



University of Nairobi

COLLEGE OF HUMANITIES AND SOCIAL SCIENCES

INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES

RESEARCH PROJECT ON

**THE ROLE OF THE CRIMINAL JUSTICE SYSTEM IN PROMOTION AND
PREVENTION OF TERRORISM, A CASE STUDY OF KENYA. (2011-2018)**

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R50/7760/2017

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**A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT FOR THE
AWARD OF MASTER'S DEGREE IN INTERNATIONAL STUDIES FROM THE
UNIVERSITY OF NAIROBI**

DECLARATION

I affirm that this Master Thesis is my original work and has not been submitted for another academic award in any other University or Academic Institution. Ideas from other scholars and excerpts are clearly referenced.

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DEDICATION

This project is dedicated to my husband, Mr Muliru Yoni and son, Xander Muliru who have constantly encouraged, supported and inspired me to toil and make the world more habitable and safe for them to leave in. They have been a source of strength, during this process. I also dedicate this work to my parent's, for their prayers, support and unconditional love; and my sibling, who has been with me and helped me through the entire process.

ACKNOWLEDGEMENT

I would wish to thank the God for the grace and knowledge to complete this Degree. I would like to recognize the support of family and friends who have supported me and of whom am deeply indebted to. My husband who has led by example in our family by always striving to achieve more and having a never-ending push of never giving up or giving in to anything that comes his way and for the insights in the course of my study. My son, who has also been a great blessing to me by always giving me a smile and a hug when all seems too difficult to achieve. I would like to mention, and most sincerely thank my Lecturers, with special thanks to Dr Wayne Mutuma, for guiding me through the entire process and helping me through my study and research. Finally, my colleagues who have been of great support by going an extra mile to encourage and assist me whenever I needed that extra hand.

ABSTRACT

Terrorism has been in existence under different terms and it's not a new prodigy to the world today. It has been in existence for an exceptionally long time and has been shifting and changing form into a dynamic and sophisticated global concern, resulting in the massive loss of lives and dignity to humanity. With the globe being under the religious phase of terrorist activities, the Horn of Africa countries, including Kenya; face the brunt of the menace. In every state, the criminal justice system should provide a seamless mechanism of dealing with terrorism. However, the opposite seems to be accurate as terrorism-related incidents are on the rise, with extrajudicial killings and limited prosecutions being witnessed. In Kenya, the courts are accused of misconduct and misdeed resulting from flimsy evidence provided by the investigating officers. The presence of jurisprudence notwithstanding, the application is wanting, and a lot of the responses misdirected, leading to drivers of terrorism than solutions to the challenge. Correctional facilities have also become target and hot recruitment grounds for inmates. The main objective of the study examines whether the criminal justice system inadvertently prevents or supports terrorism through the application of the available instruments and processes. The study adopts an exploratory evaluation of the existing works on the subject matter, as the most preferred method for this study, taking into consideration the availability of secondary sources. The study examines, the procedures and protocols that have been put in place for fair trial of suspects and the victims. It examines the loopholes attributed to the failures of the criminal justices' system in Kenya. The study thus concludes that, even though much has been done to ensure that justice is served, more effort is need in ensuring that there is better corporation between the different actors within the judicial system, and the different strategies developed need to have a well laid out strategy of how they interrelate and work to together seamlessly, and ensuring that they address the issue of justice when it comes to issues terrorism in the county. This study will be used to advise the academia by building a body of knowledge on the issue and also be a source of information for the legal institutions, criminal justice system, government and development partners for new initiatives and also for programming purposes.

A List of Abbreviations and Acronyms

ATPU	Anti-terrorism police Unit
CT	Counterterrorism
CAP	County Action Plan
BBC	The British Broadcasting Corporation
CEO	Chief Executive Officer
CoK	Constitution of Kenya
CSO	Civil society organizations
CT	Counterterrorism
GoK	Government of Kenya
ICC	The International Criminal Court
ICL	International Criminal Law
ICCJ	The International Criminal court of Justice
IED	Improvised Explosive Device
IPOA	The Independent Police Oversight Authority
ISIS	Islamic State of Iraq and the Levant,
KDF	Kenya Defense forces
KNCHR	Kenya National Commission on Human Rights
NCTC	National counter-terrorism Center
NLA API	National Legal Aid and Awareness Policy
NSCVE	National Strategy to Countering Violent Extremism
NPS	National Police Service
NSIS	National Security Intelligence Services
P/CVE	Preventing / Countering Violent Extremism
UDHR	Universal Declaration of Human Rights

USAID United States Agency for International Development

UNSC United Nations Security Council

VE Violent Extremism

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CHAPTER ONE

1.0 Introduction

Terrorism has been in existence under different terms and it's not a new prodigy to the world today. It has been in existence for an exceptionally long time and has been shifting and changing form into a dynamic and sophisticated global concern, resulting in the massive loss of lives and dignity to humanity. The magnitude of its effects is felt across the globe and raises questions of; t how to counter it, the institutional justice capacity, and authority's ability, and mandate to persecute those culpable. Additionally, achievement of justice to those afflicted is yet to fully analysed.

In the 21st century, terrorism has remained the primary global concern and security challenge for many states and governments. The attack in United States in 2001 caused a myriad of reactions from world leaders and international institutions, including the United Nations Security Council; condemning the heinous act and calling for all nations to '*redouble their efforts*' to thwart and prosecute terrorist.¹

The rising threat from terrorism has also afflicted Africa. The attacks on embassies in on East Africa in 1998, leading to the death of 223 civilians including diplomats,² is an example of the effects of terrorism in the region. In 2002, Kenya had its subsequent major setback as a result of terrorist activity, in the simultaneous attacks on tourists from Israel in Kenya. This attack killed eight people and left about 80 civilians wounded.³

¹ Hault Vault, "Reactions to 9/11," History.Com August 13, 2010. <https://www.history.com/topics/reaction-to-9-11>. Accessed 03 24, 2018.

² Christopher Clapham. "Terrorism in Africa: Problems of definition, history and development," *South African Journal of International Affairs*, 10:2, (2003): Pp.13-28, DOI: 10.1080/10220460309545424

³ The Guardian, "At Least 12 Killed in Kenya Hotel Blast," The Guardian Newspaper, November 28, 2002. <https://www.theguardian.com/world/2002/nov/28/israel.kenya>. Accessed 03 27, 2018.

Kenya's most notable attacks to date have been the Westgate attack in 2013,⁴ Mpeketoni attack in 2014⁵ and the Garissa University attack in 2015.⁶ Despite the war on terror aiming at neutralizing the threats of terrorism, the international community has always stressed on the utilization of the conventions of law and the permitted systems to prevent and counter terrorism. However, there little to show on the effectiveness of the judicial institution using those reprimanded and arraigned in court as case studies.

The lack thereof of the institutional, legal capacity has not gone unmentioned or unnoticed, and its rumored that the incapacity to adequately deal with the issues contributes to the current outcomes. This study aims at finding out the loopholes and gaps within the criminal justice system that cause the insufficiency, in dealing with terrorism. The study will endeavour to understand the processes, drivers and the roles the different actors play within the criminal justice system. The researcher will analyze samples globally and use Kenya as a case study.

1.1 Statement of the Problem

There has been much mention on the topic of terrorism and the fight against it, that rallies support from around the globe. Kenya has in recent times, been a victim with the country witnessing attacks, loss of lives and property damage. In pursuit of a common goal of fighting terrorism, states are accused of using force and disregarding the very humanity that they are trying to fight for.

The rise in terrorist activities in Kenya in 2002, therefore warranted the country to come up with countermeasures that would ensure a haven for the citizen. In 2003, the National Counter-Terrorism Centre (NCTC) and the Anti-terrorism police Unit (ATPU) were established to

⁴ Tristian McConnell, "Close Your Eyes and pretend to be dead," *Foreign Policy*. September 15, 2015. <http://foreignpolicy.com/2015/09/20/nairobi-kenya-westgate-mall-attack-al-shabab/>. accessed April 27, 2018.

⁵ Catherine Wambua-Soi, "Kenya Mpeketoni attack: Who is fooling who?" *Aljazeera*, July 23, 2014. <https://www.aljazeera.com/blogs/africa/2014/06/99121.html>. Accessed April 27, 2018.

⁶ BBC News, "Kenya attack: 147 dead in Garissa University assault," *BBC News*, April 02, 2015. <http://www.bbc.com/news/world-africa-32169080>. Accessed April 27, 2018

ensure the fight against terrorism was being addressed and streamlined through a well-defined channel.⁷ Kenya is by no chance an exception to allegations; with dozens of cases concerning the use of lethal force and extra-judicial ⁸ killing. It is argued that these factors have further propelled the emergence of gangs and terror groups within its borders, with comparatively high levels of radicalization among the at-risk youth population, who are either sympathizers or pushed toward terrorism by circumstances.

It is a government's mandate to operate in the conventions of law by protecting and promoting human rights of all its people. A response that utilizes the rule of law would further ensure that the process is seamless to its entirety; from arrest to actual prosecution and imprisonment of a culpable terrorist.⁹

However, incidents detailing operations outside the rule of law are on the rise in the country and go unreported due to fear of victimization or harassment by law enforcement. In 2016, a newspaper article quoted a senior police officer stating that up to 80 cases linked to terrorism were in the courts.¹⁰ This number is much lesser compared to the terrorism-related incidences that have been reported in the country which may to some extent, be attributed to the swift operationalization of the legislated legal framework and the counter-measures put in place in addressing terrorism.

⁷ Edward Mogire, & Kennedy Agade Mkutu, "Counter Terrorism in Kenya," *Journal of Contemporary African Studies*, 29(4), (2011): Pp. 473 - 491.

⁸ Amnesty International, "The impact of Anti-terrorism operation on Human Rights" *Amnesty International*. April 23, 2005. <http://www.amnesty.org/en/library/info/AFR32/002/2005>. Accessed April 28, 2018

⁹ Jessica Schubert, *What Is the Criminal Justice System? Definition, Components & Problems*. *Study.Com*, April 04, 2018. <https://study.com/academy/lesson/what-is-the-criminal-justice-system-definition-components-problems.html> . Accessed 04 28, 2018

¹⁰ Vivian Jebet, "80 Cases on Terrorism Presented in Court This Year, Says Muhoro." *All Africa News*, July 31, 2016. <http://allafrica.com/stories/201607310118.html>. Accessed 04 29, 2018.

As nerve-racking and challenging as the threat of global terrorism is, all the key actors and significant stakeholders involved in the fight against terrorism must adopt strategies that would lead to the defeat of this global menace.

The impact and treatment of terror suspects, before, during and after confinement has been argued to cause more sympathy to extremist organisations and to erode the gains of P/CVE in Kenya. This, therefore, warrants changes that would include, sectoral capacity building for the different subsystems, within the justice system such as the law enforcement, magistrates and judges, prosecutors and investigators, which should be adopted to make the war against terror successful within the confines of the law.¹¹

1.2 Research Questions

1. What are the strategies and procedures adopted by Kenya's Criminal Justice System in addressing terrorism?
2. What is the impact of the strategies and the inadvertent consequences of the Criminal justice system in fighting terrorism?
3. Case study of Al-Shabaab linked cases to illustrate the unintended consequences of the Criminal justice system

1.3 Hypothesis

Anchored on the edited model, the researcher seeks to find out whether the independent variable; the criminal justice system mandate in the prevention of terrorism and its role in the promotion of the same affects the dependent variable; terrorism, based on the management and execution of case's related to terrorism in the country.

¹¹ UNODC, "UNODC launches manual on human rights and criminal justice responses to terrorism," *UNODC Kenya*, March 28, 2017. https://www.unodc.org/unodc/en/frontpage/2017/March/kenya_-unodc-launches-manual-on-human-rights-and-criminal-justice-responses-to-terrorism.html. Accessed August 08, 2019.

In her analysis, the researcher will review the following hypothesis based on the research study objectives;

H₁: The justice system encourages terrorism due to lack of proper implementation and interpretation and inadequacy in addressing terrorism.

H₂: The Law has unintended effects of bolstering terrorism through the judicial processes and its incapacity to prosecute the cases fairly

H₃: The lack of cooperation between the different arms of the criminal justice system promotes terrorism

1.4 Objectives of the research

1.4.1 General Objective

To examine whether the criminal justice system inadvertently prevents or supports terrorism through the application of the available instruments and processes.

1.4.2 Specific Objectives:

1. To investigate whether the criminal justice system inadvertently through the adopted strategies, procedures and protocols is leading to Violent extremism and terrorism
2. To examine if there is a link between the Kenya judicial system and public support of Al-Shabaab and other extremist organizations
3. To examine the judicial system related drivers to violent extremism and terrorism.

1.5 Justification of the study

There are a couple of issues that necessitate this study. In an article published in January 2018 dubbed “finding a cure of Kenya’s criminal justice system,” by Lady justice Grace Ngenye, she, highlights the imminent need for justice as evident through the presence of security within

all spheres of life.¹² This creates some form of distress to the civilians who opt for leverage from the media, which is predominantly accused of playing both judge and jury in many instances, making it almost impossible for the law to take its due course.

The occurrences of dozens of cases concerning extrajudicial killings, mysterious disappearance, harassment and profiling by law enforcement have been reported across the borders of our country. These can be attributed to being among the many reasons as to why many of the terror suspects go free as a result of family and relatives being in fear of losing their relatives without a free and fair trial.¹³

The courts, on the other hand, have also been reported to have their fair share of misconduct's and misdeeds leading to lack of free and fair trials for those that make it to the courtrooms. Prosecutors have been said to work with police and the suspects, and the files end up misplaced. It was also established that the police abstract the entire court process by failing to provide evidence that is beyond a reasonable doubt in court, and ensuring that the witnesses get to court and that their security is guaranteed.¹⁴

The fear of retribution is sighted as some of the many reasons as to why most of these cases go unprosecuted. The correctional facilities have also become a target and hot recruitment grounds for inmates. The effects that this has had in international relations and the process of dealing with terrorism as a whole cannot be overstated. This fact then begs the question of how then can we adequately deal with terrorism in the country and as a country, without infringing on the law and its provision?

¹² Grace Ngenye, "Finding a cure of Kenya's criminal justice system," *Judiciary*. January 27, 2018 <https://www.judiciary.go.ke/finding-a-cure-of-kenyas-criminal-justice-system/>. Accessed May 29, 2019

¹³ Maggie Fick, "A Special Report-Amid claims of police brutality in Kenya, a watchdog fails to bite," *Reuters*. February 23, 2018. <https://af.reuters.com/article/africaTech/idAFL4N1QC4AM>. Accessed April 29, 2018.

¹⁴Ibid

Understanding the drivers of terrorism and the process of radicalisation is also of equal importance in the effort of countering terrorism. It is similarly essential also to establish the linkage between the drivers of the inmates and those who are out in the streets. To date, most of the drivers mentioned in all the reports point to rising numbers of inmates being radicalised within the system that is meant to be a correctional facility and is also meant to rehabilitate the offenders for reintegration into the community once they serve their term in the prisons. The dominant corruption in Kenyan correctional facilities, that permits convicts to have unrestricted messaging and financial access from outside the prison, makes the situation more dire. This status is something that Al-Shabaab is presumed to be gaining and establishing terrorist cells inside the prison.¹⁵

To this end, IPOA, The Police oversight Authority has taken up the task of investigating the police/law enforcement dealing with such issues to ensure that the system is free, fair and ensure that the due process is followed. However, even with this kind of information, it is not clear on the level of effort from the systems in Kenya. The effort it has made has been recognized, but the question of how and what can be done to make the process more seamless requires an investigation to examine whether the criminal justice system inadvertently prevents or supports terrorism through the application of the available instruments and processes.

¹⁵ Boniface Msangi, "Alarm as Shabaab Infiltrates Prisons," *Mediamax News*, July 17, 2015. <http://www.mediamaxnetwork.co.ke/156069/alarm-as-shabaab-infiltrates-prisons/>. Accessed Jan 29, 2019.

1.6 Theoretical Framework

The legal system in Kenya still requires extensive capacity building. Terrorism is a global phenomena and states like Kenya should have a legal framework to respond without infringing on human rights and dignity without discrimination.¹⁶

In this research, the researcher will incorporate left realism theory which attributed high levels of crime to the different factors affecting civilians including marginalisation, a liberal approach which essentially advocates for an eye for an eye as a response and a line of thought that most of the law enforcement agencies are using in dealing with terrorism cases though not in isolation, and the orthodox approach which identifies the strategies used in violent extremism and terrorism when conducting the study.

1.6.1 Left Realism Theory

Left Realism has generally been denoted as a political thought focusing on the common causes of crime and aberration in society today as it related to development and investment.¹⁷ This is because of the cultural inclusion, that allows everyone to pursue their ideas and concepts under capitalism. It is within this theory that scholars have categorised and stated different variants that led to the execution of the LRT theory. The flexibility allowing for ideas to be pursued results in a criminogenic triangle composed of, relative deprivation, marginalisation and subculture. This triangle can be used to explain some factors that lead to violent and extreme reaction from individuals and groups.¹⁸

¹⁶ Peter Onyango, *Kenya Entangled in Proscribed Crimes of Terrorism and Violations of Human Rights Law*, (Kenya: Horizon Research Publishing, 2015).

¹⁷ Joe Ricker, "What is Left Realism in Criminology?" Study.Com, August 18, 2017. <https://study.com/academy/lesson/what-is-left-realism-in-criminology.html>. Accessed April 30, 2018

¹⁸ Joe Ricker, "What is Left Realism in Criminology?" Study.Com, August 18, 2017. <https://study.com/academy/lesson/what-is-left-realism-in-criminology.html>. Accessed April 30, 2018

The application of this theory to this study will be to make sense and deduce the different dynamics and set-up that led to the execution of heinous crimes committed by law enforcement, including extrajudicial killings, who have on various occasions been quoted stating that they are not compensated fairly for their efforts while for the case of terror suspects and those joining the groups have openly alluded to the fact that they are pushed due to victimisation and other social injustices inflicted to them by the system and through the system.

In as much as a realist acknowledges that criminal activities have an element of social construction, they also allude to the fact that human misery is undeniably a significant cause and drive into crime. Victimization, profiling and unemployment are a few social constraints linked to the heightened level of criminal activities in society today. For a left realist, crime, which is also the general blanket of terrorism is more rampant and more of a reality, particularly for the socially disempowered who are disproportionately victims of crime. Most left realist scholars pointed at the different dimensions about how specific capitalist economic arrangements lead to severe violence and punitive cultural attitudes from both the state and the people.

Economic inequality is at the core of most crimes, hence the assertion of the left realist is that of focusing on policy that will significantly affect the socially disempowered, hence reducing the social gaps and eliminating other social injustices in society today.¹⁹

The criminal justice system is infiltrated with very high levels of corruption, due to various reasons ranging from, low salaries to the law enforcement, the judicial systems and finally the correctional facilities. Members of these facilities usually take bribes while others get into a system that is already messed up, and follow suit. In various researches conducted, most of

¹⁹ Randolph R. Myers, "Left Realism Theory," *The Encyclopedia of Criminology and Criminal Justice*, January 22, 2014, <https://onlinelibrary.wiley.com/doi/abs/10.1002/9781118517383.wbeccj193>. Accessed 04 30, 2018.

those radicalised and recruited into terrorism are those who have been affected by various issues including, victimisation, unemployment, historical injustices, among others.

The researcher will want to ascertain the main reason behind the high level of terror cases being withdrawn and those that go unprosecuted by finding out the main reasons behind this. This theory will help in the development of the actual reasons behind the high rates of radicalisation and recruitment, terrorism and the failure to ensuring that there is no spiral effect within the system, hence hampering the efforts.

A realist also views the world as is and are of the assertion that people are sinful and wicked by nature. They, therefore, advocate for power and dominance and this may explain why the law enforcement officers usually end up acting as judge and jury in terror cases by assassinating the suspects, torturing them and why others also end up disappearing under mysterious circumstances.

1.6.2 Liberal Approach

Liberals, in general, support the treatment of harshness with harshness. An eye for an eye. This seems to be the scapegoat that law enforcement in Kenya seems to be using. A Shoot to kill order had been issued against terrorist a while back, and this seems to fit perfectly well with the liberal approach. However, according to an article written by Jonathan Simonoff, “the liberal approach to terrorism would be to treat it as a criminal matter rather than a military matter.”²⁰

To put this into perspective, Jonathan states that this is more a matter of strategy than tactics. Liberals argue that conservatives inflate the importance of what are inherently criminal gangs,

²⁰ Peter Chalk, “The Liberal Response to Terrorism,” in *West European Terrorism and Counterterrorism*, Peter Chalk. (Palgrave Macmillan, London: 1996), Pp 91 – 116.

the categorization and treatment of crimes with limited output and impact as existential threats, and thus convincing the people to accept limits on civil liberties and overspending on the criminal justice system. Some argue that we would be better off and just as safe if we treated terrorists the way we treat drug cartels and other criminal offences, but the absence of a comprehensive assessment on the amount of destruction they cause in the society, challenges this narrative.²¹

The application of this approach in this study will be to offer insights into the justification that the state has within its constitutional right to classify and execute terrorist through law enforcement. The assertion to this is that the state has classified terrorists as individuals who leave alone in isolation and hence, the mistreatment of this individual does not affect any other person or persons.

1.6.3 Orthodox Terrorism Theory

Orthodox terrorism Theory attempts to explain the logic of terrorism as a doctrine and the strategies applied through political actions and reaction for change.²² The orthodox approach is that which describes terrorism as the study of methods of violence through means,²³ as is further denoted as functional²⁴: it illicit and provokes a reaction from state governments.

It is also symbolic; as it aims at intimidating and frightening, which according to Sun Zu, terrorism intends to kill on and scare tens of thousands. Terrorism is also tactical based on the tactics employed in acts of terror. The orthodox approach has mainly focused on operations of terrorists and operational methods with a clear interest in coming up with ways to counter it

²¹ Ibid.

²² Ishrat Abbasi, Mukesh Kumar Khatwani, "An overview of the political Theories of Terrorism," *Journals of Humanities and Social Science* 19:8, (2014): Pp 103 - 107.

²³ Jason Franks, "Rethinking the Roots of Terrorism: Beyond Orthodox Terrorism Theory—A Critical Research Agenda," *Global Society Journal*, 23:2, (2009): Pp 153-176, DOI: 10.1080/13600820902766219

²⁴ Abbasi, Ishrat, and Mukesh Kumar Khatwani, "An overview of the political Theories of Terrorism." *Journals of Humanities and Social Science* 105 (2014) Accessed 09 2019.

through policy and the institutional capacity of states of dealing with the vice without necessitating human rights uprise while at it in instances where it is violated.

Terrorism does not have a sole reference as of yet with different meanings being assigned to it. Different groups have assigned and attributed it to a variety of reasons and narrative, including political ideology, religious and ethnic bases and power, only to name but a few.

The incorporation of the different theory will be to have a holistic approach to terrorism, and the counter-measures, with a keen eye on the state, approaches to count-terrorism (CT) through the different adopted strategies and the legal institutions.

1.7 Literature Review

International Criminal Law (ICL) has achieved a degree of performance and prominence through the creation of international tribunals. The tribunals have conducted various trials through their hybrid nature which has led to the combination of international and domestic features in the prosecution of past atrocities hence strengthen international Norms. However, even with the justice cascade, questions on the effectiveness and legitimacy persists more so in this era to global terrorism.²⁵

The proliferation of global terrorism has subdued enormous pressure to bring terrorism inside the circle of International Criminal Justice (ICJ). The quest to hold perpetrators responsible within the framework of an international criminal proceeding that adapts to the prevailing fair trial standards and principles of legality dates to Nuremberg, primarily regarded as the birth of modern international Criminal law.

Terrorism has been a frequent subject for debate and discussion globally, forming part of the narrative when it comes to fairness and legal capacity to try such cases within the different jurisdictions across the globe. However, there is not a unified and globally accepted definition of terrorism in international humanitarian law. It remains insufficiently precise and prone to overboard interpretations.²⁶ States, international organization's and scholars have attempted to give terrorism a definite definition, coined around similar attributes that they seem to agree on.

According to Mathieu Deflem, "*Terrorism in its purest form is the unilateral self-help by organized civilians who covertly inflict mass violence on other civilians.*"²⁷ The authors distinguish characteristics of terrorism, through its very nature of using force that injures and

²⁵Jonathan Hafetz, *Punishing Atrocities through a fair trial: International Criminal Law from Nuremberg to the Age of the Global Terrorism*. (Cambridge: Cambridge University Press, 2018).

²⁶ Ibid

²⁷ Mathieu Deflem, ed. *Terrorism and Counterterrorism: Criminological Perspectives*. Vol. 5. (Oxford: Elsevier Ltd, 2004).

kills many, hence partly resembling lesser forms of criminal activities in the modern-day such as homicide and assaults.

The bases of the arguments brought forward by the scholars is that of treatment of terror suspects through the same criminal law by simplifying the act to resembles other criminal activities concerning the pain inflicted, and the amount of destruction caused. In this front, it would then be justified to have terror suspect through the criminal law with a mere comparison of the authority they have committed being compared to one that already exists in the law.

Jonathan Ottavio, in his contribution, denotes terrorism as the 'crucible' in which the rule of law is tested.²⁸ According to him, the justice system has often acquitted itself admirably and at other instances failed miserably through the prosecution of terrorism-related cases. He attributes this by classifying them into two major parts: Concerns over the effectiveness from law enforcement agencies in handling arrests and solving the issues and the climax of the legal process through the trial period.

Like any terrorism-related case in Kenya, many of the suspects do not make it to court while others end up being acquitted due to lack of proper evidence handling and presentation.²⁹ The case of Sheikh Aboud Rogo is a classic example of Jonathan's argument. Sheikh Rogo was arraigned in court, and after two years he was acquitted for lack of enough evidence as was noted by the proceeding judge, only for him to be shot dead by what was rumored to be the police in Mombasa on the fateful morning of 27th August 2012.³⁰

²⁸ James Ottavio Castagnera, *Counter-Terrorism studies case studies in the court room*. (Florida: CRC Press, 2010).

²⁹ Mkongo, Malemba. "The star Newspaper." *The star*. August 29, 2018. <https://www.the-star.co.ke/news/big-read/2018-10-29-why-terror-cases-rarely-get-convictions/>. Accessed August 08, 2019.

³⁰ Nyabega Gisesa, "Aboud Rogos Last Moments." *Daily Nation*, September 1, 2012. <https://www.nation.co.ke/news/Aboud-Rogos-last-moments/1056-1492950-86xb9h/index.html>. Accessed September 09, 2019.

Law is a function of social space,³¹ hence scares at the extremes of relational and cultural distances in conflict setups. Since terrorism is not categorized simply as a form of crime, through social lenses, the control of this menace cannot be informed by criminal justice alone. Underpinning terrorism by attempting to prosecute using the criminal law is therefore sociologically unrealistic.³²

In this argument, the author attests to the fact that it is merely impossible to categories ‘and equate terrorism to other listed crimes although they may have some characteristics in common including the violation of human rights.’³³ Mathieu further endorses preposition of the existing theory of answering and responding to terrorism in kind, basically denoted as a policy of ‘Tit for Tat’, an affirmation of using equal force and violence against those associated with terrorism.³⁴

The law enforcement department in Kenya has indirectly been in agreement with this notion, through their acts of retaliation and the killing and disappearances of terror-related subjects within the state.³⁵ A report published in 2014, reported evidence of 10 dead terror suspect who were last seen in the custody of the Anti-terror police unit.³⁶

³¹ Mathieu Deflem, ed. *Terrorism and Counterterrorism: Criminological Perspectives*. Vol. 5. (Oxford: Elsevier Ltd, 2004).

³² Mathieu Deflem, ed. *Terrorism and Counterterrorism: Criminological Perspectives*. Vol. 5. (Oxford: Elsevier Ltd, 2004).

³³ Clement Voulé, “Stop using anti-terrorism laws to target human rights defenders and guarantee due process,” *International Service for Human Rights*. April 13, 2015. <https://www.ishr.ch/news/kenya-stop-using-anti-terrorism-laws-target-human-rights-defenders-and-guarantee-due-process>. Accessed August 08, 2018.

³⁴ Mathieu Deflem, ed. *Terrorism and Counterterrorism: Criminological Perspectives*. Vol. 5. (Oxford: Elsevier Ltd, 2004).

³⁵ Human Rights Watch. "Kenya; Killings. Disappearances by Anti-Terror Police." *Human Rights Watch*. August 18, 2014. <https://www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police>. Accessed July 09, 2019.

³⁶ Ibid

Terrorism dynamics are changing, and the world is coming into terms with the dynamic nature of terrorism which results in a combination of strategies and tactics from both state and non-state actors.³⁷

With a call for a global alliance to fight the vice, many states have established institutions and various frameworks. However, in a US-published report, the systemic issues in place, become complicated and worse through creation of additional bodies. The challenge of the criminal justice system is that it is an organization with no responsible leader, no entity/ person is in charge, leaving everybody to operate in their way.³⁸

Nation-states, including Kenya, have developed legal instruments to deal with, and respond to terrorism. The various laws in Kenya include; Security amendment bill of 2014,³⁹ KDF bill of 2015, that allowed them to operate inside the state,⁴⁰ the anti-money laundering act,⁴¹ and the penal code.

Additionally, there are institutions created by these laws to deal with the challenge. One such institution is the National Counter Terrorism Center; with the mandate to coordinate all issues related to terrorism,⁴² created by the 2013 prevention of terrorism bill. This institution created National Strategy to Counter Violent Extremism, (NSCVE) and County Action Plans (CAPs) to guide responses to the issues of terrorism.

³⁷ Council on Foreign Relations, "The Global Regime for Terrorism," *International Institutions and Global Governance Program*. August 31, 2011. <https://www.cfr.org/report/global-regime-terrorism>. Accessed September 10, 2019.

³⁸ Richard Bennett, Transforming the us Justice System, rejecting the status quo, speeding the pace of reform, Washington, D.C American university. (2019). Retrieved from https://www.american.edu/spa/news/upload/Transforming-the-US-Justice-System-Report_ONLINE_V30.pdf

³⁹ *The Security law (Amendment) Act 2014*, Nairobi, National Council for Law Reporting, 317. (2014.) Accessed 09 2019.

⁴⁰ *The Kenya Defense Forces (Amendment) Bill 2015*, Nairobi: National Council for Law Reporting, 2275. (2015.) Accessed 09 2019.

<http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2015/KenyaDefenceForcesAmendmentBill2015.pdf>.

⁴¹ *Proceeds of Crime and Anti-Money Laundering Act* Nairobi, National Council for Law Reporting. (2012) Accessed 09 2019.

⁴² *The Security law (Amendment) Act 2014*, Nairobi, National Council for Law Reporting, 317. (2014.) Accessed 09 2019.

The instruments developed fail to address the gaps associated with justice, but they also fail to recognise the interactions and coordination required to make the system more organised. In order to be efficient and effective, realistic measures have to be taken to facilitate the pace and speed at which reforms take shape and place within the system. This also means that the world generally needs to think outside the box and avoid the norm of replicating the same strategies over and over again and yet they are not working.

It is excellent of the government to come up with institutions and reforms that aim at countering terrorism by enhancing, supporting and complementing the already existing law. However, the efforts have not been realised and though through to incorporate and include various aspects including the essential anchoring of these new strategies on the laws that are already in existence. This brings about a contradiction and some form of confusion when it comes to what takes precedence over the other in terms of institutions, policy and strategy when dealing with terrorism and violent extremism.

1.8 Research Methodology

The study will be designed as an exploratory review of the existing works on the subject matter. The highly preferred method for this study, taking into consideration the availability of secondary sources, was desktop analytical research; this includes articles, books, journals conventions, treaties, internet, and case studies. Available literature in books, internet and periodicals will be the main tools for conducting this research. The study will extensively adopt secondary analysis by analysing data presented by other scholars and writers.

This method allows the researcher to adopt a desktop triangulation process that would otherwise be difficult in a fieldwork process. It eases the accessibility to the research material, very time efficient and cost friendly. This, therefore, renders the desktop analytical method the most preferred for this work. The desk research in this study will comprise of probing of available resources, such as articles, journals and reports on the institutional capacity of justice system and terrorism.

1.9 Chapter Outline

This section provides the layout of the research study. This report includes five chapters, as depicted below.

Chapter one covers the introduction and background research of terrorism from a global lens, and systematically focus in Kenya over the years, with a review of how such cases have been handled and highlights on the need to have affected judicial system handling terrorism in Kenya. The chapter also supplies an overview of the study by critically analysing the Criminal justice system scholarly approach to fighting terrorism across the globe

Chapter two critically reviews the procedures and the criminal justice protocols that have been put in place to ensure that there is a fair trial for both the suspect and the victims. The review covers various stages on the general treatment of suspects from arrest to arraignment in court and sentencing. The main issues addressed include; the composition of the criminal justice system, the mandate of every branch, the various instruments that have been developed to supplement the existing laws in response to terrorism in the country today.

Chapter three looks into issues revolving around the discussed handling of terrorists with a keen focus on targeted killings, physical and psychological torture of the suspected terrorists, detention and arrests of suspected terrorists by the police, the derailed court process and the situations in the various correctional facilities. The chapter will also address the current loophole attributed to the failures of the criminal justices' system sighting the actors solely responsible.

Chapter four examines a classic case in Kenya that has gone through the system in Kenya, and one that highlights the vulnerability of terror suspects in the country. The chapter will analyse the process, outcome and verdicts which could be leading to sympathizers and other persons to violent extremism and terrorism or better yet the reduction of the same. The chapter will examine and

evaluate cases that have been mentioned vis a vis the application of the measures as listed in Chapter Two and hence evaluate the disconnect.

Chapter five provides a summary of the finding, conclusion and offers recommendations. This chapter highlights the critical summaries from each chapter and make suggestions for further research in the subject matter.

CHAPTER TWO

THE STRATEGIES AND PROCEDURES ADOPTED BY KENYA'S CRIMINAL JUSTICE SYSTEM IN ADDRESSING TERRORISM

2.0 Introduction

This chapter will be critically reviewing the criminal justice system in its entirety by examining the processes and procedures that have been put into place in dealing with terrorism in Kenya, from arrest, arraignment in court and eventually sentencing. In a detailed manner, the chapter will identify the judicial systems and other legal protocols that have been adapted to fight terrorism in the country. The Chapter explores the descriptive overview of the three main actors within the criminal justice system and are directly involved in the legal protocols and systems put in place in the war against terrorism through the legal process.

2.1 Legal and Formal framework of Terrorism Handling in Kenya

2.1.1 The Process

The institutional, legislative and policy framework governing the different subsystems and actors of the criminal justice system was restructured to unify the engagement within the system to administer justice to all.⁴³ Just like other states, the criminal justice system in Kenya comprises actors with obligations. These include the handling of the suspects, facilitating the due process through different functions and responsibilities and subsequently the sentencing of those found

⁴³ International Commission of Jurists, "Criminal Justice Reforms: Issues and Options for Kenya." *International Commission of Jurists*. July 13, 2018. <https://icj-kenya.org/news/latest-news/184-criminal-justice-reforms-issues-and-options-for-kenya>. Accessed August 08, 2019.

guilty of committing the offences. The main players within this system include the Law enforcement, the Judiciary, and the prison probation and care services.⁴⁴

2.1.2 Criminal Procedure code

The process and common practice followed in prosecuting criminal matters are well stipulated in the criminal procedure code.⁴⁵ Once a person is arrested the process for presentation in court for trial is required within a stipulated time of 24-hours for non-capital offences and 14-days for capital offences.⁴⁶ The process is lengthy with the steps clearly outlined to provide the clear channels from arrest, the rules on presentation of the case in court, remand, Bail and bond processes, legal representation in the proceedings and finally the prosecution under special legislation where terrorism is especially categories.⁴⁷

The unique attribute of the criminal justice system is that no actor can work without the support coordination of the other, making it a process that requires high levels of coordination, trust and a relationship that ensures the process actualized. This attribute is one that makes the system more vulnerable to external factors, directly affecting its operationalization through the processes.

The state has a constitution which as the highest law and it gives necessary guidelines on the limitation and guidelines on the expected code of conduct. The development of other strategies and institutions within the legal framework should ideally be anchored on the constitution.

2.2 The Constitution and the rule of law.

⁴⁴International Commission of Jurists, "Criminal Justice Reforms: Issues and Options for Kenya." International Commission of Jurists. July 13, 2018. <https://icj-kenya.org/news/latest-news/184-criminal-justice-reforms-issues-and-options-for-kenya>. Accessed August 08, 2019.

⁴⁵Criminal Procedure Code Act, "The criminal Procedure codes Cap 75." *Kenya Law ;2009*. <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2075>. Accessed June 09, 2019.

⁴⁶ Beth Elise Whitaker, "Reluctant Partners: Fighting Terrorism and Promoting Democracy in Kenya." *International Studies Perspectives* 9:3 (2008): Pp 254-71. www.jstor.org/stable/44218549.

⁴⁷ Ibid

The legal system is unique in every nation. In Kenya, for instance, the judicial processes are founded on Customary law, the English common law, Islamic law, and its Statutory law.⁴⁸ The variations in social, economic and political dynamics have inevitably led to changes within the legal systems and framework in the country. Human rights organisations have cautioned the criminal justice system in Kenya to be unregulated,⁴⁹ whose operation has often led to criminalization and prosecution of poor and profiled citizens.⁵⁰

In its attempt to make the longed-for reforms, the pronouncement of the Kenyan constitution in 2010, was said to have significantly imposed on the restructuring of the criminal justice sector within the state. It brought with it the foundation to observe, respect, encourage and fulfil human rights within confines of the law.⁵¹

Some of the inferential articles include; Article (2), which mainly focused on the supremacy of the constitution on Kenya,⁵² (5) which provides support to international law as part of the municipal law, and Article (6) that supports the ratification processes for treaties and conventions ratified by Kenya.⁵³ Similarly, other key provisions directly addressing the criminal justice system included articles, Articles (48) to (50), that summarizes the rights to a free and fair trial regardless of the offence.⁵⁴

The provision in the constitution hence recognizes and respects human rights. This then gives preference to the treatment of suspects with dignity and rights regardless of the offences that

⁴⁸ National Council on Administration of justice: *Legal Resources Foundation Trust: Resource Oriented Development Initiatives*, Criminal Justice system In Kenya. Nairobi Kenya: Legal Resources Foundation Trust: Resource Oriented Development Initiatives, 37. (2016.) Accessed 07 2019.

⁴⁹ International Service for Human Rights. *Kenya: Stop using anti-terrorism laws to target human rights defenders and guarantee due process*. New York: International Service for Human Rights. (2015). Accessed 08 2019.

⁵⁰ Karuti Kanyinga, "Democracy and Political Participation: A review by AfriMAP and the Open Society Initiative for Eastern Africa." (Nairobi: Open Society Initiative for Eastern Africa, 2011).

⁵¹ UNODC, *Kenya Training Manual on Human Rights and Criminal Justice system responses to terrorism*. (Nairobi: UNON Publishing services Section, 2004).

⁵² National Council for Law Reporting: The Attorney General, 13 (2010). *The Constitution of Kenya*. Nairobi: Accessed 07 2019

⁵³ Ibid

⁵⁴ Ibid

they have committed. This then provided the anchor on which the different strategies and institutions should be built on, in the efforts of having an effective and reputable criminal justice system, that does not infringe on human rights.

The rise in terrorism in Kenya led to the need to double up efforts to address the issue more comprehensively. This meant that other instruments that were more subjective and generalised to communities, on terrorism issues, were inevitable in fighting terrorism in Kenya. This led to the birth of different policies, bills the transitions into laws, strategies, and institutions, that aimed at handling terrorism head-on.

2.3 The Adoption of new strategies and plans to respond to terrorism in Kenya

Many nations have had to produce new strategies and mechanism to fight the vice as complementary ways and methods to the already existing legal framework that had been put into place.

2.3.1 Prevention of Terrorism Act, No. 30 of 2012

Kenya's long legislative journey that would eventually give birth to the drafting of the Suppression of Terrorism Bill 2003 was initiated. However, the Terrorism Bill was rejected in Kenya shortly after being passed in parliament. According to the Parliamentary Committee on Justice and Legal Affairs, the said bill threatened to tear the fabric of Kenya leading to inter-religious animosity and suspicion, leading to a hostile environment.⁵⁵

The enactment of the Prevention of Terrorism Bill by former president H.E Mwai Kibaki on 27th August 2012 had is still disputed by many who perceived it as unconstitutional and a

⁵⁵ Carolyne Wanjiru Kamau, "Kenya & the War on Terrorism." *Review of African Political Economy* 33: 107 (2006): Pp 133-41. www.jstor.org/stable/4007116.

violation of the rule of law.⁵⁶ The bill was contested mainly due to its extensive categorisation of matters and vagueness and also its unfair categorisation which was viewed to mainly target Muslims.⁵⁷

In one instance, the bill provided a description of a person(s) who would be liable for arrest and prosecution by the police by arousing suspicion of belonging to a terrorist organisation. However, in its initial stages, the bill was largely contested, and a few clauses changes before the 2012 bill was enacted. It also emerged to have much advocated for hard power approach by giving the law enforcement more powers, and subsequently allowing the state to come up with a list of suspected terrorist and terror organisations without following the due proves of the law.⁵⁸

The Act was expected to make the process of dealing with terror suspects, financiers and sympathisers more fiercely efficient by increasing the jail term of those found guilty and introducing a no fine system for terror suspects in custody.⁵⁹ However, the Act only provides a rather vague definition of terrorism with no precise dimension.

What caused more uproar was the interpretation of a clause that was against wearing attires that resembled or appeared to be in close association with extremist groups. Even though the definition of terrorism alludes to the various governments and practitioners regionally and globally, the East African Law Society argued that its definition in the 2003 Bill was absurdly

⁵⁶ Standard. "Kibaki Signs Historic Anti-Terrorism Bill." *Standard Media*. October 14, 2012. <https://www.standardmedia.co.ke/article/2000068354/kibaki-signs-historic-anti-terrorism-bill>. Accessed August 07, 2019.

⁵⁷ Mazrui Alamin, Kimani Njogu, and Paul Goldsmith, *Countering Violent Extremism in Kenya: Between the rule of Law and the quest for Security*. (Nairobi: Twaweza Communications Limited, 2018).

⁵⁸ Mazrui Alamin, Kimani Njogu, and Paul Goldsmith, *Countering Violent Extremism in Kenya: Between the rule of Law and the quest for Security*. (Nairobi: Twaweza Communications Limited, 2018).

⁵⁹ Mazrui Alamin, Kimani Njogu, and Paul Goldsmith, *Countering Violent Extremism in Kenya: Between the rule of Law and the quest for Security*. (Nairobi: Twaweza Communications Limited, 2018).

broad to mean anything and that this could be used to discriminate against residents or political enemies.⁶⁰

The seemingly outright discrimination against one religion in the nation led to the withdrawal of the Bill in 2004 due to widespread criticism. The legislature retreated to the drawing board and emerged with a revised and renamed statute. The succeeding enactment of the Act in 2012 was not received well either. According to a former legislator, this law provided a balance of probabilities that was a challenge to the Bill of rights in the Constitution. It limited the threshold for security agencies to re-phrasing the scope of their work to involve "reasonable grounds to believe" term when executing their tasks.⁶¹

For a long time, utilization of the Penal Code as a yardstick for the prosecution of criminal cases in Kenya did not mention terrorism as one of the offences for the apparent reason that terrorism was a relatively new and emerging crime.⁶² This absence of an appropriate legal framework to respond to the emergent danger of terrorism caused tension and discord in the criminal justice system in Kenya, almost rendering it nonfunctional in so far as fighting terrorism was concerned.⁶³

Apart from the restrictions from the Penal Code then, various Bills from the Kenyan Parliament in the aftermath of numerous terrorist attacks precipitated a scenario where the government officials radically and without justifiable cause and obviously frustrated by the alarming tide of

⁶⁰ Carolyne Wanjiru Kamau, "Kenya & the War on Terrorism." *Review of African Political Economy* 33: 107 (2006): Pp 133-41. www.jstor.org/stable/4007116.

⁶¹ Billow Kerrow, "Anti-terrorism Bill should be aligned with Constitution," *The Standard Newspaper*. September 23, 2012. <https://www.standardmedia.co.ke/article/2000066749/anti-terrorism-bill-should-be-aligned-with-constitution>. Accessed April 29, 2018.

⁶² Scofield Yoni Muliru, *Discourse analysis of National Strategies and County Action Plans to Prevent Violent Extremism in Kenya*. (Nairobi: Scofield Associates, 2018). Unpublished.

⁶³ Charles Mwazighe, "Legal Responses to Terrorism: Case Study of the Republic of Kenya." Naval Post Graduate School, Thesis, December 2012. <https://calhoun.nps.edu/handle/10945/27876>. Accessed June 20, 2019.

terrorism, departed from the established judicial and law enforcement procedures,⁶⁴ and resorted to employing extra-judicial approaches which created a conducive environment for more radicalization and recruitment into terrorism. In Kenya, the same “democratic state” is blamed for using excessively high-handed approaches when dealing with terrorism, especially in the Criminal Justice System.⁶⁵

Notwithstanding legitimate concern among the public and other civil society organizations regarding this law, so determined was the Kenyan legislature that they gazetted the international Prevention of Terrorism Regulations 2013, and gave it further legitimacy by appending it to the UN Security Council Resolutions that was under the same citation.

The Presidential Assent propelled it to Law in Kenya. Kenya is the first nation in the greater East and Southern African region to enact a law that provided a robust legal framework for countering terrorism and expressly outlawing all its forms with stiff and deterrent penalties for offenders. Some excerpts from the Bill conferred unregulated authority on the police to arrest, search and even allowed investigators to detain suspected terrorists incommunicado for up to 36 hours, conflicting the requirements provided in the Criminal Procedure Code that require all alleged persons perceived to be engaging in any criminal activity and charged before a court of experienced authority within 24 hours of arrest.⁶⁶

2.3.2 The National Strategy for Countering Violent Extremism

In yet another effort of fighting terrorism, Kenya launched a National Strategy to Countering Violent Extremism (NSCVE) in September 2016.⁶⁷ NSCVE shifted its focus from the initial

⁶⁴Peter Chalk, "The Response to Terrorism as a Threat to Liberal Democracy." *Australian Journal of Politics and History*. 44:3 (2002).

⁶⁵Amnesty International, "The impact of Anti-terrorism operation on Human Rights," *Amnesty International*, March 23, 2005. <https://www.amnesty.org/en/documents/afr32/002/2005/en/>. Accessed 04 28, 2018.

⁶⁶*BBC News*, "Kenya anti-terror laws: Court scraps main clauses," *BBC*. February 23, 2015. <https://www.bbc.com/news/world-africa-31588445>. Accessed April 20, 2018.

⁶⁷Freedom House, "Kenya Antiterrorism Strategy Should prioritize Human Rights, Rule of Law," *Freedom House*. Nairobi: (2018). <https://freedomhouse.org/report/special-reports/kenyas-antiterrorism-strategy-should-prioritize-human-rights-rule-law>. Accessed July 01, 2019.

Act and strategies to that of engaging and actively involving various actors in the fight against terrorism.⁶⁸ The strategy is a document that focused on the promotion of coordinated efforts and cohesion, while also adhering to international human rights and humanitarian law when responding to terrorism.

While the motive and strategy are formulated for the general good of the people, the government has enormously failed to create the link and reorient its actions to the already existing legislation,⁶⁹ making the document impractical in the response to terrorism.

The County Action Plans were an outcome from the National strategy that did so little to contextualize the narratives from various regions and counties to fit the local context. As of June 2019, 43 counties had already adopted their county actions plans.⁷⁰

However, a study done by Scofield Associates, a research firm based in Nairobi in 2018 reviewing the effectiveness of the documents, found that most of this documents were being developed as a mere formality necessitated by the government but lacking on implementation, and classification of the narrative.

The adoption of the pillarization of the different dimension makes it even difficult to categories the underlying patient issues. The documents have adopted a linear scale of terrorism which then omits many variables hence making it difficult to deal with terrorism.

2.3.3 The National Legal Aid Action Plan

⁶⁸ Ibid

⁶⁹Freedom House, “Kenya Antiterrorism Strategy Should prioritize Human Rights, Rule of Law,” *Freedom House. Nairobi*: (2018). <https://freedomhouse.org/report/special-reports/kenyas-antiterrorism-strategy-should-prioritize-human-rights-rule-law>. Accessed July 01, 2019.

⁷⁰ George Ntembeya, interview by Nation Media Group, “Narok joins 42 counties in launching action plan in the anti-terror war,” *Nation Media Group*. June 06, 2019. <https://www.nation.co.ke/video/news/4146788-5161888-3odcjz/index.html>. Accessed September 09, 2019.

This plan launched by government is faulted as one that was not backed by the presence of public defender service as was intended and provided for in the law.⁷¹ The application of law-based approaches that included the use of evidentiary standards and application of equal legal representation was supported by the judiciary. The judiciary extensively braced a legal-based tactic and approach to prosecution process, that applied the same legal standards to terrorism cases as they did in other felonious lawsuits within the system.⁷²

2.4 The Criminal Justice System actors and roles in fighting terrorism

The criminal justice system adopts an almost similar model across the globe with three arms: law enforcement, prosecution and correctional facility layout. The three arms have specialised responsibilities which are dependent on well-coordinated effort for the entire system to be successful and effective.

2.4.1 Law enforcement.

Placed precisely at the point of entry, the police have been mandated with the role of receiving and recording complaints, arresting suspects and accused persons, investigating the claims and arraigning the suspects in court. They are crucial to the justice system as they determine a lot in the process. The law enforcement branch of the justice system is comprised of police officers and other agents who often act as the first contacts between lawbreakers and the justice system.⁷³

Law enforcement is the extremely visible component of the justice system as most of them are uninformed, making them identifiable to the public. Unknown to many, the policing of terrorism is

⁷¹ United States Department, "Country Reports on Terrorism 2017- Kenya". Country Reports on Terrorism, Nairobi: United States Department of State. (2018). https://www.state.gov/wp-content/uploads/2019/04/crt_2017.pdf. Accessed September 10, 2019.

⁷² United States Department, "Country Reports on Terrorism 2017- Kenya". Country Reports on Terrorism, Nairobi: United States Department of State. (2018). https://www.state.gov/wp-content/uploads/2019/04/crt_2017.pdf. Accessed September 10, 2019.

⁷³ Victor E Kappeler, "What is the place of Police within the Criminal Justice System?" *Eastern Kentucky University Police Studies Online*. October 15, 2012. <https://plsonline.eku.edu/insidelook/what-place-police-within-criminal-justice-system>. Accessed September 10, 2019.

not as common and straightforward as many may think. Mathieu Deflem describes how the prevention and response to terrorism may be viewed as a criminal activity by many police institutions.⁷⁴

In Kenya, before the recently effected merger of the Regular police (The men in blue) and the Administration police, the former was mandated to arrest and hold persons in custody as they gather evidence in preparation for court cases. However, after several attacks on Kenya, the Anti-terrorism Police Unit was invented as a unit within the National Police Service (NPS) and authorized with mitigating the terrorism-related cases in the country.⁷⁵

After the realization that terrorism, in its very nature could not be handled like any other case, the need to have divisions set out for this was crucial. A senior Magistrate; Makori, from the Mombasa law court confirmed during the acquittal of terror suspects when he echoed that; the burden of proof linking the accused to a terror group is often very difficult.⁷⁶

2.4.2 The Courts

The role of the courts include the interpretation and application of the law, as they also provide a platform where trails are heard, and sentence decided upon.⁷⁷ The court provides a neutral ground where all cases get a levelled ground where the examination of evidence presented in court as evidence by the police, witnesses, as well as the mental wellbeing of suspects when standing trial, is well taken into account.

⁷⁴ Mathieu Deflem, *The policing of terrorism; Organizational and Global Perspectives*. (New York: Taylor and Francis Group, 2010).

⁷⁵ National Police Service, "ANTI-TERRORISM POLICE UNIT(ATPU)" *Directorate of Criminal Investigations*, 2017. <http://www.cid.go.ke/index.php/sections/specilizedunits/atpu.html>. Accessed 09 2019.

⁷⁶ Malemba Mkongo, "Why terror cases rarely get convictions." *The Star*. August 29, 2018. <https://www.the-star.co.ke/news/big-read/2018-10-29-why-terror-cases-rarely-get-convictions/>. Accessed August 08, 2019.

⁷⁷ Bartleby Research, "Legal Studies- Courts Role in the Criminal Justice System Essay example." *Bartleby Research*. (2013) 03. <https://www.bartleby.com/essay/Legal-Studies-Courts-Role-in-the-Criminal-P3CQUJKCVJ>. Accessed September 10, 2019.

Contrary to general civilians knowledge, the court system is more than the bench of judges, and there are other significant officials who form part of the team; including the prosecutors and the attorney general who also plays a critical part in the maintenance of the law in society today.⁷⁸

Once a case has been presented in court, the due process takes place with the presentation of evidence by the officer in charge of the case, presentation of witnesses and the defendant is also given a chance to present their case and defend their front. The court is mandated to follow the rules and laws that have been stipulated under the code of conduct for every subject matter presented to them without favors of parties. Apart from the constitution and the other legal instruments provided, the court draws its ruling from the provision given to resolve the cases amicably.

2.4.3 The Correctional Facilities.

At the almost tail end of the criminal justice system is the correctional facilities which provide a platform for reforms and reintegration of suspect found guilty of the various offences. Currently, Kenya has about ninety two correctional Institutions among them.⁷⁹ Other core functions for these facilities are those of keeping safe custody of all prisoners placed under their care during trial and Producing then to the courts.⁸⁰

In recent studies, prisons and correctional facilities have been classified as a hotbed for terrorist recruitment and radicalization.⁸¹ This factor elicited the discussion of separating suspects and culprits of terrorism related cases in the country. In 2016, President Uhuru Kenyatta announced plans of building separate prisons for terrorist suspects to try and curb radicalization on the

⁷⁸Shetreet, Shimon. *The roles of courts in society*. (Lancaster: Martinus Njihoff Publishers, 1988).

⁷⁹David Goodman, "Kenya Prisons Service Unit; How Kenya's Correctional Departments and Facilities have Changed." *Strategic intelligence*. April 14, 2015. <https://intelligencebriefs.com/kenya-prison-service-unit-how-kenyas-correctional-departments-and-facilities-have-changed/>. Accessed September 14, 2019.

⁸⁰ Ibid

⁸¹Gladys Wambui Kahara, "Violent Extremism and Radicalization among Youth in Prisons: (2017). A Case of Langata Womens, Kamiti and Shimo La Tewa Prisons in Kenya." *United States International University Repository*. 2017. <http://erepo.usiu.ac.ke/handle/11732/3567;jsessionid=5C6938CCE7132A8DD9AAA495BE0E88F0>. Accessed September 09, 2019.

Kenyan correctional facilities.⁸² This move was however received with mixed reaction, especially from the human rights organizations sighting that this would lead to the unintended outcome. Other questions raised were on how the rule of law measures would be applied and whether the move of separating the inmates would indeed result in the intended outcomes⁸³ of rehabilitation and reintegration.

2.5 Chapter summary and conclusion

It is imperative to note that every state and nation needs to have a safe, secure and peaceful nation, where terrorism cannot thrive. However, a majority of stakeholders in the P/CVE field including practitioners and human rights bodies and institutions have recommend a general preference for counterterrorism efforts, within the conventions of law.

As provided for in the constitution, it is a common belief that the approach towards preventing and countering violent extremism (P/CVE) should be more inclusive, and one that ensures that there is public participation for the citizens. Civil society and CSOs should also be obligated with providing oversights to governments initiative geared towards P/CVE

The government's efforts of fighting terrorism are of good intentions, but the birth of various instruments and strategies of combating the vice, and limited linkage and coordination, makes it difficult to win the war. No linkages provided on policy or documents take precedence among the many that currently already exists, and to think that new strategies are being adopted every other day makes the situation direr.

⁸² Yusuf Mohammed, "President: Kenya to Build Jail for Terror Suspects." VOA. February 17, 2016. <https://www.voanews.com/africa/president-kenya-build-jail-terror-suspects>. Accessed September 20, 2019.

⁸³ Irene Ndungu, "Separate prisons for terror suspects and convicted offenders could fuel radicalization instead of curbing it," Institute for Security studies. April 12, 2016. <https://issafrica.org/iss-today/will-kenyas-proposed-prison-for-extremists-help-to-combat-terror>. Accessed September 20, 2019.

A report published by the global counterterrorism forum working group of 2012, noted that having legal tools and strategies is not enough in the war against terrorism.⁸⁴ The need for a broad and comprehensive justice responses to terrorism entails a robust criminal justice system that functions not only in writing but in practice. This would hence entail having investigative agencies, prosecutors, judges and magistrates to overcome the institutional barriers by working collaboratively while recognizing their rules and roles.

The elimination of institutional barriers that often bar effective counterterrorism collaboration between constitutional structures and the criminal justice system actors can lead to a significant change.

⁸⁴ Global Counter Terrorism Forum, "*The Rabat Memorandum on Good Practices for Effective Counterterrorism practice in the Criminal Justice sector.*" Criminal Justice Sector /Rule of Law Working Group September 11, 2012. <https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF-Rabat-Memorandum-ENG.pdf>. Accessed September 20, 2019.

CHAPTER THREE

THE IMPACT OF THE STRATEGIES EFFECTED BY THE CRIMINAL JUSTICE SYSTEM IN FIGHTING TERRORISM

3.0 Introduction

The adoption of strategies to fight terrorism should be for the common good of the citizen, as the process can ensure a safe place for people to call home. This chapter will focus on examining the impact of the different strategies that have been put in place and loopholes that exist within the system. Kenya has largely been accused of its assurance to human rights and law due to its aggressive nature against terrorism.⁸⁵ Various human rights reports have put her on the spot for violating and defying the very rights that they are part of when fighting terrorism.

3.1 Overview of the actors within the justice system.

As part of the justice system the law enforcement selectively enforces the law in a process that should protect the public, by arresting those suspected to be violating the law and subsequently preventing crime.⁸⁶ Courts, on the other hand, are mandated with ensuring suspected criminals receive a free and fair trial. The goal of the correctional facilities is that of rehabilitation of offenders or to encourage behavior change for reintegration to the community.

The existence of a procedure for persons who enter the criminal justice system remains anecdotal as they remain unfollowed competently. The three systems are primary in existence to reduce the levels of crime in the state through a more humane and law-abiding way.

⁸⁵ Freedom House, "Kenya Antiterrorism Strategy should prioritize Human Rights, Rule of Law," Freedom House. Nairobi: (2018). <https://freedomhouse.org/report/special-reports/kenyas-antiterrorism-strategy-should-prioritize-human-rights-rule-law>. Accessed July 01, 2019.
https://freedomhouse.org/sites/default/files/Final_PolicyBriefKenya_11_14_18.pdf.

⁸⁶ Kim R Cocklin, " *Functions of Criminal Justice - Procedures, Tasks and Personnel*, "in Dae H. Chang, Ed. " *From Fundamentals of Criminal Justice - A Syllabus and Workbook*", (Paladin House Publishers,1977).

There is vagueness on the crime scene responsibilities, chain of command and agency divisions within the police divisions, the court structure, selection of judges for the case, and the functions of prosecutors, and other court personnel, correctional officers, probation officers, and parole officers.⁸⁷ The lack of clarity on the roles and responsibilities of the different actors within the criminal justice system results in credibility concerns, and ability to perform becomes questionable.

3.2 Background on the impact of Judicial Process system in Kenya

Kenya has played host to numerous distressing incidents of acts of violent extremist cases pronounced as terrorism. A challenge, without a doubt, and is shared across the globe on terrorism, concerns the legal and institutional capacity of states to fight the vice without violation of human rights.

Currently, violent extremism and terrorism are categorised as a “crime without borders” with a global reach and impact.⁸⁸ It is strategically tailored to fit the definition of organised crime.⁸⁹ However, terrorism is boundary specific at times, with each state having a predisposed leeway in how they exercise justice in relation to the same without infringing on human rights.

As a member of the United Nations, Kenya is warranted to be a party to some of the proposed treaties and agreements.⁹⁰ As such, Kenya has ratified various international and regional instruments and committed to taking the necessary measures to uphold the rule of law, as it combats terrorism and without violating human rights. As the government fulfils its commitment of protecting life and providing security to its citizens, it has a duty to indict those

⁸⁷ Kim R Cocklin, " *Functions of Criminal Justice - Procedures, Tasks and Personnel*, "in Dae H. Chang, Ed. " *From Fundamentals of Criminal Justice - A Syllabus and Workbook*", (Paladin House Publishers,1977).

⁸⁸ Elisha Zebedee Ongoya, " *Legal and Policy Dilemma in The Fight Against Terrorism: The Bail Question in Terrorism Cases in Kenya*, " *Kenya Law*. August 25, 2014. <http://kenyalaw.org/kenyalawblog/legal-and-policy-dilemma-bail-question-in-terrorism-cases/>. Accessed July 05, 2019.

⁸⁹ Ibid

⁹⁰ United Nations, "United Nations Charter" *United Nations Website*, June 26, 1945. <https://www.un.org/en/charter-united-nations/>. Accessed June 24, 2019.

who are responsible for terrorist acts, as well as to protect individuals within its jurisdiction.⁹¹

Deliberate measures must be adopted to preserve life as everybody is eligible to the right to life.⁹²

In the aftermath of the Kikambala hotel bombing, some communities were reported as suspects, stopped, searched, arrested and held in custody solely because of their ethnic, racial or religious origins.⁹³ Besides, more people were arrested as they went on their way to attend Friday prayers in the mosques.⁹⁴ One hundred and fifty people in Nairobi's Eastleigh area⁹⁵ and up to thirty four people in Mombasa and Lamu⁹⁶ were arrested and detained in operations by the Anti-Terrorism Unit and the General Service Unit of the Kenya Police Force.⁹⁷ These incidents are still on the rise but either go unreported or those affected fear sharing their experiences.

In 2016, a newspaper article quoted a senior police officer stating that up to 80 cases linked to terrorism were in the courts.⁹⁸ This number is much lesser compared to the terrorism-related incidences in the country; maybe as a result of the swift operationalization of the legislated legal framework.

⁹¹ Eusebio Wanyama, and Austine Nyaoke, *Report on Securing National Security and protection of Human Rights*. Legislation and policy, Kenya National Human Rights. June 06, 2018.

http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Securing%20National%20Security%20and%20Protection%20of%20Human%20Rights_1.pdf?ver=2018-06-06-202730-197. Accessed July 05, 2019,

⁹² OAU, "African Charter on Human and Peoples Rights," *The Organization of African Unity*. June 27, 1981. <http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf>. Accessed July 10, 2019.

⁹³ The Christian Post Reporter, "National Security Minister Murungaru Bans Police Swoops at Mosques," *The Christian Post*, November 11, 2003. <https://www.christianpost.com/news/national-security-minister-murungaru-bans-police-swoops-at-mosques.html>. Accessed June 04, 2019.

⁹⁴ Vivian Jebet, "80 Cases on Terrorism Presented in Court This Year, Says Muhoro." All Africa News, July 31, 2016. <http://allafrica.com/stories/201607310118.html>. Accessed 04 29, 2018.

⁹⁵ News 24 Archives, "150 foreigners held in Kenya," News 24 Archives. May 27, 2003.

<http://www.news24.com/Africa/News/150-foreigners-held-in-Kenya-20030527>. Accessed June 25, 2019.

⁹⁶ The Muslim Lawyers Trust is a non-governmental organization (NGO) whose objective is "to promote human rights and the creation of a society based on justice and equality, [provision of] legal aid and promotion of the rights of Muslim advocates."

⁹⁷ Amnesty International, "The impact of Anti-terrorism operation on Human Rights," *Amnesty International*, March 23, 2005. <https://www.amnesty.org/en/documents/afr32/002/2005/en/>. Accessed 04 28, 2018.

⁹⁸ *ibid*

3.3 A review of the impact of law enforcement actions the war on terrorism

The law enforcement agencies have continuously been blamed for serving as judge and jury. A human rights report from 2015, presented a rather alarming state of violations to human rights as executed by the Kenya security forces.⁹⁹ In the report, multiple cases of extrajudicial killings, enforced disappearances and torture to alleged terror suspects were presented with chilling narrations from survivors, eyewitness accounts and affected family members recounting the incidents with actual evidence of the involvement of law enforcement officers.¹⁰⁰

3.3.1 Extrajudicial killings and enforced disappearances

Substantial evidence has shown that Kenya's Anti-Terrorism Police Unit (ATPU) has been in the business of violating human rights through its dealings. The unit is blamed for enforced disappearances of suspects, capricious arrests, mistreatment of the accused in custody and extrajudicial killings.¹⁰¹ There is a widespread perception within the law enforcement circles that the Criminal Justice System is vicious and bedeviled by numerous “legal” and “ethical” loopholes that could be abused by criminal lawyers, court prosecutors and investigating officers to slow down or stall criminal cases altogether.

This is alluded to by an anonymous Anti-Terrorism Police Unit (ATPU) officer in an interview with the BBC. According to the officer, “*The justice system in Kenya is not favorable to the*

⁹⁹ KNCHR, “The error of fighting terror with terror,” *Kenya National Commission on Human Rights* (KNCHR). September 04, 2015.

<http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf>. Accessed July 06, 2019.

¹⁰⁰ *ibid*

¹⁰¹ Human Rights Watch, “Kenya: Killings, Disappearances by Anti-Terror Police,” *Human Rights Watch*. August 18, 2014. <https://www.hrw.org/news/2014/08/18/kenya-killings-disappearances-anti-terror-police>. Accessed June 04, 2019.

*work of the police. So, we opt to eliminate the suspects. We identify you; we gun you down in front of your family, and we begin with the leaders.”*¹⁰²

It has been stated that ATPU officers have assumed that whenever a suspect is arraigned to court, they lose the suspect, and therefore they resort to “illuminate” the suspect. There is an assumption that the ATPU cannot rely on the courts to prosecute terror suspects; this is due to the complexity of evidence collecting and obtaining testimonies for court. Which eventually leads to an exoneration as the prosecution fails to meet the threshold in the cases presented.

ATPU has acknowledged to a couple of killings which include Kassim Omollo on June 17, 2013, after the ATPU claimed that he had failed to surrender himself to the officials. Salim Mohammed Nero (Alias Suleiman Shauri) was also shot on the same day. The police used Nabiswa to get information as to terror cells in the area and were using him as an informant to give the ATPU further leads.¹⁰³

There has also been unacknowledged disappearances and killings by the ATPU. This has been seen in the deaths of Badru Mramba, an acquaintance of Sheikh Aboud Rogo, on November 14, 2012, Bekhit Kassim, Sylvester Owino Opiyo (Alias Musa Osodo), Jacob Musyoka, Jeremiah Onyango Okumu (Alias Duda Black), Stephen Mwanzia Osaka (Alias Duda Brown), Omar Shwaib, Salim Abubakar, Sheikh Ibrahim Omar Rogo, Alias Ibrahim Ismael and lastly Sheikh Aboud Rogo¹⁰⁴.

With government efforts stirred towards fighting terrorism, the very acts aimed at protecting the citizens is by no doubt, infringing on human rights and in violation of the law. The lack of confidence in the system by the very actors that should work hand in hand is demining, to say

¹⁰² BBC News, “Kenya's anti-terror forces face accusations after Westgate,” *BBC*. December 19, 2013. <https://www.bbc.com/news/world-africa-25436316>. Accessed July 06, 2019.

¹⁰³ Jonathan Horowitz, “Rumblings Along the Coast,” *Foreign Policy*, September 11, 2012. <https://foreignpolicy.com/2012/09/11/rumblings-along-the-coast/>. Accessed May 14, 2019.

¹⁰⁴ *ibid*

the least. This shows the level of incapacity in dealing with cases related to terrorism in the country.

3.3.2 Witness and Victim protection

Witnesses and victims play a critical role in connecting the acts to the individual and persons presented in court. Their role in the dispensation of justice cannot be over-emphasized. However, in the recent past, the justice system is a source of disappointment based on the exonerations in most sensitive cases covering terrorism due intimidation, threats and even murder in some instances.¹⁰⁵

The Witness protection Agency in Kenya, established under the witness Protection Act, (Cap 79 Laws of Kenya) came into operation 2008.¹⁰⁶ It was meant to act and respond to the various difficulties the state had encountered over the years in investigating and prosecuting cases classified as high-level cases including the Embassy bombing in Nairobi and Kikambala hotel in the coastal city of Mombasa. However, to date, not much can be said regarding the effects of the agency.

3.2.3 Burden of Proof

The law enforcement is mandated to arrest, gather evidence and present suspects in court within the stipulated timelines. However, in various accounts, they have had the challenging task of providing proof and evidence that directly implicates the suspects to terrorism.¹⁰⁷

Senior magistrate Evans Makori alluded to the fact that the burden of proving that the accused persons belonged to a terrorist group is always a tussle, as the terror group members do not

¹⁰⁵ Eric Wanjohi Wambungu, "Witness Protection in Kenya: A Comparative Analysis with the United States of America." *Academia*. July 2015. https://www.academia.edu/18898164/Witness_Protection_in_Kenya_A_Comparative_Analysis_with_the_United_States_of_America. Accessed September 16, 2019.

¹⁰⁶ Ibid

¹⁰⁷ Malemba Mkongo, "Why terror cases rarely get convictions." *The Star*. August 29, 2018. <https://www.the-star.co.ke/news/big-read/2018-10-29-why-terror-cases-rarely-get-convictions/>. Accessed August 08, 2019.

have proof of identity or marks that show that they are members.¹⁰⁸ According to him, police officers should be well-trained and equipped to handle terrorism cases as they are not related to the other common cases in any way prosecuted within the same system. Investigators in terrorism ought to use the intelligence report to get sufficient evidence linking the accused to the terror group or better yet the terror activities. However, such reports cannot be produced in court.

3.3.4. Profiling of terror suspects.

As stipulated in acts that govern the judicial system, there are some merits in profiling criminals based on various characteristics and applied context. The criminal justice systems have been attempting to use some of the notes by changing the context to fit that of terrorists when profiling terrorist by making them fit into the current wave of religious indoctrination and ideology.¹⁰⁹

However, various scholars are of the opinion that some modification to any system and mechanism being adopted is imperative when seeking to be applied in a different context to that which it was initially intended for.¹¹⁰ The profiling of terror suspects has been in intricate issues within the country. The police have borne much of the backlash with regards to victimisation and profiling of terror suspects. In different operations undertaken by the law enforcement agencies in Lamu and Nairobi, most of the victims arrested and detained accused the forces of profiling them based on their religion and ethnicity.

Many of those profiled have on various occasions shared their torment and disgust over the events. In an interview conducted in 2017, one such party shared their encounter sighing it as a

¹⁰⁸ Ibid

¹⁰⁹ Edward Tverdek, "The Limits to Terrorist Profiling." *Public Affairs Quarterly* 20:2, (2006): Pp 175-203. www.jstor.org/stable/40441435.

¹¹⁰ Geoff Dean, "Criminal Profiling in a Terrorism Context," in Richard, N. Kocsis, Ed. "Criminal Profiling International Theory, Research, and Practice." (Totowa: Humana Press Inc., 2008), Pp. 169 – 188.

factor that almost pushed him into joining the extremist group to retaliate the harsh treatment they received during the ordeal.¹¹¹

3.3.5 Watchlist screening at entry points.

The Kenyan government has been in the vanguard to thwart the migration of external terrorist fighters, who attempt to join Al-Shabaab or ISIS, or those returning from abroad.¹¹² In March 2018, police arrested and detained three suspected ISIS travel facilitators in Malindi, whereas in May the same year, in partnership with the South Sudanese, Kenya Police deported back a Somali and three Kenyans, who were arrested in South Sudan after the Malindi group allegedly recruited them to travel to join ISIS-Libya.

Terrorists are aggressively reported to have taken advantage of Kenya's sporadically inhabited border regions and the uncontrolled land borders to conduct attacks and move operatives in and out of the country with minimal roadblock and hindrances. An excellent example of this is Lamu and Isiolo counties. Isiolo County is known as the transit town or gateway to northern Kenya.¹¹³ In a report published in 2018, Isiolo was marked as a slipper cell county which is relatively marked as a low rated ground for terrorist activity but high slipper cell due to its geographical positioning.

3.4 A review of the Court system and the rule of law and its impact on terrorism.

¹¹¹ Scofield Associates. "Baseline Evaluation for Inuka Project. *Search for Common Ground*, February 10, 2017. <https://www.sfcg.org/wp-content/uploads/2017/07/SFCG-BASELINE-EVALUATION-REPORT-FOR-INUKA-PROJECT-Final.pdf>. Accessed September 22, 2019.

¹¹² United States Department, "Country Reports on Terrorism 2017- Kenya". *United States Department of State*. (2018). https://www.state.gov/wp-content/uploads/2019/04/crt_2017.pdf. Accessed September 10, 2019.

¹¹³ Ibid

The criminal justice system mandates the court to prosecute a terrorist suspect and sentence the accused when he/she is found guilty. The court looks at the evidence provided by both the prosecution and the defence.

However, how severe a case is, for instance, on the grounds that there have been large masses of civilian losses, the court rules in favor of the prosecution's case if the threshold is met. Since the prosecutors must bear the burden of proving the guilt of a suspect, the standard set, is "beyond a reasonable doubt"¹¹⁴ In instances where it is ruled that the defendant has a case to respond to, and is put on a defense, the court later rules to acquit or convict the accused when found innocent or guilty respectively.¹¹⁵

Kenya's judicial system has previously been accused of sluggishly precede cases. Terrorism cases are no exception regardless of the nature and urgency that such cases bear. As an example, the Garissa university case was finalized in 2019, almost six years after the attack. Similarly, the case for the British Terrorist Jermaine Grant was still pending verdict for the separate convictions in 2005, even as he served his nine-year time for previous offences.

The pace at which the trials progress often leave room for disruption and tampering with the proceeding, including loss of case file through unclear circumstances and the withdrawal of witnesses due to exhaustion.

3.4.1 Categorization of terror suspects

When it comes to terrorist, it is imperative to note that, often the suspects arrested and presented in under a general assumption that they are all terrorists. However, it would be interesting to note that, like any other organized institution and organisation, there are general classification

¹¹⁴ Criminal Procedure Code Act, "The criminal Procedure codes Cap 75." Kenya Law ;2009. <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2075>. Accessed June 09, 2019.

¹¹⁵ Ibid

and categories of people with different duties, obligation and roles in propagating the acts of terror. In order for a terrorist to organize , plan and carry out any attack, they usually need and engage recruits, supporters or sympathizers, require funding and weapons, communication support, and movements while they access the susceptible targets,¹¹⁶ to facilitate the activities.

This gives a categorisation rational of those that are brought to court. The various categories which would broadly include suicide bombers and attackers, sympathizers, Supporters, and others that offer refuge and communication channels are among the categorization of the well-organized planning group.

Hardly do the terror group soldiers; especially those who use suicide bombing, make it to court as most of them usually end up dead and hence often the sympathisers or supporters including relatives, are usually arrested as proxies and convicted. The notion behind this is that they acted as an accomplice.

The lack of categorization of the offenders would relatively also make it very difficult for the court and the prosecution for that matter to try and pin down the suspects by linking them to the attacks especially if the evidence presented in court is not sufficient to have them reprimanded and sensed. Aboud Rogo's wife, Hinaya Sagar is a classic example of the arraignment of suspect on bases of relation and proxy as opposed to evidence and witness to link the suspect to the case presented in court.

3.4.2 Prolonged hearing of Terrorist cases

Kenya's judicial system has previously been accused of sluggishly precede cases. Terrorism cases are no exception regardless of the nature and urgency that such cases bear, as shown in

¹¹⁶ Organization for Security and Co-operation in Europe *Preventing Terrorism and Countering violent Extremism and Radicalization that lead to terrorism: A community Policing Approach. Training*, Vienna: Organization for Security and Co-operation in Europe. (2014).
<https://www.osce.org/secretariat/111438?download=true>. Accessed September 10, 2019.

the accused from the Garissa University attacks. Similarly, the case for the British Terrorist Jermaine Grant, was still pending verdict for the separate convictions in 2005, even as he served his nine-year time for previous offences.¹¹⁷

Due to a backlog of cases, In Kenya, a case may take years to be fully heard and determined. Although in most times a terrorist case is heard in urgency, it is not concluded in a day. This also brings about several challenges.

One challenge is that the accomplices of a terror suspect may try to compromise the hearing. For instance, in the case of Lukeman Khatib, the magistrate gave an order of transferring the case of the accused to Shanzu Law Courts instead of Mombasa Law Courts since the accused was held at Shanzu Prison, and during the transportation of the said criminal, the accomplices have been trying to sabotage the situation. The intelligence report proved that Lukeman and his associates, who were not in custody, were potential threats to security officers escorting him as well as other court users.

3.4.3 Lack of special courts and skilled personnel to deal with terror-related cases

Another challenge revolves around the absence of special terrorism courts, unlike the Environmental and Land Courts or Employment and Labor Relations Courts as created in the 2010 CoK.

The same magistrates and judges sitting through different cases of different gravities are the ones mandated to hear and determine terrorist cases. This increases the length of proceedings. However, there is an imminent threat to personnel actively engaged in terrorism-related cases as they may be compromised or threatened. This would then mean that a majority of the personnel might not be up to the task due to the security concerns attached with such cases

¹¹⁷ Criminal Procedure Code Act, "The criminal Procedure codes Cap 75." Kenya Law ;2009. <http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%2075>. Accessed June 09, 2019.

making it difficult and rather stressful to get judges or magistrates to sit in for the hearing of such cases.

3.5 The role and impact of correctional facilities the war against terrorism

The Kenyan correctional institutions have not escaped the blame either. Among the convicted persons in custody or the prisons, there is evidence showing that the Kenyan prisons are infiltrated by Al-Shabaab who are offering forgiveness and an opportunity to be cleansed as opposed to the stigma by the current system.¹¹⁸

Some of the correctional facilities mentioned include; Kamiti maximum prison and Shimo-La-Tewa Prisons in Nairobi and Mombasa, respectively.¹¹⁹ The article also indicates that at least eighty inmates are jailed or remanded at the Kamiti prisons in connection with terror-related offences and about twice the number held at Shimo-La-Tewa. British terror suspects Jermaine Grant: remanded at the coastal facility, is believed to be among the key masterminds of the radicalization scheme in local prisons.¹²⁰

3.5.1 The impact of interaction and Isolation of Terror Suspects

There has been an unambiguous upsurge in the number of terror suspects arrested in the past ten years, in relation to terrorism, and also those perceived to have radical extremist ideologies, in prisons throughout the world.¹²¹ The category of these convicts has created a new set of

¹¹⁸ Zaddock, Angira, "Kenya: Terror Recruitment 'Thriving in Prisons,'" *Daily Nation Newspaper*, June 3, 2016. <https://mobile.nation.co.ke/news/Terror-recruitment-thriving-in-prisons/1950946-3230328-vf2qa/index.html>. Accessed May 11, 2018.

¹¹⁹ Boniface Msangi, "Alarm as Shabaab Infiltrates Prisons," *Mediamax News*, July 17, 2015. <http://www.mediamaxnetwork.co.ke/156069/alarm-as-shabaab-infiltrates-prisons/>. Accessed Jan 29, 2019.

¹²⁰ *ibid*

¹²¹ Dennis Ross, "Counterterrorism: A Professional's Strategy." *World Policy Journal*. 24:1, (2007): Pp 19–31. doi: <https://doi.org/10.1162/wopj.2007.24.1.19>

challenges that has prompted the need for the adoption of new approaches, policies, and practices.¹²²

In the recent past, it was established that terrorist has been using prisons as recruitment grounds for other inmates. It is, however, appearing that the staff in prison must be taught to deal with their extremist attitudes and intentions towards the suspects and culprits who end up behind bars. It is slowly becoming a norm for terrorists in prisons facilities to recruit prison officers for terrorism purposes or try to plot attacks both inside and outside the prison facilities.¹²³

The increased "free time" between inmates has resulted in inter-mingling between terror-related prisoners and the others which have been attributed as one of the reasons behind the high levels of radicalisation and recruitment in the facilities. It is argued that this free interaction may have also provided a thriving atmosphere for radicalization and recruitment.

A proposal by the government to build a separate prison for extremist offenders raises more questions than answers considering the Human Rights provisions contained in the Constitution as far as providing solutions to the problems is concerned.¹²⁴ The government of Kenya had also recognised the need and urgency to address the issue of recruitment and radicalisation in the correctional facilities.¹²⁵

However, this process had been initiated in Shimo la Tewa and Kamiti prisons but was later halted with no official communication on what might have led to this. Never the less, the move had spiked controversy with human rights watch activists protesting the move.

¹²² Rafia Bhulai And Naureen Chowdhury Fink, "Strengthening Regional Cooperation to Prevent and Counter Violent Extremism in South Asia: What Role for Civil Society?" *Global center on Cooperative Security*. December 2, 2016. https://www.un.org/sc/ctc/wp-content/uploads/2017/02/2016-12_Bhulai-Fink-South-Asia-CSE-Process.pdf. Accessed September 21, 2019.

¹²³ Ibid

¹²⁴ Irene Ndungu, "Separate prisons for terror suspects and convicted offenders could fuel radicalization instead of curbing it," Institute for Security studies. April 12, 2016. <https://issafrica.org/iss-today/will-kenyas-proposed-prison-for-extremists-help-to-combat-terror>. Accessed September 20, 2019.

¹²⁵ ibid

The general view of human rights organisation have been vocal on having better option on the handling of terror suspects, with most of the institutions advocating for better practices on handling of violent extremist prisoners like other prisoners by providing them with necessities and looking after them with humanity and subsequently giving them an equal opportunity to reform and rehabilitate themselves.¹²⁶

The impact and the treatment of the terrorist suspects, before, during and after incarceration has been argued to cause more sympathy to extremist organizations and eroding the gains of P/CVE activities in Kenya. Their immediate families have also faced some challenges that create vulnerabilities to violent extremism.

3.5.2 Reforming and reintegration strategy and opportunity for terror suspects

It is inarguably undisputed that the prisons bear the responsibility of facilitating the transformation of those who have been put in the facilities. The process entails rehabilitation of the culprits through different programs that are geared toward the change in behaviour and character.

The international centre for counter-terrorism, recommends an evidence-based approach which identifies the desired outcome with respect to the subject matter, in this case, terrorism.¹²⁷ The programs targeting terror suspects should be designed on trial and error basis with logical considerations in mind, and should also be rigorously monitored and evaluated to inform policy and other necessary adjustments in the fight against terror.¹²⁸

¹²⁶ United Nations on Drugs and Crime. *Management of Violent Extremist prisoners and the prevention of Radicalization of violence in prisons*. Handbook, (Vienna: United Nations on drugs and crime, 2016).

¹²⁷Tinkah Veldhuis, "Designing Rehabilitation and Reintegration Programmes for Violent extremist offenders," *International center for counter-terrorism - The Hague*. March 2, 2012. <http://icct.nl/wp-content/uploads/2015/05/ICCT-Veldhuis-Designing-Rehabilitation-Reintegration-Programmes-March-2012.pdf>. Accessed August 10, 2019.

¹²⁸ Tinkah Veldhuis, "Designing Rehabilitation and Reintegration Programmes for Violent extremist offenders," *International center for counter-terrorism - The Hague*. March 2, 2012. <http://icct.nl/wp->

Within the Kenyan context, the issue of revision and inclusion of curriculum that targets terror suspect has not been adopted. This becomes a significant challenge as the prisons do not have the directed and proper rehabilitation guidelines for terror suspects.

3.6 Chapter Summary and Conclusion

The need of having a judicial system whose actors are working together in a coordinated effort cannot be over-emphasized. The judicial system is what most of the citizen's look-up to for ensuring that justice is served. Evidently, the system in Kenya cannot adequately address this due to the different loopholes and challenges faced with each category of the subsystem.

It is imperative for nation-states including Kenya to have the essential authorities who are able and capable of conducting concealed surveillance of suspected terrorist, better evidence gathering for terrorist actions that can be produced and applied as evidence in a court of law.

The arrest of a subject should also be by the book which basically means detaining suspects based on evidence, obtain intelligence from them about terrorist plots, prosecute them fairly and effectively through lawful accounts, and affording those who are convicted appropriate punishment in prisons.

In the application of all the measures, the criminal justice officials are required by the law to fully respect human rights obligations and the rule of law, while protecting the safety of those participating in the process and the government's sensitive sources and methods.

Violation of human rights, mishandling of evidence, lack of proper witness protection services is among the critical issues discussed which have resulted in improper management of criminal

cases. It is also clear that corruption and influence from the political sphere is a crucial hindrance to the maturity of terrorism cases' in the country.

The criminal justice system sub-systems have major loopholes which need to be addressed in the country if the state is to win on the war against terrorism. The redesigning of the system to accommodate terrorism as a prime issue is critical. This would primarily focus on dealing with the handling of cases, from the onset, presentation to court, prosecution process which should highly focus on the categorization of those brought before the court and finally the correctional facilities through their rehabilitation and reintegration processes.

CHAPTER FOUR

CASE STUDY OF THE JUDICIAL PROCESS IN THE HANDLING OF TERRORISM RELATED CASES IN KENYA

4.1 Introduction

This chapter will be critically reviewing a classic case of the Muslim cleric Sheikh Aboud Rogo and his family with a snip pit of other cases to draw tangible evidence of the loopholes in the handling of terrorism-related cases. The case depicts the disconnect, unprecedented contravention of human rights and dignity. The Chapter will review the handling of different cases regarding the Rogo family, from arrest, arraignment in court, prosecution process, prosecution with a deception of the extra-judicial measures witnessed. A comparative analysis covering right procedures for case handling will be provided.

4.2 Background and Overview

Though various studies have mentioned the state-sanctioned forms of extremism, the actions emanating from the Kenya Criminal Justice System can be seen to align well with the political drivers of violent extremism including; Rejection and withdrawal of political rights and civil liberties, Government repression and gross violations of human rights.¹²⁹

A human rights report in 2015 documents over one hundred and twenty (120) cases human rights violation in relation to terrorism related in various geographical locations in Kenya.¹³⁰

Among the listed occurrences, twenty-five were listed as extrajudicial murders, and eighty-one were categorised under enforced disappearances.¹³¹ The rates reports are alarming, to say the

¹²⁹ Denoex Guillain and Lynn Carter, "Guide to the Drivers of Violent Extremism," *USAID*. February 2009. https://pdf.usaid.gov/pdf_docs/Pnadt978.pdf. Accessed October 04, 2019.

¹³⁰ KNCHR, "The error of fighting terror with terror," Kenya National Commission on Human Rights (KNCHR). September 04, 2015.

<http://www.knchr.org/Portals/0/CivilAndPoliticalReports/Final%20Disappearances%20report%20pdf.pdf>. Accessed July 06, 2019.

¹³¹ *Ibid*

least, but are an accurate depiction of the status of affairs within the country despite the presences of a working criminal justice system. The cases are only but a few that have made it on record, implying that dozens of these cases are not reported, recorded and even heard.

The suffering of those affected by this in one way or the other is heart-breaking. The physical and psychological torture and pain are beyond imagination, to say the least. The narrative from this individual has shown the lack of trust, lost hope and brought a sense of desperateness, bitterness and in some instances revenge.

4.3 Terrorism cases reported in Kenya since 2010

It is rather unfortunate and unconventional to note that Kenya has reported a total number of about 321 terror attacks since 2011.¹³² This can be deduced to mean that three terrorism related attack happens within our borders every month.¹³³ If the statistics are anything to go by, the status of terrorism-related cases in Kenya should be a record high with dozens of suspects and culprits being prosecuted and sentenced to prison for their crimes every passing day.

In 2016, the director of criminal investigations in Kenya confirmed the presence of 80 terror-related cases in court.¹³⁴ However, it is not clear on exactly how many among them made it to the subsequent stages of the due process, hence begging the question of how effective is the system in the battle against terrorism based on the data presented by officials.

The presentation of cases is one component with the hearing and determination of the cases creating another set of mishaps and gaps, hence raising more questions than the system can provide answers to.

¹³² Juliet Atella, and Yvonne Masinde, "A timeline of terror Attacks in Kenya Since 1975." *The elephant*. January 20, 2019. <https://www.theelephant.info/data-stories/2019/01/20/a-timeline-of-terror-attacks-in-kenya-since-1975/>. Accessed May 04, 2019.

¹³³ Ibid

¹³⁴ Malemba Mkongo, "Why terror cases rarely get convictions." *The Star*. August 29, 2018. <https://www.the-star.co.ke/news/big-read/2018-10-29-why-terror-cases-rarely-get-convictions/>. Accessed August 08, 2019.

4.4 A review of Aboud Rogo's trail

4.4.1. Lack of direct linkage of suspects to the attacks, circumstantial evidence and limited proof

In 2003, then controversial Muslim cleric in the coastal town of Mombasa was arraigned in court alongside other co-accused and charged with the Kikambala bomb attack.¹³⁵ The case took about two years in the corridors of justice and was eventually dismissed for lack of direct linkage of the accused to the terrorist attack. Less than two years later, Sheikh Rogo was yet again presented in court on similar charges, after the police found firearms, ammunition and detonators in his house in early 2012.¹³⁶

Sheikh Rogo was linked to the illegal Radicalization, and indoctrination of youth's in the Masjid Mussa Mosque in the coastal town of Mombasa. Sheikh Rogo had been sanctioned by the United Nations in July 2012 under what they termed as a danger to peace, security and stability of Somalia by providing financial and material aid to Al-Shabaab.¹³⁷

Prior to his shooting, his lawyers had requested to be served with the evidence against his client as it was imposing an enormous amount of pressure to his client as well as putting his client's life under threat.¹³⁸ Aboud Rogo was killed under unclear circumstances while driving his wife to hospital.¹³⁹ His alleged assassination triggered a group of violent protesters who smashed

¹³⁵Juliet Atella, and Yvonne Masinde, "A timeline of terror Attacks in Kenya Since 1975." *The elephant*. January 20, 2019. <https://www.theelephant.info/data-stories/2019/01/20/a-timeline-of-terror-attacks-in-kenya-since-1975/>. Accessed May 04, 2019.

¹³⁶ France 24, "Violent riots hit Kenya after Muslim cleric is shot dead." *France 24*. August 28, 2012. <https://www.france24.com/en/20120828-violent-riots-kenya-muslim-cleric-shot-dead-mombasa-rogo-christians-shabaab>. Accessed September 10, 2019.

¹³⁷ United Nations Security Council. "Aboud Rogo Mohammed" *United Nations Security Council*. July 25, 2012. <https://www.un.org/securitycouncil/sanctions/751/materials/summaries/individual/about-rogo-mohammed>. Accessed September 10, 2019.

¹³⁸ Jonathan Horowitz, "Assassinations, Disappearances, and Riots: What's Happening in Mombasa?" *Open Society Justice Initiative*. August 29, 2012. <https://www.justiceinitiative.org/voices/assassinations-disappearances-and-riots-what-s-happening-mombasa>. Accessed September 09, 2019.

¹³⁹¹³⁹ France 24, "Violent riots hit Kenya after Muslim cleric is shot dead." *France 24*. August 28, 2012. <https://www.france24.com/en/20120828-violent-riots-kenya-muslim-cleric-shot-dead-mombasa-rogo-christians-shabaab>. Accessed September 10, 2019.

cars and torched churches in the coastal city of Mombasa, which they termed as an attack on Muslims.¹⁴⁰

One of the protesters was quoted saying that the police were to blame as they had imposed on him terrorism charges, arrested and charged him but they feared that the courts would release him once again, hence executing him without following the due process. The surge was also linked to the killing of Samir Hashim Khan and the disappearance of Mohammed Bekhit Kassim over what many termed as police instigated.¹⁴¹

This can be taken as a classic example of how the justice system has failed both the civilians and the accused persons. Had the law enforcement handled and presented the evidence in its correct manner, Rogo would have probably been convicted or set free to which the police would have had the obligation of ensuring that he is safe.

Had the law enforcement also respected the role of law, they would have ensured that Rogo was protected and guarded during the proceeding hence ensuring that his right for a free and fair trial is followed and guaranteed to him as the law states. Due to the nature of the case, the court would have explored the better option of ensuring that he was safe during the trial. The sensitivity of the case would have probably seen Rogo remain in custody if what was happening to these found in similar circumstances was anything to go with.

4.4.2 Victimization and arbitrary arrest, a case review of Khubied Rogo

Shortly after the brutal murder of Slain Muslim cleric Aboud Rogo, his son was Khubied Rogo was yet again under intense pressure by the police over what they sighted as linkage to al Shabaab through what they believed had been influenced by the late father.¹⁴² Khubied rogo

¹⁴⁰ Ibid

¹⁴¹ Josh Kiron " Riots in Kenya After Killing of Muslim Cleric." *New York Times*, October 04, 2013. <https://www.nytimes.com/2013/10/05/world/africa/deadly-riots-in-kenya-after-muslim-clerics-killing.html>. Accessed September 09, 2019.

¹⁴² Rogo, Khubied, interview by Mwanaiisha chidzuga. 2013. (*Mwanawe Aboud Rogo ahofia maisha yake*) The Standard Group . KTN , Nairobi . 03 13. Accessed 09 2019.

was arrested tortured and detained in a manner that does not go by the stipulated procedure. The humiliation and torture made him lose friends and even rendered it impossible for him to move around due to the mere fact that he had to inform the very people who were after his life of any intended movement.¹⁴³

Khubied Rogo gives a clear picture of how far the law enforcement can go into using lethal force and victim's innocent individual, in their quest of remaining relevant and at the top of their game. The officers, when subsequently questioned of their actions refuted the claims. However, when previously questioned, they had stated that they do not have faith in the court system which then justified them to act. During the scuffle, various individual and institutions come out to protest on the ill-treatment of the son, claiming that the police were not justified. Similarly, the emergence of groups with the city of Mombasa protesting this was also clear.

4.4.3 Haniya Saggat, Sheikh Rogo's Widow and three others

Wife of slain Islamic preacher Aboud Rogo; Haniya Saggat has also had her fair share of mistreatment and lengthy judicial proceedings over what the police sighted as aiding terror activities and failing to give information which would have stopped the commissioning of terror in 2016.¹⁴⁴

Haniya had been sentenced to 10 years by a magistrate court in Mombasa alongside Zamzam Abdi and Sisters Lulu Ali and Masteho Ali but were later acquitted by Justice Dora Chepkwony after they appealed the ruling. In her ruling, the judge said that the magistrate erred when she convicted Haniya on circumstantial evidence which she termed as unlawful and unfair, stating that this did not warrant her such a ruling.¹⁴⁵

¹⁴³ Ibid

¹⁴⁴ Mkongo, Malemba. "Rogo's wife walks free after High court overturns her 10-year sentence." *The star Newspaper*. August 05, 2018. <https://www.the-star.co.ke/news/2018-10-05-rogos-wife-walks-free-after-high-court-overturns-her-10-year-sentence/>. Accessed September 10, 2019.

¹⁴⁵ ibid

In yet another twist of events, terror suspects Ummulkheir Sadri, Maryam Said and Khadija Abubakar were arrested on March 2015 in Elwak, Mandera county; an area bordering Somalia.¹⁴⁶ The police claimed that they had received intelligence of the involvement of the three women intension of joining the Somali based terror group Al-Shabaab in the weak of a series of attacks on Kenya Soil.¹⁴⁷ Shortly after their arrest another suspect, Halima Adan was arrested along Mombasa-Nairobi highway, and it was alleged that she had recruited the other into joining Al-Shabaab.

The three were later acquitted under what the judge termed as lack of enough evidence to warrant for their conviction after a two-year incarceration period and further two-year case proceeding in Mombasa Court. In his statement, Senior Magistrate Evans Makori stated the burden of prove to terror-related groups had been the hardest as the members of these groups do not have identity cards that isolate them from the others. In his submission, he noted that the main reason for the acquittal of dozens of terrorism cases in the country was due to the complex nature of the cases but also due to the cost implication in handling these cases.

4.5 Illegal Extradition

There have been cases of illegal extradition of suspects outside Kenya's Jurisdiction without the due legal process of the law.¹⁴⁸ A classic case of this is that of Salim Awadh and Said Hamisi who were arrested detained and later extradited to Ethiopia where they were held for more than two years as terrorist suspects.¹⁴⁹

¹⁴⁶ Mkongo, Malemba. "Rogo's wife walks free after High court overturns her 10-year sentence." *The star Newspaper*. August 05, 2018. <https://www.the-star.co.ke/news/2018-10-05-rogos-wife-walks-free-after-high-court-overturns-her-10-year-sentence/>. Accessed September 10, 2019.

¹⁴⁷ *ibid*

¹⁴⁸ Adam Mwenda and Hamisi Mwamburi, "Human rights abuses of Muslim minority in Mombasa, Kenya." *International Journal of Islamic Thoughts*. 1-15. (2016). <http://www.ijits.net/human-rights-abuses-muslim-minority-mombasa-kenya-adam-mwenda-hamisi-mwamburi/>. Accessed 10 2019.

¹⁴⁹ Philip Muyanga And Mazera Ndurya, "They tortured us in Ethiopian 'Guantanamo': Freed Kenyans." *The Daily Nation*. October 04, 2008. <https://allafrica.com/stories/200810060773.html>. Accessed September 09, 2019.

The two are among over one hundred cases of victims who have been extradited to Ethiopia and Uganda, including Allamin Kimanathi who was being held in a Uganda prison under the same circumstances.¹⁵⁰Allamin was held for over one year without stepping foot into a court. After the Ugandan minister was questioned over the holding of Allamin, he stated that they had been waiting for the Kenyan government to give them a report on the way forward.¹⁵¹

This extradition further raises the question of the faith that the government has on the already set system in determining cases of suspected terror suspect and also the belief that the prison in Kenya can hold such suspect without the fear that they will disappear or better yet find a way within the system to walk free without any trial whatsoever.

4.6 Lack of Faith in the system by part the very system

In April 2014, Muslim cleric Abubakar Shariff, Alias “Makaburi” was killed in broad daylight outside the Shanzu law courts in Mombasa having survived previous assassination attempts.¹⁵²

In a documentary by Al Jazeera,¹⁵³ the death squad officers interviewed by Al Jazeera admitted that indeed Abubakar Sharif had been gunned down by police officers, an act authorized by high ranking police officers and state officials sitting in Kenya’s National Security Council.¹⁵⁴

The officer interviewed was in agreement with the general chain of command that Makaburi was bringing problems with his radical messages and needed to be silenced for peace to prevail.

¹⁵⁰ Hassan, Omar Hassan, "Dear Alamin Kimathi, justice shall retaliate with ruthless candour." *The Standard* . August 28, 2011. <https://www.standardmedia.co.ke/article/2000041718/dear-alam-in-kimathi-justice-shall-retaliate-with-ruthless-candour>. Accessed September 10, 2019.

¹⁵¹ Ibid

¹⁵² Bocha, Galgalo, "Radical cleric Makaburi shot dead." *The Daily Nation* . April 01, 2014. <https://www.nation.co.ke/news/1056-2266174-nf03o1z/index.html> . Accessed September 10, 2019.

¹⁵³James, et-all interview by Al Jazeera, “Inside Kenya’s Death Squads,” *Al Jazeera News Agency*. December 10, 2014. <https://interactive.aljazeera.com/aje/kenyadeathsquads/>. Accessed September 10, 2019.

¹⁵⁴ Chris Mgidu and Njoroge Kaburo, "Ministry of Interior denies existence of alleged police death squads." *Coast Week* . Augusts 18, 2019. <http://www.coastweek.com/3749-Ministry-of-Interior-denies-existence-of-alleged-police-death-squads.htm>. Accessed October 09, 2019.

Officers interviewed in the documentary narrated chilling details on the motives behind the rampant extra judicial-killings and assassinations, explaining that police officers often fail to produce substantial evidence to convict terror suspects and hence resort to killing and assassinating the suspects. “*You take him to court, and then you find that the next day he has been bailed out,*” explained a National Security Intelligence Service (NSIS) officer.¹⁵⁵ A GSU Recce Company officer agreed by saying, “If the law cannot work, there is another option... eliminate him.”¹⁵⁶

In yet another publication by the Open Society justice initiative and Muslims for human rights, the report dubbed “we are tired of taking you to court,” an accentuate from a comment made to a suspect who was detained during an operation in Mombasa in 2012, with a warning that he would be executed.¹⁵⁷ Officers have been recorded stating that the gaps in the judicial system provides extrajudicial killing as the better option.¹⁵⁸

4.7 Chapter Summary and Conclusion

Terrorism cases are not unheard of in Kenya, especially due to media’s obsession in reporting such cases. Those perceived to be radical individuals of violent extremism and terrorism have always received exclusive coverage by the media, who often end up as judge and jury.

This usually ends up drawing a lot of support and unnecessary attention to such cases. The case of Sheikh Aboud Rogo and his family over the years is one that caused uproar not only in his home ground Mombasa, as it also set a rather dull atmosphere across the state. The isolated

¹⁵⁵ *ibid*

¹⁵⁶ Adam Mwenda and Hamisi Mwamburi, "Human rights abuses of Muslim minority in Mombasa, Kenya." *International Journal of Islamic Thoughts*. 1-15. (2016). <http://www.ijits.net/human-rights-abuses-muslim-minority-mombasa-kenya-adam-mwenda-hamisi-mwamburi/>. Accessed 10 2019.

¹⁵⁷ Jonathan Horowitz, "Kenya Needs to End Human Rights Abuses by Its Anti-Terrorism Police Unit." *Open Society Justice Initiative*. November 19, 2013. <https://www.justiceinitiative.org/voices/kenya-needs-end-human-rights-abuses-its-anti-terrorism-police-unit>. Accessed September 09, 2019.

¹⁵⁸ Chris Mgidu and Njoroge Kaburo, "Ministry of Interior denies existence of alleged police death squads." *Coast Week* . Augusts 18, 2019. <http://www.coastweek.com/3749-Ministry-of-Interior-denies-existence-of-alleged-police-death-squads.htm>. Accessed October 09, 2019.

case caused an uproar in Mombasa, which led to violent protests by young people in Mombasa. Subsequent to the assassination of Rogo, dozens of youths in Mombasa were reported to engage in unprecedented code of conduct as retaliation for the assassination of the sheikh.

The handling of his case and that of his family members has led to violent outburst among sympathizers who are mostly the youth. With various studies pointing at the youth as the most vulnerable and at-risk population to radicalization and recruitment. It would then form the bases of how effective our system is in fighting the vice. Many have argued that the very system is pushing many into extremism as it is already extreme in its dealing.

The abuses of human rights when dealing with such cases has been in a record high. This can be categorically denoted as a factor that is leading many youth and families into extremism as a way of revenging the death of their keen and as a way to be heard by the authorities.

As most of these cases are more common within the coastal and northeastern part of the country, most of those affected in one way or the other have pointed an accusing figure on the government and the lack thereof of an efficient and fair judicial system. In various narrations, dozens of those affected have disclosed their pain especially in cases of mistaken identity, killings and disappearances of keen and relatives, resulting into pain, agony and in many instances deplorable leaving conditions due to poverty as a result of a lost keen.

The different analogies are more than enough to push individuals into terrorism as a source of income to sustain the family: revenge in order to avenge a relative's death or disappearance: audience seeking to the government and authorities for historical injustices and victimization and profiling.

CHAPTER 5

SUMMARY CONCLUSION AND RECOMMENDATIONS

5.1 Introduction.

The intention of the study is the examination of the crucial part played by the actors and institutions within the criminal justice system and the legal, policy and institutional framework within the justice system. The main hypothesis before embarking on this study was that the criminal justice system plays a critical role in either : (i) preventing terrorism through its processes by enforcing the law through the use of proper mechanism that do not infringe on human rights and dignity or (ii) promoting the very act through unorthodox means which further propel those effected into joining and being part of terror activities within the country.

In this regard the study was embedded on critically analyzing the various actors and their action when dealing with terror related cases. This was imperative as it formed the basis of the argument on the preventing and promotion of violent extremism, with narrative on the extremities evidenced through the court process in Kenya today in relation to terrorism.

5.2 Summary of the findings

Based on the problem statement, objectives and justification of the study the utilization of the theoretical framework and literature review show that the criminal justice system is not only a mere requirement by the law for any country or state. It is an expectation that the system will bring some form of sanity and by bringing those found infringing on the law to book and ensuring that justice is served to those afflicted and affected.

However, from the extensive research done through this study, the criminal justice system in Kenya lacks in its dealing, and by extension, in the fight against terrorism, The system is heavy

infested by lack of institutional capacity, coordination and cooperation in the processes leading to its unsatisfactory delivery of duty as tasked by the state and the constitution.

5.1.1 Lack of Cooperation and coordination among the sub-systems within the Criminal Justice System

The system, like any other, heavily relies on the cooperation of and coordination of effort between and among the sub-systems. The transition processes are very closely linked, and a very thin line can be drawn to show the distinction. Through the study, it was evident that the law enforcement agencies, the court and the correctional facilities must work together to ensure effectiveness within the system. A minor disconnect in one of the arms of the systems jeopardize the entire system making it almost impossible to achieve the set goal and mandate of the justice system.

Throughout the study, it was evident that the three main sub-systems within the criminal justice system are disengaged as they do not work in well-coordinated efforts, in ensuring a proper transition ending into a free and fair trial and subsequently the deserved prison time/ punishment in the correctional facilities for those found culpable of the offences. The disconnect is causing more harm than good, and stakeholders in this sector should come up with mechanism, rules, procedures and protocols on the handling of the different terrorism cases in the country.

The interpretation of the law and the application of the same should allow for accountability for all the categories within the justice system, coupled with capacity building session for the human resources. A clear line of command and jurisdiction should be drawn, and measure put in place to ensure that all actors are delivering on their part and mandate.

5.1.2 The emergence of strategies and policies on the war against terror.

Kenya has witnessed dozens of attacks in the recent past, and so has the world. With the increase of terror attacks, world government have resulted in coming up with different ways and mechanisms that would aid the war against the violent extremism, radicalization and recruitments. The country has over time, adopted different strategies and policies that would ideally enhance the already existing ones in eradicating the vice.

The development of these tools, instruments and institutions is good if not great. However, the major challenges result from vagueness on which policy takes precedence, and how they interlink with other laws, and acts, already set within the criminal justice system. The policies and strategies, therefore, fail to identify and provide a clear procedure of what takes precedence over what.

The National Counter-Terrorism Center is a perfect example of the disconnection within the system. They do not the power to arrest and present a suspect to court, and the National Strategy to Counter Violent Extremism is subordinate to existing laws. Though the narrative from the Centre points to coordination, it is not clear on how it operates with other arms of government, including the criminal justice system.

5.1.3 The violation of human rights and the rule of law.

Victimization, profiling, torture, disappearances and extrajudicial killings are significant ills from the law enforcement. However, they are expected to provide security and guarantee safety to civilians, witnesses, whistleblowers and suspects. In as much as the law enforcement have continuously been quoted validating their actions, the universal declaration of human rights reserved the rights to all humans regardless, hence the urgency in dealing with terrorism with a more human approach as opposed to what is currently happening on the ground. Law enforcement has had to bear the blow from these violations.

The study also brought to light the evident confusion between the different branches of law enforcement agencies, including the regular police, ATPU and the other arms that have been set up to enhance the war on terror.

The main focus issues that come into play is that of which arm of the national police service takes precedence in terrorism cases within the state. Before the merger, the regular police were mandated with arrest, gathering of evidence and presentation of the suspects to courts. The introduction of another department with the service to fight terrorism cases then raises the question of whether the new faculties have been given the mandate to present suspects and evidence in court or if they still have to rely on the regular police to do this.

ATPU have mainly been said to be mainly in the forefront of exerting lethal force by killing and torturing suspects. The violation of human rights by this unit then beg the question on under whose authority do they operate and why can't they follow the due processes to attaining justice. This, therefore, means that their need to be a clear and well-defined role and boundaries to the units to avoid the confusion and interference and misconduct as a result of overcrossing jurisdiction within the line of duty when it comes to the officers

5.1.4 Incapacity of the different officers within the criminal justice system to handle terrorism-related cases.

In as much as terrorism has been linked and categorized under the criminal offences, it is without a doubt evident that there was need for capacity building of different personnel within the system to deal firsthand with terrorism issues.

Most cases were sighted to have been acquitted due to the provision of circumstantial evidence produced in court. This was noted as a major hindrance in the prosecution of such cases which

would, therefore, warrant for specialized training to the police when handling terror suspect and evidence, witness protection and presentation of witnesses to the court.

The need for Magistrates and judges to be specially trained to interpret and handle terrorism cases was also evident. In as much as the law does not change, the context under which an issue is translated and synthesized always differs hence the need to have specially trained judges and magistrate's to translate and apply the law correctly and in a manner that does not underpin the issue at hand.

The correctional facilities cannot be left out for their role on rehabilitation and reintegration to the communities. However, evidence has shown that high corruption cases and lack of specialized training in handling terror suspects and culprits are lacking which more often than has not led to radicalization happening under their noses. The need to set up special courts and prisons has been a subject for discussion among and between many states. However, more questions with regards to this have emerged due to the blurry classification and categorization of terrorism.

5.1.5 Lack of categorization of the terror suspects

After thorough research on this topic, the researcher found out that one of the major gaps is that of categorization of terror suspect when presented to court. It is imperative to note that within the terror groups, we have different capacities and roles played by the different people. The perpetrators, usually referred to as the suicide bombers or the snippers early make it out of the scene of the crime. Even when they do the 'Jihad warriors' are often under oath and to them, death usually a cost that they have to bear.

Other categories that often get presented to the courts are sympathizer like in the case of Aboud Rogo, proxies who are often taken up due to their relationship with the perpetrators like in the case of Aboud Rogos Son and Wife.

The other category also includes, the host who are those who offer accommodation to soldiers in waiting, drivers , those who fund the processes and also the mastermind who do extensive work in planning and also facilitate the process like in the case of Samantha Lewthwaite, also known as the white widow believed to have been the brain behind the Westgate attack in Nairobi.

The researcher believes that the different categories of terror suspects should be marked and considered during arrest, presentation to court and during sentences. Though notwithstanding, it can be argued that a terrorist is a terrorist regardless of rank and description of duties that they undertake, but incorporation of different measure for different categories could in the long run led to a more specific system which identifies with the direct context hence making it easier for the judicial process to take effect without much interpretation.

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