

**A CRITICAL ANALYSIS OF THE RIGHT TO COUNSEL AS A MEANS TO A FAIR
TRIAL FOR THE UNREPRESENTED ACCUSED IN KENYA**

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

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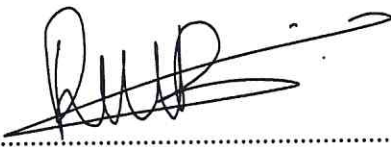
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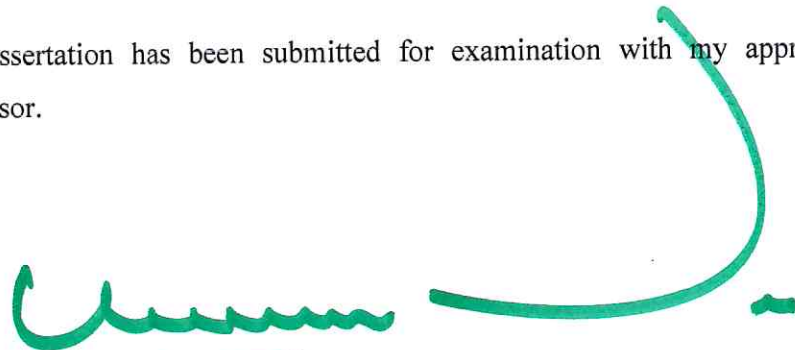
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DECLARATION

I, **RUKWARO RUTH WANGUI**, 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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ABSTRACT

Right to counsel is a fundamental right in ensuring a fair trial for the accused. In the adversarial legal system, an unrepresented accused is already at a disadvantage in conducting his case as compared to the prosecutor in view of the principle of equality of arms. Pursuant to Article 48, 50(2) (g) and (h), Kenya has an obligation to realise the right to counsel. Police, judges, lawyers, paralegals, and the state are all essential in the criminal justice system to ensure this right. The study investigates how the state approaches the right to counsel for the unrepresented accused by comparing the situation in Kenya to the United Kingdom and South Africa to derive lessons from them. Legal representation was offered by the government and civil society organizations. Different legal instruments, legal aid schemes and other private schemes were valuable in assisting the state in the provision of counsel for the unrepresented accused. The unrepresented accused is exposed to high litigation costs, the possibility of substantial injustice and complex criminal proceedings. Some of the challenges faced by the state were limited number of lawyers, lack of funds and inadequate legislation to protect this right. In conclusion, Kenya has to take its position in providing the right to counsel for the unrepresented accused to ensure that their right to a fair trial is respected and fulfilled through operationalizing the Legal Aid Act 2016 as observed in the case studies.

LIST OF ABBREVIATIONS

CCPR	UN Human Rights Committee
DPP	Director of Public Prosecutions
FIDA Kenya	Federation of Women Lawyers
ICCPR	International Convention of Civil and Political Rights
ICJ Kenya	International Commission of Jurists
KNCHR	Kenya National Commission of Human Rights
LASA	Legal Aid South Africa
LSK	Law Society of Kenya
NALEP	National Legal Aid and Awareness Programme
NCAJ	National Council on the Administration Justice
NGO	Non-Governmental Organization
NLAS	National Legal Aid Service
ODPP	Office for Director of Public Prosecutions
PACE	Police and Criminal Evidence Act of 1984
SA	Republic of South Africa
U.N.T.S.	United Nations Treaty Series
UDHR	Universal Declaration of Human Rights
UK	United Kingdom

LIST OF CASES

1. *Alloys Omondi Nanga v Republic* (2006) eKLR.
2. *Ambrose v. Harris* (2011), Supreme Court of the United Kingdom of Great Britain and Northern Ireland.
3. *Charlse Maina Gitonga v Republic* (2020) eKLR.
4. *David Njoroge Macharia v Republic* (2011) eKLR.
5. *Kenga Hisa v Republic* (2020) eKLR.
6. *McKenzie v McKenzie* (1970), England Court of Appeal.
7. *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)* (2018) eKLR.
8. *Pett v Greyhound Racing Association* (1968) England Court of Appeal.
9. *Ramabele v The State; Msimango v The State* (2020), Constitutional Court of South Africa.
10. *Re an application by Kevin Maguire for Judicial Review* (2018), Supreme Court of the United Kingdom of Great Britain and Northern Ireland.
11. *Republic v Karisa Chengo & 2 others* (2017) eKLR.
12. *S v Khanyile and another*, (1988), High Court of South Africa.
13. *S v Mhulungu* (1995), Constitutional Court of South Africa.
14. *S v Mthwana* (1992), Constitutional Court of South Africa.
15. *S v Vermaas; S v Du Plessis*, (1994), Constitutional Court of South Africa.
16. *Soobramoney v Minister of Health Kwazulu-Natal* (1998), Constitutional Court of South Africa.
17. *Thomas Alugha Ndegwa v Republic* (2016) eKLR.

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Statutes and Conventions

International Conventions

African Charter on Human and Peoples' Rights, 27 June 1981, 1520 U.N.T.S. 217.

European Convention on Human Rights, 4 November 1950, CETS No.194.

International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S. 171.

Universal Declaration of Human Rights, United Nations 1948.

Principles and Guidelines

Basic Principles on the Role of Lawyers (as adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders 27 August to 7 September 1990).

Body of Principles for the protection of all persons under any form of detention or imprisonment (as adopted by UNGA 43/173 December 1988).

Guidelines on the role of prosecutors (as adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders 27 August to 7 September 1990).

Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (as adopted by the African Union 2003).

Standard Minimum Rules for the treatment of prisoners (as adopted by the First United Nations Congress of the Prevention of Crime and the Treatment of Offenders August 1955).

Standards of professional responsibility and statement of the essential duties and rights of prosecutors (as adopted by International Association of Prosecutors 23 April 1999).

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CCPR, Concluding Observations: Kenya, 2012, UN Doc C/KEN/CO/3.

CCPR, General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, 23 August 2007

Kenya Domestic Statutes

Advocates (Continuing Professional Development) Rules 2014.

Children Act (Act No. 8 of 2001).

Constitution of Kenya 2010.

Constitution of Kenya Revised Edition 2008.

Criminal Procedure Code (Act No. CAP 75).

Gazette Notice No. 370 of 2016

Independence Constitution 1963.

Legal Aid Act (Act No. 6 of 2016).
National Legal Aid and Awareness Policy 2015.
National Police Service Act (Act No.11A of 2011).
Office of the Director of Public Prosecutions (Act No. 2 of 2013).
Person with Disabilities Act (Act No 14 of 2003)
Persons Deprived of Liberty Act (Act no 23 of 2014).

United Kingdom Domestic Statutes

Access to Justice Act 1999.
Criminal Defence (General) Regulations 2013
Criminal Procedure and Evidence Act 31 of 1917.
Human Rights Act 1998.
Legal Aid, Sentencing and Punishment of Offenders Act 2012.
Police and Criminal Evidence Act of 1984 Code Practice C.
Police and Criminal Evidence Act of 1984.
Poor Prisoners' Defence Act 1930.
Trial for Felony Act 1836(c.114. 6 & 7 Will. 4).

South Africa Domestic Statutes

Constitution of the Republic of South Africa 1996.
Criminal Procedure Act 51 of 1977.
Criminal Procedure Act 56 of 1955.
Legal Aid Amendment Act, 20 of 1996.
Legal Aid South Africa Act 39 of 2014.

CHAPTER ONE: INTRODUCTION

1.1 Introduction

Criminal proceedings are commenced by making of a complaint or when an arrested person is brought before the courts.¹ Typically, criminal proceedings have crucial stages² that an accused person not trained in law may not fully comprehend the significance of every stage. To safeguard the basic fair trial rights³ of an accused during criminal proceedings,⁴ legal representation is necessary.

Focusing on the general right to a fair trial, the investigation of right to counsel⁵ addresses the complexities of criminal proceedings and identifies attributes of the accused that necessitates counsel.⁶ Lord Denning in the case of *Pett v Greyhound Racing Association (1968)*⁷ concisely described the unrepresented accused as wanting in intelligence with either physical or mental disability which limited their capacity to defend themselves. Therefore, he concludes that, justice would be properly administered for the unrepresented accused through the assistance of counsel to ensure the best articulation of his defence and uphold a fair trial during criminal proceedings.

A country is required to balance the interest of the victim and the broader interest of the public while ensuring the accused has a fair trial.⁸ This is effectively realized through counsel who should be accorded at the earliest possible stage of criminal proceedings.⁹ Furthermore, the analysis of the right to counsel succinctly shows the role of each stakeholder, such as the police, judges, lawyers, paralegals, in securing this right for the unrepresented accused.¹⁰ This research appraises how Kenya, as expected by international standards, actualizes the right to counsel for the unrepresented accused in comparison with the United Kingdom and the Republic of South Africa.

¹ Section 89(a), *Criminal Procedure Code* (Act No. CAP 75).

² Part VI- Procedure in trials before subordinate courts, *Criminal Procedure Code* (Act No. CAP 75).

³ Zhang J, 'Fair Trial Rights in ICCPR', 2(4), *Journal of Law and Politics*, 2009,39.

⁴ Article 50 as read with Article 20(2), *Constitution of Kenya* (2010).

⁵ Right to counsel and right to legal representation will be used interchangeably

⁶ Zhang J, 'Fair Trial Rights in ICCPR', 40-41.

⁷ *Pett v Greyhound Racing Association, (1968)*, England Court of Appeal.

⁸ Kiage P, '*Essentials of Criminal Procedure in Kenya*', LawAfrica, Nairobi, 2014, 2.

⁹ United Nations Office on Drugs and Crime, '*Early access to legal aid in criminal justice processes: a handbook for policymakers and practitioners*', Vienna 2014, 3.

¹⁰ United Nations Office on Drugs and Crime, '*Handbook on Ensuring Quality Legal Aid Services in Criminal Justice Processes: Practical Guidance and Promising Practices*', Vienna 2019, 95.

1.2 Background of the Problem

The right to counsel is recognized internationally, however, this was not always the case. Before the eighteenth century, in the English criminal trials, the victim prosecuted the accused, who conducted their own defence at the accused speaks trial.¹¹ According to Langbein,¹² the courts denied the accused defence counsel because he was viewed as an informational resource and the best person to give his/her own defence. The magistrates acted as the counsel for the accused with the mandate of cross-examination. According to Beattie, this was prejudicial for the accused as the judges would seek for the case to be answered rather than to discredit it.¹³

During the eighteenth century, the victims involved lawyers in their cases and later there was the introduction of public prosecutors. Nevertheless, the accused felon was not allowed to have a defence counsel.¹⁴ With developed prosecution techniques, the courts discovered an imbalance in the courtroom where the prosecutors had resources to investigate the crime and the monetary incentive from the State motivated convictions which lead to false prosecutions.¹⁵ Therefore, the courts allowed a defence counsel limited to cross-examination and providing arguments on points of law on behalf of the accused felons at the discretion of the magistrate.¹⁶ This marked the entry of defence lawyers and the origin of the adversarial system in criminal trials. Langbein contends that this system was an error in common law because it had a combat and wealth effect. The combat effect was where the lawyer was motivated to win a case, distorting the search for the truth while the wealth effect was advantageous to the wealthy, who were hardly ever the accused.¹⁷

Kenya, having adopted the common law system, embraced the adversarial system of litigation. Steytler asserted that this system burdened the litigants with the onus to advance their respective cases for judicial officer's determination who is passive during the proceedings.¹⁸

¹¹May A, 'Review of Langbein, John H, The Origins of Adversary Criminal Trial,' H-Albion, H-Net Reviews, March 2014. <<<http://www.h-net.org/reviews/showrev.php?id=9004>>> accessed on 20 October 2020.

¹² Langbein JH, 'The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors', 58(2), *The Cambridge Law Journal*, 1999, 315.

¹³ Beattie JM, 'Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries', 9(2), *Law and History Review*, 1991, 221-267.

¹⁴ Lemmings D, 'Criminal Trial Procedure in eighteenth century England: the impact on lawyers', 26(1), *The Journal of Legal History*, 2005, 73.

¹⁵ Lemmings D, 'Criminal Trial Procedure in eighteenth century England: the impact on lawyers', 74.

¹⁶ Langbein JH, 'The Prosecutorial Origins of Defence Counsel in the Eighteenth Century: The Appearance of Solicitors', 317.

¹⁷May A, 'Review of Langbein, John H, The Origins of Adversary Criminal Trial,' H-Albion, H-Net Reviews, March 2014. <<<http://www.h-net.org/reviews/showrev.php?id=9004>>> accessed on 20 October 2020.

¹⁸Steytler NC, 'The Undefended Accused on Trial: Justice in the Lower Courts', Published PhD Thesis, University of Kwazulu-Natal, Delaware 1986, 8-10.

Given that the prosecution is required to ascertain a case beyond reasonable doubt, it is justified for the accused to be represented by a lawyer to provide his defence during criminal proceedings.

The Independence Constitution 1963, provided for the right for the accused to choose either to defend themselves or to be defended by an advocate.¹⁹ However, the State had no obligation to offer state-funded legal representation to the accused.²⁰ Despite the increase in poverty, illiteracy, and diseases, the Constitution of 1969 still excluded state-funded legal representation.²¹ The courts remedied this problem by providing counsel under the criminal pauper brief program for the accused charged with murder in the High Court²² and child offenders.²³ This left out other capital offences, affecting an accused right to liberty.²⁴ Therefore, many accused persons were unrepresented and dependent on civil society organizations, that are confined in major cities, to have access to legal representation.²⁵ Concurrently, the Attorney General was the chief public prosecutor²⁶, who was empowered to appoint public prosecutors through the publication of a gazette notice for any specified area in Kenya.²⁷ Due to shortage of qualified lawyers in Kenya, the Attorney General appointed through a gazette notice²⁸ Police Inspector and above this rank to prosecute various criminal cases across the country in the subordinate courts.²⁹ Police prosecutors had inadequate prosecution skills due to limited exposure to criminal law and fundamental human rights in their basic and rudimentary training in prosecution.³⁰ Moreover, errors in the

¹⁹ Section 77(2) (d), *Independence Constitution* 1963.

²⁰ Section 77(14), *Independence Constitution* 1963.

²¹ Kaguru M, 'Right to Legal Representation in Criminal Proceedings in Kenya: A Case for with Prejudice Appeals in Court of Appeal', *SSRN*, 2017, 5-7. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3067885 accessed on 25 March 2020.

²² *Alloys Omondi Nanga v Republic [2006] eKLR*. The court stated that a long-standing practice in Kenya was giving free legal aid to indigent accused person charged with murder; Muigua K, 'Access to Justice and Alternative Dispute Resolution Mechanisms in Kenya' Kariuki Muigua & Co Advocates Publications, September 2018, 9. <http://kmco.co.ke/wp-content/uploads/2018/09/ACCESS-TO-JUSTICE-AND-ALTERNATIVE-DISPUTE-RESOLUTION-MECHANISMS-IN-KENYA-23rd-SEPTEMBER-2018.pdf> accessed on 21 December 2020.

²³ Section 186(b), *Children Act* (No.8 of 2001).

²⁴ Office of Attorney General and the Department of Justice, *National Action Plan: 2017-2022*, 2017, 17; Cotran E, 'The Development and Reform of Law in Kenya', 27(1), *Journal of African Law*, 1983, 58.

²⁵ Latham & Watkins LLP, *A Survey of Pro Bono Practices and Opportunities in 84 Jurisdictions*, Pro Bono Institute, March 2016, 365.

²⁶ Section 26(3), *Constitution of Kenya* 1969.

²⁷ Section 85, *Criminal Procedure Code* (Act No. CAP 75). This section was repealed by Act No. 12 of 2012.

²⁸ Legal Notice No. 234/1972.

²⁹ United Nation Office of Drugs and Crime, 'A Situational Analysis of the State of the Prosecution Services and the Way Forward Towards A Professionalised System in the Republic of Kenya', 2011,44.

³⁰ Mwalili J 'The Role and Function of Prosecution in Criminal Justice' https://www.unafei.or.jp/publications/pdf/RS_No53/No53_23PA_Mwalili.pdf accessed on 4 July 2020.

appointment of unqualified police officers were matters which the High Court had to address in appeals arising from police prosecutions in the subordinate courts.³¹ This fell short of international standards which required prosecutors to have appropriate education and training in the legal profession and to be cognisant of the protection, at all times, of the fundamental rights of the suspect and that of the victims.³² In this instance, and not by design, the police prosecutor and an unrepresented accused person faced off in court with a semblance of equality of arms; both having limited training in law. This was despite the fact that a trial court's primary function is to arrive at a just decision supported by evidence properly presented and interrogated before it.³³

The Constitution of Kenya 2010 addressed the issues of police prosecutions and unrepresented accused in different ways. Regarding criminal prosecutions, adhering to international requirements, an independent Office of the Director of Public Prosecutions (ODPP) was established³⁴ and given jurisdiction to institute and undertake criminal proceedings against a suspect before any court.³⁵ The Office of the Director of Public Prosecutions Act required public prosecutors to be trained advocates of the High Court³⁶ thus, replacing the police prosecutors. Regarding the unrepresented accused, the Constitution introduced state-funded legal representation and duty to inform of the right to counsel. To operationalize this, Parliament enacted the Legal Aid Act 2016 which is yet to be implemented.³⁷

These developments presented a challenge where complainants had well-trained prosecutors, funded by the State, from the ODPP whereas the unrepresented accused did not have the benefit of the services of a public defender to represent them. A task force on Judicial Reforms (2010), found that the state counsel would collude with litigants for unreasonable settlements and consents. It was also noted that persons of means got away with a lighter sentence while the poor ended up with a heavy sentence.³⁸ Inequality of arms immediately became evident in court because an accused is more susceptible to irregularities and injustices.

³¹ United Nation Office of Drugs and Crime, 'A Situational Analysis of the State of the Prosecution Services and the Way Forward Towards A Professionalised System in the Republic of Kenya', 45-52.

³² Paragraph 13, *Guidelines on the role of prosecutors*, 27 August to 7 September 1990; Paragraph 4.3, *Standards of professional responsibility and statement of the essential duties and rights of prosecutors*, 23 April 1999, 1-5.

³³ Section 216, *Criminal Procedure Code* (Act No. CAP 75) as read with Article 50, *Constitution of Kenya* (2010).

³⁴ Article 157(10), (11), *Constitution of Kenya* (2010).

³⁵ Section 5(b), *Office of the Director of Public Prosecutions* (Act No. 2 of 2013).

³⁶ Section 21, *Office of the Director of Public Prosecutions* (Act No. 2 of 2013); Office of the Director of Public Prosecutions, *Strategic Plan 2016-2021*, April 2017, 8.

³⁷ Section 7, *Legal Aid Act* (Act No. 6 of 2016).

³⁸ Hon. Mr Justice William Ouko, *Final Report on the Task Force on Judicial Reforms*, July 2010, 110.

1.3 Statement of the Problem

Fair trial, as a fundamental human right, is recognized internationally by the Universal Declaration of Human Rights (UDHR), as an authoritative declaration, which requires an accused to have all guarantees required for his defence.³⁹ Binding Conventions such as the International Convention of Civil and Political Rights (ICCPR) guarantees all persons legal assistance where there is an interest of justice and freely available where an individual cannot afford.⁴⁰

Additionally, the African Charter on Human and Peoples' Rights (African Charter) provides that an accused right to be heard is guaranteed when the individual enjoys the right to counsel of his choice.⁴¹ The African Charter further made the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa which required party states to ensure there were mechanisms for operational and availability of lawyers. It also provides that access to lawyers should be equal to all and should be provided to both the complainant and the accused without discrimination.⁴²

Kenya, being a monist country and a signatory to both conventions⁴³, has an international obligation to adhere to such standards. The Constitution of Kenya (2010) respects and protects the right to a fair trial of the accused, including right to legal representation, which is unlimited.⁴⁴ The right to counsel is a constituent of the right to a fair trial. However, the Constitution abridges the unlimited entitlement of right to a fair trial by setting out criteria based on 'substantial injustice' as a basis for the state to offer counsel which lacks clarity. Substantial injustice can only be determined by the courts. As a result, Article 50(2) (h) is rendered a limited right, thus, impeding Article 48 and 50(2)(g). Furthermore, The National Legal Aid Service (NLAS), established by the Legal Aid Act 2016,⁴⁵ and different civil society organizations have been providing pro bono legal representation as one of their legal aid

³⁹ Article 11, *Universal Declaration of Human Rights*, United Nations 1948.

⁴⁰ Article 14(3) (d), *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171.

⁴¹ Article 7, *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 U.N.T.S. 217.

⁴² Paragraph G and H, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, 7.

⁴³ Malombe D Mavunjina Medi Mbataru S, 'Kenya's Regional and International Human Rights Obligations', Kenya Human Rights Commission Publications, 23 August 2016, 1-17. <https://www.khrc.or.ke/mobile-publications/economic-rights-and-social-protection-er-sp/126-kenya-s-regional-and-international-human-rights-obligations/file.html> accessed on 21 December 2020.

⁴⁴ Article 25, *Constitution of Kenya* (2010).

⁴⁵ Section 7, *Legal Aid Act* (Act No. 6 of 2016).

services. However, they are underfunded and underpublicized⁴⁶ which prevents them from carrying out their mandate. This research investigates how Kenya has fulfilled its international obligation to realize the right to legal representation for the unrepresented accused for a fair trial.

1.4 Purpose of the Study

The research establishes how legal representation for the accused is legislated, implemented, and practiced by the State in accordance with the Constitution of Kenya 2010. The beneficiaries of this research include the beneficiaries in the criminal justice system including the accused, the ODPP, the Judiciary and the legal fraternity among others. It also aims to show that the realization of the right to counsel effectively ensures that the accused asserts their human rights to be secured by the judiciary. Therefore, the public will have faith in the judiciary in securing their rights.

1.5 Justification of the Study

This research highlights the importance of legal representation for the accused which promotes fair trial rights, equality of arms, and inclusiveness of the unrepresented accused in criminal proceedings. It provides a discussion on duties of the State in ensuring the fair trial rights such as legal representation for the unrepresented accused are protected, respected and fulfilled. The research identifies the best practices from the United Kingdom (UK) and the Republic of South Africa (SA) that Kenya can apply in legislation, implementation and practice regarding the right to counsel. It seeks to demonstrate the need to protect the right to counsel and its effective implementation in accordance with the Constitution of Kenya 2010 for a fair trial.

1.6 Research Objectives

The main objective of the study is to investigate whether the State has an obligation to realise the right to counsel for the unrepresented accused and how it has respected, protected and enforced this right.

The objectives of the research are outlined as follows:

⁴⁶ United Nations Office on Drugs and Crime, *Global Study on Legal Aid: Country Profiles*, 2016,139. <https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/GSLA - Country Profiles.pdf> accessed on 20 March 2020.

1. To analyse the current legal framework and legal foundations on the right to counsel.
2. To determine the extent to which the Kenya has facilitated the right to counsel and identify the challenges it face when realising this right
3. To identify best practices from the comparative studies that Kenya can adopt for effective facilitation of the right to counsel to guarantee a fair trial for the unrepresented accused.

1.7 Research Questions

1. What are the current legal framework and legal foundations on the right to counsel?
2. To what extent has the Kenya facilitated the right to counsel and what challenges does it face when facilitating the right to counsel?
3. What best practices can Kenya adopt from the comparative studies for effective facilitation of the right to counsel to guarantee a fair trial for the unrepresented accused person?

1.8 Literature Review

Steele⁴⁷ and Cole⁴⁸ assert that legal representation is a right that is fundamental for a fair trial, procedural fairness and equal treatment during criminal proceedings due to the adversarial system. The fulfillment of legal representation, as a right for the accused, promotes access to justice which is defined by Amondi⁴⁹ as the elevation of the poor and disadvantaged, who would otherwise be excluded, to be able to seek legal remedies to their injustices.

The status of the unrepresented accused in different stages of criminal proceedings was revealed in a National Council on the Administration Justice (NCAJ) 2017 report,⁵⁰ which stated that the poor were more likely to be arrested, charged for petty offences and sentenced than those with sufficient means. Grave offences including organized crime, capital offences had the highest acquittals and withdrawals while 70% of the cases processed were found to be

⁴⁷ Steele W W, 'The Doctrine of Right to Counsel', 23(3), *South Western Law Journal*, 1969, 491-523.

⁴⁸ Cole R J V, 'Between Judicial Enabling and Adversarialism: The Role of the Judicial Officer in Protecting the Unrepresented Accused in Botswana in a Comparative Perspective', 11, *University of Botswana Law Journal*, 2010, 81-84.

⁴⁹ Amondi C, 'Legal Aid in Kenya: Building a Fort for Wanjiku', 201.

⁵⁰ National Council on the Administration of Justice, '*Criminal Justice System in Kenya: An Audit*', 2017, xxiv.

petty offences. According to Kenya National Commission of Human Rights (KNCHR), Kenya focuses on self-representation due to lack of access to counsel nationwide.⁵¹

According to Amondi⁵², the State has a positive obligation to guarantee that everyone has access to justice at an affordable fee. Ogletree⁵³ studied the different ways South Africa, the United States and China facilitated the right to representation to its people and their challenges. He states that some challenges included independent financial problems and a high crime rate, thus, there were more accused persons than advocates. Given that the right to counsel is limited as provided in the Constitution of Kenya 2010, obtaining legal representation is highly discretionary and ultimately unfair to the indigent unrepresented accused.⁵⁴ Wascilzuk views the right to counsel as complementary to access to legal aid whereby the accused capacity to defend themselves is paramount when determining whether an accused requires legal representation.⁵⁵ Thus justifying, the need to for legal representation for vulnerable groups such as children, mentally ill among others.

1.9 Hypothesis

The research hypothesis is:

Kenya has failed to meet its obligation to realise the right to counsel as offered in Article 50(2) (g) and (h) of the Constitution of Kenya 2010 to guarantee the fair trial for the unrepresented accused.

1.10 Research methodology

The research used a doctrinal approach where it examines legal doctrines through an analysis of legislation and cases law by the application of reasoning. The primary sources include relevant domestic and international legislation, domestic and international policies and case

⁵¹ Kenya National Commission of Human Rights, *Annual Report and Financial Statements for the period 2016/17*, 2017, 31.

⁵² Amondi C, 'Legal Aid in Kenya: Building a Fort for Wanjiku', 201-202.

⁵³ Ogletree C J, "The Challenge of Providing "Legal Representation" in the United States, South Africa, and China', 7(47), *Washington University Journal of Law & Policy*, (2001), 61.

⁵⁴ Ogletree C J, "The Challenge of Providing "Legal Representation" in the United States, South Africa, and China', 62-65.

⁵⁵ Wascilzuk M K, 'Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense', 45(1), *International Law and Politics*, 2012,302.

law relevant to the research.⁵⁶ The research has also used secondary data from journals, textbooks, and conference reports.

The study used UK and SA as the case studies to provide a comparative analysis with the Kenyan context. The UK is a suitable comparison for this research because it introduced the concept of the right to counsel, identified the issue of legal representation early and developed different ways to realize this right over the years. SA is also a suitable comparison to Kenya because the two countries are developing countries that experienced injustices due to lack of legal representation. Kenya and SA implemented their laws regarding legal representation in the same period between 2014 and 2016, thus, a comparison would review the expeditious nature of realizing this right. Kenya and SA adopted the common law legal system from the UK which is the foundation when analyzing the right to counsel.

In this research, data was collected through case studies. This study intensively investigates the obligation of the state to safeguard the right to legal representation for the unrepresented accused under criminal proceedings in Kenya, the UK and SA. The factors considered in the study were:

1. Socio-economic factors of accused such as their education and financial status
2. International and domestic legal instruments relevant to right to legal representation
3. How the State realises right to counsel in the legislature, executive and judiciary.

1.11 Limitations of the study

The research is limited to a desk study which delves into a thorough analysis of the different literature review material. The research is limited to primary and secondary sources in accordance with the doctrinal approach. The scope of the study is restricted to the right to legal counsel in Kenya, UK and the SA with regards to unrepresented accused in criminal proceedings.

1.12 Chapter summary

Chapter 1 covers, introduction and background of the study, the statement of the problem, the purpose and justification of the study, objectives of the study and literature review on emerging

⁵⁶ Hutchinson T, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law', 3, *Erasmus Law Review*, 2015, 130-138. https://www.elevenjournals.com/tijdschrift/ELR/2015/3/ELR-D-15-003_006 accessed on 25 March 2020.

issues on the right to counsel in Kenya. This Chapter also provides the research methodology and the hypothesis of the study.

Chapter 2 discusses the theoretical framework which considers the Social Contract theory and the Theory of Justice as justification for the obligation of the State to realise the right to counsel for the unrepresented accused

Chapter 3 covers the status in Kenya by providing a discussion on international and regional principles and guidelines on the right to counsel and their integration into national laws and the challenges Kenya faces when realizing this right for the unrepresented accused.

Chapter 4 delves into different practices regarding the right to counsel in the UK and SA according to the research objectives. This Chapter focuses on the law, court decisions and the practices from different stakeholders such as the police and legal aid providers in the case studies. These findings from the case studies regarding the right to counsel of the unrepresented accused provide for best practices that Kenya can implement to effectively actualise the right to counsel for unrepresented accused in Kenya.

Chapter 5 provides the conclusion and the recommendations of the study according to the discussion of the findings.

CHAPTER TWO: THEORETICAL FRAMEWORK

2.1 Introduction

The Social Contract theory and Theory of Justice are underpinning theories that provide the premise for the duty of the state towards its citizens such as to the duty to actualise legal representation for the unrepresented accused.

2.2 Theoretical Framework

2.2.1 Social Contract Theory

2.2.1.1 Socrates

The State authority, derived from Athenian laws, was dependent on civil obedience. Socrates asserted that Athenian Law was driven by rationality rather than politics. Hence, it imposed a compelling obligation on the citizens to obey the law. This was because it constituted the good life necessary in the society and thus, the laws were just.⁵⁷ As a result, the law entitled the citizens to enjoy benefits such as education, citizen participation in political decisions and the possibility of free emigration⁵⁸. In consequence of the enjoyment of these benefits, the conduct of the citizens set up a social contract between the citizens and the Law. This created an obligation of civil obedience to the Athenian Laws which was paramount to ensure adherence to the implied social contract.⁵⁹The laws allowed citizens to opt-out by exiling to Greece.

The State had the responsibility to deliver the benefits received by citizens as subjected by the law which correlates to the right to counsel in the Kenya Bill of Rights.⁶⁰ Similar to a just man obeying the law, the State is required to fulfill, protect and respect the benefits or rights in the law due to the implied social contract.

2.2.1.2 Thomas Hobbes

Hobbes claimed that man was a matter in motion equipped with self-interest and practical reasonableness to formulate the means to their ends. In the state of nature, man had free will to enjoy liberty, thus he could do what they desired.⁶¹ However, due to limiting resources, there was a state of competition, distrust, violence, living in fear leading to a state of war.⁶² Given

⁵⁷ Evers WM, 'Social Contract: A Critique', 1(3), *Journal of Libertarian Studies*, Pergamon Press Great Britain, 1977, 185-187.

⁵⁸ Ritchie D G, 'Contributions to the History of the Social Contract Theory', 6(4), *Political Science Quarterly*, The Academy of Political Science, 1891,657.

⁵⁹ Ritchie D G, 'Contributions to the History of the Social Contract Theory', 657.

⁶⁰ Article 50(2) (g) (h), *Constitution of Kenya* (2010).

⁶¹ *Leviathan*, 1651, 1906 Ed, 39.

⁶² *Leviathan*, 1651, 1906 Ed, 274.

man's practical reason and need for self-preservation, man gave up his free will to form a social contract amongst themselves.⁶³ The social contract required man to live collectively and renounce their rights and submit to an enforcement mechanism to enforce the contract hence, the civil state. Man consented to submit to the social contract to secure their self-interest thus, promoting peaceful living.⁶⁴

The social agreement was formed once the people agreed to obey the common law and submit to the sovereign who had the coercive power to enforce the covenant. Hobbes asserts that man reasonably bestows the sovereign with absolute powers over its subjects to avoid the state of nature.⁶⁵ Hobbes' theory, as a case in point, represents the constitution of Kenya as the social contract which prevents citizens from holding the state accountable for failure to enforce the covenant. This perpetuates the States to abuse its power by violating the constitution without regard to adherence to its obligations thus lacking accountability to the governed.

2.2.1.3 John Locke

Regarding John Locke, during the state of nature man had liberty and was free to pursue their desires subject to natural law. Natural law, as the basis for morality, equally entitled man the right to life, health, liberty and property.⁶⁶ Contrary to Hobbes' premise for the state of war, John Locke argues that the threat of security of property due to the absence of law, an impartial judge and absence of enforcement for natural law caused the state of war.⁶⁷ Accordingly, people voluntarily gave up their power to the government which punished offenders of natural law, hence, a civil state.⁶⁸ Under Locke's social contract, man submitted to the will of the government for protection of their rights and to maintain order. The government took the role of enforcing rights that are natural and inalienable to men through judges adjudicating laws and executive power to implement the laws made by parliament. The failure of government to undertake its obligation warranted the people to resist it and thus, forming a revolution and a new government.

⁶³ Leviathan, 1651, 1906 ed.

⁶⁴ Leviathan, 1651, 1906 ed.

⁶⁵ Leviathan, 1651, 1906 ed.

⁶⁶ Locke J, 'Two Treatises of Government', Awnsam Churchill, England, 1689.

⁶⁷ Locke J, 'Two Treatises of Government', Awnsam Churchill, England, 1689.

⁶⁸ Crawford C, Maldonado D B, 'Access to Justice: Theory and Practice from a Comparative Perspective', 27(1), *Indiana Journal of Global Legal Studies*, 2020,5

John Locke's social contract theory stated that the legitimate government is instituted by the legitimate consent of the governed.⁶⁹ Commentators such as Albertson⁷⁰ agree that, in Locke's theory, the authority of the State emanated from the people it represented while it had the obligation to realize the rights of those whom it represents. Kenya as the case in point, the sovereignty⁷¹ of the people denoted the legitimate consent of the governed bestowing the government with an obligation to respect, protect and fulfill the rights⁷² in the constitution.

2.2.1.4 Jean Jacques Rousseau

In the Social Contract 1762,⁷³ Rousseau stated that an agreement of the people to form a collective was the foundation of the society. Individual wills collectively submitted to a collective will, General Will. In this case, free individuals lived together without coercion from others.⁷⁴ The General Will regained man his freedom and liberty in society. The sovereign only acted as an enforcer of the General Will which implies that it can be held accountable if it did not implement the General Will as agreed. This gives the political authority legitimacy which was founded on the agreement of free and equal individuals.⁷⁵

As a result, the idea of reciprocity was introduced where the sovereign, collective body politic, was committed to the good of the individuals while the individuals themselves were committed to the collective good. This was the purest form of democracy.⁷⁶ The social contract provided for the duties of government that were based on the contract freely entered into by individuals who are part of the sovereign. The sovereign people had a non-derogable right of self-determination through their constitution and legislation which acknowledged referendums and initiatives as a way of changing legislation in a State.⁷⁷

2.2.2 Rawl's Theory of Justice

John Rawl's theory of justice attempted to define elements that constitute a just society. In contrast to the current society, the theory was an ideal that one could compare to identify

⁶⁹ Riley P, 'On Kant as the Most Adequate of the Social Contract Theorists,'1(4), *Political Theory*, Sage Publications Inc., 1973,459.

⁷⁰ Albertson S, 'Punishing Foreigners: Is the Equal Treatment of Citizens and Aliens Accused of Crime Consistent with Social Contract Theory and the Constitution', 1(1), *Penn Undergraduate Law Journal*, 2013 ,11

⁷¹ Article 1, *Constitution of Kenya* (2010).

⁷² Article 50(2) (g) (h), *Constitution of Kenya* (2010).

⁷³ Rousseau J J, *The Social Contract or Principles of Political Right*, 1762,10-12.

⁷⁴ Rousseau J J, *The Social Contract or Principles of Political Right*, 29.

⁷⁵ Rousseau J J, *The Social Contract or Principles of Political Right*, 12-21.

⁷⁶ Rousseau J J, *The Social Contract or Principles of Political Right*, 50.

⁷⁷ Shapeera S A, 'Evaluating the Social Contract theoretical ideas of Jean Jacques Rousseau: An analytical perspective on the state and relevance to contemporary society', 9(2), *African Journal of Political Science and International Relations*, 2015, 41.

injustices in society and find ways to resolve them. He stated that despite the way of life of different people, the citizens needed to collectively agree on the basic rules that governed the basic structure of society such as the legal system and social institution.⁷⁸ However, due to the inequality in society, the wealthy had over the years negotiated rules that were in their favour. Rawls states that this was moral arbitrariness; where people did not earn these advantages, they got them by luck and used it in their favour which was unfair to society.⁷⁹ The ideal initial situation known as the original position eliminated the effect of specific conditions that enable men to exploit social and natural circumstances to their advantage.⁸⁰

Rawls inspired the claim that justice is fairness which constituted two concepts namely:

- a. The original position; and
- b. The veil of ignorance.⁸¹

According to Rawls, communities made various institutions in the original position. The conditions in the original position were chosen in the spirit of perfect procedural justice where the independent principle of justice was to establish basic liberties as a priority for all through legislation, policies, among others.⁸² The veil of ignorance, as fairness, presumed everyone was equally rational and without the influence of moral arbitrariness.⁸³ Nonetheless, these individuals had self-interest towards primary goods, such as rights and liberties, opportunities which influenced their choice of principles of justice.⁸⁴

A just society, in Rawls's view, was expected to conform to the rules formulated in the original position by virtue of the veil of ignorance where people, from the same point of view, agreed on the most basic principles of justice. Tibet concurs with Rawls that justice was achieved once the veil was lifted and everyone would have the best possible outcome in their life prospects.⁸⁵ In the original position, Rawls suggested that rational participants chose two principles namely, the principle of justice and the difference principle. The principle of justice ensured each person

⁷⁸ Rawls J, *'A Theory of Justice'*, Belknap Press of Harvard University Press, Cambridge Massachusetts, 1971, 72-75.

⁷⁹ Dworkin R, *'Sovereign Virtue: The Theory and Practice of Equality'*, Harvard University Press, Cambridge Mass, 2000, 73.

⁸⁰ Rawls J, *'A Theory of Justice'*, 136.

⁸¹ Rawls J, *'A Theory of Justice'*, 120.

⁸² Dworkin R, 'Rawls and the Law', 72(5), *Fordham Law Review*, 2004, 1399.

⁸³ Rawls J, *'A Theory of Justice'*, 137.

⁸⁴ Rawls J, *'A Theory of Justice'*, 137-142.

⁸⁵ Thibaut J, Walker L, LaTour S, Houlden P, 'Procedural Justice as Fairness', 26(6), *Stanford Law Review*, 1974, 1287-1289.

had an equal right to the most extensive basic liberties, such as political rights, civil rights,⁸⁶ compatible with similar liberties for others.⁸⁷ This introduced the principle of equality which was paramount when distributing basic liberties such as the right to counsel.

Rawls argues that social-economic inequalities were justified if they adhere to the second principle which provided that equal socio-economic opportunities should be available to people in fair conditions. Additionally, social-economic inequalities were only permissible where it was for the greatest benefit for the least disadvantaged in the society⁸⁸

2.3 Conclusion

The proponents of the Social Contract theory focus on the shift from the state of nature to the civil state. This shift is either caused by man's self-interest, threats to property or individual free will to form a sovereign. The objective of the shift is to protect man's rights and freedoms which are enforced by the sovereign by means of law. Therefore, the main factors to be considered include the consent of the people to form a sovereign and the law which states the obligations imposed on the sovereign.

According to Rawls the right to counsel should be entitled to all persons and where socio-economic factors pose a limit, all persons should be given a reasonable opportunity to have it accessible and it provided for the greatest benefit to the disadvantaged in the society. With respect to Rousseau, accountability of the State when performing its actions is important. Using these theories, the research establishes that Kenya has an obligation to realize the right to counsel for the unrepresented accused and the research can investigate how it has respected, protected and enforced this right.

⁸⁶ Dworkin R, 'Rawls and the Law', 1400.

⁸⁷ Rawls J, '*A Theory of Justice*', 60.

⁸⁸ Rawls J, '*A Theory of Justice*', 83,302.

CHAPTER THREE: KENYAN CONTEXT

3.1 Introduction

This chapter will look at how Kenya has protected, respected and enforced the right to counsel for the unrepresented accused.

3.2 Foundations of the Right to Counsel in Kenya.

3.2.1 Common Law Legal System

According to O'Connor⁸⁹, the defence counsel has differing roles in the civil and common law system during criminal trials. Civil law is an inquisitorial system while common law is an adversarial system. Owing to the adversarial nature of common law, the defence counsel is an equal party to the prosecution while the judge passively facilitates a fair trial. Contrary to this, the active inquisitorial judge, alongside the prosecutor, contacts or examines the witnesses and uses collected evidence from the investigation phase to determine the case⁹⁰. Thus, in the common law system, courts merely facilitate the proceedings in a manner that ensured the right to a fair trial, however, they could not substantively build on the defence of the accused.

Hence, the defence counsel in civil law is limited to advising the accused on the proceedings, protecting their fair trial rights and reviewing the case file and the evidence.⁹¹ Whereas in common law, the defence counsel takes an active role from the arrest during the investigation phase to the end of proceedings such as, by carrying out their own investigation and collecting evidence to build up on the defence of the accused among others⁹². Kenya is based on the common law system with regards to formal courts, thus, the accused is highly dependent on legal representation. Hence, this system ideally requires the accused to obtain legal support from an advocate during criminal trials to ensure a fair trial within reasonable time, and procedural fairness.

⁸⁹ O'Connor V, 'Common Law and Civil Law Traditions: Practitioner's Guide', 24.

⁹⁰ O'Connor V, 'Common Law and Civil Law Traditions: Practitioner's Guide', 24.

⁹¹ O'Connor V, 'Common Law and Civil Law Traditions: Practitioner's Guide', *International Network to Promote the Rule of Law*, March 2012, 20-21.

⁹² O'Connor V, 'Common Law and Civil Law Traditions: Practitioner's Guide', 20-21.

3.2.2 Income inequality

According to the World Bank 2020 report, Kenya's poverty line decreased to 36.1% in 2015-16, however, in urban centers it rose from 2.3 million to 3.8 million.⁹³ This shows that poverty in Kenya is an important factor when determining the provision of the right to counsel. In light of Kenya's poverty status, this research will use Amondi's definition of access to justice⁹⁴ because it considers the poor and disadvantaged in the community. The Langbein wealth effect is evident, according to the ODPP, where only 7% of remandees in 2019 could afford to secure counsel.⁹⁵ Consequently legal representation, as an avenue for access to justice, is directly related to the economic status of the accused. Hence, the unequal distribution of wealth and the prevalent poverty in Kenya⁹⁶ is an impediment to access to justice for the indigent accused.

According to the Justice Needs and Satisfaction in Kenya 2018 report,⁹⁷ the police offered assistance to the unrepresented accused in criminal matters, however in court they were unfamiliar with the procedural rules and legal technicalities thus lacked the legal expertise to conduct their own case. Additionally, people with low income and education level were inclined to use the informal justice system and rarely sought advice and assistance from lawyers. This was primarily occasioned due to the high cost of litigation⁹⁸

Moreover, it is established that 70% of the crimes tried in court are petty offences which constitute of the poor.⁹⁹ Furthermore, the ODPP Report on Remand Action Plan, 2018,¹⁰⁰ found 84% of remandees, most of whom were below the age of 35, lacked legal representation, were not aware of their rights and they did not have enough funds to retain a lawyer. Therefore, the courts carried on the proceedings with unrepresented indigent accused due lack of government-sponsored public defence service.¹⁰¹

⁹³https://databank.worldbank.org/data/download/poverty/33EF03BB-9722-4AE2-ABC7-AA2972D68AFE/Global_POVEQ_KEN.pdf accessed on 25 March 2020.

⁹⁴ Amondi C, 'Legal Aid in Kenya: Building a Fort for Wanjiku', 202.

⁹⁵ Nanjala C, 'All for Justice Remand Case Review Initiative', The Prosecutor A Newsletter from the Office of the Office of the Director of Public Prosecutions, 2019, 14-15.

⁹⁶ <http://hdr.undp.org/en/countries/profiles/KEN> accessed on 21 December 2020; GINI Index 47.7. UN human development Index. Gender Inequality Index.

⁹⁷ Hague Institute for Innovation of Law, *Justice Needs and Satisfaction in Kenya: Legal problems in daily life (2017)*, March 2018, 150- 173.

⁹⁸ Office of Attorney General and the Department of Justice, 'National Action Plan: 2017-2022,' 1-26.

⁹⁹ National Council on the Administration of Justice, 'Criminal Justice System in Kenya: An Audit', xxiv.

¹⁰⁰ Office of Director of Public Prosecutions, *Preliminary Report All for Justice: Remand Action Plan, 2018* ; <https://www.odpp.go.ke/odpp-launches-preliminary-report-on-remand-action-plan/> accessed on 21 December 2020.

¹⁰¹ United States Department of State Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2019: Kenya*, March 2020, 12.

This highlighted the lack of sufficient legal knowledge and resources amongst Kenyans who resulted to find recourse through pro bono schemes from lawyers and civil society organizations. Overall, it was certain that the individuals subject to criminal proceedings lacked funds, have a low level of legal knowledge and rely on the civil society organizations and pro bono lawyers for legal representation.

3.2.3 Right to Counsel as a Constitutional Right

Given the significance of the right to counsel for the unrepresented accused, there is a need to establish the obligation imposed on the State to realise this right. In Kenya, the consent to form a sovereign is present in the preamble and principle of sovereignty¹⁰² where the people agreed to form a government based on essential values such as human rights, equality and were committed to living in peace. The government, in Locke's view, was required to protect the citizens' rights to liberty, life and property which are threatened once an accused is subjected to criminal proceedings. Therefore, it is necessary to protect right to a fair trial including the right to counsel in the Constitution of Kenya 2010, the General Will as argued by Rousseau. The powers and obligations of government to actualize these rights are performed through the legislature, judiciary and executive as envisaged by Locke.¹⁰³

It is well established that Kenya has ratified the ICCPR and the African Charter¹⁰⁴ which form part of Kenyan laws¹⁰⁵ thus, Kenya's international obligations form part of its citizens' rights. The three international obligations are to respect, to protect and to fulfill human rights. The obligation to respect requires the State to refrain from acts or omissions that violate human rights. The obligation to protect requires the state to prevent itself or other non-state actors from infringing on other people's rights. The obligation to fulfill requires the state to take necessary measures to ensure people enjoy basic human rights.¹⁰⁶ These obligations are discussed below with regards to international and regional principles and guidelines on the right to counsel.

¹⁰² Preamble, *Constitution of Kenya* (2010); Article 1, *Constitution of Kenya* (2010).

¹⁰³ Article 1, *Constitution of Kenya* (2010).

¹⁰⁴ Malombe D Mavenjina Medi Mbataru S, 'Kenya's Regional and International Human Rights Obligations', 11.

¹⁰⁵ Article 2 (5) and (6), *Constitution of Kenya* (2010).

¹⁰⁶ Malombe D Mavenjina Medi Mbataru S, 'Kenya's Regional and International Human Rights Obligations', 3.

3.2.3.1 The International and Regional Principles and Guidelines on Right to Counsel

The UDHR, adopted in 1948, protects the rights of the unrepresented accused by recognizing the universal right to counsel.¹⁰⁷ The UN Human Rights Committee(CCPR) expounded on equality of arms¹⁰⁸ as procedural fairness whereby, both parties would have the opportunities to contest all evidence adduced in court and arguments given by the other party.¹⁰⁹ The unrepresented accused, in this instance, was more susceptible to injustice and irregularities as he/she was not equipped with the relevant training to contest evidence and arguments given by the prosecution. Article 11 of the UDHR incorporates the presumption of innocence of the accused and entitles them to *'all guarantees necessary for his defence'* to achieve a fair trial.¹¹⁰ The ICCPR expounds on these guarantees in Article 14 by providing for equal access to courts¹¹¹ in criminal proceedings, granting the accused reasonable time for preparation of their defence and communication with an advocate of choice. The accused also has the option of defending himself or through counsel of his choice¹¹²

Furthermore, in General Comment 32 on Article 14, the CCPR stated that the accused has the right to autonomy in the conduct of their case, to defend oneself or seeking counsel of choice and to be informed of this right. UN resolutions have significantly recognized this right for the accused person whether a prisoner¹¹³ or a detainee¹¹⁴ during proceedings. The accused, as a result, is within his right to reject an advocate. Notwithstanding the right to autonomy of the accused, the courts can curtail this right in the interest of justice, case in point, when the accused is obstructing proper conduct of trial, they may be required to have assisted counsel.¹¹⁵ The CCPR also stated that the accused persons may be granted free legal representation depending on the circumstances of the case such as where it is in the interest of justice and the accused cannot afford the legal expense. The CCPR elaborated on the factors to consider when determining the interest of justice such as the gravity of the offence whereby capital offences

¹⁰⁷ <https://www.un.org/en/universal-declaration-human-rights/> accessed on 22 September 2020.

¹⁰⁸ Article 7, *Universal Declaration of Human Rights*.

¹⁰⁹ CCPR General comment no. 32, Article 14, *Right to equality before courts and tribunals and to fair trial*, 23 August 2007, 3.

¹¹⁰ Article 11, *Universal Declaration of Human Rights*.

¹¹¹ Article 14(1), *International Covenant on Civil and Political Rights*.

¹¹² Article 14(3), *International Covenant on Civil and Political Rights*.

¹¹³ Rule 93, *Standard Minimum rules for the treatment of prisoners*, August 1955.

¹¹⁴ Principle 11(1), *Body of Principles for the protection of all persons under any form of detention or imprisonment*, December 1988.

¹¹⁵ CCPR General comment no. 32, 11.

punishable by death would warrant a court to assign legal representation in the various stages of the trial.¹¹⁶

The Basic Principles on the Role of Lawyers echoes the right to autonomy of the party involved in criminal matters and the duty to be informed of this right by the government.¹¹⁷ The government is also required to ensure there are procedures, funding and responsive mechanisms for operational and non-discriminatory access to lawyers and to ensure legal services are offered to disadvantaged and poor individuals. The principles encourage the states and lawyers to work together to promote programmes that spread information about the public's rights and duties.¹¹⁸

The European Convention on Human Rights(ECHR) safeguards a fair trial for everyone which consists of minimum rights such as the right to legal representation.¹¹⁹ The African Charter protects the right to a defence for the unrepresented accused through defence by counsel of choice thus ensuring the accused has the right to have his case heard, thus having a fair trial.¹²⁰ The African Charter is mandated to formulate principles and guidelines aimed at solving problems regarding the right and fundamental freedoms of African States.¹²¹ These guidelines provide that States should adhere to the above-mentioned principles on the Role of Lawyers. Additionally, the guidelines also provide that an accused has a right to assisted counsel where there is an interest of justice. The interest of justice can be considered on a case-to-case basis with the following criteria:

- a) The seriousness of the offence; and
- b) The severity of the offence

In addition to this, it provides instances where legal assistance can be produced by professional associations and different organizations.

In *Avocats Sans Frontières (on Behalf of Bwampamye) v Burundi*¹²² the Supreme Court of Burundi compelled the accused to represent himself due to the absence of his lawyer during criminal proceedings. The African Commission held that Burundi had violated the accused

¹¹⁶ CCPR General comment no. 32, 12.

¹¹⁷ *Basic Principles on the Role of Lawyers* 27 August to 7 September 1990.

¹¹⁸ *Basic Principles on the Role of Lawyers* 27 August to 7 September 1990.

¹¹⁹ Article 6, *European Convention on Human Rights*, 4 November 1950, CETS No.194.

¹²⁰ Article 7, *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 U.N.T.S. 217.

¹²¹ Article 45(c), *African Charter on Human and Peoples' Rights*.

¹²² *Avocats Sans Frontières (on behalf of Bwampamye) v. Burundi*, ACmHPR Comm. No. 231/99 (2000).

right to defence by counsel of choice and its domestic laws had failed to adhere to the obligation set out in the African Charter.

With respect to the right to counsel in Kenya, every accused person has a constitutional right to defend themselves or to choose to be represented by an advocate and be informed of this right.¹²³ Additionally, it is the State's obligation to ensure access to justice for all persons is provided at a reasonable fee.¹²⁴ Hence, the introduction of state-funded legal representation as a constitutional right subject to substantial injustice criterion.¹²⁵ Therefore, the right to counsel constitutes; the right to be informed of this right, the right to have representation by an advocate and the right to state-funded legal representation.

3.3 Legal Framework on the Right to Counsel

3.3.1 Right to be promptly informed

The right to be informed in all cases commences upon the arresting stage where the duty to inform the accused of their right to counsel is on the courts and the police. In Kenya, the police have a duty to promptly inform an arrested person and detainees of their right to counsel by adhering to Article 49-51 of the Constitution of Kenya 2010.¹²⁶ However, it was noted that the Criminal Procedure Code was silent on the right to state funded legal representation for the unrepresented accused.

Whereas in courts, the judge should promptly inform the unrepresented accused of his right to counsel when they appear before it.¹²⁷ Given the status of the unrepresented accused in Kenya, most of unrepresented accused would be dependent on state-funded legal representation. However, informational rights on state-funded representation or availability of legal aid are only provided in the Article 49(c) of the Constitution of Kenya (2010)¹²⁸ which is vague; 'provides for communication with an advocate and assistance where necessary'; and Persons Deprived of Liberty Act 2014¹²⁹ that applies to an arrested person only. Thus, there is no explicit legislation that guides the police on the duty to inform detainees or arrested persons of their right to counsel other than the Constitution and Persons Deprived of Liberty Act 2014. Additionally, in practice, this is rarely observed because most of the remandees are

¹²³ Article 50(2) (g), *Constitution of Kenya 2010*.

¹²⁴ Article 48, *Constitution of Kenya 2010*.

¹²⁵ Article 50(2) (h), *Constitution of Kenya 2010*.

¹²⁶ Fifth Schedule Rule 2, *National Police Service Act*, (Act No.11A of 2011).

¹²⁷ Section 43(1) (a), *Legal Aid Act*, (Act No. 6 of 2016).

¹²⁸ Article 49, *Constitution of Kenya 2010*.

¹²⁹ Section 6 (b), *Persons Deprived of Liberty Act*, (Act No.23 of 2014).

unrepresented due to a lack of knowledge of their rights and the police extort bribes from arrested persons to allow them to hire counsel.¹³⁰

3.3.2 Right to choose and be represented by an advocate

Individuals such as refugees, persons with disabilities and children, who would otherwise be excluded from the law, have their right to counsel protected by the Constitution of Kenya (2010) and their respective Acts of Parliament. Furthermore, the Criminal Procedure Code also provides that an accused person charged with any crime under the Code has, as of right, to be defended by an advocate.¹³¹

Recognized refugees and their family members are entitled to rights including the right to counsel under Kenyan law and international conventions despite their lack of citizenship.¹³² Aliens are also entitled to legal assistance where consular services are not available.¹³³ This clearly demonstrates that every person in Kenya has the right to choose and be represented by an advocate if they have sufficient means to do so or apply for legal aid where it is available.

The right to legal representation is reiterated during plea agreements which provides that a court recording a plea agreement must ensure that the accused understands that he is waiving his right to a legal representative of his choice and where necessary the right to have a court-appointed legal representative among other rights.¹³⁴ This shows the significance of this right to an accused person's right to a fair trial. In accordance with Rawl's principle of justice, Kenya guarantees the right to counsel to everyone and only the accused has the right to waiver the right as was found in *General Comment 32*.

3.3.3 Right to assisted counsel

Assisted counsel is offered when an accused has insufficient funds to afford legal services. Notwithstanding the right to a fair trial being unlimited, the right to counsel is limited in Kenya. In Kenya, state-funded legal representation is limited by the Constitution of Kenya 2010; where it is only granted if substantial injustice would otherwise occur.¹³⁵ However, there are cases

¹³⁰ United States Department of State Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2019: Kenya*, March 2020, 12.

¹³¹ Section 193, *Criminal Procedure Code* (Act No. CAP 75).

¹³² Section 16(1), *Refugees Act*, (Act No. 13 of 2006)

¹³³ Section 11, *Persons Deprived of Liberty Act* (No.23 of 2014); Section 42, *Legal Aid Act 2016*(Act No. 6 of 2016).

¹³⁴ Section 137F, *Criminal Procedure Code* (Act No. CAP 75).

¹³⁵ Article 50(2) (h), *Constitution of Kenya 2010*.

where state-funded representation is required, such as court proceedings with unrepresented child offenders¹³⁶ and in capital offences. This is viewed as a problem in practice given that a recent NCAJ Status Report 2019,¹³⁷ stated that pro bono lawyers for children were few and most children in the country continued to have their cases concluded with no legal representation. Additionally, the Attorney General, Council and the LSK are yet to make regulations providing for free legal services for persons with disabilities with respect to cases involving capital punishment of persons with disabilities.¹³⁸ Kenya's legislation has not been fully operationalized and lacks core regulations needed for it to fulfill its mandate. Assisted counsel is provided by the legal aid service providers¹³⁹ such as National Legal Aid scheme, non-governmental organisations (NGO), community-based organizations, professional bodies and educational institutions.

3.3.3.1 Legal Aid in Kenya

The Legal Aid Act 2016, enacted in April 2016, was the first legislation on legal aid in Kenya that addressed the issue of actualizing the right to free or subsidized state legal representation for the indigent accused. The legislation established a body corporate, NLAS¹⁴⁰ whose main function was to establish and administer a national legal aid scheme that was affordable, accessible, sustainable, credible, and accountable.¹⁴¹ The NLAS is to be governed by the board whose mandate is to facilitate, monitor, and evaluate the performance of the service.¹⁴² NLAS provides different legal aid services, including, but not limited to, legal advice, legal representation and assistance.¹⁴³ This recognises the right to counsel for the accused and gives him or her different avenues to access counsel.

3.3.3.1.1 Eligibility Criteria for Legal Aid

Legal aid is only granted to persons who have met the eligibility criteria as provided in Section 36 of the Legal Aid Act 2016 (the Act). According to the Act, an indigent person is a person

¹³⁶ Section 186 *Children Act* (Act No 8 of 2001); 77, *Children Act* (Act No. 8 of 2001).

¹³⁷ NCAJ Special Task Force on Children Matters, 'Status Report on Children In The Criminal Justice System', 20th November 2019, 45-51

¹³⁸ Section 38(1), *Person with Disabilities Act* (Act No. 14 of 2003); Amondi C, 'Legal Aid in Kenya: Building a Fort for Wanjiku', 205-209.

¹³⁹ United Nations Office on Drugs and Crime, 'Early access to legal aid in criminal justice processes: a handbook for policymakers and practitioners', Criminal Justice Handbook Series, Vienna 2014, xi

¹⁴⁰ Section 5, *Legal Aid Act* 2016 (Act No. 6 of 2016).

¹⁴¹ Section 7, *Legal Aid Act* 2016 (Act No. 6 of 2016).

¹⁴² Section 10, *Legal Aid Act* 2016 (Act No. 6 of 2016).

¹⁴³ Section 2, *Legal Aid Act* 2016 (Act No. 6 of 2016).

who cannot afford to pay for legal services.¹⁴⁴ In accordance with the Constitution, state-funded representation is available to all persons as long as they are indigent and resident in Kenya. This may include Kenyan citizens, children, refugees under the Refugee Act, victims of human trafficking, an internally displaced person and a stateless person.¹⁴⁵ Eligibility for state-funded legal representation in the Kenya is subject to the means test and the substantial injustice test in accordance with the ICCPR.

The Act¹⁴⁶ states that NLAS must determine whether a person has financial resources for an indigent person, however, the criteria for financial resources, means test, for an indigent person has not been formulated in subsidiary legislation.¹⁴⁷ A means test is essential for the unrepresented accused and the courts when determining whether eligibility for state-funded legal representation can be granted. Once a person is eligible for legal aid, the NLAS considers the following factors before granting legal aid services:

- a) The success of the case is commensurate to the cost incurred
- b) Availability of resources
- c) Sustainability of incurring such costs
- d) Nature, seriousness, the importance of the case justifies the cost
- e) The conduct of the applicant warrants assistance
- f) A matter of public interest
- g) Proceedings are likely to occasion the loss of any right of the applicant
- h) Complexities of the case such as involvement of expert witness
- i) In the interest of a third party that the applicant is represented
- j) Denial of legal aid would result in substantial injustice
- k) Any other reasonable ground to justify the grant of legal aid.¹⁴⁸

This criterion provides for a wide scope for grant of legal aid however, if the financial criteria is not available to the unrepresented accused one may not be able to access legal representation or assistance through legal aid.

¹⁴⁴ Section 2, *Legal Aid Act 2016* (Act No. 6 of 2016).

¹⁴⁵ Section 36(1), *Legal Aid Act 2016* (Act No. 6 of 2016).

¹⁴⁶ Section 36(3), *Legal Aid Act 2016* (Act No. 6 of 2016).

¹⁴⁷ Section 86, *Legal Aid Act 2016* (Act No. 6 of 2016).

¹⁴⁸ Section 36(4), *Legal Aid Act 2016* (Act No. 6 of 2016).

3.3.3.1.2 Court Responsibility concerning Legal Aid

Where substantial injustice may occur, the court is required to promptly inform the unrepresented accused of his right to an assigned advocate and order the NLAS to provide legal aid to the accused.¹⁴⁹ Courts have a mandate to determine whether an accused can be granted state-funded legal representation.

The Act also provides that the court should order the NLAS to offer legal representation to an unrepresented child¹⁵⁰ and capital offence cases subject to means test.¹⁵¹ Nevertheless, the Act states that the lack of legal representation should not be a bar to the continuation of proceedings against an accused.

3.4 Facilitation of the Right to Counsel in Kenya

3.4.1 Right to be promptly informed

The police rarely adhered to the duty to inform an arrested person of their right to counsel. In the CCPR report 2012, arrested detainees lacked contact to counsel thus showed that this right was not respected.¹⁵² As recent as 2019, the police were taking advantage of the vulnerable in society through extortion of bribes from the poor¹⁵³ to enable them to access counsel. Additionally, the police instructed children not to communicate with the judge¹⁵⁴ during criminal proceedings which may have affected their right to a fair trial because they are excluded in the criminal proceedings.

The right to be informed of the right to counsel by the courts was brought into question in the case of *Charlse Maina Gitonga v Republic* in the Supreme Court.¹⁵⁵ The petitioner was unrepresented in both the trial and the appellate court and in both courts, he was not informed of his right to counsel nor was it brought up as an issue in the proceedings. The respondent argued that duty to inform an accused of this right was insufficient ground to nullify the conviction and the petitioner could not avail both rights in Article 50(2) (g) and (h) thus

¹⁴⁹ Section 43(1) (a), *Legal Aid Act* 2016 (Act No. 6 of 2016).

¹⁵⁰ Section 43(3), *Legal Aid Act* 2016 (Act No. 6 of 2016).

¹⁵¹ Section 43(4), (5) *Legal Aid Act* 2016 (Act No. 6 of 2016).

¹⁵² CCPR, *Concluding Observations: Kenya*, 2012, UN Doc, C/KEN/CO/3.

¹⁵³ United States Department of State Bureau of Democracy, Human Rights and Labor, *Country Reports on Human Rights Practices for 2019: Kenya*, March 2020, 12.

¹⁵⁴ NCAJ Special Task Force on Children Matters, *Status Report on Children In The Criminal Justice System*, 20th November 2019, 45-51.

¹⁵⁵ *Charlse Maina Gitonga v Republic* [2020] eKLR.

showing that they were mutually exclusive. However, the Supreme Court of Kenya stated that it lacked jurisdiction to determine the matter because the appeal had nothing to do with the interpretation and application of the Constitution. Hence, it did not have an opportunity to give their determination.

Nonetheless, Justice Nyakundi¹⁵⁶ emphasised on the right to counsel, stating that an advocate is recognised for applying facts of the case whether in court or in the police station. Therefore, he found that rules of police protocols should not negate the realisation of this right. Kenya does not provide legal representation for the accused in police custody.

3.4.2 Right to the choice of counsel

An accused with sufficient means to retain counsel had the right to choice of counsel however, assigned counsel granted by the court through the criminal pauper brief scheme was not chosen by the accused. In the case of *Alloys Omondi Nanga v Republic 2006*, the appellant claimed that he was not represented by the legal representative of his choice which was a violation of Section 77(2)(d) of the Independence Constitution 1963.¹⁵⁷ The court held that the right of choice of counsel in court-appointed counsel, was a right of election rather than a right of choice for the accused. The accused could either consent to the court-appointed counsel or choose to represent themselves. Therefore, the court recommended when the accused is offered court-appointed counsel, they should be required to indicate written acceptance of the counsel, or the court would facilitate this.¹⁵⁸

3.4.3 Right to assisted counsel

The right to assisted counsel can be offered by different publicly funded¹⁵⁹ and privately funded legal aid provider schemes. This research focused on legal representation as the service offered by the legal aid providers. When applying these schemes there is a need to adhere to Rawl's difference principle where it should give equal opportunity to all and guarantee the greatest benefit for the disadvantaged in society.

¹⁵⁶ *Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)* [2018] eKLR

¹⁵⁷ Section 77(2)(d), *Independence Constitution* 1963.

¹⁵⁸ *Alloys Omondi Nanga v Republic* [2006] eKLR.

¹⁵⁹ Danish Institute for Human Rights, 'Access to Justice and Legal Aid in East Africa: A Comparison of the Legal Aid Schemes used in the Region and the Level of Cooperation and Coordination between the various Actors', (2011),39.

3.4.3.1 Public Schemes

3.4.3.1.1 Criminal pauper brief program

The Chief Justice developed rules to facilitate state-funded legal representation for grave and serious offences such as the offence of murder and child offenders who could not access and afford counsel.¹⁶⁰ The courts introduced the criminal pauper briefs which were assigned to advocates by the Chief Justice to take up such cases for a standard fee. However, lawyers were reluctant to participate due to the low fee paid and the time spent on such briefs.¹⁶¹ In the case of *In Alloys Omondi Nanga v Republic*, the court stated that the criminal pauper brief scheme was a long practice of the judiciary which granted free legal aid to an accused charged with the offence of murder.¹⁶²

Honorable Chief Justice Dr. Willy Mutunga published a gazette for practice directions on pauper briefs which provided that pro bono services were to be offered in all capital offences¹⁶³, child offenders and increased the lawyer fee.¹⁶⁴ This increased the scope of state-funded legal representation, however, increased fees failed to incentivise lawyers to take on pro-bono cases.

3.4.3.1.2 National Legal Aid Scheme

Prior to the Constitution of Kenya 2010, the Ministry of Justice National Cohesion and Constitutional Affairs launched National Legal Aid and Awareness Programme (NALEP), a pilot project set up in 2007, as the first government-funded national legal aid scheme in Kenya. NALEP had the aim of testing out the establishment of a national legal aid scheme in Kenya and reported on the status of access to justice to the government.¹⁶⁵ The NALEP launched 6 pilot projects in 6 thematic areas¹⁶⁶ working with; the Judiciary, Law Society of Kenya and different civil society organisations such as Kituo cha Sheria, to implement its objectives by providing legal advice and representation to the indigent. In criminal matters, NALEP mainly focused on children in need of care and protection, children in conflict with the law and capital offenders.¹⁶⁷

¹⁶⁰ Kibwana, Kivutha, 'Fundamental Rights and Freedoms in Kenya', Oxford University Press, 1990, 56-57; *Alloys Omondi Nanga v Republic* [2006] eKLR.

¹⁶¹ Office of Attorney General and the Department of Justice, *National Action Plan: 2017-2022*, 2017, 2017, 15.

¹⁶² *Alloys Omondi Nanga v Republic* [2006] eKLR.

¹⁶³ A capital offence is any crime that attracts a death penalty or life imprisonment.

¹⁶⁴ Gazette Notice No. 370 of 2016, the former Chief Justice Dr Willy Mutunga Gazette Practice Directions on Pauper Brief Schemes and Pro Bono Services.

¹⁶⁵ Office of Attorney General and the Department of Justice, 'National Action Plan: 2017-2022', 5.

¹⁶⁶ Office of Attorney General and the Department of Justice, *National Action Plan: 2017-2022*, 6.

¹⁶⁷ Office of Attorney General and the Department of Justice, *National Action Plan: 2017-2022*, 5-6.

The National Legal Aid and Awareness Policy was approved by Cabinet in May 2015; its primary objective was to develop a National Legal Aid Institution that provided a sustainable framework for quality access to justice to all in line with the government's development agenda.¹⁶⁸ During this period, the government in the consultative process with the civil society were drafting legislation and policy on legal aid. In 2016 there was the enactment of the Legal Aid Act which established a body corporate, NLAS a successor to NALEP whose main function was to establish and administer a national legal aid scheme.¹⁶⁹ The NLAS in Kenya cooperates with different civil society organizations such as FIDA Kenya, Paralegals, ICJ Kenya, Kituo cha Sheria, the Judiciary among others.

3.4.3.1.2.1 Application of Article 50(2) (g), (h) in courts

The constitutional right to state-funded legal representation has recently been in contention where most unrepresented accused, who were convicted, have appealed on the grounds of infringement of their right to counsel in the trial and appellate court. The Constitution of Kenya 2010 and legislation such as the Legal Aid Act fail to define substantial injustice thus it is the mandate of the Court to determine the definition of substantial injustice given the circumstances of the case.¹⁷⁰

In the case of *Kenga Hisa v Republic*¹⁷¹, Justice Nyakundi stated that it was a violation of the principle of equality of arms, where an illiterate appellant was in a trial conducted by a trained prosecutor. He also acknowledged that the national legal aid scheme in Kenya was still in the infancy stage due to budgetary constraints. Furthermore, he explained that the accused was dependent on the right to interpretation and information for a fair trial which ought be fully funded by the State. Thus, the courts were required to at least entitle the accused these minimum rights. In Kenya, courts are required to use the criteria provided in Section 36 of the Legal Aid Act to grant state-funded representation however, due to the delayed operationalization of the Legal Aid Act, it is a futile gesture of the court. Therefore, the pro bono and pauper briefs are the main sources of state-funded legal representation which are granted to all capital offences and children's criminal matters.

Nevertheless, the Supreme Court of Kenya has held that the right to state-funded legal representation is a fundamental ingredient to a right to a fair trial in accordance with the

¹⁶⁸ National Legal Aid and Awareness Policy 2015.

¹⁶⁹ Legal Aid Act 2016. (Act No. 6 of 2016).

¹⁷⁰ Article 50(2) (h), *Constitution of Kenya* 2010.

¹⁷¹ *Kenga Hisa v Republic* [2020] eKLR.

Constitution of Kenya 2010. However, it emphasized that the right is not absolute, and it is only granted by the State where substantial injustice would otherwise result.¹⁷² The Court of Appeal in the case of *David Njoroge Macharia v Republic* held that substantial injustice could occur in non-capital offence cases for the indigent accused. When determining whether an accused would suffer substantial injustice without state-funded legal representation, the court considered the following factors:

- a) The severity of the charge
- b) Complexities of the case
- c) The capacity of the accused person to defend themselves
- d) The public interest which requires the accused to have court-appointed counsel due to the nature of the offence.¹⁷³

This provided a criterion for subsequent courts when granting state-funded legal representation depending on the circumstances of the case such as in *Thomas Alungha Ndegwa v Republic case*. The court found that the appellant, who was charged and convicted of an offence of defilement, was eligible for legal aid. This was because he was serving a mandatory sentence of life imprisonment and was unrepresented in the trial and appeal stage. Therefore, for his second appeal the court held that substantial injustice would have resulted unless he had counsel.¹⁷⁴

3.4.3.2 Private Schemes

Private schemes in Kenya are mainly funded by international donors such as Sweden, Germany, and Denmark amongst others. Some examples of such organizations related to legal representation include the Federation of Women Lawyers (FIDA Kenya), the CRADLE, the International Commission of Jurists (ICJ Kenya), Kituo cha Sheria and the Law Society of Kenya (LSK)¹⁷⁵. These institutions have primarily been serving specific unrepresented accused depending on the mission of the organization in form of pro bono services to fill the gap left by the government.

The LSK creates an incentive for legal professionals to take part in pro bono activities in cooperation with the Legal Aid Programme which gains them a number of points for their

¹⁷² *Republic v Karisa Chengo & 2 others* [2017] eKLR.

¹⁷³ *David Njoroge Macharia v Republic* [2011] eKLR.

¹⁷⁴ *Thomas Alungha Ndegwa v Republic* [2016] eKLR.

¹⁷⁵ Amondi C, 'Legal Aid in Kenya: Building a Fort for Wanjiku', 205-209.

Continuous Professional Development¹⁷⁶ In the Police station, the paralegals ensure the right to counsel by visiting detainees and arrested persons in police custody, assessing their case and connecting lawyers to the cases that needed legal expertise for no fee. The paralegals also use interactive lessons to educate the unrepresented accused in custody on criminal law and procedure.¹⁷⁷

In Kenya, these organizations are the main providers of the majority of pro bono legal services, and they are mainly located in large cities and have limited financial capacity.¹⁷⁸ As a result secluding area such as Northeastern from the formal justice system resorting them to using an informal justice system.¹⁷⁹ This shows that the government had abandoned the role of realizing the right to counsel to the civil society, which was an overwhelming mandate for the NGOs.

3.5 Challenges encountered by the State and effective way to resolve them

The scope of the state funded representation in Kenya is very narrow. The Practice Directions on Pauper Brief Schemes and Pro Bono provide this legal representation for capital offenders and child offenders. However, children still lack legal representation during trial. As of 2019, criminal pauper briefs covered only 25% of remandees in the criminal justice system¹⁸⁰ leaving out capital offenders and children who lacked legal representation during their trials. An order was made by former Honourable Chief Justice David Maraga to all courts to accord legal representation to all children in conflict with the law during criminal proceedings.¹⁸¹

The court's interpretation of 'substantial injustice' also focuses on the criteria of capital offences, despite that 70% of the convicted persons are for petty offences would not be granted legal aid.

The CCPR report 2012, noted that the legal aid scheme lacked funding and physical accessibility factors which is still the case with the NLAS given that is yet to be

¹⁷⁶ Rule 11, Advocates (Continuing Professional Development) Rules 2014.

¹⁷⁷ United Nations Office on Drugs and Crime, 'Handbook on improving Access to Legal Aid in Africa: Criminal Justice Handbook Series, Vienna, 70-71.

¹⁷⁸ United Nations Office on Drugs and Crime, *Global Study on Legal Aid: Country Profiles*, 2016,139. [https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/GSLA - Country Profiles.pdf](https://www.unodc.org/documents/justice-and-prison-reform/LegalAid/GSLA_-_Country_Profiles.pdf) accessed on 20 March 2020.

¹⁷⁹ Danish Institute for Human Rights, *Access to Justice and Legal Aid in East Africa: A Comparison of the Legal Aid Schemes used in the Region and the Level of Cooperation and Coordination between the various Actors*30.

¹⁸⁰ Nanjala C, 'All for Justice Remand Case Review Initiative', The Prosecutor A Newsletter from the Office of the Office of the Director of Public Prosecutions, 2019, 14-15.

¹⁸¹ Former Chief Justice David Maraga gave an order on 11 November 2020 to all courts to ensure all child offenders are represented.

operationalized.¹⁸² The government allocates the least amount of funds to this sector. The NLAS is limited to focus on the legal education, in cooperation with pro bono lawyers,¹⁸³ for prisoners and detainees on their right to self-representation rather than providing a legal representative.

In Kenya, the legal aid system is faced with procedural, structural, human resource and administrative limitations that hinder the indigent from exercising their right to counsel.¹⁸⁴ The Legal Aid Act requires subsidiary regulations for it to be fully operational, however, these regulations have not been formulated such as the criterion for the means test. Furthermore, the NLAS is only located in five regions in the country, therefore, it has not yet achieved its mandate of being a national legal aid scheme. Consequently, this limits public awareness on the right to state funded legal representation.

The unavailability of lawyers is a major factor that leads to lack of legal representation. Patricia Mbote and Migai Aketch¹⁸⁵ highlight that the ratio of lawyers to the Kenyan population is at 1:5400 as of 2011, which is below the international standard of 1:600, therefore, the demand for lawyers in Kenya is high. Additionally, with the increase in population in Kenya, the ideal ratio only gets harder to achieve. The lawyers mainly practice in cities thus when serving in a remote community they may have a strained relationship with the accused due to differences in culture and language. Kenya has focused on self-representation education to enable an unrepresented accused to exercise their right to self-representation,¹⁸⁶ which is a compromise and disservice to the realisation of their right to counsel. The government also advocated for simpler court language to enable the unrepresented accused to exercise their right to self-representation.¹⁸⁷

3.6 Conclusion

Kenya respects and protects the right to counsel in its legal framework; however, the practices of the police continue to violate this right. The police fail to inform the accused of his right to counsel and extort bribes from the vulnerable to allow access to counsel. The courts respect the

¹⁸² CCPR, *Concluding Observations: Kenya*, 2012, UN Doc, C/KEN/CO/3.

¹⁸³ Section 2, *Legal Aid Act 2016*(Act No. 6 of 2016).

¹⁸⁴ Office of Attorney General and the Department of Justice, ' *National Action Plan: 2017-2022*, 5.

¹⁸⁵ Aketch M, Mbote P, ' *Justice Sector And the Rule of Law Kenya* ', Open Society Initiative for Eastern Africa, Nairobi, 2011.114.

¹⁸⁶ Kenya National Commission of Human Rights, *Annual Report and Financial Statements for the period 2016/17*, 31.

¹⁸⁷ Hon. Mr. Justice William Ouko, *Final Report on the Task Force on Judicial Reforms*, 110.

right to counsel however, the Supreme Court views it as a matter of record and the delayed in the operationalization of the Legal Aid Act 2016 has limited the court to guaranteeing this futile right.

CHAPTER FOUR: CASE STUDIES

4.1 Introduction

This chapter is a discourse on experiences of two jurisdictions namely, the United Kingdom and the Republic of South Africa on how they have protected, respected and enforced the right to counsel for the unrepresented accused.

4.2 United Kingdom (UK)

4.2.1 Introduction

According to the Ministry of Justice report 2019, the unrepresented defendants have a significant impact on the Crown court process and reform. They were either those that had issues with legal aid or those that chose to represent themselves due to non-financial reasons.¹⁸⁸

The Ministry of Justice found that the unrepresented defendants had a limited understanding of the court process. This burdened the judge and prosecutor with the mandate of explaining the procedure and different legal concepts which lead to disproportionate efficiency of the court. The prosecutor, to some extent, would inform and help the defendant, however, they urged the court to appoint a solicitor for the defendant in order to serve the defendants.¹⁸⁹

The defendants lacked knowledge on how to question a witness and how to set out their arguments and lacked knowledge on other court proceedings which limited disclosure of evidence during trial.¹⁹⁰ The unrepresented defendant would in certain instances intimidate or waste the time of the witnesses during cross-examination due to their lack of understanding of the type of evidence that was needed from the witness.¹⁹¹ This shows that the dilemma of an unrepresented accused is experienced in different jurisdiction such as Kenya and UK. Therefore, all these factors limited the defendant from putting their case forward thus infringing on their right to a fair trial.

¹⁸⁸ Ministry of Justice Analytical Series, *Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales practitioners*, 2019, 5.

¹⁸⁹ Ministry of Justice Analytical Series, *Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales practitioners*, 6.

¹⁹⁰ Ministry of Justice Analytical Series, *Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales practitioners*, 7-8.

¹⁹¹ Ministry of Justice Analytical Series, *Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales practitioners*, 9-10.

4.2.2 Underpinnings for the right to legal representation in the UK

4.2.2.1 The Prisoners' Counsel Act 1836

As discussed in the background of the study, there was an imbalance in the court where an unrepresented accused conducted his case alongside a trained prosecutor which posed a threat of the prosecutors carrying out false prosecutions. Consequently, the Prisoner's Counsel Act 1836 was enacted which provided that an accused put on trial for a felony would be granted full defense which allowed the accused to answer and defend his case before the jury through the assistance of a counsel learned in law.¹⁹² The role of a defense counsel in representing the accused was widened which ensured fairness and accountability in the courtroom. As viewed by Beatti; the end of advocacy was truth-finding which was a more effective and humane form of criminal trials.¹⁹³ However, the accused had to bear the cost of his defence counsel which presented a dilemma because many could not afford it. Section 10(2) of the Criminal Law Act 1967 repealed this Act because it was found to be redundant.¹⁹⁴

4.2.2.2 The Poor Prisoners Defence Act 1903

In the UK, many of the unrepresented prisoners could not afford the cost of a defence counsel thus, necessitated effective ways for the unrepresented accused to be granted counsel. The dock brief system allowed the accused to request for a barrister from the present court, who would represent them for a lower fee.¹⁹⁵ This was ineffective as it was impromptu for the barrister to offer legal representation with inadequate facts of the case and their remuneration was low. The Poor Prisoners Defence Act 1903 was enacted to provide free legal aid to prisoners who had a defence and could not afford legal services.¹⁹⁶

Legal representation was only available in the higher courts subject to the defendant disclosing their defence. This Act was ineffective because the defence counsel's pay was insufficient compared to the prosecutor's pay and it excluded legal aid for guilty prisoners.¹⁹⁷ The Poor Prisoners Defence Act 1930, which repealed the 1903 Act, extended the scope of legal aid to preliminary inquiries and cases that were heard summarily by the magistrate. Additionally, the

¹⁹² Article 1, *Trial for Felony Act 1836* (England).

¹⁹³ Beattie JM, 'Scales of Justice: Defence Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries', 221-267.

¹⁹⁴ <https://www.legislation.gov.uk/ukpga/1967/58/contents> accessed on 21 October 2020.

¹⁹⁵ Levenson H, 'Legal Aid for Mitigation', 40(5), *Modern Law Review*, 1977, 523.

¹⁹⁶ Levenson H, 'Legal Aid for Mitigation', 523.

¹⁹⁷ ALCOCK C P, 'A study of legal aid and advice in England and Wales', Published Masters, Sheffield Hallam University (United Kingdom), 1976, 10. <https://shura.shu.ac.uk/19235/1/10694115.pdf> accessed on 22 October 2020.

disclosure of defence was not a requirement to be assigned counsel in this Act.¹⁹⁸ This protected the unrepresented accused from self-incrimination.

4.2.2.3 Rushcliffe Committee 1945

Post-World War two, the Rushcliffe Committee investigated the non-availability of lawyers for persons in need of legal services but could not afford them.¹⁹⁹ The committee recommended for a legal aid system that would help those with few resources and allowed lawyers to get remuneration for their services.²⁰⁰ With regard to criminal proceedings, the challenges found included the reluctance of the court to grant legal aid certificates, inadequate remuneration for the defence counsel for the difficult work and inadequate time for defence preparation and lack of knowledge of the accused and the general public about the Poor Prisoners Defence Act 1930.²⁰¹

The Committee recommended that certificates for legal aid had to be granted in the interest of justice in favour of the applicant, lawyers were to be remunerated properly, courts were required to give reasonable time for barristers to prepare the defence and raise public awareness of the Poor Prisoners Defence Act 1930 for the accused during trial.²⁰² These recommendations were realized in 1949 after the enactment of the Legal Aid and Advice Act and many other Acts thereafter.²⁰³

4.2.3 Legislation on the right to counsel in the UK

4.2.3.1 Right to be informed

Pursuant to the Police and Criminal Evidence Act (PACE) code practices,²⁰⁴ police are required to inform an arrested person during arrest or interrogation stage, in a comprehensible language, of their right to counsel and their option of legal aid schemes where they cannot afford to

¹⁹⁸ ALCOCK C P, 'A study of legal aid and advice in England and Wales', 16.

¹⁹⁹ Brooke H, 'The History of Legal Aid 1945-2010', Bach Commission on Access to Justice Appendix 6, September 2017, 5. <https://www.fabians.org.uk/wp-content/uploads/2017/09/Bach-Commission-Appendix-6-F-1.pdf> accessed on 21 October 2020.

²⁰⁰ House of Lords, 'Legal Aid and Advice Act 1949 Anniversary', 2019, 2. <file:///C:/Users/Rukworo/Downloads/LLN-2019-0099.pdf> accessed on 21 October 2020.

²⁰¹ Rushcliffe Committee, *Report of the Committee on Legal Aid and Legal Advice in England and Wales*, London, 1945, 25-26.

²⁰² Rushcliffe Committee, *Report of the Committee on Legal Aid and Legal Advice in England and Wales*, 26-27.

²⁰³ Smith R H, 'Legal Aid and Advice: The Rushcliffe Report as a Land Mark', 33(5), *American Bar Association Journal*, 1947, 445-557.

²⁰⁴ Para. 6.6, United Kingdom, Police and Criminal Evidence Act 1984, Code of Practice C.

acquire a lawyer.²⁰⁵ However, this right is not absolute; a superintendent can restrict this right if it causes unreasonable delay to the process of investigation, which can only last 36 hours.²⁰⁶

4.2.3.2 Right to the choice of counsel and representation

Article 6 of the ECHR provides for a fair trial for everyone charged in a criminal matter. Minimum rights for an accused include an entitlement to defend oneself or a counsel of their choice and assisted counsel where the interest of justice is required.²⁰⁷ The Human Rights Act 1998²⁰⁸ incorporates this into domestic law to allow citizens to raise allegations of violation of their rights in domestic courts

4.2.3.3 Right to assisted counsel

4.2.3.3.1 Legal Aid and Advice Act 1949

This Act introduced a legal aid system which widened the scope of legal assistance in criminal matters to those with inadequate finances. The means test did not apply to the criminal cases,²⁰⁹ therefore, no contribution was required from the assisted person. Legal representation was facilitated in all criminal cases where it was in the interest of justice.²¹⁰

The assisted person applied for legal aid through a letter or in person through the court clerk during the hearing. Legal assistance was also extended to convicted persons for purposes of mitigation of sentence.²¹¹ The Law Society was responsible of establishing and administrating the legal assistance scheme without government supervision. However, the scheme was non-profitable, the Law Society acted in their best interest and deviated from the objective of the scheme which was the assisted persons.²¹² The Legal Aid and Advice Act 1949 was replaced by a series of Legal Aid Act 1960-79 which introduced financial criteria for legal representation and remuneration of solicitors and barrister.²¹³

This led to the Legal Aid Act 1988 that introduced cuts to the eligibility for legal aid and an independent board, the Legal Service Commission, which was responsible for the administration of the scheme. This enabled the government to control the expenditure of the

²⁰⁵ Para. 6.6, United Kingdom, Police and Criminal Evidence Act 1984, Code of Practice C.

²⁰⁶ Section 58(6)-(11), United Kingdom, Police and Criminal Evidence Act 1984.

²⁰⁷ Article 6(3), *European Convention on Human Rights*, 4 November 1950, CETS No.194.

²⁰⁸ <https://www.legislation.gov.uk/ukpga/1998/42/schedule/1> accessed on 21 December 2020.

²⁰⁹ LCBG, 'Legal Aid and Advice Act 1949', 13(1), *Modern Law Review*, 1950, 86.

²¹⁰ Hart LJ, 'The British Legal Aid and Advice Bill', 23, *Temple Law Quarterly*, 1949, 68-74.

²¹¹ Hart LJ, 'The British Legal Aid and Advice Bill', 68-74.

²¹² Hansen O, 'A Future for Legal Aid', 19(1), *Journal of Law and Society*, 1992, 85-100.

²¹³ Brooke H, 'The History of Legal Aid 1945-2010', 8-10.

scheme, save on cost and ensure effective and quality service for consumers.²¹⁴ The Legal Aid Act 1988 was replaced by the Access to Justice Act 1999 to introduce more efficient and effective structures for legal schemes in the country. The vision for the legal aid scheme in 1949 was access to justice to all which included the right to legal representation; however, the scheme had lost its vision and focused on saving cost.²¹⁵

4.2.3.3.2 The Access to Justice Act 1999

As legal aid expanded its reach, the criminal legal aid expenditure was increasing due to increased crime which led to more cases.²¹⁶ Thus, to be cost-effective the government started a mixed model. The Access to Justice Act 1999 included a cap on legal aid expenditures and established the Community Legal Service and the Criminal Defence Service which provided criminal legal aid.²¹⁷ The mixed model involved private solicitors under blocked contracts and salaried solicitors under the Criminal Defence Service.²¹⁸ Criminal Defence Service Act 2006 amended the Access to Justice Act. The government further cut costs as envisaged in the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

4.2.3.3.3 Legal Aid, Sentencing and Punishment of Offenders Act 2012

The Legal Aid, Sentencing and Punishment of Offenders Act 2012, as enacted in 2012, limited the scope of legal matters that were available for legal aid.²¹⁹ This Act repealed section 1-26 of the Access to Justice Act 1999. Section 13 required availability of legal advice and assistance for persons in custody at the police station and provided for a Director who determined whether a person was eligible for legal aid could be referred to a solicitor.²²⁰ It limited legal aid to the poorest where only the very poor could access it, therefore, persons with moderate means and prisoners were excluded from access to legal aid.²²¹

²¹⁴ Hansen O, 'A Future for Legal Aid', 85-100.

²¹⁵ Bach Commission on Access to Justice, *The crisis in the justice system in England and Wales*, November 2016, 1-22. https://www.fabians.org.uk/wp-content/uploads/2016/11/Access-to-Justice_final_web.pdf accessed on 22 October 2020.

²¹⁶ Brooke H, 'The History of Legal Aid 1945-2010', 10-11.

²¹⁷ Section 4-11, *Access to Justice Act 1999*; Section 12-18, *Access to Justice Act 1999* have been repealed by the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

²¹⁸ Brien DO, Epp JA, 'Salaried Defenders and the Access to Justice Act 1999', 63(3), *Modern Law Review*, 2000, 394-412.

²¹⁹ Part 2, *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

²²⁰ Section 13, *Legal Aid, Sentencing and Punishment of Offenders Act 2012*.

²²¹ Bach Commission on Access to Justice, 'The crisis in the justice system in England and Wales', November 2016, 1-22. https://www.fabians.org.uk/wp-content/uploads/2016/11/Access-to-Justice_final_web.pdf accessed on 22 October 2020.

4.2.4 Facilitation of the right to counsel in the UK

4.2.4.1 Right to be informed

The duty of the police to inform a person of his right to counsel was interpreted in *Ambrose v. Harris*.²²² The court held that a person who is ‘a suspect’, ‘in police custody’ or ‘a subject of police interrogation’ should be aware of their right to counsel during police interviews. Furthermore, this is a duty imposed on the police immediately after the person has answered a highly incriminating question which would amount to a substantial effect on an individual. The court stated that where the police officer failed to adhere to this requirement, the evidence collected after further questioning would be ruled as inadmissible. The police were also required to inform a person of their right to legal aid which is available in the police station such as duty solicitor schemes or the Defence solicitor call centers which allow arrested and detained people to have access to legal advice through a telephone service.²²³

4.2.4.2 Right to counsel and choice of counsel

In Kevin Maguire’s application for judicial review,²²⁴ the Supreme Court considered the application of the right to choose counsel in Article 6(3(c)) of the ECHR. The appellant was granted state-funded legal representation of two instructing solicitor, provided that one was a senior. However, he requested for a junior advocate to represent him as the lead counsel, but his request was denied. He claimed this was a violation of Article 6(3(c)) of the ECHR. The court held that adequate representation was of more emphasis over choice as to identity; to this degree, it showed that the right to counsel was not absolute. Thus, it is conditional that an accused justifies how the counsel of their choice would assure their right to a defence, of which the appellant did not give reasonable justification. The court held that a fair trial was achieved through the provision of legal aid and Article 6 did not give an accused the right to demand counsel of his choice at public expense in criminal proceedings.

4.2.4.3 Right to assisted counsel

The Public Defender Service administers criminal legal aid. Individuals who have been arrested are entitled to free legal advice at the police station.²²⁵ During trial, legal representation is mandatory for minors and individuals receiving benefits such as universal credit and income support. The state-subsidized legal representation is only granted in accordance with the

²²² *Ambrose v. Harris* (2011), Supreme Court of the United Kingdom of Great Britain and Northern Ireland.

²²³ Para. 6.6, United Kingdom, Police and Criminal Evidence Act 1984, Code of Practice C.

²²⁴ *Re an application by Kevin Maguire for Judicial Review* (2018), Supreme Court of the United Kingdom of Great Britain and Northern Ireland.

²²⁵ Article 58(1), Police and Criminal Evidence (Act of 1984).

Criminal Defence (General) Regulations 2013²²⁶ which stipulates the means test which is disposable income below £37500 in the Crown Court and £3398 in the magistrate's court and the interest of justice test.²²⁷ The Courts are guided by Widgery report²²⁸ to determine whether the interest of justice test is satisfied subject to the circumstance of the case. This includes;

- a) a grave charge that the accused will lose his liberty or suffer serious damage to his reputation;
- b) the charge raises a substantial question of law;
- c) inadequacies such as lack of knowledge of English among others;
- d) nature of defence involves cross-examination of expert witnesses of the prosecution; and
- e) where it is in the interest of someone other than the accused.

The Legal Aid Agency liaises with private practitioners and salaried solicitors to assist the assisted persons who need legal aid. They have well-documented reports and articles on the status of legal aid in England and Wales. Online applications for an assisted person allow for easy access to legal aid given that the means test is provided by the Legal Aid Agency.²²⁹

4.2.4.3.1 Lawyers and Civil Society

State-subsidized legal representation is not offered to all unrepresented accused therefore, private schemes are established to help such persons who are too rich for legal aid but too poor for litigation. This has been done through pro bono works by legal professionals such as the Bar Free representation Unit 1972, the Advocate (the Bar Pro Bono Unit), Circuits free representation schemes and Solicitors Pro Bono Group (LawWorks).²³⁰ Legal advice and assistance are also offered in student clinics and community law centers in partnership with different law firms.²³¹

4.2.5 Challenges faced in the UK in ensuring the right to representation

The budget cut of the legal aid national scheme led to the decrease of the number of people eligible for legal aid.²³² The State remedied this challenge through the Exceptional case

²²⁶ Criminal Defence (General) Regulations 2013.

²²⁷ Legal Aid Agency, *Criminal Legal Aid Manual: Applying for legal aid in criminal cases in the magistrates' and Crown Court*, October 2020, 48. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/926398/criminal-legal-aid-manual_October_2020.pdf accessed on 22 October 2020.

²²⁸ Justice, *The Unrepresented Defendant in Magistrates Courts*, London, 1971, 5.

²²⁹ <https://www.gov.uk/guidance/work-out-who-qualifies-for-criminal-legal-aid> accessed on 22 September 2020.

²³⁰ Latham & Watkins LLP, *A Survey of Pro Bono Practices and Opportunities in 84 Jurisdictions*, 182-191.

²³¹ Latham & Watkins LLP, *A Survey of Pro Bono Practices and Opportunities in 84 Jurisdictions*, 182-191.

²³² Amnesty International UK, *Cuts that Hurt: The Impact of Legal Aid cuts in England on access to justice*, 4.

funding which ensured that legal aid is available to the most vulnerable such as children, the youth, migrants, refugees, and persons with mental illness and other disabilities. This scheme was found to be inadequate due to the presence of red tape bureaucracy when making applications and the reluctance of the Legal Aid Agency to grant legal assistance.²³³

The introduction of the cap on legal aid expenditure in 1997 initiated a standard fee for criminal defendants employed by the State. The State reduced its expenditure by; advocating for alternative dispute resolution and advocated for contribution cost of the case if the accused could share the financial ownership of litigation.²³⁴ As a result criminal defendants were poorly remunerated which led to them opting out of the specialty leaving the accused unrepresented through no choice of their own.²³⁵ Lack of public legal education and closure of advice centers, as a result of cutting costs in the legal aid sector, led to the unrepresented accused turning to lay advisers known as McKenzie Friends.²³⁶

4.2.6 Conclusion

The UK has developed and expanded the access to counsel for decades. The development of legislation ensured lawyers were remunerated after providing legal services to an indigent accused. The funding of the State enabled the law centers to spread throughout England and Wales to allow access to counsel to people with scarce resources. The funding of the State also allowed for quality service from the legal professionals and the protection of the rights of the accused.

4.3 The Republic of South Africa (SA)

4.3.1 Introduction

South Africa has a hybrid legal system which includes Roman, Roman-Dutch, and English law. Roman law provided that an advocate assigned by the governor had a public duty, to represent the vulnerable accused such as minors, physically and mentally challenged. The Roman-Dutch law provided that an advocate should be assigned to an indigent accused upon request of the court.²³⁷ For criminal matters, SA applies English law which as discussed guaranteed the right

²³³ Amnesty International UK, *Cuts that Hurt: The Impact of Legal Aid cuts in England on access to justice*, 2016, 4.

²³⁴ Memorandum to the Justice Select Committee, Post-Legislative Memorandum of the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012.

²³⁵ Bach Commission on Access to Justice, *The crisis in the justice system in England and Wales*, 1-22.

²³⁶ *McKenzie v McKenzie* (1970), England Court of Appeal.

²³⁷ Berat L, 'Legal Aid and The Indigent Accused in South Africa: A Proposal for Reform', 18(2), *Georgia Journal of International & Comparative Law*, 1988, 240-292.

to counsel in 1836 but an advocate was not provided for an indigent accused. Therefore, this shows that lawyers played a dominant role in the defence of an accused which is established on the principles of equality and a fair trial.

Scholars such as Steytler stated that the principle of equality meant that a person is not denied access to the legal system due to their class.²³⁸ Therefore, an indigent accused, and a wealthy accused ought to be promptly informed of the right to counsel and have equal access to lawyers. This brings about the need for legal representation for the indigent accused, which is a privilege to few South Africans.²³⁹

4.3.2 Foundations of the right to legal representation in South Africa

The South African criminal codes of 1917, 1955, and 1977 provided the right to counsel in principle.²⁴⁰ In the case of *Brink v Commissioner of Police*, the courts held that a person charged in any court for judicial proceedings was entitled to appear with a legal adviser. It also held that this right could only be limited by the law as a necessity. This showed that the legal representation was evolving into a significant right.²⁴¹

Until 1819, in the case of *S v Wessels*, an accused could not demand that they be defended by an advocate. The accused requested for an advocate after taking the plea and in most cases, the court allowed this request. In *S v Wessels and S v Blooms*, the courts held that the denial of this fundamental right could facilitate a miscarriage of justice which warranted the accused's case to be retried. However, in other cases such as *S v Nongila* the court stated that the denial of the right to counsel did not in of itself afford an accused ground for relief. The court cited *R v Howes* which held that the role of the court was to be completely satisfied that despite the lack of legal representation the accused had suffered a miscarriage of justice. Lynn Berat argued that the right to counsel could inherently be deprived because it is dependent on the ability of the accused to pay an advocate to conduct his/her defence.²⁴²

²³⁸ Steytler N C, 'Equality before the Law and the Right to Legal Representation', 2(1), *South African Journal of Criminal Justice*, 1989, 66.

²³⁹ Bekker PM, 'The undefended accused/defendant: a brief overview of the American, American Indian and South African Positions', 24(2), *The Comparative and International Law Journal of Southern Africa*, 1991, 152.

²⁴⁰ Section 93; 218, *Criminal Procedure and Evidence Act* (Act No. 31 of 1917); Section 84, 158, *Criminal Procedure Act* (56 of 1955); Section 73 *Criminal Procedure Act* (51 of 1977).

²⁴¹ Bekker P M, 'The right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa', 37(2), *The Comparative and International Law Journal of Southern Africa*, 2004, 173-175.

²⁴² Berat L, 'Legal Aid and The Indigent Accused in South Africa: A Proposal for Reform', 240-292.

4.3.3 Legislation on the right to counsel in South Africa

The Constitutional dispensation²⁴³ in SA made provisions on the Bill of Rights which guaranteed access to courts²⁴⁴ and the principle of equality.²⁴⁵ The right to counsel includes a duty of police or courts to promptly inform the arrested person of this right. A duty was imposed on courts to provide counsel to the accused if substantial injustice might occur.²⁴⁶

Statutes such as Section 73 of the Criminal Procedure Act 51 of 1977 protected an accused right to legal representation of his choice at their own expense. The provision states that the accused is entitled to legal representation from the time of his arrest. It further elaborates on the notification of legal aid in the case where the accused cannot afford a legal adviser.²⁴⁷

The Institute of Race Relations in Johannesburg was the first legal aid program established in 1968 whose main objective was to give free advice for civil matters only. This was because the Department of Justice deemed their legal system as just thus, there was no need for state-funded legal representation.²⁴⁸ Other organizations were offering free legal work to oppose the apartheid regime such as the South African Defence and Aid Fund which offered legal representation in criminal and civil matters pertaining to apartheid.²⁴⁹ The Legal Aid Act 22 of 1969 was an obstacle for NGOs when providing legal aid because it only covered civil matters. This agitated South Africans who were rampantly initiating law clinics in SA, in universities and published research demonstrating the inadequacies of Legal Aid Act 22 of 1969.²⁵⁰

The Legal Aid Act 1969 ineffective for 25 years because it only served the apartheid government thus was amended. The Legal Aid South Africa Act 39 of 2014 replaced the Legal Aid Act 1969 in 2014. Legal Aid South Africa (LASA), established in 2015, uses public funds to subsidize cost of legal assistance to those who cannot afford it.²⁵¹ Its main responsibilities include rendering and providing access to legal aid, advice, and representation. The main

²⁴³ *Constitution of the Republic of South Africa* (1996).

²⁴⁴ Section 34, *Constitution of the Republic of South Africa* (1996).

²⁴⁵ Section 9, *Constitution of the Republic of South Africa* (1996).

²⁴⁶ Section 35(2), (3), *Constitution of the Republic of South Africa* (1996).

²⁴⁷ Section 73, *Criminal Procedure Act* (51 of 1977).

²⁴⁸ As H V, 'Legal Aid in South Africa: Making Justice a Reality', 49(1), *Journal of African Law*, School of Oriental and African Studies, 2005, 55.

²⁴⁹ As H V, 'Legal Aid in South Africa: Making Justice a Reality', 55.

²⁵⁰ Steytler N.C., 'The Undefended Accused', Cape Town, 1988, 15.

²⁵¹ Legal Aid South Africa Act (39 of 2014).

objective of the legal aid system was to realize the constitutional entitlements of access to justice, right to counsel, and offering legal aid and advice.²⁵²

4.3.4 Facilitation of the right to representation in South Africa

The interpretation of the right to counsel was delivered in the case of *S v Vermaas; S v Du Plessis*.²⁵³ In both cases, the accused had counsel, however, they withdrew or were dismissed from the case due to financial constraints. The accused was unrepresented at the end of their case, thus they applied to the trial judge for state-funded legal representation. The trial court denied this right stating that the future conduct of the trial was not affected by the Constitution which had not yet been promulgated thus highlighting the matter in contention.²⁵⁴

The Constitutional Court²⁵⁵ held that only the trial court could assess whether the accused was entitled to legal representation according to the circumstances of the case which would otherwise lead to substantial injustice. The court also emphasized the need for more efforts to form financial and administrative establishments to actualize this right to counsel. This was because even though the court would inform the accused of this right it was a futile gesture without backed up mechanisms to enforce the right.²⁵⁶ The court, however, stated that an accused entitled to state-funded legal representation did not have a right to select the lawyer appointed to represent him.

The right to legal counsel of choice was interpreted by the Constitutional Court of South Africa in *Ramabele v The State; Msimango v The State*. The court established that the right to legal representation was inherent to the right to a fair trial. However, state-funded legal representation excluded choice of counsel, thus, the accused could only accept the legal representation. Regarding unreasonable delays, the court asserted that a fair trial within a reasonable time was very important for the accused. It was held that the High Court had afforded the accused an opportunity to obtain legal representation and when their counsel withdrew, the court informed the accused on their right to state-funded legal representation. Thus, this gave an accused a fair and reasonable opportunity to get legal representation.²⁵⁷

²⁵² Legal Aid South Africa Act (39 of 2014).

²⁵³ *S v Vermaas; S v Du Plessis*, (1994), Constitutional Court of South Africa.

²⁵⁴ *S v Mhulungu* (1995), Constitutional Court of South Africa.

²⁵⁵ *S v Vermaas; S v Du Plessis*, (1994), Constitutional Court of South Africa.

²⁵⁶ Rosa S, 'S v Vermaas; S v Du Plessis CCT/1/94; CCT/2/94; 1995 (3) SA 292 (CC); 1995(7) BCLR 851 (CC)', 12, *South African Journal on Human Rights*, 1996, 135-138.

²⁵⁷ *Ramabele v The State; Msimango v The State* (2020), Constitutional Court of South Africa.

In the case of *S v Khanyile and another* 1988²⁵⁸ and *S v Mthwana* 1992²⁵⁹ it was held that the infringement of right to counsel caused an accused substantial injustice in the instance where the accused had insufficient funds, was facing a capital punishment sentence and where adequate representation would make a material difference in the outcome of a trial.²⁶⁰

The court used a set of factors to determine whether an accused needed legal representation to prevent substantial injustice from occurring. These factors included circumstances of the accused, gravity and nature of offence, availability of state-funded representation and any other factor a court deems to be relevant²⁶¹

During the apartheid regime the right to counsel was eroded by the State therefore, alternative providers of this right included:

- a) the community-based advice offices;
- b) NGOs;
- c) University Legal Aid Clinics;
- d) Self-help Services;
- e) Ombudsman Services;
- f) Pro Bono Services; and
- g) Short-Term Insurance schemes.²⁶²

However, with the enactment of the Legal Aid South Africa Act 39 Of 2014 the constitutional right to legal representation was realized through the LASA. ²⁶³ LASA determined who an indigent was through a means test provided in the Legal Aid manual. The eligibility criteria required for an individual to be granted state-funded legal aid as set out in the Legal Aid Act subsidiary regulation and legal aid guide. Criminal legal aid was automatically granted to children and persons receiving state grants or old age pension. The other accused persons were required meet a means test as provided in the guide.²⁶⁴

The Legal Aid Board uses justice centers, cooperation agreements with university law clinics, contracted private attorneys and special impact litigation to carry out its mandate. There are 64

²⁵⁸ *S v Khanyile and another* (1988), High Court of South Africa.

²⁵⁹ *S v Mthwana* (1992), The Supreme Court of South Africa.

²⁶⁰ As H V, 'Legal Aid in South Africa: Making Justice a Reality', 58.

²⁶¹ Section 3B (1) (a), *Legal Aid Amendment Act* (20 of 1996).

²⁶² Legal Aid South Africa, *Country report*, April 2017, 1-26.

²⁶³ Section 3, *Legal Aid Act*, 22 of 1969 as amended by the *Legal Aid Amendment Act*, 20 of 1996.

²⁶⁴ Chapter 4, *Legal Aid Guide* 2014.

justice centers where an accused who qualifies for legal representation can be assigned a public defender in criminal cases.²⁶⁵ These centers offer legal services to legal aid applicants from salaried lawyers thus making the centers a one-stop-shop focused on serving the indigent. This improved the quality of the service delivery that the justice center gave to its applicants.

The cooperation agreements are between the Legal Aid Board and university law clinics or NGOs to provide legal assistance to local communities. The Legal Aid Board appoints private attorneys, through the Judicare system, who carry out their function voluntarily with rates as provided in the contract. Special litigation is pursued by the Legal Aid Board on a case-to-case basis on matters that have an impact on South African law such as constitutional violations.²⁶⁶

4.3.5 Challenges faced in South Africa in ensuring the right to counsel

Poverty is the main cause of limited access to counsel for the indigent accused. The accused cannot afford to pay the legal fees thus are left to either represent themselves or find other reliefs offered by the government or civil society organizations. The average South African has to save a week's income in order to pay for a one-hour consultation with an attorney which might not be the priority in that household.²⁶⁷ The Department of Justice addressed this issue through regulation of fees which would lead to the reduction of costs of legal services.

The Legal Resource Centre reviewed the LASA and found that approximately 85% of their matters were criminal matters mostly focused on children found in conflict with the law. However, they also found that as of 2015, there was a lack of state infrastructure, scarcity of legal skills in poor areas and illiteracy and low level of education of legal rights and entitlements which were barriers to access to justice more specifically access to counsel for the indigent accused.²⁶⁸

The ratio between lawyers to the citizens in the country is alarming. Although the number of legal practitioners is rising the question is whether they will be enough to serve the legal needs of the rising population in SA. Despite the number of legal practitioners rising, most of them practice in the cities while most of the population in SA resides away from the formal system. This is a challenge because the legal practitioners are taken out of their comfort zones to serve

²⁶⁵ As H V, 'Legal Aid in South Africa: Making Justice a Reality', 57.

²⁶⁶ Legal Aid South Africa, Integrated Annual report 2017-2018, 2018, 17.

²⁶⁷ *Soobramoney v Minister of Health KwaZulu-Natal* (1998), Constitutional Court of South Africa.

²⁶⁸ Latham & Watkins LLP, *A Survey of Pro Bono Practices and Opportunities in 84 Jurisdictions*, 597-604.

the community and the indigent accused is only comfortable with a legal practitioner with whom they share a similar culture and language.²⁶⁹

The judiciary addressed this issue by distributing mobile courts, establishing more sexual offences community courts and traditional courts. They also addressed the need for additional languages for legal practitioners in court. The Judiciary emphasized on the urgent need to supply additional information to the public about programmes offered by the judiciary including information about the rights of the public and how best they can access justice.²⁷⁰

4.3.6 Conclusion

SA has various avenues for the indigent accused to access counsel due to partnerships between the LASA, legal practitioners, University Law Clinics and NGOs. The Legal Aid System has focused on criminal matters to realize the right to counsel for the unrepresented accused.

4.4 Achievements in facilitation of the right to counsel

4.4.1 Right to have legal representation

Kenya and SA have enshrined the right to a fair trial in their constitutional dispensations while the UK has incorporated the fair trial rights in the ECHR to its domestic law. In accordance with Rawl's principle of justice, Kenya, UK and SA have guaranteed the right to counsel to everyone and only the accused has the right to waiver the right as was found in *General Comment 32*. Thus, the accused is guaranteed right to a fair trial which constitutes the right to counsel which has been stipulated in the Constitution of Kenya (2010) as; the right to be informed of this right, the right to an advocate of one's own choosing and, the right to state funded legal representation. Additionally, it provides that the State has an obligation to ensure that all persons have access to justice at a reasonable fee.

4.4.2 Right to an advocate of one's own choosing

In Kenya, SA and U.K, the courts safeguard the right to counsel of choice where it is reasonable, and the accused has sufficient means to retain counsel. All three countries have emphasized that the right to choice of counsel is not absolute regarding state-funded legal representation In Kenya, the right to choice of counsel this was a right of election rather than a

²⁶⁹ Republic of South Africa, Department of Justice, *Discussion Document on transformation of the Judicial system and the role of the Judiciary in the Development of South Africa*, Mookgopong, Limpopo on 5 August 2012.

²⁷⁰ Republic of South Africa, Department of Justice, *Discussion Document on transformation of the Judicial system and the role of the Judiciary in the Development of South Africa*, Mookgopong, Limpopo on 5 August 2012.

right of choice. In the U.K, the court stated that this right had to be justified, and the accused had no right to demand state-funded counsel of his own choosing. In SA, the courts stated that the trial court was required to give an accused reasonable opportunity to retain counsel and if this was impossible the court ought to inform the accused of the right to state-funded legal representation. Therefore, the right to choice of counsel is indeed limited and more effectively when it comes to state-funded legal representation.

4.4.3 Right to assisted counsel

Kenya, UK and SA children's courts provide mandatory legal representation either from the state or the private sector this is because children do not have the capacity to defend themselves. As Wascilzuk²⁷¹ stated essentially, where the capacity of the defendant is not apparent, the court was required to automatically provide state-funded legal representation. The UK, SA and Kenya have legislation pertaining to state-funded representation where the legal aid scheme was offered to a person with insufficient funds subject to the interest of justice test or substantial injustice test and the means test.

4.5 Best practices identified from the case studies

4.5.1 Legislating on informational rights

In the UK, the police use PACE code of practice which guides them on their mandate while adhering to the duty to inform the accused of his right to counsel. Further, these guidelines provide that the police can only limit this right, after the accused, suspect or detainee has been in custody for less than 36 hours if it interferes with criminal investigations. Kenya lacks elaborated rules for the police on the right to inform an accused of their right to counsel. However, the Criminal Procedure Code of Kenya is silent on guaranteeing state-funded legal representation and availability of legal aid.

Additionally, courts are only required to inform the accused of the right to counsel in Kenya but in UK and SA the courts are required to inform the accused not only of the right to counsel but also the availability of legal aid and its use. Given the status of the unrepresented accused in Kenya, most of them would be dependent on state-funded legal representation.

4.5.2 Legislating on a criterion of means test for legal aid

U.K and S.A have guidelines for the means test that are applied by the legal aid agency of the respective country. In the U.K, the means test is different when accessing different courts thus, has considered the moderate-income class in the community. In SA the legal Aid Guide and

²⁷¹ Wascilzuk M K, 'Substantial Injustice: Why Kenyan Children are Entitled to Counsel at State Expense', 302.

the Legal Aid Manual²⁷² provides for the means test. These guidelines are clearly publicized and distributed by the legal aid agencies to raise public awareness. In Kenya, the Legal Aid Act required subsidiary regulations for it to be fully operational, however, these regulations have not been formulated. This included the regulations on the criteria for the means test for an accused to be eligible for legal aid.

4.5.3 Scope of eligibility for state-funded representation

Both in SA and UK, the judges have a well-defined guide in subsidiary regulation for determining substantial injustice, depending on the circumstances of the case. SA has the Legal Aid Guide and Legal Aid Manual.²⁷³ In SA, the substantial injustice as defined in the legal aid manual is a person at risk of three months' imprisonment who would otherwise experience injustice without legal aid.²⁷⁴ In the U.K, the Crown court only requires means-testing because all cases automatically meet the interest of justice test.²⁷⁵ The Criminal Defence (General) Regulations 2013 and the Widgery report provide for the means test and the substantial injustice test respectively.²⁷⁶ However, the interest of justice test is satisfied if there is a possibility of imprisonment of an accused thus risking the loss of his liberty.²⁷⁷ This increases the probability of a person to be eligible for legal representation This is simplified by the Legal Aid Agency to make it easy for the public to access. This has enabled them to widen the eligibility of unrepresented accused, thus, ensuring their right to counsel is protected. This ideally would include more accused persons in the criminal justice system for state funded representation subject to the means test.

The scope of the state funded representation in Kenya is very narrow. The Practice directions on Pauper Brief Schemes and Pro Bono provide that legal representation is mandatory for capital offenders and child offenders. However, children still lack representation during trial. The court's interpretation of 'substantial injustice' also focuses on the criteria of capital offences therefore, given that 70% of the convicted persons are convicted of petty offences, they would not be granted legal aid. Hence, the customization of these factors to the criminal justice context helps the unrepresented accused have a possibility of accessing an advocate.

²⁷² Legal Aid South Africa, Legal Aid Manual, 2017 20.

²⁷³ Legal Aid South Africa, Legal Aid Manual, 20.

²⁷⁴ Legal Aid South Africa, Legal Aid Manual, 2017 20.

²⁷⁵ Section 21, *Criminal Defence (General) Regulations* 2013.

²⁷⁶ Legal Aid Agency, Interest of Justice: Guidance on the Consideration of Defence Representation Order Applications, 9.

²⁷⁷ Legal Aid Agency, Interest of Justice: Guidance on the Consideration of Defence Representation Order Applications, January 2020, 9.

4.5.4 Nationwide legal aid scheme

The judicial centers in SA are 64 while in the U.K it is nationwide, therefore, the presence in different geographical locations increases access to lawyers for the citizens in accordance with the Basic Principles on the Role of a Lawyer. In Kenya, the NLAS is only located in five regions in the country, therefore, it has not yet achieved its mandate of being a national legal aid scheme. Consequently, this limit public awareness of the right to state funded legal representation.

4.5.5 Delivery of national legal aid service

In SA, the Legal Aid Board relies heavily on its judicial centers which have salaried lawyers, paralegals, clerks, interns and the cooperate agreements with rural law firms and University law clinics to reach the remote areas. Similarly, the U.K Legal Aid Agency cooperates with salaried lawyers from the Public Defence Service and with other contracted law firms that specialize in criminal law. In the U.K the police stations are equipped with duty solicitors who offer legal representation and advice to the accused. This is applied when carrying out arresting duties and in the interrogation stage. As was held in the *Ambrose v Harris* case this protected the accused from incriminating themselves. Additionally, the accused is allowed to have a McKenzie friend who can only advise him but not act as his defence counsel due to the decreased number of eligibilities in UK.

The scheme in SA utilizes most of its resources to the benefit of the people thus adheres to Rawl's difference principle. The NLAS in Kenya cooperates with different civil society organizations such as FIDA Kenya, Paralegals, ICJ Kenya, Kituo cha Sheria, the judiciary and other stakeholders in criminal justice system. Kenya focuses on educating the unrepresented accused on self-representation which is a compromise and disservice to the realisation of their right to legal representation. The government also advocated for simpler court language to enable the unrepresented accused to exercise their right to self-representation. However, in SA the lawyers were urged to have additional languages to show a shared language and culture with the accused. Whereas Kenya legal aid focuses on self-representation education, the U.K and S.A offer a professional legal representative to assist the accused in their defence.

4.5.6 Established private schemes

Unlike in Kenya, the Bar and Solicitor associations in the U.K have different structured schemes for pro bono services with different law firms that work together with the community. SA also has innovative private schemes such as Short-term Insurance scheme which can help an unrepresented accused pay legal fees.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

States have an obligation to respect, protect and fulfill the right to counsel for the unrepresented accused pursuant to domestic law and international conventions. This is ensured by different levels of government. Right to a fair trial and right to counsel has been enshrined in constitutional dispensations or statutes as in UK which incorporated the rights in the ECHR to its domestic law. The executive implements the legislation through national legal aid schemes for unrepresented indigent accused and adherence to code of practices by police officers due to the lack of legal knowledge of the unrepresented accused. The judiciary adjudicates matters regarding right to counsel in different ways to protect the rights of the accused while adhering to the law on a case-by-case basis. Thus, the right to counsel effectively protects other rights of the accused such as the right to remain silent, right against self-incrimination, the presumption of innocence, right to defence and upholds equality of arms and procedural fairness.

Taking note of the nature of the common law system, the international obligation of the State, the prevalent poverty and lack of legal knowledge of the accused in Kenya, the need for counsel for the unrepresented accused is a problem that needs to be addressed. Kenya has a robust constitutional dispensation which informs statutes that secure the right to counsel with the exception of minor ambiguity. Ambiguity is observed in the Criminal Procedure Code that lacks a provision on the right to state funded representation or legal counsel of choice, the Legal Aid Act lacks subsidiary regulation for its implementation and the definition of substantial injustice is yet to be defined by any legislation.

The facilitation of this right is done by the courts assigning an advocate in the interest of justice. The courts ensured that this right is not infringed and facilitated it to vulnerable groups such as children. However, the children are still not represented, and the police fail to inform the accused of the right to counsel. The unrepresented accused mainly relies on the private sector to access counsel. Some of the challenges the State faces when realizing this right include unavailability of lawyers, the underfunded and underpublicized NLAS, limited scope of state-funded legal representation as provided in the pro bono and pauper brief directions and the high percentage of poor people in the criminal justice system who cannot afford counsel. The best practices in the UK and SA which Kenya can borrow to overcome some of its challenges

include legislating on informational rights with regards to right to counsel, establishment of structured private schemes and establishing an effective national legal aid scheme.

5.2 Recommendations

The research makes the following recommendations based on the findings:

1. The National Police Service Act and the Criminal Procedure Code should codify the right to inform an accused of his right to counsel and state funded legal representation.
2. The Kenyan government should hasten the operationalization of the Legal Aid Act 2016 to enable it to carry out its mandate and implement the objectives in the National Action Plan 2017-2022 such as formulating subsidiary regulation on the criteria for the means test for the indigent person.
3. The Government, through courts, police stations, NLAS, in coordination with the civil society organizations should extend public awareness of the right to counsel and the different ways to access it to a national level.

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