to appeal a decision. Therefore, TDRMs to some extent does encompass the right of appeal.

[249] Kariuki F, 'Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed [2013] eKLR*, 2 Alternative Dispute Resolution 1, (2014), 202.
[250] Elechi O, 'Human Rights and the African Indigenous Justice System,' A Paper for Presentation at the 18th International Conference of the International Society for the Reform of Criminal Law, August 8 – 12, 2004, Montreal, Quebec, Canada.

CHAPTER FOUR

THE IMPORTANCE OF THE RIGHT OF APPEAL IN TDRMs

4.1 INTRODUCTION

This chapter starts by discussing the functions of the right of appeal in formal justice. It goes ahead to discuss why the right of appeal is important in TDRMs and criticism of the right of appeal.

4.2 FUNCTIONS OF APPEALS IN FORMAL JUSTICE

The main function of the right of appeal is to safeguard one against failure of the judicial system to attain justice.[251] The failure to attain justice occurs in two ways. One, a person can be wrongly convicted because the judge or the magistrate may fail to look and assess the evidence before him properly or he may be misled by fabricated, irrelevant, exculpatory or prejudicial evidence which may not be presented during trial.[252] The other way is where one does not receive a fair trial for countless potential reasons.[253] The right of appeal helps to provide a chance for a party to address these issues.

Secondly, appeals ensure that there is consistency in the trial courts.[254] This is achieved by the appellate courts through two ways which are linked.[255] The appellate court corrects where the law has been applied wrongfully in certain cases.[256] After the clarification, guidance is given on how the law should be applied. This leads to a greater consistency of the law in the future. Also, the right of appeal encourages better decision making among the judges as the appellate court act as the oversight.[257]

Finally, appeals serve an important institutional function as they provide legitimacy to the justice system.[258] It increases the public confidence in the administration of justice as justice is dispensed fairly and consistently making it hard for any miscarriage of justice to occur.[259] Moreover, the people dispensing justice are subjected to oversight and it is possible to hold them accountable for their performance.[260]

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[251] Langein, History of the Common Law, The Development of Anglo-American Legal Institution, 415.
[252] Langein, History of the Common Law, The Development of Anglo-American Legal Institution, 416.
[253] Langein, History of the Common Law, The Development of Anglo-American Legal Institution, 418.
[254] Orfield, History of Criminal Appeal in England, 1936, 938.
[255] Orfield, History of Criminal Appeal in England, 1936, 938.
[256] Orfield, History of Criminal Appeal in England, 1936, 939.
[257] Orfield, History of Criminal Appeal in England, 1936, 939.
[258] Langein, History of the Common Law, The Development of Anglo-American Legal Institution, 417.
[259] Langein, History of the Common Law, The Development of Anglo-American Legal Institution, 417.
[260] Langein, History of the Common Law, The Development of Anglo-American Legal Institution, 417.

4.2 THE IMPORTANCE OF RIGHT OF APPEAL IN TDRMS

The right of appeal in TDRMs will help in enhancing access to justice. The Constitution provides for the right to access justice[261] and many other international instruments. The term access to justice does not have a specific definition. According to Ladan, it is a way of finding the best solutions for the people in need from systems which are not only accessible but also comprehensible to the ordinary man and which provide justice without any discrimination, fear or favour, fairly and speedily.[262] Access to justice is essential in any country in order to maintain democracy.[263] It is now generally accepted that justice can be dispensed by other institutions and not only by the formal justice system.[264]

The courts have tried to define what access to justice means. In the case of *Dry Associates v Capital Market Authority*, the court stated that access to justice includes;

> '*…the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay*.'[265]

There is no single approach of addressing injustice particularly in a pluralistic state since injustice comes in different forms.[266] One can attain justice if he is aware of the different injustice occurring and aware that only one solution cannot deal with all forms of injustice.[267] If one relies on only form, then it can easily hinder access to justice.[268] For a full realization of the right to access justice we need to have different ways of accessing justice.[269] Judicial

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[261] Article 48, *Constitution of Kenya* (2010).
[262] Ladan M, 'Access to justice as a human right under the ecowas community law,' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336105 on 10 November 2019.
[263] Hurter E, Access to justice: to dream the impossible dream? 44 *The Comparative and International Law Journal of Southern Africa* 3, 2011, 408.
[264] Hurter, Access to justice: to dream the impossible dream? 409.
[265] *Dry Associates Limited v Capital Markets Authority & Another, Interested Party Crown Berger (K) Ltd* (2012) eKLR.
[266] Kinama, Traditional Justice Systems as alternative Dispute Resolution under Article 159 (2) (c) of the Constitution of Kenya 2010 at 25.
[267] Kinama, Traditional Justice Systems as alternative Dispute Resolution under Article 159 (2) (c) of the Constitution of Kenya 2010 at 25.
[268] Kinama, Traditional Justice Systems as alternative Dispute Resolution under Article 159 (2) (c) of the Constitution of Kenya 2010 at 22-23.
[269] Kinama, Traditional Justice Systems as alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010, 1.

authority originates from the people therefore they should be given an opportunity to choose the forum they think it's the most appropriate.[270] In the case of *Ndeto Kimomo v Kavoi Musumba*,[271] the judge agreed with this argument by stating that if parties involved in a dispute agree that they will decide the case by taking an oath, they are moving into another jurisdiction and withdrawing from the court's jurisdiction.

Appeals will help to provide check and balances for TDRMs. The Constitution provides that TDRMs can be used if they do not contravene the Bill of Rights, not repugnant to justice and not inconsistent with the Constitution or any other written law.[272] Where TDRMs will have gone against the Constitution one will have a chance to have the decision looked at by a different panel in appeal.

Through appeals, the party which feels the decision made is unfair, can have the decision reviewed within the TDRM. A well-structured system of appeal within the TDRMs will correct errors by the council of elders and the right of appeal ensures that, as far as possible, TDRMs arrive at correct decisions. The decisions of appellate courts are fully reasoned and widely available. Apart from correcting the errors, appeals will provide accountability.

TDRMs have for a long time operated under the formal justice system as it has been viewed to be inferior to formal justice system.[273] Although they have been attacked by people who support formal justice system that they do not have an adequate legal framework and they do not respect and protect fundamental human rights and freedoms, they have remained resilient.[274] In Kenya, although the effect is yet to been really felt, the government has tried to incorporate TDRMs subject to some limitations.[275] The issue has been whether formalizing TDRMs will make it loose its flexibility and informality or will it remain the same.[276] Depending on the nature and the extent of the government backing, state recognition of TDRMs may formalize them.[277] The mere recognition of TDRMs by the government without promoting

[270] Kariuki F, Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya, 205.
[271] *Ndeto Kimomo v Kavoi Musumba*, (1977) eKLR.
[272] Article 159 (3), Constitution of Kenya (2010).
[273] Kariuki F, Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology, 2.
[274] Kariuki, Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya: Case Study of *Republic v Mohamed Abdow Mohamed* (2013) eKLR, 2.
[275] Kariuki, Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology, 4.
[276] Kariuki, Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology, 4.
[277] Kariuki, Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology, 4.

it will make it hard for TDRMs in achieving the access to justice.[278] The state may recognize the existence of TDRMs by enforcing the decisions of the traditional leaders and lending the appeal process.[279]

However, the problem with linking the formal justice system with the informal justice system is that TDRMs will lose its informality. This will hinder the access to justice as many people will not be able to have their matters solved. Majority of people in Kenya do not solve their cases in court because of various reasons such as; one party being more powerful than the other party, others do not have any idea about the formal justice system, while others fear aggravating the relationship.[280]

Right of appeal in TDRMs will help in achieving access to justice. TDRMs is about restorative justice which is based on three premises: those who commit certain kinds of wrongful acts, mostly serious crimes, morally deserve to suffer a proportionate punishment; it is intrinsically and morally good for someone to mete out punishment to offenders and thirdly, that it is morally impermissible intentionally to punish the innocent or to inflict disproportionately large punishments on wrongdoers.[281]

Where one feels like he or she has been discriminated against or feels like the dispute was not fair, he or she should have a way of addressing these issues in a different platform or heard by a different panel. Some of the TDRMs do not provide this chance for people to appeal, for example among the Somalis, the decision by the *Maslah* is final and it cannot be appealed. Other communities like the Agikuyu where there is a right to appeal, the members of the community cannot appeal as they fear they will be cursed as it is like disrespecting the council of elders.

4.3 CRITICISM OF THE RIGHT OF APPEAL

The right of appeal has received many criticisms. One, is that appeals have undermined the finality of a case. In the United States, the Chief Justice in the case of *Evitts v Lucey* stated that,

[278] Forsyth M, 'A Typology of Relationships between State and Non-State Justice Systems,' 67-68.
[279] Kariuki, Community, Customary and Traditional Justice Systems in Kenya: Reflecting on and Exploring the Appropriate Terminology, 4.
[280] Muigua K, Traditional Dispute Resolution Mechanisms Under Article 159 Of the Constitution of Kenya 2010, 2.
[281] The Stanford Encyclopaedia of Philosophy (Fall 2014 Edition) http://plato.stanford.edu/archives/fall2014/entries/justice-retributive/ on 12 November 2019.

> "*Few things have so plagued the administration of criminal justice or contributed more to lowered public confidence in the courts, than the interminable appeals, the retrials, and the lack of finality.*"[282]

During appeals, the judges do not have a chance to interact with the evidence and the witnesses first-hand, the only deal with printed copies.[283] Therefore chances of coming up with an incorrect verdict are higher than when the case is first heard by a judge who deals with the evidence and witnesses first-hand.

Secondly, the right of appeal increases the cost of access to justice which is supposed to be reasonable.[284] This is because more judges will be needed to listen to these cases. Apart from judges, there will be needed to employ more supporting stuff such as clerks. This will also affect the parties as they will need more money for the extra-legal services which would not be incurred if there is no appeal. This argument of increase in cost is linked with argument that appeals causes delay. Delay undermines the confidence of the reliability of the final verdicts.[285]

Finally, is that the right of appeal has made judges and magistrates more inclined to making errors.[286] This is because appeals undermine the sense of responsibility felt by judges and magistrates.

4.4 CONCLUSION

The right of appeal is important in achieving justice. Although TDRMs is an informal justice system it still has challenges. The challenges facing TDRMs which are corruption and discrimination against women cannot help in accessing justice. The right of appeal of will help solve some of these challenges and with this people will be able to achieve justice. However, in allowing one to appeal he should be able to appeal within the TDRM. This is to enable TDRMs to remain informal. TDRMs should have a structure which enable one to appeal in order to rectify the errors which may occur at the first instance. But mainly to deal with corruption and the discrimination against women.

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[282] *Evitts v. Lucey*, The Supreme Court of United States.
[283] Berger, Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals, 2005.
[284] Sibley W, Criminal Appeal and Evidence, 1908, 19.
[285] Berger, Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals, 2005.
[286] Sibley W, Criminal Appeal and Evidence, 1908, 23.

CHAPTER FIVE

FINDINGS, RECOMMENDATION AND CONCLUSION

5.0 INTRODUCTION

This chapter provides the findings of the research which will be in relation to the objectives and hypothesis of the study. Thereafter, it proposes some recommendation based on the findings. It finally presents a conclusion to the study.

5.1 FINDINGS

The study finds that the right of appeal is provided by the Constitution and other international instruments as a matter of right and as prescribed by the law as discussed in chapter two. The study also finds that the right of appeal is an important right based on the principals of natural justice as it provided under the right to a fair hearing hence the need for its inclusion in TDRMs.

Traditional Dispute Resolution mechanisms are based on customary practices and principles as explained in chapter three. Some of the TDRMs however do not engender legal principles; in particular the right to a fair hearing as examined under chapter three owing to the low literacy levels of the adjudicators. This in turn hinders the execution of justice according to natural justice principles. However, other communities have the right of appeal in their TDRMs, but they do not have a well-structured system.

As outlined in chapter three, this study finds that given the nature of TDRMs, the right of appeal is far from being incorporated to the dispute resolution processes. The study finds that there is a need to incorporate the right in TDRMs given the constitutional and statutory provisions legitimising their use in dispute resolution. Furthermore, it is foreseeable that TDRMs will be increasingly applicable in resolving a wider range of disputes.

5.2 RECOMMENDATIONS

- TDRMs should modify their way of settling disputes in a way that includes the right of appeal so that it adheres to the principle of natural justice and to be consistent with the constitution. This can be done by coming up with a legislation that will regulate TDRMs. The legislation should outline a clear the process of appeal within the TDRMs. The legislation should list the official TDRMs in the different communities in Kenya. The legislation should also outline the customary powers and functions of the elders in TDRMs, to reflect the principles of natural justice and thus include the right to a fair hearing in TDRMs.

- The government should provide civic education to the people using TDRMs because of the low level of literacy. This education will be important in educating the adjudicators in TDRMs in every community on the right to a fair hearing as well as its importance. In turn the execution of the program would aid in seeing that the right to a fair hearing is practically engendered in TDRMs which include the right of appeal. The Judicial Service Commission has stated it will consider supporting elders involved in (ADR) following appeals from Isiolo elders.

5.3 CONCLUSION

The study has tested the hypothesis which was TDRMs does not provide for the right of appeal and found out that some communities provide for the right by examining the nature of TDRMs and the right of appeal. Chapter two discussed the aspects of the right of appeal. Chapter three look at the nature of the TDRMs from the pre-colonial to the recent development. Chapter four look at the importance of the right of appeal and examined whether it is important in TDRMs. The right of appeal is an important right and its lack of inclusion in TDRMs jeopardizes the execution of justice which demands that it must not only be done but should be seen to be done.

BIBLIOGRAPHY

Books

- Kenyatta J, *Facing Mount Kenya: The Tribal Life of the Gikuyu*, Clays Ltd. St Ives PLC Great Britain, 1974.
- Kalya P Ruto, Adan Mohamud, Masinde Isabella, *Indigenous Democracy Traditional Conflict Resolution Mechanisms,* Intermediary Technology Development Group – Eastern Africa, January 2004.
- Rawls J, *A theory of justice*, Harvard University Press, Cambridge, 1971.
- Wade H.W.R, Forsyth C.F, *Administrative Law*, Oxford University Press, Oxford, 2014.
- Langein J.H, *History of the Common Law*, *The Development of Anglo-American Legal Institution*. 2ed Aspen Publishers, England 2009.
- Ashworth *A, English Criminal Appeals, 1844-1994: Appeals Against Conviction and Sentence in England and Wales,* Oxford University Press, Oxford 1996.
- Trechsel S, *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford, 2005.

Journals

- Coldham S, 'Criminal justice policies in Commonwealth Africa, trends and prospects, 44 *Journal of African Law* 2, 2000.
- Kariuki F, 'Applicability of Traditional Dispute Resolution Mechanisms in criminal cases in Kenya*: Case* study of *Republic v Mohamed Abdow Mohamed* (2010) eKLR, 2 *Alternative Dispute Resolution* 1, (2014).
- Kinama E, Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2)(c) of the Constitution of Kenya 2010, *Strathmore Law Review* 1 2015.
- Marshall P.D, A Comparative Analysis of the Right to Appeal, 22 *Duke Journal of Comparative and International Law* 1, (2011).
- Benjamin B.L, Criminal Appeals as Jury Control: Anglo-Canadian Historical Perspectives on the Rise of Criminal Appeals, 10 *Canadian Criminal Law Review* 1, (2005).
- Orfield, History of Criminal Appeal in England, 1 *Missouri Law Review* 4, 1936.
- Western P, Drubel R, Towards a General Theory of Double Jeopardy, Supreme Court Review, 1978 *University of Chicago Press* 1, 1978.
- Sanders G.M, How Customary is African Customary Law? 20 *The Comparative and International Law Journal of Southern Africa* 3, 1987.

- Allot A.N, What is to be done with African Customary Law? The Experience of Problems and Reforms in Anglophone Africa from 1950, 28 *Journal of Africa Law*, 1/2, 1984.
- Cotran E, The Development and Reforms of the Law in Kenya, *27 Journal of Africa Law* 1, 1983.
- Bennett T.W, Re-Introducing African Customary Law to the South African Legal System, 57 *The American Journal of Comparative Law* 1, 2009.
- Hurter E, Access to justice: to dream the impossible dream? 44 *The Comparative and International Law Journal of Southern Africa* 3.
- Muigua K, Alternative Dispute Resolution and Article 159 of the Constitution.
- Muigua K & Kariuki F, ADR, Access to Justice and Development in Kenya, Strathmore Annual Law Conference, held on 3rd & 4th July 2014 at Strathmore University Law School.

Dissertation(s)

- Chepkoech C, 'The Applicability of Traditional Dispute Resolution Mechanisms in Criminal Cases in Kenya' LLB Dissertation, Strathmore University, January 2017.

Online Sources

https://www.judiciary.uk/ on 28 February 2019.

Natural Justice-: Rule of Fair Hearing https://gaurlaw.wordpress.com/2015/05/01/natural-justice-rule-of-fair-hearing/ on 28 February 2019.

Access to Justice in Sub-Saharan Africa, Penal Reform International 2000, https://cdn.penalreform.org/wp-content/uploads/2013/06/rep-2001-access-to-justice-africa-en.pdf on 12 February 2019.

T*he Stanford Encyclopaedia of Philosophy,*

2005 https://plato.stanford.edu/archives/fall2015/entries/rights/ on 24 July 2019.

Ladan M, 'Access to justice as a human right under the ecowas community law,' https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336105 on 10 November 2019.

The Stanford Encyclopaedia of Philosophy (Fall 2014 Edition) http://plato.stanford.edu/archives/fall2014/entries/justice-retributive/ on 12 November 2019.

Kariuki F, *African Traditional Justice Systems* < http://kmco.co.ke/wp-content/uploads/2018/08/African-Traditional-Justice-Systems.pdf> on 10 February 2019.