

**ACCESS TO STATE FUNDED LEGAL REPRESENTATION FOR INDIGENT  
PERSONS CHARGED WITH CAPITAL OFFENCES IN KENYA**

**A THESIS SUBMITTED TO THE UNIVERSITY OF NAIROBI SCHOOL OF LAW IN  
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DEGREE (LLM)**

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**DECLARATION**

I, Wekesa Jackson Abala, declare this research to be my original work and that it has been submitted only to the University of Nairobi.

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**SIGNATURE**

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**DATE**

This thesis has been submitted for examination with my endorsement as the student supervisor

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**DR. NANCY BARAZA**

**SIGNATURE**

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**DATE**

## **DEDICATION**

I dedicate this thesis to my family for their love and support during this this undertaking.

## **ACKNOWLEDGMENT**

All honour and glory belongs to the Most High God for sustaining me throughout the research process.

I appreciate the comments and support that I received from my supervisor, Dr. Nancy Baraza. Thank you for taking time to review and comment on every chapter and for being very responsive.

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## **ABBREVIATIONS AND ACRONYMS**

ACHPR	African Charter on Human and People’s Rights
AG	Attorney General
DOJ	Department of Justice
ECOSOC	United Nations Economic and Social Council
FIDA	Federation of Women Lawyers
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists in Kenya
IDLO	International Development Law Organization
KLRC	Kenya Law Reform Commission
KNBS	Kenya National Bureau of Standards
LSK	Law Society of Kenya
NLAS	National Legal Aid Service
NALEAP	National Legal Aid Awareness Policy
NGOs	Non-Governmental Organisations
OAU	Organisation of African Unity
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
USA	United States of America



## LIST OF CASES

### International Cases

#### **African Commission on Human and Peoples' Rights**

*Advocats Sans Frontiers (on behalf of Bwampanye) v Burundi*, COMM. NO. 213/99 (2000).

*Avocats Sans Frontières (on behalf of Bwampanye) v. Burundi*, (2000) AHRLR 48 (ACHPR 2000).

#### **United States Supreme Court**

*Gideon v. Wainwright*, No. 155, decided 18 March 1963.

*Johnson v Zerbst*, No. 699, decided 23 May 1938.

*Powell v Alabama*, No. 98-100, decided 7 November 1932.

#### **England**

*Pett v Greyhound Racing Association*, (1968) 2 All ER 545.

#### **Indiana Supreme Court**

*Webb v Baird*, 6 Ind. 13.

### Domestic Cases

#### **Kenyan courts**

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

*David Macharia Njoroge v Republic*, Criminal Appeal No. 497 of 2007; [2011] eKLR.

*Dominic Kimaru Tanui v Republic*, [2014] eKLR.

*Francis Karioko Muruatetu & another v Republic*, [2017] eKLR.

*John Swaka v Director of Public Prosecutions, Attorney General & 2 others*, [2013] eKLR. Petition No. 318 of 2011.

*Karisa Chengo & 2 others v Republic*, [2015] eKLR, Criminal Appeal Nos. 44, 45 & 76 of 2014.

*Republic v Dorine Aoko Mbogo & Another*, [2010] eKLR, Criminal Case 36 of 2010.

*Republic v Karisa Chengo & 2 others*, [2017] eKLR, Petition 5 of 2015.

*Republic v Ruth Wanjiku Kamande*, [2018] eKLR, Ruling on Sentence dated 19 July 2018.

## **TABLE OF LEGISLATIONS**

### **International Instruments**

International Covenant on Civil and Political Rights, adopted 16 December 1966, entered into force 23 March 1976.

The Economic and Social Council Resolution 2007/24, ECOSOC Resolution of 26 July 2007.

United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Resolution A/RES/67/187 adopted by the General Assembly, June 2013.

Universal Declaration of Human Rights, Resolution 217A (III); UN Doc A/810 91, UN General Assembly, 10 December 1948.

### **South African**

Criminal Codes of 1917, 1955 and 1977.

The Constitution of the Republic of South African, as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, promulgated 18 December 1996, entered into force 4 February 1997.

The Legal Aid Act, No. 22 of 1969.

The South African Criminal Procedure Act, No. 51 of 1977.

### **United Kingdom**

Access to Justice Act of 1999.

Legal Aid Act of 1988.

Legal Aid, Sentencing and Punishment of Offenders Act, Act of 2012.

### **Australia guideline**

Australian Government, 'A Single Framework for Access to Justice in the Federal Civil Judicial System: A Guide for Future Action' 2009, Access to Justice Taskforce Attorney General's Department.

### **Regional Instruments**

The African Charter on Human and Peoples' Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, passed at the Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa in Lilongwe, 22-24 November 2004.

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, by African Commission on Human and Peoples' Rights of 2003.

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, Adopted 10 June 1998, entered into force 25 January 2004.

The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, by African Commission on Human and Peoples' Rights of 2003.

## **National Instruments**

### **Kenyan Legislations**

The Constitution of Kenya, 1963.

The Constitution of Kenya, 2010.

The Criminal Procedure Code, Chapter 75 Laws of Kenya.

The Legal Aid Act, No. 6 of 2016, assented to on 22 April 2016 and commenced on 10 May 2016.

The Penal Code Chapter 63 Laws of Kenya, Revised Edition 2012[2010].

The Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services, Gazette Notice No. 370, dated 20 January 2016 and took effect 1 July 2016.

## **ABSTRACT**

The Constitution of Kenya recognises and protects the right to state funded legal representation by all accused persons in Kenya. The Legal Aid Act espouses on this right by setting out the procedures, terms and institutions to offer legal aid services to persons who cannot afford them. While this is the position, no provision of the Kenya law expressly provides for access to state funded legal representation by indigent persons charged with capital offences. It has however been the norm that persons charged with murder often receive state funded legal representation. This is not the case with indigent persons accused of robbery with violence, the similarity of the sentence with that of murder notwithstanding. Taking into account the severity of sentences in capital offences, it is necessary that indigent accused persons charged with these offences receive state funded legal representation. This is explored and justified in this study.

## CHAPTER ONE:

### GENERAL INTRODUCTION

#### 1.1 Background of the Study

Access to state funded legal representation by accused persons is a right recognised and protected under the Constitution of Kenya.<sup>1</sup> This is a right enjoyed by all accused persons including persons charged with capital offences. Treason, murder and robbery with violence are identified as capital offences in the Kenya Penal Code.<sup>2</sup> These offences inform the discussions in this study. It has been a norm in Kenya that persons charged with murder often receive state funded advocate representation. Persons charged with the offence of robbery with violence do not however receive the same treatment as those charged with murder, the similarities in sentences, death sentence, notwithstanding. This leaves out many indigent persons. Indigent persons are construed in the Legal Aid Act as “persons who cannot afford to pay for legal services”.<sup>3</sup> The Black’s Law Dictionary defines an indigent persons as a “person who is needy and poor”.<sup>4</sup> Taking into account the severity of sentences in capital offences, it is necessary that indigent accused persons charged with such offences to receive counsel representation at the expenditure of the government.

Indigent persons accused of capital offences are not often in a position to defend themselves on their own, identify weaknesses of the other side’s case or identify arguments that favour their case. They also often cannot ask questions that build on their case during cross examination of a witness.<sup>5</sup> Lord Denning observes that the accused person may be “tongue-tied or nervous, confused or wanting in intelligence”. Lord Denning observes further that it is expected that an accused person would ask any question he/she may like when a magistrate asks them to do so. He notes that “If justice is to be done, he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for this task?” He notes further that an accused person whose livelihood or reputation is at stake has the right not to speak on their own but to have counsel speak on their behalf.<sup>6</sup> This constitutes legal representation.

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<sup>1</sup> The Constitution of Kenya, 2010, Article 50(2)(g).

<sup>2</sup> Chapter 63 Laws of Kenya, Revised Edition 2012[2010], sections 40, 203 & 296(2).

<sup>3</sup> Legal Aid Act, No 6 of 2016, section 2.

<sup>4</sup> Bryan A Garner (ed) Black’s Law Dictionary 9th Edition, Pg.912.

<sup>5</sup> Lord Denning in *Pett v Greyhound Racing Association*, (1968) 2 All ER 545, at 549.

<sup>6</sup> Lord Denning (n 5 above) 549.

Legal services in Kenya as is the case in any other country, world over, is often very costly. Kenya in 2016 introduced the Legal Aid Act<sup>7</sup> to help mitigate the fees for advocate services. The primary aim of the Legal Aid Act is to see to it that legal services are more affordable for indigent persons.<sup>8</sup> The Legal Aid Act broadly defines legal aid to connote various legal services such as legal advice and representation, alternative dispute resolution and settlement out of court, legal drafting, awareness creation and legal reforms recommendation.<sup>9</sup> The Black's Law Dictionary describes legal aid as the inexpensive or free legal service given to those who are not in position to fully pay for the service.<sup>10</sup> Legal aid would thus cover the ways through which indigent accused persons get legal representation at the expense of the giver or reduction of legal fees. Indigent accused persons who are "citizens of Kenyan, refugees, stateless persons, children, human trafficking victims and internally displaced persons" are entitled to legal aid.<sup>11</sup> While the personal needs of these people could vary, they often have similar legal needs, that is, they cannot afford legal representation.<sup>12</sup> The Legal Aid Act makes it a prerequisite that for a 'person to receive legal aid service', their financial resources should justify their need for legal aid.<sup>13</sup> The "nature, seriousness and importance" of the case to the accused person also play an important role in deciding whether or not to provide free legal representation.<sup>14</sup> The exercise is however not always smooth. Rabinowitz observes that protection of indigent persons is the most serious problem in the administration of criminal law.<sup>15</sup> He therefore calls on states to put in place requirements for access of justice that can be met by both the wealthy and the poor.

The exorbitant fees that lawyers in Kenya charge for their services prevents persons who cannot afford them from accessing legal services in Kenya. Where one is charged with an offence that has a capital element to it, the legal fees incurred are even more expensive. Capital offences informing discussions in this study are defined under the Penal Code,<sup>16</sup> they include; treason, murder and robbery with violence.<sup>17</sup> Upon conviction, such offences attract a death penalty. Important to note

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<sup>7</sup> No. 6 of 2016.

<sup>8</sup> Office of the Attorney General & Department of Justice, 'National Action Plan on Legal Aid 2017 – 2022' (2017) <statelaw.go.ke/wp-content/uploads/2017/12/NAP-Legal-Aid-2017-2022.pdf> accessed 9 January 2019.

<sup>9</sup> Legal Aid Act, section 2.

<sup>10</sup> Garner (n 4 above) 912.

<sup>11</sup> Legal Aid Act, section 36(1).

<sup>12</sup> The Legal Aid Act mandates the National Legal Aid Service to identify the legal needs of indigents, section 35(3)(a).

<sup>13</sup> Legal Aid Act, section 36(3).

<sup>14</sup> Legal Aid Act, section 36(4).

<sup>15</sup> Victor Rabinowitz, 'Indigent Defendants and the Right to Representation' (1957) 17 Lawyers Guild Review 127

<sup>16</sup> Chapter 63 Laws of Kenya, Revised Edition 2012[2010].

<sup>17</sup> Treason contrary to Section 40 of the Penal Code; Murder contrary to Section 203 of the Penal Code: and Robbery with Violence contrary to Section 296(2) of the Penal Code.

is that self-representation for someone who is facing such dire consequences would certainly come with challenges.

Indigent persons facing capital offences are therefore in dire need of legal aid in the form of provision of the services of counsel which they find themselves unable to afford. This violates the principle of equality of every person before the law as it pegs one's fate to the state of their finances. In the words of Hersch Lauterpact, "Equality before the law is the most important right amongst the rights of man".<sup>18</sup> Availability of quality legal aid to all accused persons is an access to justice issue. It is therefore urgent that the state moves to secure and guarantee the rights of such individuals as no one should be denied justice because he or she is poor and cannot afford legal assistance. An indigent person should enjoy the benefits and protections offered by the law.<sup>19</sup>

Since Kenya's independence, the state and non-state actors in tandem have been the key providers of the legal aid to indigent and vulnerable accused persons. The state however took a less active role while the non-state actors played the chief role. The key reason for this has been lack of clear legal, institutional and coordinated framework which presented a great challenge towards effective provision of legal aid services.<sup>20</sup>

The judiciary has operated a pauper brief scheme, over the years, aimed at providing poor persons accused of murder with free advocate representation. The scheme is similar to that of legal aid. The scheme leaves out poor accused persons charged with the other classes of capital offences which on conviction, bear severe consequences for the accused. In 2016, the Chief Justice gave "practice directions on pro bono legal services and pauper briefs".<sup>21</sup> The effect of these practice directions is to offer legal representation to suspects facing charges of a capital nature by setting up court user committees to allocate these matters to qualified counsel. Though long overdue, Kenya has come a long way in formulating a sound legal framework for legal aid. This presents an access to justice challenge in the country, and addressing this challenge significantly adds to the realizing of the constitutional right of access to justice.

According to legal aid expert Dr. Ruth Adhiambo Aura, the main challenge that faces the traditional legal aid offered in Kenya in regards to criminal cases was that Government gave trivial

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<sup>18</sup>Hersch Lauterpact, *An International Bill of Rights of Man* (first published 1945, Oxford) 115.

<sup>19</sup> Osino George Osanda, 'Examining the Right to Legal Representation at Public Expense' <<https://bit.ly/2VBCDPr>> accessed 9 January 2019.

<sup>20</sup> Osanda (n 19 above).

<sup>21</sup> Judiciary Gazette Notice 370 of 2016.

assistance to indigent accused persons. The services were also not attractive to lawyers practising at the time due to very minimal legal fees that were paid to them. This compromised the quality of legal service rendered. Cases also took longer to be determined, more so, in criminal cases where accused persons were not represented by counsel.<sup>22</sup>

Upon the promulgation of Kenya's Constitution in 2010, Chapter Four enshrined standard requirements calling upon the state to, at its expense, provide counsel to all accused persons in instances where substantial injustice may otherwise occur.<sup>23</sup> The Constitution further empowered Parliament to develop a mechanism for the recognition of this right. In obedience to this constitutional provision, parliament in 2016 enacted the Legal aid Act which took effect on 10<sup>th</sup> May 2016.

By specifically providing for funding of legal aid, Kenya benefits with a scenario where the implementation of legal aid programmes and interventions which ensure deepening of access to justice are prioritised. It is also instrumental in attaining development which is an integral part of the Third Kenya Vision 2030 Medium Term Plan.<sup>24</sup>

## **1.2 Statement of the Problem**

Indigent accused persons facing capital offences in Kenya are not adequately provided state funded legal representation as set out under the Constitution of Kenya. The Constitution requires that counsel be provided to an accused person at the expense of the state. Other Kenyan laws on free legal representation do not adequately cover provision of free legal services to indigent persons accused of capital offences. Specifically, the Legal Aid Act and Chief Justice Practice Directions relating to Pauper Briefs Scheme Services fail to put in place adequate financial arrangements to effectively provide quality legal aid to indigent persons accused of capital offences, resulting in lack of realisation of this constitutional right. The existing frameworks further speaks to provisions of free legal services to indigent persons accused of murder. Offences such as treason and robbery with violence which are capital offences with the same sentence as that of murder are not factored in.

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<sup>22</sup> Dr. Ruth Adhiambo Aura interview, 'Kenya's First Legal Aid Action Plan Formally Launched 21<sup>st</sup> December 2017' <<https://www.idlo.int/news/highlights/kenya-first-legal-aid-action-plan-formally-launched>> accessed 10 January 2019.

<sup>23</sup> Constitution of Kenya, 2010, Article 50(2).

<sup>24</sup> Concept Note Term Medium Term Plan 2018 – 2022 at Pg.10. <<https://www.mtp3.go.ke/portal/data/apis/uploads/site/downloads/CONCEPT%20NOTE%20MTP3.pdf>> accessed 10 January 2019.



### **1.3 Justification of the Study**

Though legal aid has been provided for as a constitutional right, its realisation has been far from reality owing to the dire economic situation in Kenya. The study will look into the availability of state funding for indigent individuals facing capital offences and whether the policy and legislative frameworks have provided for the effective realisation of the same for these classes of individuals. Kenya is a country that ranks highly in the world poverty index.<sup>25</sup> This translate to increase in the number of accused persons who cannot afford legal service. Thus, justify the need for legal aid.<sup>26</sup> This study will also examine the need for state funded legal representation where an individual is accused of robbery with violence and treason, as has been the case with murder trials where it is a norm that any accused person charged with murder receive state funded legal aid.

The study will analyse cases where the state has provided legal services to indigent persons facing capital offences and assess the impact of the service to those in need towards achieving justice. Indigent persons charged with capital offences have been identified owing to their limitation of resources in accessing own legal representation. Further, the severity of the sentences issued out in capital cases is so severe that it is crucial that an accused person should be represented by counsel for better outcome of the accused person's case.

### **1.4 Research Objective**

The general aim of this thesis is to examine whether available legislative and institutional frameworks on legal aid and pauper briefs in Kenya efficiently and resourcefully provide for adequate provision of free legal services to indigent persons accused of murder, treason and robbery with violence in Kenya.

The specific research objectives which this study seeks to address are:

- i) To examine whether the state has put in place adequate measures to realise the right of funded legal services by indigent accused persons facing capital offences in Kenya.
- ii) To analyse, review, and critique the existing legislative framework on provision of legal aid and pauper briefs in Kenya.

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<sup>25</sup> S Alkire & G Robles, 'Multidimensional Poverty Index Summer 2017: Brief methodological note and results' OPHI Methodological Note 44 (University of Oxford 2017).

<sup>26</sup> Aura (n 22 above).

- iii) To recommend policy and administrative measures that may be suitable towards the realisation of the right of legal aid for indigent accused persons facing capital offences in Kenya.

### **1.5 Research Questions**

This thesis mainly seeks to respond the ensuing questions:

- i) To what extent are the measures put in place in Kenya adequate to realise the right of funded legal services by indigent persons charged with capital offences in Kenya?
- ii) What is the existing regulatory framework on legal aid and pauper briefs for indigent persons accused of capital offences in Kenya?
- iii) What policy recommendations can be made to ensure the realisation of the right to quality state sponsored legal aid for indigent persons facing capital offences in Kenya?

### **1.6 Hypotheses**

This thesis is premised on the following hypotheses:

- i) The state funded legal interventions for indigent persons facing capital offences do not achieve the best available results for access to justice in the provision of timeous and quality legal representation for indigent and vulnerable persons as is required under Kenya's Constitution.
- ii) The legislative framework in Kenya encompassing state funded legal aid and pauper briefs for indigent persons facing capital offences does not adequately address their specific needs.
- iii) The funds allocated for delivery of sponsored legal services in Kenya do not sufficiently meet the request for legal representation by indigent persons charged with capital offences in Kenya.

### **1.7 Limitations of the Study**

The main limitation of this thesis relates to obtaining adequate literature for review. Although there exist a lot of literature on legal aid procedures for funding, very few writers have specifically written on or analysed legal aid to capital offenders.

Another limitation is that it may be difficult to obtain information on how state funds meant for legal aid are spent due to government bureaucracy and red tape. This is because it would involve

identifying and contacting persons within government who are specialized or conversant with and who would be willing to provide such information.

## **1.8 Theoretical Framework**

It is prudent for a country to put in place a sound legal framework for purposes of achieving access to justice for all by breaking down barriers to justice. Barriers to justice reinforce poverty and exclusion.<sup>27</sup> This study will be guided by the interplay between the theory of justice and development theory. These theories are elaborated further below.

### **1.8.1 Theory of Justice**

The theory of justice was first propounded in 1971 by John Rawls in the book '*A Theory of Justice*'<sup>28</sup> where he posits that theories of justice are about ways that are appropriate to structure government and society. He argues that justice guarantee morally acceptable and just societies. It is therefore contextually relevant to take into account whether access to justice measures the needs of society. Rawls speaks of a society where every individual is holding equal basic rights, needs and liberties. He states that political bargains or social interest should in no way hinder full enjoyment of the rights secured by justice. He argues that 'an erroneous law is better than no law at all'. Thus, injustice can only be tolerated where a greater injustice will be avoided.

John Rawls identifies the principles of equal liberty, difference and equal opportunity as the three principles of justice.<sup>29</sup> Under the principle of equal liberty, all persons have equal rights to rudimentary liberties. The difference principle protects persons who are least well-off when they are faced with an unequal arrangement. It is an exception to the principle of equal liberty. If there is any allocation made, it encourages unequal allocation to the least well-off people where such a form of distribution is going to make them better off.<sup>30</sup> The principle of equal opportunity calls for the provision of equal opportunities for all. All these principles can be linked to legal representation where all accused persons should be treated equally. Where free legal services are necessary to make indigent persons better off is so far as legal representation and access to justice are

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<sup>27</sup> Australian Government, 'A Single Framework for Access to Justice in the Federal Civil Judicial System: A Guide for Future Action' 2009, Attorney General's Department.

<sup>28</sup> John Rawls, *A Theory of Justice* (Harvard University Press Cambridge Massachusetts 1971).

<sup>29</sup> Rawls (n 28 above).

<sup>30</sup> John Rawls (n 28 above).

concerned, the difference principle will come in handy to give these forms of advantages to them so that they are in an equal position with accused persons who can afford legal services.

### **1.8.2 Development Theory**

Development theory posits that any internal social processes within a given country should mainly focus on the prudent use of resources. According to Amartya Sen on development theory, sound development is about the expanding capabilities of a particular society and as such development must be sustainable in both the intra-generational and inter-generational sense to meet the expectations of the people in the present as well as those of the future.<sup>31</sup> The economic capabilities of a society are therefore relevant in determining whether the access to justice needs of the vulnerable and indigent are being met.

According to Pieterse, development theory is grounded on economic, cultural and political setting.<sup>32</sup> The nexus of relevance between the development theory and achieving access to justice for all goes in tandem with the bigger picture of using a country's resources prudently. This study is therefore guided by the development theory and will investigate whether state funded legal representation will contribute to development by giving indigent Kenyans access to justice, reduce the number of innocent persons in our jails and contribute to the sustainable development of our country.

### **1.9 Literature Review**

The need for a sound and coherent legal framework for legal aid cannot be understated. There is also a basis for having a legal aid system which is cost-effective and sustainable as is stipulated in order to keep in line with the current economic realities. Legal aid is purposive as it is an instrument of public policy. A government ought to promote the public interest at all times and is therefore entrusted with the responsibility of achieving and promoting certain policies which are expected to be in public good and reflect public interest. By guaranteeing access to justice for all, governments ensure that there is democratic participation and that mechanisms for accountability are in place. It therefore follows that policy makers should pay attention to access to justice.<sup>33</sup> It

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<sup>31</sup> Amartya Sen, 'Development as Capability Expansion' <[http://www.ophi.org.uk/wp-content/uploads/Sen-2003\\_Development-as-Capability-Expansion.pdf](http://www.ophi.org.uk/wp-content/uploads/Sen-2003_Development-as-Capability-Expansion.pdf)> accessed 1 September 2019.

<sup>32</sup> Jan Nederveen Pieterse, *Development Theory* (Sage 2010).

<sup>33</sup> Dr. Julieta Marotta, 'Access to Justice: A Driver for the Sustainable Development Goals' (2018) <<http://www.mepli.eu/2018/04/access-to-justice-a-driver-for-the-sustainable-development-goals/>> accessed 3 September 2019.

is the duty of the state to afford legal aid since it is instrumental in a functional criminal justice system.<sup>34</sup>

According to Laibuta, since independence, the demand for justice has increased over the years but access to justice has been dodged by myriad challenges such as the high cost of accessing justice, protracted legal procedures leading to inordinate delays in administration of justice and ignorance of the law.<sup>35</sup> This study will seek to find out whether the measures put in place by the state to meet the need for legal aid are sufficient and address the challenges mentioned above.

According to Marcos Atsiaya, there are cogent reasons why countries ought to put in place a proper system for legal aid, chief among them being that justice is a very important concept of democracy. Marcos posits that even though Kenya is a fairly democratic country, justice has not been afforded to indigent persons who cannot afford lawyers.<sup>36</sup> This is a situation that needs to be addressed through effective implementation of the “Chief Justice Practice Directions relating to Pauper Briefs Scheme and Pro Bono Services” and the “Legal Aid Act of 2016” which are the legislative measures in place established to meet these urgent needs.

Jill Cottrell Ghai has pointed out a discriminatory practice in the provision of legal aid to indigent accused persons in Kenya. She points out a disturbing trend whereby the state provides legal aid to capital offenders specifically charged with murder but does not extend the same to persons charged with robbery with violence.<sup>37</sup> This is discriminatory because both classes of offences carry the same penalty and should be remedied to ensure that access to justice is afforded to all persons. She points out that the Legal Aid Act discriminates against stateless persons. Such a person would not be in a position to request for legal aid. This is certainly unfair and against the Constitution, which recognizes “every accused person’s” right to be represented by an advocate.<sup>38</sup> This study will therefore seek to highlight this gap in our laws and make available recommendations on how to deal with this shortcoming.

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<sup>34</sup> United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 1 and Principle 2.

<sup>35</sup> K.I Laibuta (2010), ‘Access to Justice: An Appraisal of the Policy and Legal Frameworks’ <<http://erepository.uonbi.ac.ke/handle/11295/15704>> accessed 1 September 2019.

<sup>36</sup> Atsiaya Mongoi Marcos, ‘A Research Paper on Access to Justice and the Right to Legal Aid: A Comparative Analysis of Kenya and the United Kingdom’ (Central European University) <[http://www.etd.ceu.hu/2011/atsiaya\\_marcos.pdf](http://www.etd.ceu.hu/2011/atsiaya_marcos.pdf)> accessed 8 December 2018.

<sup>37</sup> Jill Cottrell Ghai, ‘Legal Aid in Kenya: New Hope or false dawn?’ <[https://www.the-star.co.ke/news/2016/05/28/legal-aid-new-hope-or-false-dawn\\_c1357206](https://www.the-star.co.ke/news/2016/05/28/legal-aid-new-hope-or-false-dawn_c1357206)> accessed 10 January 2019.

<sup>38</sup> Ghai (n 37 above).

The Legal Aid Act 2016<sup>39</sup> is the legislative backbone for providing legal aid in Kenya. It establishes the Legal Aid Fund.<sup>40</sup> The state, with donor funding and technical support from the International Development Law Organization (IDLO) put in place the “National Action Plan on Legal Aid” under the auspices by the “National Legal Aid Service” (NLAS). The purpose of these measures is to realize the funding for legal aid and this study will seek to establish whether the Legal Aid Fund adequately avails finances towards legal representation for indigent persons facing capital offences.

Legal representation in a court of law is considered the most expensive form of legal service and is topping the pyramid.<sup>41</sup> From the foregoing, we can agree that the key challenge facing access to justice in Kenya is the failure of those in authority to prioritize the funding of the “right to legal aid” as a significant human right and to acknowledge their responsibility to grant access to justice for all. The principle of non-discrimination, which is a general rule and standard for human rights, are applicable to legal aid provisions. Citizens must have full realisation of their right to access justice through legal aid by assisting them to receive quality legal services without undue delay or exorbitant expense.

### **1.10 Research Methodology**

The study is largely analytical and will heavily rely on a rich mixed design in order to provide a detailed examination of the legal aid system established in Kenya vide the Legal Aid Act of 2016. The study will primarily rely on secondary data. This study relies on library research as well as make comparative juxtapositions from authors who have researched and commented on the legal aid process and legislation from different jurisdictions. Other materials to be referred to include: international conventions and instruments; judicial decisions of courts; peer reviewed academic journals; newspaper articles; books and booklets; conference papers and; publications by relevant organizations; as well as contemporary studies by various scholars.

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<sup>39</sup> Legal Aid Act No 6. of 2016.

<sup>40</sup> *ibid* sec 29.

<sup>41</sup> The Danish Institute for Human Rights, ‘Access to Justice and Legal Aid in East Africa’ (2011) <<https://www.humanrights.dk/publications/access-justice-legal-aid-east-africa>> accessed 19 January 2019.

## **1.11 Chapter Breakdown**

This study is examined in five chapters, as follows:

Chapter one is the introductory chapter. It sets out the background of the thesis, discusses the statement of the problem and outlines the justification of the thesis, research questions, objectives and hypothesis. Sets out the limitations of the thesis. Discusses the theoretical framework, research methodology and finally, the literature review.

Chapter two conceptualises access to state funded legal representation by indigent accused persons charged with capital offences in Kenya

Chapter three explores the institutional and legal framework for accessing state funded legal representation by indigent persons charged with capital offences in Kenya.

Chapter four analyses the current mechanism for representations of indigent persons charged with capital offences in Kenya, identifies challenges and draws lessons from other jurisdictions.

Chapter five summarizes, gives recommendations and concludes the study.

**CHAPTER TWO:**

**CONCEPTUAL ANALYSIS OF ACCESS TO STATE FUNDED LEGAL  
REPRESENTATION BY PERSONS CHARGED WITH CAPITAL OFFENCES IN  
KENYA**

**2.1 Introduction**

To further understand the importance of state funded legal representation of indigent persons charged with capital offences in Kenya, this chapter delves into the past developments in the area. Importantly, an analysis of the system of criminal justice in Kenya is necessary in order to understand the nature, procedure and key stakeholders involved in the prosecution of capital offences in Kenya. Historical developments such as the court's practice on capital offences prosecution and whether it has previously established that absence of state funded legal representation of indigent persons charged with capital offences results in huge numbers of convictions. Conversely, this chapter explores the courts' findings on capital offences where accused persons are represented by pro- bono lawyers and private advocates. This chapter notes that in the recent past, more so, following the promulgation of Kenya's Constitution,<sup>42</sup> it became mandatory for persons charged with capital offences to be represented by advocates since failure to, would result in substantial injustice, this is because of the nature of the sentences that capital offences attract.<sup>43</sup>

It is against this backdrop that this chapter conceptualises access to state funded legal representation by indigent accused persons charged with capital offences in Kenya. It is divided into four major parts; the first part gives a synopsis of the criminal justice system in Kenya. The second part briefly discusses the historical developments in the area. The third part examines the jurisprudence that has been set on state funded legal representation of indigent persons accused of capital offences in Kenya. The fourth party analyses the correlation between convictions and advocate representation of indigent persons accused of capital offences in Kenya. The chapter then concludes.

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<sup>42</sup> 27 August, 2010.

<sup>43</sup> Article 50(2) (h).



## 2.2 Overview of Kenya's criminal justice system

The legal system in Kenya is adversarial in nature. This connotes representation of parties to a case by advocates who control the information presented to the court which then pass judgment accordingly.<sup>44</sup> Under this system statutory law, customary law, common law and Islamic law are relied upon. Moreover, the doctrine of precedents is implemented.<sup>45</sup> The supreme law under the Kenya's legal structure is the Constitution of 2010.<sup>46</sup> The criminal justice system in Kenya brings together stakeholders for example, the community, police, judiciary, probation officers and prison services.<sup>47</sup> The mandates of the police are to arrest suspects or accused persons, receive and record complaints, case investigations and prepare charge sheets. The judiciary is the custodian of justice. It hears and determines cases brought before it. The society influence attitudes towards criminal offenders. Reforms in the Kenyan criminal justice system are spearheaded by the National Council on Criminal Justice Reforms.<sup>48</sup> Access to counsel and free legal representation is integral to the criminal justice system in Kenya. Crimes are categorised as misdemeanors, which are less serious crimes and felonies, which are more serious crimes such as capital offences.<sup>49</sup>

In the Kenyan criminal justice system, capital offences are considered the worst forms of crimes against society. These offences attract a death sentence.<sup>50</sup> The burden of proof for such offences in Kenya is 'beyond reasonable doubt'. Most Kenyans however and a majority of human rights campaigners support the abolition of death penalty since it infringes the right to life.<sup>51</sup> Death penalty has also been viewed to take away the discretion of judges to consider mitigating circumstances prior to sentencing.<sup>52</sup> The Supreme Court of Kenya pronounced itself on death

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<sup>44</sup> The Great Soviet Encyclopedia, 'Adversary Procedure'

<<https://encyclopedia2.thefreedictionary.com/Adversarial+system>> accessed 12 August 2020.

<sup>45</sup> International Commission of Jurists, 'Criminal Justice Reforms: Issues and Options for Kenya' (2018) <<https://www.icj-kenya.org/news/latest-news/184-criminal-justice-reforms-issues-and-options-for-kenya>> accessed 11 August 2020.

<sup>46</sup> The Constitution of Kenya, 2010, Article 2(1).

<sup>47</sup> *ibid.*

<sup>48</sup> National Council on the Administration of Justice, 'Criminal Justice System in Kenya: An Audit' (2017) 63 available at [http://kenyalaw.org/kenyalawblog/wp-content/uploads/2017/01/Criminal\\_Justice\\_Report.pdf](http://kenyalaw.org/kenyalawblog/wp-content/uploads/2017/01/Criminal_Justice_Report.pdf).

<sup>49</sup> Obi Ebbe, 'World Factbook of Criminal Justice Systems' available at <https://www.bjs.gov/content/pub/pdf/wfbcjsk.pdf>.

<sup>50</sup> National Crime Research Centre, 'Perceptions on capital offences and punishment in Kenya' <<http://www.crimeresearch.go.ke/perceptions-on-capital-offences-and-punishment-in-kenya/>> accessed 11 August 2020.

<sup>51</sup> *ibid.* The Constitution of Kenya, 2010, Article 26 stipulate that the right to life of persons must not be intentionally deprived. This right is reaffirmed by other international and regional human rights instruments that have been ratified by Kenya.

<sup>52</sup> David Indeje, 'Death Sentence is Inconsistent with the Constitution – Supreme Court' <<https://sokodirectory.com/2017/12/death-sentence-is-inconsistent-with-the-constitution-supreme-court/>> accessed 11 August 2020.

penalty in the case of *Francis Karioko Muruatetu & another v Republic*,<sup>53</sup> (*Muruatetu case*) where it held that death sentence was unconstitutional.<sup>54</sup> It set out mitigating factors for re-hearing a sentence on a murder charge to include; “offender’s age, first time offender, plea of guilty by offender, previous record and character of offender, commission of the offence in response to gender-based violence, whether offender is remorseful, reform and social re-adaptation of the offender”.<sup>55</sup> There is therefore in place a moratorium for the imposition of death penalty. Notwithstanding this moratorium, courts have continued to issue death sentences, such persons are however not executed but serve a life imprisonment instead.<sup>56</sup> The last execution took place in 1986.<sup>57</sup>

Courts have discretion not to sentence accused persons charged with capital offences to death only in deserving cases. From the ratio in the case, deserving cases are cases that fall under the guidelines given by the Supreme Court in *Francis Karioko case*. The factors to consider in determining a deserving case include “age of the offender, being a first offender, whether the offender pleaded guilty, character and record of the offender, commission of the offence in response to gender-based violence, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender and any other factor the court might deem relevant”.<sup>58</sup> This was decided upon by the High Court in *Republic v Ruth Wanjiku Kamande*.<sup>59</sup> It was similarly decided upon in *Muruatetu case* where the Supreme Court observed that courts have jurisdiction to consider and pass a death sentence. From the foregoing and taking into account the severity of the sentence for capital offences in Kenya, it is necessary that state funded legal representation be provided to persons who cannot afford them in order to avert any substantial injustice that might otherwise result.

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<sup>53</sup> [2017] eKLR.

<sup>54</sup> *ibid* paragraph 112.

<sup>55</sup> *ibid* paragraph 71.

<sup>56</sup> Kenya National Commission on Human Rights, ‘Review of the Law on Capital Punishment in the Kenyan System’ (2018) <<https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1034/Review-Of-The-Law-On-Capital-Punishment-In-The-Kenya-System>> accessed 11 August 2020.

<sup>57</sup> The Judiciary, ‘Sentencing Policy Guidelines’ available at [http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing\\_Policy\\_Guidelines\\_Booklet.pdf](http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf).

<sup>58</sup> *Republic v Margret Karemi Njiru* [2018] eKLR

<sup>59</sup> [2018] eKLR, Ruling on Sentence dated 19 July 2018.

### 2.3 Historical developments on state funded legal representation of persons charged with capital offences

While the current laws and regulations provide for the right to state funded legal representation, it was not the case in the past. This subsection takes the reader on a journey to the past developments for the recognition and protection of the right to free advocate representation, particularly, where an accused person is indigent and facing a capital offence. The right to legal representation first came into the picture in the 19<sup>th</sup> Century in Europe where European countries were appointing counsels to persons who were unable to pay for legal services.<sup>60</sup> Around 1808, legal aid associations were set up in America to provide legal aid. The right to an advocate at the expenditure of the state was for the first time recognised in 1853 by the courts. Specifically, the Indiana Supreme Court in *Webb v Baird*,<sup>61</sup> observed that “indigent persons accused of crime were entitled to legal representation at the expense of the state”. In the words of the Indiana Court:

It is not to be thought of in a civilized community for a moment that any citizen put in jeopardy of life or liberty should be debarred of counsel because he is too poor to employ such aid..... No court could be expected to respect itself to sit and hear such a trial. The defense of the poor in such cases is a duty which will at once be conceded as essential to the accused, to the court and to the public.

Fast forward to 1932, the Supreme Court of the United States in *Powell v Alabama*,<sup>62</sup> stated that legal representation was a necessity in state capital proceedings. It also recognised in *Johnson v Zerbst*,<sup>63</sup> the right of accused persons to have counsel representation in federal proceedings. Following this, most volunteer pro bono lawyers were relied upon in representing indigent persons accused of serious crimes.<sup>64</sup> In 1963, United States Supreme Court observed in *Gideon v. Wainwright*,<sup>65</sup> that indigent persons facing a capital offence charge were “entitled to legal representation at the expense of the state”. In the same year, Kenya gained its independence, following which the 1963 Constitution was enacted. The 1963 Constitution of Kenya recognised

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<sup>60</sup> Jaysikuku, ‘Right to Legal Representation under the 2010 Constitution is it an Absolute Right’ (2014) <<https://jaysikuku.wordpress.com/2014/07/04/right-to-legal-representation-under-the-2010-constitution-is-it-an-absolute-right/>> accessed 12 August 2020.

<sup>61</sup> 6 Ind. 13.

<sup>62</sup> No. 98-100, decided 7 November 1932.

<sup>63</sup> No. 699, decided 23 May 1938.

<sup>64</sup> National Legal Aid & Defender Association, ‘History of Right to Counsel’ <[http://lobby.la.psu.edu/064\\_Legal\\_Services/Organizational\\_Statements/NLADA/NLADA\\_History\\_right\\_counsel.htm](http://lobby.la.psu.edu/064_Legal_Services/Organizational_Statements/NLADA/NLADA_History_right_counsel.htm)> accessed 12 August 2020.

<sup>65</sup> No. 155, decided 18 March 1963.

the right to legal representation in criminal cases.<sup>66</sup> It did not expressly provide that this right should be provided at the expenditure of the state. Following this, court practice was developed to the extent that pro bono legal services were provided majorly to persons charged with murder. Select non-governmental organisations also initiated programmes for pro bono legal representation of indigent persons.<sup>67</sup>

Fast forward to 2010, the Constitution of Kenya in express terms provide that an ‘accused person is entitled to be assigned counsel’ by and at the cost of the state where failure to would cause a substantial injustice.<sup>68</sup> This is a right that should be promptly communicated to the accused person. This right was given further protection by the Legal Aid Act<sup>69</sup> which was enacted to set out terms for legal aid. These laws have informed various court cases on the right to free legal representation of persons charged with a capital offence. As has been pointed out in Chapter Two, the “Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services” issued by the Chief Justice in 2016 and the Criminal Procedure Code<sup>70</sup> recognise accused persons’ “right to legal representation”. In comparison to the capital offences of robbery with violence and treason, the offence of murder has informed many court cases on the “right to free legal representation”. It is espoused further in the subsequent sections of this chapter. Currently, and as has been pointed out under the previous chapter, several institutions have been established that see to it that indigent accused persons charged with a capital offence in Kenya receive free legal representation.

## **2.4 Jurisprudence on legal representation of indigent persons accused of capital offences in Kenya**

Though the right to be “represented by counsel” in Kenya is set out under the Constitution of 2010 in broader terms in comparison with the Constitution of 1963, it is not an absolute right since it can be waived by the court where it is demonstrated that no substantial injustice would result if it

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<sup>66</sup> Section 77(2).

<sup>67</sup> Jaysikuku, ‘Right to Legal Representation under the 2010 Constitution is it an Absolute Right’ (2014) <<https://jaysikuku.wordpress.com/2014/07/04/right-to-legal-representation-under-the-2010-constitution-is-it-an-absolute-right/>> accessed 12 August 2020.

<sup>68</sup> Article 50(2)(h).

<sup>69</sup> No. 6 of 2016.

<sup>70</sup> Chapter 75 Laws of Kenya.

is not provided.<sup>71</sup> This subsection examines notable cases that justify why indigent persons accused of capital offences are entitled to state funded legal representation.

To begin with, it seeks to demonstrate that legal representation of indigent persons charged with capital offences is necessary so as to avert substantial injustice that may result. What constitute “substantial injustice” is not defined by Kenya’s Constitution and the Legal Aid Act. Kenyan courts have however construed that it results where a person charged with a capital offence cannot afford legal representation. Kenya’s Supreme Court in *Republic v Karisa Chengo & 2 others*,<sup>72</sup> observed that failure to provide legal representation to an accused person is detrimental to their access to justice. It noted that in so far as legal representation is concerned, substantial injustice would result “where a person is charged with an offence punishable by death”.<sup>73</sup> The High Court in *Dominic Kimaru Tanui v Republic*,<sup>74</sup> held that the state in deciding whether or not to grant free legal representation should conduct a case by case examination, assess the complexity of law and facts, ability of accused to conduct own defence and public interest.<sup>75</sup> The Supreme Court in *Republic v Karisa Chengo & 2 others*,<sup>76</sup> outlined various factors for substantial injustice to include; “seriousness of the offence, sentence severity, ability of accused person to pay own legal representation, age and literacy of accused and charge complexity”. This was also decided upon by the Court of Appeal in *Karisa Chengo & 2 others v Republic*,<sup>77</sup> where it observed that: -

.....substantial injustice only arises in situations where a person is charged with an offence whose penalty is death and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise.

It was recognised by the Appeal Court in *David Macharia Njoroge v Republic*,<sup>78</sup> that in addition to substantial injustice that might result, offences that attract a death penalty are entitled to state

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<sup>71</sup> Jaysikuku Blog, ‘Right to Legal Representation under the 2010 Constitution is it and Absolute Right’ <<https://jaysikuku.wordpress.com/2014/07/04/right-to-legal-representation-under-the-2010-constitution-is-it-an-absolute-right/>> accessed 12 August 2020.

<sup>72</sup> [2017] eKLR.

<sup>73</sup> ibid paragraph 6.

<sup>74</sup> [2014] eKLR.

<sup>75</sup> See also Kelvin Mugwe, Legal Aid Act, 2016’ (2016) The Nairobi Law Monthly, available at <https://nairobi.lawmonthly.com/index.php/2016/09/01/legal-aid-act-2016/>.

<sup>76</sup> [2017] eKLR, Petition 5 of 2015.

<sup>77</sup> [2015] eKLR, Criminal Appeal Nos. 44, 45 & 76 of 2014.

<sup>78</sup> [2011] eKLR, Criminal Appeal No. 497 of 2007.

legal representation. As was also noted by the Appeal Court in *Alloys Omondi Nanga v Republic*,<sup>79</sup> legal practice had been established on legal representations of indigent persons charged with murder in order to ensure that justice is accorded to them. This extends to appellants who are charged with the offence of robbery and attempted robbery with violence. In such instances where an accused person is unable to pay for own legal representation, such a person has no choice of the counsel who is to represent him.<sup>80</sup>

It was observed in the High Court case of *John Swaka versus Director of Public Prosecutions and two others*,<sup>81</sup> that though the right to free legal representation is essential to avert a “substantial injustice” that may result, such legal representation need not be provided immediately, neither does cases where it is not provided for does not automatically become a nullity. In *John Swaka versus Director of Public Prosecutions and two others*,<sup>82</sup> the High Court observed that it is not only indigent persons but “all persons” accused of offences that attract a death penalty are “entitled to legal representation at the expense of the states”. This is regardless of the economic circumstance of the accused person.<sup>83</sup>

At the regional level, the African Commission on Human and Peoples’ Rights in *Advocats Sans Frontiers (on behalf of Bwampanye) versus Burundi*,<sup>84</sup> observed that the gravity of the sentence should be considered when according legal assistance to an accused person. It noted further that legal representation is instrumental in access to justice.

From the foregoing, it is clear that indigent persons accused of capital offences are entitled to free legal representation to avert any injustice that would otherwise result. This is because capital offences attract a death sentence and indigent persons cannot afford legal services.

## **2.5 Analysis of the correlation between convictions and lack of legal representations of persons charged with capital offences in Kenya**

It’s not in doubt that the state and various non-governmental organisations have put in place various measures to see to it that indigent persons accused of capital offences receive free legal representation in Kenya. The practice, after the promulgation of Kenya’s Constitution in 2010, is

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<sup>79</sup> [2006] eKLR.

<sup>80</sup> *ibid.*

<sup>81</sup> [2013] eKLR.

<sup>82</sup> [2013] eKLR.

<sup>83</sup> *ibid* paragraph 39.

<sup>84</sup> African Commission on Human Rights, COMM. NO. 213/99 (2000).

that, persons accused of capital offences in Kenya receive legal representation at the expenditure of the government. The argument therefore that indigent persons do not receive legal representation do not hold water. The question that comes to mind instead is with regards to the quality of free legal services that indigent persons charged with capital offences receive.

While legal provisions on free legal aid is spelt out in clear terms, it does not guarantee free and equal access to justice by accused persons charged with capital offences. Nyangaya observes that “high-quality legal representation in Kenya is expensive and sometimes inaccessible”.<sup>85</sup> He notes that a trial is only fair when parties to a criminal case have access to legal counsel on equal basis. He further calls for consistent, timely and competent legal representation. While indigent persons charged with murder and treason are most likely to receive legal aid during the trial, robbery with violence is often left to the accused person to find legal counsel. According to Amnesty International, 650 people were on death row in Kenya as at November 2018.<sup>86</sup> This number is on the rise. Ascertaining whether or not these figures are based entirely on fair trial proves difficult. It is however not in doubt that free legal representation as provided for under the law do not guarantee quality legal services.

Statistics have demonstrated that a majority of capital offences that are assigned to pro bono lawyers result in convictions. According to the Kenya National Commission on Human Rights for example, over 85% of capital offences that are assigned to pro-bono lawyers by the court result in convictions. The reverse is correct where private lawyers are engaged by accused persons.<sup>87</sup> This demonstrates that giving free legal representation to indigent persons accused of capital offences does not in itself guarantee them access to justice.

In his analyses of access to justice and legal aid, Marcos notes that cases assigned to pro bono lawyers in Kenya at times result in poor quality legal services for reasons that the assigned lawyer may not be an expert in the case, which may ultimately jeopardize a good case resulting in a

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<sup>85</sup> The Standard, ‘Consider the Poor in Legal Representation’ (2016) <<https://www.standardmedia.co.ke/commentary/article/2000190879/consider-the-poor-in-legal-representation>> accessed 14 August, 2020.

<sup>86</sup> Death Penalty Database, ‘Kenya’ (2019) <<https://dpw.pointjupiter.co/country-search-post.cfm?country=Kenya#f4-2>> accessed 15 August 2020.

<sup>87</sup> Kenya National Commission on Human Rights, ‘Review of the Law on Capital Punishment in the Kenyan System’ (2018) <<https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1034/Review-Of-The-Law-On-Capital-Punishment-In-The-Kenya-System>> accessed 11 August 2020.

conviction.<sup>88</sup> Marcos notes that factors such as lack of accountability and corruption pose a threat to free legal representation in Kenya.<sup>89</sup> Pro bono lawyers may not also be as committed to the case in terms of time and research as compared to lawyers that have been hired privately. This could be as a result of the small remuneration that they received from the state.

From the foregoing, convictions of capital offenders are likely to result due to poor quality of free legal representation as opposed to its absence or lack. This is because Kenya has put in place good legal and legislative frameworks that see to it that indigent persons accused of capital offences receive advocate representation at the expenditure of the government. It is also unlikely that a person would lack legal representation since various stakeholders such as police officers and the court have been tasked with informing the accused of their right to free counsel representation. The court may also assign a pro bono lawyer in instances where there is none. Alternatively, accused persons also have a duty to make an application to the National Legal Aid Service for a state funded lawyer. There are hardly any statistics on the quality of free legal representation. One cannot therefore ascertain whether all convictions are due to poor-quality pro-bono legal services or not.

## **2.6 Conclusion**

In conclusion, this chapter has set out the historical developments for free counsel representation of indigent persons accused of capital offences in Kenya. The most notable development is the recognition by Kenya's Constitution of 2010 of the right to state funded legal representation in instances where substantial injustice may otherwise occur. This chapter has highlighted various jurisprudence from both Kenyan and foreign courts that justify the right to free advocate representation of indigent persons accused of capital offences. This chapter has demonstrated that capital offences meet the requirements for offences that would cause a significant injustice where state funded legal representation is not granted. Finally, this chapter has demonstrated that convictions of capital offenders to death result due to poor quality legal services and not lack of legal representation.

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<sup>88</sup> Atsiaya Mongoi Marcos, 'Access to Justice and the Right to Legal Aid: A Comparative Analysis of Kenya and the United Kingdom (England and Wales)' Research Paper submitted to Central European University, Budapest, Hungary.

<sup>89</sup> *ibid.*



## **CHAPTER THREE:**

# **LEGAL AND INSTITUTIONAL FRAMEWORK FOR ACCESSING STATE FUNDED LEGAL REPRESENTATION BY INDIGENT PERSONS CHARGED WITH CAPITAL OFFENCES IN KENYA**

### **3.1 Introduction**

Laws are instrumental in enforcing rights. The right to legal aid is an essential constituent of fair trial. It is instrumental in according justice to an accused person. Legal aid is significant in enforcing social, economic and cultural rights as well as civil and political rights. Historically, legal aid was rooted in right to counsel and fair trial where lawyers offered pro-bono services. The right to counsel is set out under international human rights instruments as is demonstrated later in this chapter. Legal aid recognition under the law has evolved in Kenya, this was first seen in the Constitution of 2010 and later the Legal Aid Act. The Constitution of Kenya of 1963 did have the right to legal representation of accused persons by advocates of their choice but the said provision did not provide for state funded legal representation.<sup>90</sup> Various institutions have over time been set up to see to it that legal aid is granted in Kenya. This informs the discussions in this chapter.

It is against this backdrop that this chapter explores the legal and institutional framework for state funded legal representation in Kenya. It is divided into two major sections. The first section examines international, regional and national laws on state funded legal representation. The second section explores the institutional framework for the same. The chapter then gives concluding remarks. As you will note throughout the discussions put forth herein, hardly do the laws examined speak specifically to free advocate representation of indigent persons accused of capital offences in Kenya. Their relevance to the topic can however be inferred from a general perspective. Any gaps that needs to be addressed will be identified and explored further in the fourth chapter of this paper.

#### **3.1.1 International instruments**

Kenya's Constitution of 2010 stipulate that the "general rules of international law, treaties and conventions" that have been ratified by Kenya constitute Kenyan laws.<sup>91</sup> The Legal Aid Act of Kenya which was enacted to bring into effect the provisions of the Constitution of Kenya on legal

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<sup>90</sup> Section 77(2).

<sup>91</sup> Article 2 (5) & (6).

aid stipulate that the National Legal Aid Services, a corporate body created by it to see to it that legal aid is implemented in Kenya, is guided by the provisions of regional and international laws that have been ratified by Kenya.<sup>92</sup> Relevant international instruments that Kenya has ratified are the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Other international principles and guidelines on legal aid are also explored.

The UDHR<sup>93</sup> protects “the right of every person to a public hearing” by an impartial and independent tribunal in the determination of a criminal case.<sup>94</sup> It protects the right of presumption of innocence until proved guilty.<sup>95</sup> These are integral in according justice to accused persons. Legal aid is a foundation for enjoyment of these rights. These provisions are reaffirmed in the Preamble of the “United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems”.

The ICCPR<sup>96</sup> recognises the inherent dignity of every person.<sup>97</sup> It recognises the right of accused persons to be assigned an advocate where they are in no financial position to pay for legal services and if it is in the interest of justice to do so.<sup>98</sup> This the ICCPR terms as the ‘minimum guarantees’ which every accused person is entitled to.<sup>99</sup> This is a right which Kenya is obligated to “observe, respect, protect, promote and fulfil”.<sup>100</sup> The ICCPR further protects the right of accused persons to “fair and public hearing” by a ‘competent, impartial and independent tribunal set up under the law’.<sup>101</sup> Integral to fair hearing is the right of accused persons to be presumed innocent until proved guilty.<sup>102</sup> Flynn *et al* argue that failure to provide a suspect with legal aid during the arrest or detention violates the ICCPR provisions on the right to liberty and security of the persons and right

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<sup>92</sup> Legal Aid Act, section 4(g).

<sup>93</sup> Resolution 217A (III); UN Doc A/810 91, UN General Assembly, 10 December 1948.

<sup>94</sup> Article 10.

<sup>95</sup> Article 10 & 11.

<sup>96</sup> Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

<sup>97</sup> Preamble.

<sup>98</sup> Article 14(3)(d). See the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Preamble.

<sup>99</sup> Article 14(3).

<sup>100</sup> ICCPR, Preamble; see also The Constitution of Kenya, 2010, Article 21(1).

<sup>101</sup> Article 14(1).

<sup>102</sup> ICCPR, Article 14(2).

to communicate with an advocate.<sup>103</sup> Any accused person who is provided legal aid should be granted ‘timely access to counsel’ and at all stages of the proceedings.<sup>104</sup> Accused persons are further entitled to a private and confidential communication with an advocate.<sup>105</sup> This right was confirmed by the Human Rights Committee in *CCPR General Comment No. 32*<sup>106</sup> which reiterated the requirement that an advocate should be allowed to meet and communicate with the accused person privately. Such communications should not be conducted in the presence of a third party.

“The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems” (‘UN Principles and Guidelines’)<sup>107</sup> calls on states to see to it that detainees or arrested persons accused of criminal offences punishable by a death penalty or other term of imprisonment receive legal aid “at all stages of the criminal process”.<sup>108</sup> It recognizes that legal aid is “essential in fair, humane and efficient criminal justice system”. It is also the foundation for enjoying the right to fair trial and building trust and fairness in a criminal justice system.<sup>109</sup> It calls on states to enact legislations on legal aid.<sup>110</sup>

The UN Principles and Guidelines points out that the ‘urgency and severity of a case’ which are essential in the interest of justice, should be factored in when granting legal aid.<sup>111</sup> It calls on states to on similar conditions or on more lenient terms grant child offenders legal aid.<sup>112</sup> It further calls on judges, police and prosecutors to see to it that accused persons who appear before court and cannot afford legal representation be provided access to legal aid.<sup>113</sup> Such legal aid should be provided on a non-discriminatory basis.<sup>114</sup> It speaks specifically about ensuring that persons who

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<sup>103</sup> “Asher Flynn and Jacqueline Hodgson and Jude McCulloch and Bronwyn Naylor, ‘Legal Aid and Access to Legal Representation: Redefining the Right to a Fair Trial’ (2016) 40 *Melbourne University Law Review* 207”; see ICCPR, Articles 9(1) & 14(3)(b).

<sup>104</sup> Lawyers’ Rights Watch Canada, ‘International Law Right to Timely and Confidential Access to Counsel’ January 2017 Report by Samantha Black <<https://www.lrwc.org/international-law-right-to-timely-and-confidential-access-to-counsel-report/>> accessed 5 August 2020.

<sup>105</sup> ICCPR, Article 14(3)(b).

<sup>106</sup> Article 14 (Right to equality before courts and tribunals and to fair trial), CCPR/C/GC/32, 23 August 2007.

<sup>107</sup> Resolution A/RES/67/187 adopted by the General Assembly, June 2013, available at [https://www.unodc.org/documents/justice-and-prison-reform/UN\\_principles\\_and\\_guidelines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.unodc.org/documents/justice-and-prison-reform/UN_principles_and_guidelines_on_access_to_legal_aid.pdf).

<sup>108</sup> Principle 3, paragraph 20.

<sup>109</sup> Preamble & Paragraph 1.

<sup>110</sup> Principle 2, paragraph 15.

<sup>111</sup> Principle 3, paragraph 21.

<sup>112</sup> Principle 3, paragraph 22.

<sup>113</sup> Principle 3, paragraph 23.

<sup>114</sup> Principle 6, paragraph 26.

are accused of a criminal offence that attracts a capital punishment are represented by counsel throughout the trial stage and at the appeal stage.<sup>115</sup>

“The Economic and Social Council Resolution 2007/24”<sup>116</sup> on “International cooperation for the improvement of access to legal aid in criminal justice systems, particularly in Africa” notes that the time spent by suspects and prisoners in detention and prisons may be reduced through legal aid.

### 3.1.2 Regional Instruments

On the same breath as international instruments, regional instruments ratified and acceded by Kenya make part of Kenyan laws.<sup>117</sup> To begin with, “The African Charter on Human and Peoples’ Rights” (Banjul Charter)<sup>118</sup> recognises the right of every individual to be “defended by counsel of his choice”.<sup>119</sup> This protects the right of every person to have their cause heard. It further protects the right “to be tried within a reasonable time” and “presumption of innocence until proved guilty”.<sup>120</sup> The Banjul Charter also in broad terms protects the right to “fair trial”.<sup>121</sup> “The Protocol to the African Charter on Human and Peoples` Rights on the Establishment of an African Court on Human and Peoples` Rights”<sup>122</sup> speaks to the right to “free legal representation where it is necessary for justice to be met”.<sup>123</sup>

“The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa” (African Guidelines)<sup>124</sup> calls on states to ensure access to lawyers by all persons on a non-discriminatory basis. It also protects the right to legal aid by accused persons. In determining whether or not to grant legal aid in criminal cases, “the seriousness of the offence and the severity of the sentence” are taken into account.<sup>125</sup> The African Guidelines speaks specifically to legal assistance of accused persons in capital cases.<sup>126</sup> What constitute capital cases have not however

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<sup>115</sup> Guideline 5, paragraph 45.

<sup>116</sup> ECOSOC Resolution of 26 July 2007 available at <https://www.un.org/ecosoc/sites/www.un.org.ecosoc/files/documents/2007/resolution-2007-24.pdf>.

<sup>117</sup> The Constitution of Kenya, 2010, Article 2(5) &(6).

<sup>118</sup> Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

<sup>119</sup> Article 7(1).

<sup>120</sup> *ibid.*

<sup>121</sup> Article 5, 6 & 26.

<sup>122</sup> Available at [https://www.achpr.org/public/Document/file/English/achpr\\_instr\\_proto\\_court\\_eng.pdf](https://www.achpr.org/public/Document/file/English/achpr_instr_proto_court_eng.pdf).

<sup>123</sup> Article 10(2).

<sup>124</sup> By African Commission on Human and Peoples’ Rights of 2003 available at <https://www.achpr.org/legalinstruments/detail?id=38>

<sup>125</sup> G on Access to lawyers and legal services and legal aid and legal assistance.

<sup>126</sup> *ibid.*

been defined. The right to be represented by a qualified person at all stages of the proceeding is also protected.<sup>127</sup> This is integral to fair hearing.

“The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa”<sup>128</sup> notes that “prolonged detention of suspects without providing access to legal aid is a violation of basic principles of international law and human rights”.<sup>129</sup> It observes that the primary responsibility to provide for access of legal aid rest on states.<sup>130</sup> It calls on states to sensitize criminal justice stakeholders on legal aid.<sup>131</sup> “The Lilongwe Plan of Action for the Implementation of the Declaration, the Principles and Guidelines”<sup>132</sup> calls on governments to formulate laws and put in place institutions that are in charge of provision of legal aid and to create legal awareness on legal aid.<sup>133</sup>

### **3.1.3 National instruments**

#### **3.1.3.1 The Constitution of Kenya**

Kenya’s Constitution promulgated in 2010 (the Constitution) as the supreme law in Kenya<sup>134</sup> is considered to be one of the most progressive constitutions in Africa. The Preamble recognises Kenyans’ aspirations for a government which pays attention to human rights protection, equality and social justice. The Constitution sets out comprehensive provisions on human rights under its Bill of Rights Chapter,<sup>135</sup> which constitute an integral part of Kenya and influences social, economic and cultural policy formulations.<sup>136</sup> It calls on all persons and state organs to recognise and protect the rights and freedoms of all humans in order to protect their dignity and promote realisation of human rights and social justice.<sup>137</sup> The Constitution further protects the right of every

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<sup>127</sup> Principle 2 on fair hearing.

<sup>128</sup> Passed at the Conference on Legal Aid in Criminal Justice: the Role of Lawyers, Non-Lawyers and other Service Providers in Africa in Lilongwe, 22-24 November 2004, available at [http://www.legalaidrwanda.org/legal\\_text/Lilongwe-declaration-2004.pdf](http://www.legalaidrwanda.org/legal_text/Lilongwe-declaration-2004.pdf).

<sup>129</sup> Preamble.

<sup>130</sup> Declaration 1.

<sup>131</sup> Declaration 2.

<sup>132</sup> Lilongwe Declaration, page 6.

<sup>133</sup> Lilongwe Declaration (n 73 above).

<sup>134</sup> Article 2(1).

<sup>135</sup> Chapter Four, Articles 19-59.

<sup>136</sup> Article 19(1).

<sup>137</sup> Article 19 (2).

person to “equality, equal protection and equal benefit of the law”.<sup>138</sup> In line with this and of paramount importance is the right to human dignity which is recognised by the Constitution.<sup>139</sup>

The Constitution protects the rights of arrested persons to ‘communicate with and advocate’.<sup>140</sup> Importantly, it obligates the state to ensure that justice is accessed by all persons. In so doing, it is mandated to take responsibility for any fees that might be required. The state is called upon to not specifically impeded access to justice.<sup>141</sup> The Constitution recognises the right of every accused person to fair trial. This includes the “right to at the expense of the state have an advocate assigned to him/her by the state”. This is applicable where a “substantial injustice would otherwise result”. What constitute substantial injustice has not been defined. This right is to be communicated promptly to the accused person.<sup>142</sup> Accused persons also have a “right to choose and be represented by an advocate”.<sup>143</sup> The right to “fair trial” is an integral part of access to justice which informs the law on legal aid. The right to fair trial is set out under the Constitution as a right that must not be limited.<sup>144</sup> Free legal representation is therefore critical in attaining access to justice and social justice.

It is against this backdrop and allow for the recognition of the aforementioned human rights that the Legal Aid Act<sup>145</sup> was enacted in 2016 to “facilitate access to justice and social justice, to provide legal aid and to fund legal aid”. This is discussed further in the subsequent sub-section.

### **3.1.3.2 Legal Aid Act**

The Legal Aid Act was enacted to allow for the establishment of legal and institutional frameworks that facilitate access to justice by availing legal services to indigent persons in Kenya, legal aid schemes to facilitate access of legal aid by indigent persons, promote awareness on legal matters, fund justice advisory centres, education and research and promote alternatives forms for resolution of disputes in order to enhance access to justice as stipulated under the Constitution of Kenya.<sup>146</sup> The overarching purpose of the Legal Aid Act is to see to it that legal aid services are provided to indigent persons in Kenya. It recognises indigent persons as being unable to pay for legal

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<sup>138</sup> Article 27(1).

<sup>139</sup> Article 28.

<sup>140</sup> Article 49(1)(c).

<sup>141</sup> Article 48.

<sup>142</sup> Article 50(2)(h).

<sup>143</sup> Article 50(2)(g).

<sup>144</sup> Article 25(c).

<sup>145</sup> No. 6 of 2016, assented to on 22 April 2016 and commenced on 10 May 2016.

<sup>146</sup> Legal Aid Act, section 3.

services.<sup>147</sup> As has been pointed out in the introductory chapter of this paper, the Legal Aid Act defines legal aid broadly to comprise legal advice and legal representation.<sup>148</sup>

The Legal Aid Act allowed for the establishment of the Legal Aid Fund, which is managed by the National Legal Aid Service.<sup>149</sup> The Legal Aid Fund is made up of parliament of Kenya allocated sums of money, grants, gifts, donations, loans received by it and money accruing to it from any lawful source or money received during the exercise of its functions.<sup>150</sup> The monies are utilised to settle debts that arise from legal representation under the legal aid, remunerate legal aid providers and pay for any expenses incurred by them during the providing of legal services and to settle any expenses incurred by the National Legal Aid Service.<sup>151</sup> Under the Legal Aid Act, criminal matters qualify as a legal service subject to legal aid.<sup>152</sup> Moreover, the Legal Aid Act expressly obligates the National Legal Aid Service to identify the legal wishes of indigent persons and disadvantaged communities in Kenya.<sup>153</sup>

The Legal Aid Act speaks of a ‘cost-effective and efficient system for the providing of legal services of high quality with the available financial resources’.<sup>154</sup> It further expressly provides that indigent persons are only eligible to legal aid services if they are resident in Kenya, citizens of Kenyan, refugees, stateless persons, children, human trafficking victims, and persons internally displaced.<sup>155</sup> Such persons are required to make applications, by self or through another person or organization, for legal aid services in writing before the final resolution of a case.<sup>156</sup> Such persons would only qualify for legal aid services where it is shown that they have financial constraints and is subject to availability of resources by the National Legal Aid Service. The legal proceedings’ cost should be justifiable. Legal aid services can also be provided where a substantial injustice may otherwise result to the applicant and in instances where cross-examination of witnesses is necessary.<sup>157</sup> In examining whether an injustice would otherwise result where legal aid is not given, the offence and the harshness of the sentence, the case difficulty and the accused person’s

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<sup>147</sup> Section 2.

<sup>148</sup> *ibid.*

<sup>149</sup> Section 29(1).

<sup>150</sup> Legal Aid Act, section 29(2).

<sup>151</sup> Legal Aid Act, section 30.

<sup>152</sup> Section 35(2)(b).

<sup>153</sup> Section 35(3).

<sup>154</sup> *ibid* subsection 4.

<sup>155</sup> Section 36(1).

<sup>156</sup> Legal Aid Act, section 40.

<sup>157</sup> Legal Aid Act, section 36(1).

capacity are considered by the court.<sup>158</sup> Based on these discussions and taking into account the gravity of capital offences, it is reasonable that indigent persons charged with these offences receive legal aid services.

The Legal Aid Act mandates the court and officers in charge of prisons, police stations and remand home for children to notify accused persons of their right to seek legal aid services. It emphasises that such communications be done quickly, in a language which the accused person understands.<sup>159</sup> It reaffirms the constitutional right of fair hearing where accused persons have a right to be informed promptly of their right to be assigned an advocate by the state.<sup>160</sup>

It is not expressly stated in the Legal Aid Act that state funded legal representation should be accorded to indigent persons charged with capital offences in Kenya. The requirement that accused persons ought to apply for legal aid service with the National Legal Aid Service is a hindrance to access to justice by the accused. It is because, not all indigent accused persons understand that from the point of arrest, it is possible for them to have a state funded counsel. A majority of whom, learn about this right during plea taking in court. If necessary, applications should be made once a person is arrested. The arresting officers can then be tasked with notifying accused persons of this right. The practical challenges of this proposal are noted.

### **3.1.3.3 Chief Justice Practice Directions relating to Pauper Briefs Scheme Services**

“The Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services” were issued by the Chief Justice in January 2016.<sup>161</sup> These directions relate to the Constitution of Kenya, 2010, the civil Procedure Act (Chapter 21 Laws of Kenya) and Civil Procedure Rules, 2010. It directs that pro bono services be offered in all courts in Kenya. It specifically mentions that capital offences shall receive pro bono services. These Practice Directions have proved to be effective since accused persons charged with capital offences who appear before court without legal representation have been assigned pro bono advocates from a register of advocates maintained by various court stations.

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<sup>158</sup> Legal Aid Act, section 43(1)(A).

<sup>159</sup> Sections 42 & 43.

<sup>160</sup> The Constitution of Kenya, Article 50(1)(h).

<sup>161</sup> Gazette Notice No. 370, dated 20 January 2016 and took effect 1 July 2016.



### 3.1.3.4 Criminal procedure code

“The Criminal Procedure Code”<sup>162</sup> recognises the right of accused persons to be represented by an advocate in a criminal proceeding.<sup>163</sup> It speaks to the obligation of the court to inform an accused person before recording a plea agreement of their right to have the representation by counsel. Where they are unable to pay an advocate, the court to appoint a legal representative for him/her.<sup>164</sup> These provisions do not expressly speak to capital offences but an inference of their relevance to this study can be inferred.

## 3.2 Institutional framework

Taking into consideration then nature of legal aid in Kenya i.e. cost and physical distance between legal service providers and accused persons, laws alone are not sufficient to ensure that ‘all accused persons who cannot afford advocates are provided with legal aid’. Legal aid institutions are therefore very importing in enforcing the right to legal aid. This is evident by the various institutions that have been set up or organisations that have expanded their mandates to include legal aid. Noteworthy, the Legal Aid Act expressly provides that advocates operating under the Law Society of Kenya pro bono programme, firm of advocates, paralegal, faith based organization, government agencies accredited to provide legal aid and university legal aid clinics are recognized as legal aid providers.<sup>165</sup> The Legal Aid Act further allows for the creation of Justice Advisory Centre which is tasked with administering and providing legal services in Kenya.<sup>166</sup> These institutions are explored further below.

### 3.2.1 National Legal Aid Service

The Legal Aid Act provides for the establishment of the National Legal Aid Service which is a “body corporate with perpetual succession and a common seal”.<sup>167</sup> It is a successor of the National Legal Aid and Awareness Program (NALEAP) which existed prior to the enactment of the Legal Aid Act.<sup>168</sup> NALEAP was created to “oversee coordinate, monitor and provide policy direction regarding a legal aid program under the auspices of the Ministry of Justice”.<sup>169</sup> The National Legal

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<sup>162</sup> Chapter 75 Laws of Kenya.

<sup>163</sup> Section 193.

<sup>164</sup> Section 137F(1)(a)(vi).

<sup>165</sup> Legal Aid Act, section 2.

<sup>166</sup> Legal Aid Act, section 2.

<sup>167</sup> Legal Aid Act, section 5.

<sup>168</sup> *ibid.*

<sup>169</sup> Latham & Watkins, ‘Pro Bono Practices and Opportunities in Kenya’

<<https://www.lw.com/admin/Upload/Documents/Global%20Pro%20Bono%20Survey/pro-bono-in-kenya.pdf>>  
accessed 5 August 2020, page 366.

Aid Service is guided by the national values and principles of governance as provided for under Article 10 of the Constitution of Kenya.<sup>170</sup> It is also guided by the values and principles of public services provided for under Article 232 of the Constitution of Kenya.<sup>171</sup> It is further guided by the principles of “gender equality, gender equity, impartiality, inclusiveness, non-discrimination, protection of the marginalized groups and rules of natural justice”.<sup>172</sup>

The National Legal Aid Service was tasked with creating and running a legal aid scheme that is “affordable, accessible, credible and accountable”. It advises the Cabinet Secretary in charge of justice on legal aid related matters in Kenya. It promotes alternative forms for resolution of disputes and spearheads research relating to “legal aid and access to justice” with specific focus being placed on research that relate to marginalised groups and indigent persons. The National Legal Aid Service provide grants in the form of aid to allow for the implementation of legal aid service in Kenya.<sup>173</sup> It further plays a key role in development of legal aid programs for education or training and guidelines that allow for setting up of legal aid schemes by Non-Governmental Organisations (NGOs). It is in charge of creating public awareness on legal aid and related matters. Importantly, it sees to it that persons granted legal aid are represented and assigns legal aid providers to them.<sup>174</sup>

### **3.2.2 The Kenya Courts**

“The Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services” mandates all court stations to set up pro bono committees responsible for allocating pro bono briefs to individual advocates.<sup>175</sup> They take it upon themselves to appoint an advocate for accused persons under the ‘pauper briefs’ scheme.

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<sup>170</sup> “The national values and principles of governance set out under Article 10(2) of the Constitution are: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized; good governance, integrity, transparency and accountability; and sustainable development”.

<sup>171</sup> “The values and principles of public services set out under Article 232(1) are: high standards of professional ethics; efficient, effective and economic use of resources; responsive, prompt, effective, impartial and equitable provision of services; involvement of the people in the process of policy making; accountability for administrative acts; transparency and provision to the public of timely, accurate information; fair competition and merit as the basis of appointments and promotions; representation of Kenya’s diverse communities; and affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of— men and women; the members of all ethnic groups; and persons with disabilities.”

<sup>172</sup> Legal Aid Act, section 5.

<sup>173</sup> Legal Aid Act, section 7.

<sup>174</sup> *ibid.*

<sup>175</sup> Practice directions relating to pauper briefs scheme and pro bono services, direction 6.

### 3.2.3 Law Society of Kenya

The Law Society of Kenya (LSK) has improving access to justice in its strategic plans. Pro bono services have therefore been adopted by the LSK to enhance accessed to justice by accused persons who are either marginalised or indigent. Through the LSK legal aid and awareness week, lawyers have an opportunity to “provide legal services on pro bono basis” to persons who cannot afford to pay for them. LSK also maintains a database of pro bono lawyers who are then assigned to cases based on need basis.<sup>176</sup>

### 3.2.4 Non-governmental Organisations and other institutions

As has been pointed out earlier, NGOs such as Kituo Cha Sheria, CRADLE in Kenya, Federation of Women Lawyers (FIDA) Kenya, International Commission of Jurists in Kenya (ICJ Kenya) and Public Law Institute offer pro bono legal services to accused persons.<sup>177</sup> Under its legal aid and education programme Kituo Cha Sheria offers legal education and legal representation to persons who are socially and economically disadvantaged. It ensures that indigent persons have access to justice in Kenya.<sup>178</sup> Kituo Cha Sheria was the first Kenyan legal aid centre.<sup>179</sup> FIDA Kenya deliver pro bono services to indigent women. It also trains women to act for themselves in court. FIDA has a pro bono lawyers’ scheme which aims at expediting access to legal counsels by indigent clients.<sup>180</sup> FIDA further creates legal awareness across Kenya.<sup>181</sup> The CRADLE in Kenya promotes and protects the rights of children who cannot afford legal representation through its legal aid program.<sup>182</sup> ICJ Kenya’s core mandates are protection of peoples’ rights and aiding in access to justice. Public Law Institute promotes “human rights and the rule of law”. It provides legal aid to indigent and disadvantaged persons.<sup>183</sup>

Other institutions such as university law clinics and university students also have an opportunity to offer legal aid services to indigent accused persons under their legal aid studies. Some Kenyan law firms also afford pro bono services to indigent accused persons as a way of giving back to the community.

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<sup>176</sup> Latham & Watkins *Supra Note* 167 at 369.

<sup>177</sup> Latham & Watkins *Supra Note* 167 at 367.

<sup>178</sup> Kituo Cha Sheria, ‘Legal Aid and Education (LEAP) Programme’ <<http://kituochasheria.or.ke/our-programs/legal-aid-education-programme/>> accessed 5 August 2020.

<sup>179</sup> Latham & Watkins *Supra Note* 167 at 368.

<sup>180</sup> FIDA Kenya, ‘Pro Bono Lawyers’ Scheme’ <<https://www.fidakenya.org/site/work?id=4>> accessed 6 August 2020.

<sup>181</sup> Latham & Watkins *Supra Note* 167 at 368.

<sup>182</sup> The CRADLE, ‘Legal Aid’ <<http://thecradle.or.ke/oldsite/programmes/legal-aid>> accessed 6 August 2020.

<sup>183</sup> Latham & Watkins *Supra Note* 167 at 368.

### **3.3 Conclusion**

In conclusion, this chapter has identified several national, regional and international instruments that speaks to free legal representation. At the international level, the UDHR, ICCPR, UN Principles and Guidelines have been explored. At the regional level, the Banjul Charter, “Protocol to the African Charter on Human and Peoples` Rights on the Establishment of an African Court on Human and Peoples` Rights”s, the African Guidelines and the Lilongwe Declaration and Action Plan have been identified. Nationally, the Constitution, the Legal Aid Act, “Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services” and the Criminal Procedure Code have been explored. All these legal instruments speak to legal aid by indigent persons in both broad and specific terms. The UN Principles and Guidelines, African Guidelines and “Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services” specifically mentions legal aid where an offence attracts a sentence of death penalty or in the case of capital offences.

This chapter has also explored the institutional framework for free legal representation in Kenya. The mandates of the National Legal Aid Service which is a creation of the Legal Aid Act has been explored. Other legal aid providers have also been discussed for example the courts under the pro bono committees set up in various court stations, the Law Society of Kenya, various NGOs and other institutions such as the university legal aid clinics and law firms.

The next chapter would therefore identify the challenges in the current regime for free legal representation of indigent persons accused of capital offences in Kenya. It will also examine and draw lessons from other jurisdictions.

## CHAPTER FOUR:

### ANALYSIS OF THE CURRENT MECHANISM FOR REPRESENTATIONS OF INDIGENT PERSONS CHARGED WITH CAPITAL OFFENCES IN KENYA AND LESSONS FROM OTHER JURISDICTIONS

#### 4.1 Introduction

The previous chapters have comprehensively discussed the foundations, the legal and institutional frameworks and the correlation between convictions and the absence of legal representation of indigent persons accused of capital offences in Kenya. This chapter discusses the mechanisms adopted in Kenya with the intention of comparing and drawing lessons from the United States of America, South Africa and the United Kingdom since they are at an advanced stage in their regimes/frameworks for legal representation of indigent persons charged with capital offences. Clearly, Kenya is not the first country to implement state funded legal representation of indigent persons charged with capital offences in Kenya, in fact it is one of the youngest jurisdictions to adopt it, taking into account its initial recognition under the Constitution of Kenya,<sup>184</sup> and thereafter under the Legal Aid Act.<sup>185</sup>

It is against this backdrop that this chapter proceeds to examine the regime for legal representation of capital offences in Kenya and to identify and examine practices by other jurisdictions which Kenya can draw lessons from. This is done in two major sections; the first section briefly introduces the capital offences in Kenya as they influence the discussions in this paper. It analyses the framework for their legal representation in Kenya. The second section identifies and examines the practices by other jurisdictions which Kenya can learn from in their enhancement of the current regime. Specifically, the practices in the United States of America, South Africa and United Kingdom are explored. The chapter thereafter concludes.

#### 4.2 Challenges in the current mechanisms for representation of indigent persons charged with capital offences in Kenya

This section explores the framework for legal representation of indigent persons charged with capital offences in Kenya. This is done with the intention of identifying the gaps or challenges that exist under the present regime. This section begins by briefly exploring capital offences under the

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<sup>184</sup> Of 2010.

<sup>185</sup> Of 2016.

Kenyan law. Offences are considered capital if an accused person on conviction is liable to a death sentence. The Penal Code<sup>186</sup> however requires that persons under the age of eighteen should not be sentenced to death but to be detained at the ‘President’s pleasure’.<sup>187</sup> Similarly, pregnant women cannot be sentenced to death.<sup>188</sup> The introductory chapter of this paper has discussed that, capital offences consist of “murder, treason, robbery with violence and attempted robbery with violence”. The offence of illegal administration of oath is also a capital offence considering the penalty which it attracts and that is, death. These offences are explored further below.

Treason is committed when a person “compasses, imagines, invents, devises or intends the death, maiming or wounding, or the imprisonment or restraint, of the President of Kenya”, deposes the President of Kenya from his position through unlawful means or attempts to overthrow the government.<sup>189</sup> Treason is further committed by “expressing, uttering or declaring any such compassings, imaginations, inventions, devices or intentions by publishing a printing or writing or by any overt act or deed”.<sup>190</sup> A person who levies or aids conflict against Kenya is also guilty of treason.<sup>191</sup> The punishment for treason is a death sentence.<sup>192</sup>

Murder is committed by taking the life of another person. Murder is characterised by malice aforethought which connotes intention to cause death.<sup>193</sup> Persons convicted of murder are liable to a death sentence.<sup>194</sup> Robbery with violence arise where an accused person while robbing a person either uses a dangerous weapon or is in company with other people and in the process beats or wounds the person.<sup>195</sup> Such accused persons are liable to a death sentence if convicted.<sup>196</sup> Further, an accused person who attempts to rob a person while having in their possession a dangerous object or is accompanied by other persons and equally beats or wounds the person is on conviction liable to a death sentence.<sup>197</sup> A person who commits a felony of unlawfully administering an oath is liable to a death sentence.<sup>198</sup> The person who takes the oath is liable to a sentence of life imprisonment

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<sup>186</sup> Penal Code, Chapter 63 Laws of Kenya,

<sup>187</sup> The Penal Code, section 25(2).

<sup>188</sup> *ibid* section 211.

<sup>189</sup> The Penal Code, section 40(1)(a).

<sup>190</sup> *ibid* subsection b.

<sup>191</sup> *ibid* subsection 2.

<sup>192</sup> *ibid* subsection 3.

<sup>193</sup> *ibid* section 206.

<sup>194</sup> The Penal Code, sections 203 & 204.

<sup>195</sup> Section 296(2).

<sup>196</sup> *ibid*.

<sup>197</sup> The Penal Code, section 297(2).

<sup>198</sup> Penal Code, section 60.

while<sup>199</sup> a person who is present and consent to an unlawful administration of an oath is liable to a death sentence.<sup>200</sup> The High Court in *Republic v Dorine Aoko Mbogo & Another*<sup>201</sup> observed that:

.....the offence of murder, like treason, robbery with violence or attempted robbery with violence, are offences which are not only punishable by death, but are by reason of their gravity, (taking of away another person's life, disloyalty to the state of one's nationality, or grievous assault and injury to another person or his property) are offences which are by their repre-hensiveness, not condoned by society in general.....

Having introduced capital offences in Kenya, I proceed to analyse the manner in which state funded legal representation is accorded to indigent accused persons. Unlike murder and treason, "robbery with violence" and "attempted robbery with violence" are tried by subordinate courts of the first class.<sup>202</sup> In terms of state funded legal representation of indigent persons or persons generally charged with capital offences, hardly do the relevant legal framework speak to them specifically. As has been pointed out in the second chapter of this paper, only the "United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems",<sup>203</sup> the "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa"<sup>204</sup> and the Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services<sup>205</sup> specifically mentions that persons accused of capital offences should be represented by advocates. Besides this, no other Kenyan legislation and to be more specific, neither do the Constitution nor the Legal Aid Act which are the parent laws on legal aid in Kenya speak specifically to it.

Taking into account past practices on legal representation of persons at the expense of the state, there exist myriad of case laws that demonstrate that the offence of murder has almost certainly been prosecuted by pro bono lawyers acting for the accused where they cannot afford legal representation. However, in most cases counsel has been provided to the accused in court and not from the time of arrest or detention. The offence of treason has hardly been prosecuted in Kenya.

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<sup>199</sup> *ibid* section 59(b).

<sup>200</sup> *ibid* section 59(a).

<sup>201</sup> [2010] eKLR, Criminal Case 36 of 2010.

<sup>202</sup> Criminal Procedure Code, Chapter 75 Laws of Kenya, First Schedule, Chapter XXVIII.

<sup>203</sup> Resolution A/RES/67/187 adopted by the General Assembly, June 2013.

<sup>204</sup> African Commission on Human and Peoples' Rights of 2003.

<sup>205</sup> Gazette Notice No. 370, dated 20 January 2016 and took effect 1 July 2016.

In the very few instances where there has been prosecution, the accused could on their own afford legal representation.

Persons accused of “robbery with violence”, “attempted robbery with violence” and “unlawful administration of oaths” hardly receive state funded legal representation. As regards legal representation of accused persons charged with the offence of “robbery with violence” and whether any such case should be transferred to the high court from a subordinate court for trial, Justice Mureithi in *John Swaka versus Director of Public Prosecutions and two others*<sup>206</sup> decided that it could not order that robbery with violence cases be heard and resolved by the high court since subordinate courts obtain jurisdiction to hear such cases under the law. It being a legislation issue therefore, it opined that only the parliament could change the law so as to allow the high court to hear and resolve these cases. The court also reaffirmed the right of indigent persons accused of robbery with violence to be represented by counsel at the expense of the state owing to the severity of the sentence that it attracts. This judgment notwithstanding, robbery with violence has not received the same level of attention in so far as legal representation is concerned in comparison to the offence of murder. The institutions that have been set up, such as the Kenyan courts, National Legal Aid Service, Law Society of Kenya and NGOs also suffer from financial constraints and staff inadequacy, hence, reaching out to all indigent accused persons charged with capital offences has proved difficult.<sup>207</sup> The subsequent section therefore explores the legal and institutional frameworks that are applied in the United States of America, South Africa and the United Kingdom in order to draw lessons from them.

#### **4.3 Lessons from the United States of America, South Africa and United Kingdom**

This section explores the jurisprudence of the United States of America, South Africa and United Kingdom in order to identify lessons that Kenya can borrow from. Noteworthy, this comparative jurisprudence is explored for guidance on best practices that Kenya can adopt to ensure that state sponsored Advocate representation is efficient and effective. Kenya can for example borrow from the finding of the African Commission on Human and Peoples’ Rights in *Avocats Sans Frontières*

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<sup>206</sup> [2013] eKLR, Petition No. 318 of 2011.

<sup>207</sup> Atsiaya Mongoi Marcos, ‘Access to Justice and the Right to Legal Aid: A Comparative Analysis of Kenya and the United Kingdom (England and Wales)’ Research Paper submitted to Central European University, Budapest, Hungary.



(*on behalf of Bwampamye*) v. *Burundi*<sup>208</sup> where it was decided that fair trial is characterised by legal representation. To espouse this argument, it held as follows:

“The right to fair trial involves fulfilment of certain objective criteria, including the right to equal treatment, the right to defence by a lawyer, especially where this is called for by the interests of justice, as well as the obligation on the part of Courts and tribunals to conform to international standards in order to guarantee a fair trial to all.”

While the discretion to decide whether or not an accused person is eligible representation at the cost of the state owing to the use of the words “... if substantial injustice would otherwise result...” capital offenders ought be represented by counsel at the expense of the state where they cannot afford legal representation. This has been the practice in South Africa whose constitutional provision on legal aid are expressly similar to Kenya’s Constitution of 2010. These and other lessons from other jurisdictions are explored further below.

#### **4.3.1 United States of America**

The United States is amongst the first countries in the world to recognize the right to state funded legal representation. The US first recognised the right to counsel in 1932 vide a Supreme Court decision in *Powell v. Alabama*.<sup>209</sup> Herein seven defendants were accused of raping two women. They were without the assistance of counsel tried and sentenced to death. The finding of the US Supreme Court was that failure to allow the defendants to be heard by counsel was in contravention of the Fourteenth Amendment.<sup>210</sup> The right to counsel by accused persons was thereafter recognised in *Johnson v Zerbst*,<sup>211</sup> in 1938. In *Gideon v. Wainwright*<sup>212</sup> the right to counsel by indigent persons was expressly recognised. Another notable jurisprudence was established by the Supreme Court in *Strickland v. Washington*.<sup>213</sup> This case allowed accused persons to challenge convictions that are attributed to ineffective legal representation upon demonstrating that the attorney inadequately carried out their mandate and as a result prejudiced the case.<sup>214</sup> Kenya is yet to recognise this.

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<sup>208</sup> (2000) AHRLR 48 (ACHPR 2000).

<sup>209</sup> No. 98-100, decided 7 November 1932.

<sup>210</sup> Randolph N Stone, 'The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases' (1993) 17 American Journal of Trial Advocacy 205.

<sup>211</sup> No. 699, decided 23 May 1938.

<sup>212</sup> No. 155, decided 18 March 1963.

<sup>213</sup> No. 82-1554, decided 14 May 1984.

<sup>214</sup> Stone *Supra Note* 210 at 209.

Notable programs that have been adopted by the US to see to it that legal representation is provided to accused persons include: first, appointment of lawyers for legal representation depending on the case. Secondly, contracts between the government and private attorneys or law firms to provide legal representation within agreed upon period of time to specific groups of defendants. Thirdly, “public defender programs” characterised by allowing employees of attorneys to defend accused persons.<sup>215</sup> In addition to the existing frameworks and to allow for adequate and efficient access to free legal representation, Kenya can incorporate further these practices in order to enhance accessibility and efficiency of state funded legal representation. Holding attorneys and law firms accountable would also be enhanced, more so, when the quality of legal services offered is subject to contention. In Kenya, it is in very rare circumstances where you find convicted accused persons appealing against the sentence passed due to ineffective legal representation, many accused persons are also not informed about it.

To enhance the accessibility of state funded legal representation by indigent persons in the US, organised defender agencies have been set up in urban centres where full-time salaried by the state attorneys operate from. Such attorney limits their work to the agency and refrain from engaging in private practice. New lawyers who intend to join the agencies undergo a six-week training program prior to joining and actively representing clients. Stone notes that the salary is instrumental in ensuring that the quality of legal services offered is not hampered for economic reasons. He observes further that the quality of legal representation is often times interfered with due inadequate funding, pressure of excess caseloads, lack of minimum standards of performance.<sup>216</sup> The organised defender agencies operate with the assistance of investigators who are often staff investigators and volunteer law students.

Stone notes that an effective legal aid system should address several factors including, an advocate should be allowed to assist an accused possibly from the time of arrest, sufficient funds and resources should be allocated to it, specific number of cases should be allocated to an advocate to avoid pressures that may result from huge caseloads, minimum performance standard should be established and trainings conducted regularly, advocates should be independent, public education should be conducted regularly, opportunities should be given to law schools/students to actively participate in a case, more particularly, through research/ investigations, and finally, the indigent

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<sup>215</sup> Stone (n 210) 209-210.

<sup>216</sup> Stone (n 210) 210-213.

accused persons should be to choose a pro bono lawyer. Allowing an accused person to choose an advocate is instrumental in enhancing the quality of legal services provided.<sup>217</sup> All these proposals by Stone are worth a consideration in the Kenyan context since the legal aid sector has been grappling with most of them.

#### **4.3.2 South Africa**

In South Africa the law on indigent persons was initially entrenched under the right to counsel in criminal proceedings. Historically, there was a negative attitude by the government on legal aid. For a long time, legal aid in South Africa was marred by lack of finances, limited utilization and inadequate awareness about it to the public.<sup>218</sup> Many black South Africa's cases received conviction judgments due to lack of legal representation and language related issues. Institutions that offered legal aid to indigent persons lacked finances and personnel. While the state provided legal aid, not all accused persons received such legal aid due the foregoing challenges.

The right to counsel was initially recognised under common law. Common law recognised the importance of the state to provide free legal aid to indigent persons who were charged with criminal offences.<sup>219</sup> The right to counsel was first legislated upon under the Criminal Codes of 1917, 1955 and 1977.<sup>220</sup> In 1969, the Legal Aid Act was enacted which saw the creation of a Legal Aid Board whose key mandate was to avail legal aid to indigent accused persons.<sup>221</sup> The Board thereafter established the Legal Aid Guide to guide its operations.<sup>222</sup> Under the Guide legal aid was provided in all criminal cases to indigent persons. Despite the existence of these legal aid legislations, provisions of legal aid was not sufficient and effectively provided to all indigent accused persons.<sup>223</sup> There were also in existence independent legal aid organisations such as university legal aid clinics, the Black Sash which offered legal aid entirely to Africans, the South African Council of Churches, Johannesburg Legal Aid Bureau and Legal Resource Center. Berat notes that the existence of these institutions did little to progress the situations for providing legal aid in South Africa since services offered were still inadequate.

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<sup>217</sup> Stone *Supra Note 210* at 219-224.

<sup>218</sup> *ibid* 240.

<sup>219</sup> *ibid* 248.

<sup>220</sup> *ibid* 244.

<sup>221</sup> Act No. 22 of 1969.

<sup>222</sup> Lynn Berat, 'Legal Aid and the Indigent Accused in South Africa: a Proposal for Reform' (1988) 18 *Georgia Journal of International & Comparative Law* 239-292.

<sup>223</sup> *ibid* 273.

The Constitution of the Republic of South African<sup>224</sup> was the first legislation in South Africa to expressly provide that detained persons are “entitled to state funded legal representation” in instances where substantial injustice may otherwise result.<sup>225</sup> Like the Kenyan Constitution of 2010, it speaks of the right of arrested persons to choose and communicate with a legal practitioner.<sup>226</sup> As a way of guaranteeing the right to fair trial, accused persons are, like detained persons, entitled to legal representation at the expense of the state “where substantial injustice would otherwise result”. They also have a “right to choose and be represented by an advocate”.<sup>227</sup> It was introduced to specifically give legal aid to black South Africans who were poor, illiterate and uneducated.<sup>228</sup> Legal aid was embedded generally on the right to legal represented and equality of all before the law. Like the Kenyan case, legal representation at the expenditure of the government is given to indigent persons where “substantial injustice may otherwise result”.<sup>229</sup> The court is further directed to ensure that an accused person appearing before it receives legal representation at the expenditure of the government.<sup>230</sup>

Capital offences in South Africa include “murder, treason, kidnapping, child-stealing, rape, robbery, attempted robbery, and housebreaking or attempted housebreaking where the court finds aggravating circumstances, sabotage and terrorist activities”.<sup>231</sup> Persons charged with these offences are provided with “state funded legal representation” in order to prevent a miscarriage of justice that might arise. Providing legal aid to capital offenders is the mandate of the Legal Aid Board. It is the only national legal provider that acts independently.<sup>232</sup> Its funding is derived from parliament. It is the Legal Aid Board that is responsible for establishing legal aid centres both in urban centres and rural areas. Lawyers are employed and remunerated to provide legal services in these centres. This is not the case in Kenya as the good will or lawyers is largely dependent on by the National Legal Aid Service. This is yet another lesson that Kenya can borrow from South

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<sup>224</sup> As adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly, promulgated 18 December 1996, entered into force 4 February 1997, available at <https://justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>.

<sup>225</sup> Section 35(2)(c).

<sup>226</sup> Section 35(2)(b).

<sup>227</sup> Section 35(3)(f) & (g).

<sup>228</sup> Jennifer L. Huber, ‘Legal Representation for Indigent Criminal Defendants in South Africa: Possibilities Under the 1994 Constitution’ (1995) 5 *Duke Journal of Comparative & International Law* 425-456.

<sup>229</sup> South African Criminal Procedure Act, No. 51 of 1977, section 342A.

<sup>230</sup> South Africa Legal Aid Act, section 3B.

<sup>231</sup> Berat (n 210 above) footnote 64.

<sup>232</sup> United Nations Office on Drugs and Crime, ‘Access to Legal Aid in Criminal Justice System in Africa’ (2011) Survey Report, available at [https://www.un.org/ruleoflaw/files/Access\\_to\\_Legal\\_Aid\\_in\\_Criminal\\_Justice\\_Systems\\_in\\_Africa.pdf](https://www.un.org/ruleoflaw/files/Access_to_Legal_Aid_in_Criminal_Justice_Systems_in_Africa.pdf).

Africa. The South Africa Legal Aid Board has also executed contracts with private legal aid providers in order to enhance legal aid provision in South Africa. Various law schools have also made it obligatory for their students to offer free legal aid prior to graduation.

### 4.3.3 United Kingdom

In the United Kingdom, the legal aid systems of England and Wales are explored. Legal aid in England and Wales dates back to 1949.<sup>233</sup> It first was provided by professional association, solicitors and the Law Society.<sup>234</sup> The solicitors would receive payment from the state. This structure of delivery of legal services did however not adequately provide legal representation in criminal matters. To resolve the difficulties that arose, the Legal Aid Act was enacted in 1988 to regulate legal aid in England and Wales. The Act allowed for the creation of a Legal Aid Board, which took up the legal mandate of the Law Society.<sup>235</sup> Its responsibility was to oversee the delivery of legal aid and manage the budget for legal aid. The Board did not however develop a clear structure for legal representation and its quality of legal aid was highly criticised. To resolve this, the Board established standards to regulate its legal aid affairs and improve its quality.

To enhance the provision of legal aid the Access to Justice Act was established.<sup>236</sup> It allowed for the establishment of the Legal Service Commission whose mandate was to provide and oversee the provision of legal aid.<sup>237</sup> The Legal Service Commission created the Criminal Defence Service to assist in the provision of legal aid. It ensured that the criminal justice system was not compromised. Legal aid services provided covered both free advice and representation. Persons who wished to obtain free legal representation in England and Wales were called upon to approach the Legal Service Commission for the same. The Public Defender System then on behalf of the Commission provided legal aid in all criminal cases. Legal representation was provided to an accused person from the “point of arrest, interrogation and in court during trial”.<sup>238</sup> Thus the major lessons that could be drawn from this UK system of legal aid is the establishment of the Legal

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<sup>233</sup> Ministry of Justice and Legal Aid Agency, ‘User Guide to Legal Aid Statistics, England and Wales’ (2020) Ministry of Justice Statistics, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/895096/user-guide-legal-aid-statistics-jan-mar-2020.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/895096/user-guide-legal-aid-statistics-jan-mar-2020.pdf).

<sup>234</sup> Atsiaya Mongoi Marcos, ‘Access to Justice and the Right to Legal Aid: A Comparative Analysis of Kenya and the United Kingdom (England and Whales)’ Research Paper submitted to Central European University, Budapest, Hungary.

<sup>235</sup> *ibid.*

<sup>236</sup> Act of 1999.

<sup>237</sup> Marco, *Supra Note* 234.

<sup>238</sup> Marcos *Supra Note* 234.

Service Commission which was an independent body and the Criminal Defence Services which ensured that there was accountability and efficiency in the provision of legal aid. As has been pointed out, legal aid in the UK is provided in all criminal cases.

In 2013, the Legal Service Commission was abolished by the Legal Aid, Sentencing and Punishment of Offenders Act<sup>239</sup> and replaced by the “Legal Aid Agency”, an executive agency of the Ministry of Justice.<sup>240</sup> It is currently the institution administering legal aid in England and Wales. In the UK a Central Fund has been established which provides reimbursements to defendants where they are acquitted and lawyers who cross-examine witnesses on behalf of an accused person.<sup>241</sup> Though a good system, its adoption in Kenya is impracticable owing to the financial challenges that the country is currently experiencing in provision of legal aid. Solicitor firms, not-for-profit organisations, barristers and mediators are engaged to provide legal aid in England and Wales.

#### **4.4 Conclusion**

In conclusion, this chapter has examined the capital offences in Kenya i.e. “murder, treason, robbery with violence, attempted robbery with violence and unlawful administration of oaths”. Unlike murder offences which almost certainly are allocated state funded legal representation, the other capital offences while the Constitution requires that state funded legal representation be provided to them owing to the substantial injustice that might occur, hardly receive pro bono lawyers. This chapter has put forth the argument that the effectiveness and efficiency of state funded legal aid is hindered by financial constraints and inadequacy of legal practitioners.

The chapter has proceeded to analyse the legal aid systems of the United States, South Africa and United Kingdom. As has been discussed, the US has adopted various programs that aid in the provision of legal representation. Its organised defender agencies allow for establishment of urban centres where full-time salaried attorney provide free legal representation. Several factors for effective and efficient legal aid have also been identified. In South Africa, like Kenya legal aid is provided to an accused persons “where substantial injustice would otherwise result”. The Legal Aid Board also allows for the formation of legal aid centres in rural and urban areas to ensure easy access of legal aid by all. Lastly, in the United Kingdom, the Criminal Defence Services ensured

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<sup>239</sup> Act of 2012.

<sup>240</sup> Ministry of Justice and Legal Aid Agency *Supra Note 229* at 4.

<sup>241</sup> Ministry of Justice and Legal Aid Agency *Supra Note 229* at 5.

that there was accountability and efficiency in the provision of legal aid. The Central Fund reimburses monies to defendants upon acquittal and to advocates in the form of compensation for arguing a case on behalf of an accused person.

The following chapter, which is the final chapter therefore summarizes the arguments that have been put forth in this and previous chapters, gives recommendations and concludes the study.

## CHAPTER FIVE:

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 Conclusion

This paper has pointed out that persons who are accused of offences that attract a death penalty are entitled to state funded legal representation to prevent substantial injustice that might otherwise arise.<sup>242</sup> The paper has further demonstrated that not only the law but also practice by all legal aid stakeholders have demonstrated that capital offences are deserving of legal representation at the expenditure of the government. The previous chapters have discussed that unlike murder which almost certainly receives state funded legal representation, other capital offences do not receive the same level of attention that murder does. Nevertheless, the court has reaffirmed the right of persons accused of capital offences to state funded legal representation. Lack of funding and inadequacy of counsel is the biggest threats to state funded legal representation.

The introductory chapter of this paper sought to respond to the following questions: to what extent are the measures put in place in Kenya adequate to realise the right of state funded legal services by indigent persons charged with capital offences in Kenya?; what is the existing regulatory framework on legal aid and pauper briefs for indigent persons accused of capital offences in Kenya?; and what policy recommendations can be made to ensure the realisation of the right to quality state funded legal aid for indigent persons facing capital offences in Kenya? Having examined the different dimensions of the right to state funded legal representation by indigent persons accused of capital offences, the subsequent paragraphs concludes the paper.

The first chapter introduced the study by creating a road map on state funded legal representation of indigent persons accused of capital offences in Kenya. It hypothesised; first, that state funded legal representations of indigent persons facing capital offences do not achieve the best available results for access to justice in the provision of timeous and quality legal representation for indigent and vulnerable persons as is required under the Constitution of Kenya. Secondly, that the legislative framework in Kenya encompassing state funded legal aid and pauper briefs for indigent persons facing capital offences does not adequately address their specific needs. Thirdly, that the funds allocated for provision of free legal services in Kenya do not sufficiently satisfy the demand for legal representation by indigent persons accused of capital offences in Kenya. All these

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<sup>242</sup> See the Constitution of Kenya, 2010, Article 50(2)(h).



hypotheses have been proved to be right in the second, third and fourth chapters, summarized further below.

In response to the question whether the state has put in place adequate measures to realise the right of funded legal services by indigent accused persons facing capital offences in Kenya, the second chapter has conceptualised access to state funded legal representation by indigent persons accused of capital offences in Kenya. It has set out the historical developments for free legal representation of indigent persons accused of capital offences in Kenya. The most notable development is the recognition by the Kenya's Constitution of 2010 of the right to legal representation at the cost of the government "where substantial injustice would otherwise occur".<sup>243</sup> This chapter has highlighted various jurisprudence from both Kenyan and foreign courts that justify the right to free legal representation of indigent persons accused of capital offences. The chapter demonstrated that capital offences meet the requirements for offences that would result in substantial injustice where advocate representation at the cost of the government is not granted. Finally, this chapter has demonstrated that convictions of capital offenders to death result due to poor quality legal services and not lack of legal representation.<sup>244</sup>

The existing legislative framework on provision of legal aid and pauper briefs in Kenya was analysed, reviewed, and critiqued in the third chapter. This chapter identified several national, regional and international instruments that speak to free legal representation. At the international level, the "Universal Declaration of Human Rights", "International Covenant on Civil and Political Rights", "The United Nations Principles" and "Guidelines on Access to Legal Aid in Criminal Justice Systems" have been explored. At the regional level, the "African Charter on Human and Peoples' Rights", "Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights", the "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa" and the "Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa" and the "Lilongwe Plan of Action for the Implementation of the Declaration, the Principles and Guidelines" have been identified. Nationally, "the Constitution", the "Legal Aid Act", "Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services" and the "Criminal Procedure Code" have been explored. All these legal instruments speak to legal aid by indigent persons in both broad and specific terms.<sup>245</sup> The

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<sup>243</sup> The Constitution of Kenya, 2010, Article 50(2)(h).

<sup>244</sup> Refer to Chapter Two of this study.

<sup>245</sup> Emphasis mine.

UN Principles and Guidelines, African Guidelines and Practice Directions Relating to Pauper Briefs Scheme and Pro Bono Services expressly mentions legal aid where an offence attracts a sentence of death penalty or in the case of capital offences. This chapter has also explored the institutional framework for free legal representation in Kenya. The mandates of the National Legal Aid Service, a formation of the Legal Aid Act has been explored. Other legal aid providers have also been discussed for example the courts under the pro bono committees set up in various court stations, the Law Society of Kenya, various NGOs and other institutions such as the university legal aid clinics and law firms.<sup>246</sup>

In order to derive lessons and recommendations for the study and to identify additional administrative measures that may be suitable towards the realisation of the right of legal aid by indigent accused persons facing capital offences in Kenya, the fourth chapter has analysed the current mechanisms for the access to state funded legal representation by indigent persons charged with capital offences and drew lessons from the United States of America, South Africa and the United Kingdom. The chapter discussed that “murder, treason, robbery with violence, attempted robbery with violence and unlawful administration of oaths” constitute capital offences in Kenya. This chapter has pointed out that unlike murder offences which almost certainly are allocated state funded legal representation, the other capital offences, notwithstanding that the Constitution requires that state funded legal representation be provided to them owing to the substantial injustice that may occur, hardly receive pro bono lawyers. This chapter has put forth the argument that the effectiveness and efficiency of state funded legal aid are hindered by financial constraints and inadequacy of legal practitioners. The chapter has proceeded to analyse the legal aid systems of the United States, South Africa and the United Kingdom. As has been discussed, the United States has adopted various programs that aid in the provision of legal representation. Its organised defender agencies allow for the establishment of urban centres where full-time salaried attorney provide free legal representation. Several factors for effective and efficient legal aid have also been identified.<sup>247</sup> In South Africa, like Kenya, legal aid is provided to accused persons where substantial injustice may otherwise occur. The Legal Aid Board also allows for the creation of legal aid centres in rural and urban areas to ensure easy access to legal aid by all. Lastly, in the United Kingdom, the Criminal Defence Services ensured that there were accountability and efficiency in providing of legal aid. The Central Fund reimburses monies to defendants upon

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<sup>246</sup> Refer to Chapter Three of this study.

<sup>247</sup> Emphasis mine.

acquittal and to advocates in the form of compensation for arguing a case on behalf of an accused person.

The subsequent section proceeds to give recommendations on the practices that can be adopted in Kenya for an effective and efficient framework for state funded legal representation of indigent persons charged with capital offences. As has been pointed out, the biggest challenge to the current legislative and institutional framework, is finances and inadequate counsel.

## **5.2 Recommendations**

Having identified the challenges in the present framework for state funded legal representation in Kenya, this section proceeds to give recommendations for possible adoption or review. The recommendations herein, relate to the questions that were posed in the first chapter, which are: to what extent are the measures put in place in Kenya adequate to realise the right of state funded legal services by indigent persons charged with capital offences in Kenya?; what is the existing regulatory framework on legal aid and pauper briefs for indigent persons accused of capital offences in Kenya?; and what policy recommendations can be made to ensure the realisation of the right to quality state funded legal aid for indigent persons facing capital offences in Kenya?

To begin with, to enhance the effectiveness of the realisation of the “right to state funded legal representation” by indigent persons accused of capital offence, there is need to boost the availability and quality of legal representation through continuous pieces of training and constant supervision of state funded counsel. It would be beneficial to all stakeholders, particularly, the accused, counsel and the court.<sup>248</sup> Supervision should, for example entail requiring the advocate to give constant updates on the progress of the case. To see to it that advocates offer effective legal services, specific number of cases should be allocated to them in order to avoid pressures that may result from huge caseloads. Advocates should also be independent. Advocates should be called upon to comply with set minimum standards.

As Stone observes, an effective legal aid system should address factors such as sufficient funds and resource sought to be set aside to achieve the right to legal aid. Legal aid should be availed to indigent accused persons from the time of the arrest.<sup>249</sup> It is not always the case in Kenya since

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<sup>248</sup> “Jennifer L. Huber, ‘Legal Representation for Indigent Criminal Defendants in South Africa: Possibilities Under the 1994 Constitution’ (1995) 5 *Duke Journal of Comparative & International Law* 425-456”.

<sup>249</sup> “Randolph N Stone, ‘The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases’ (1993) 17 *American Journal of Trial Advocacy* 205”.

majority of the accused persons who cannot afford legal representation are often assigned an advocate by the court upon arraignment.

There is need to constantly educate all stakeholders, more so, arrested persons, arresting officers and the general public about state funded legal aid.<sup>250</sup> Notably, as is practised in other jurisdictions such as the United States of America, law students should be given opportunities to enthusiastically participate in pro-bono cases by assisting in research or investigations. It would be more practical in Kenya if there existed various legal aid centres.

Whether or not the existing legal framework in Kenya sufficiently address indigent accused persons' right to state funded legal representation, the Constitution as read together with international, regional and other national laws call on the state to fund legal services where indigent persons cannot afford them. It is essential in allowing an accused to "choose and be represented by an advocate". This however hardly happen in practice since an indigent person would often be assigned an advocate and informed of their right to change advocates for reasons of a just determination of a dispute. Often times, the accused persons have no options but to take up a lawyer assigned to them. This is seen mostly where the court assigns a lawyer to an accused. Accused persons often have no say on the lawyer assigned to them. Kenya could establish a framework where an accused would be allowed to choose or change a state funded lawyer. This paper takes cognisance of the challenges that might arise during enforcement. Importantly, allowing an accused to choose an advocate is instrumental in enhancing the quality of legal services provided.<sup>251</sup> All these proposals by Stone are worth a consideration in the Kenyan context since the legal aid sector has been grappling with challenges relating to them.

Like the case in South Africa and the United States, organized agencies on legal aid should be set up in major towns whose roles should entail conducting civic education and bringing access to legal services closer to indigent people.<sup>252</sup> Advocates should be retained on a full-time basis, salaried and should refrain from engaging in private practice.<sup>253</sup> The state could also enter into specific contracts with law firms or non-governmental organisations involved in legal aid to offer

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<sup>250</sup> *ibid.*

<sup>251</sup> Stone *Supra Note 210*.

<sup>252</sup> Randolph N Stone, 'The Role of State Funded Programs in Legal Representation of Indigent Defendants in Criminal Cases' (1993) 17 *American Journal of Trial Advocacy* 205.

<sup>253</sup> Lynn Berat, 'Legal Aid and the Indigent Accused in South Africa: a Proposal for Reform' (1988) 18 *Georgia Journal of International & Comparative Law* 239-292.

free legal aid to the public. Such contracts could be limited in time and scope of criminal cases. This will enhance the effectiveness of the quality of legal aid offered. There would also be enhanced accountability of both firms and lawyers.

In South Africa, the Legal Aid Board receives funding from parliament, this is equally the case in Kenya since the Legal Aid Fund receive funding from parliament and amongst other sources.<sup>254</sup> What Kenya can do to enhance funds availability is to increase the allocations made by parliament. The Legal Aid Board in South Africa is an independent body, Kenya's Legal Aid Services is a body corporate. The Legal Service Commission of England and Wales is similarly independent. Whether or not granting the Kenyan body independence would enhance state funded legal services delivery, should be factored in in any future deliberations on this matter.

In the United Kingdom, the Criminal Defence Service was tasked with overseeing the delivery of legal aid in England and Wales and to specifically see to it that the criminal justice system was not compromised.<sup>255</sup> This is yet another body which Kenya may want to introduce. Its mandate should be majorly supervisory, i.e. ensuring that state funded legal representation is rendered effectively and efficiently. Thus, ensuring that there is accountability. Impressively, like the United Kingdom, Kenya has a Legal Aid Fund where legal aid monies are challenged. While in the United Kingdom, indigent defenders are on acquittal reimbursed the costs incurred during their defence, this strategy though appealing cannot be implemented in Kenya due to financial constraints. It is however achieved in other ways such as providing a state funded lawyer. This prevents the accused from cost that they would on their own incur.

Therefore, while Kenya has made several strides towards the recognition and protection of the right to state funded legal representation in capital offences by indigent persons, a lot needs to be done to ensure that the services provided are effective and efficient, that there is accountability and there is adequate funding. Accused persons should also be provided with counsel from the time of arrest as opposed to, after arraignment in court. Legal aid centres also need to be moved closer to indigent person for easy access of legal aid.

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<sup>254</sup> Legal Aid Act, section 29(2).

<sup>255</sup> Ministry of Justice and Legal Aid Agency, 'User Guide to Legal Aid Statistics, England and Wales' (2020) Ministry of Justice Statistics.

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