EVALUATING THE PLACE OF ALTERNATIVE JUSTICE MECHANISMS AS A FORM OF RESTORATIVE JUSTICE IN KENYA: INTERROGATING BEST PRACTICES FROM THE SOUTH AFRICA'S CRIMINAL JUSTICE SYSTEM

By

Nancy Nangúni Barasa
G62/34148/2019

A thesis submitted in partial fulfillment of the
requirements for the Award of the Master of Laws (LLM)
Degree of the University of Nairobi

UNIVERSITY OF NAIROBI
THE YEAR 2021

DECLARATION

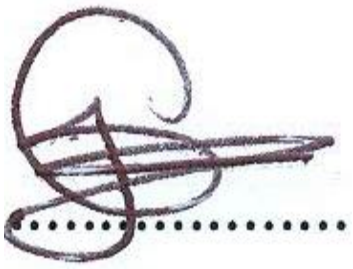
I, NANCY NANG'UNI BARASA, do hereby declare that this is my original and innovative work which has neither been submitted nor intended to be submitted for a degree in any other university in compliance with the regulations for an award of Master of Laws Degree (LLM).

DECLARANT: …….

NANCY NANG'UNI BARASA

Date 16th November 2021

This thesis is submitted for examination with my approval as University Supervisor.



SUPERVISOR: ……

DOCTOR EVELYNE ASAALA

Date……16th November 2021……...

Contents

Acknowledgments

My special gratitude is to God for the strength and good health that enabled the completion of this research.

Thanks to my supervisor, Dr. Evelyne Asaala, for her patience with me at the beginning when the ideas constituting this work were still in disarray. The immense guidance and timely advice she offered encouraged me that it was doable. May God richly bless her.

The support received from my husband Mr. Henry Tutei, my daughters; Lynn, Emma, and Stacy cannot go unappreciated, they endured inadequacy of my attention to them giving me ample time to conclude this research. Thank you very much.

Table of statutes

Child Justice Act 75 of 2008 of South Africa

Children Act, Chapter 141 Laws of Kenya

Constitution of Kenya 2010

Constitution of the Republic of South Africa, 1996

Criminal Procedure Act,1997[South Africa]

Criminal Procedure Code, Chapter 75 Laws of Kenya

Judicature Act, Chapter 8 Laws of Kenya

Penal Code, Chapter 63 Laws of Kenya

The Law of Succession Act, Chapter 160 Laws of Kenya

Victims Protection Act No. 17 of 2014, Laws of Kenya

Table of International and Regional Instruments

Table of Cases

List of Abbreviations

ADR	Alternative Dispute Resolution
AJS	Alternative Justice System
CJA	Child Justice Act
CPC	Criminal Procedure Code
FGM	Female Genital Mutilation
ODPP	Office of the Director of Public Prosecutions
TDRM	Traditional Dispute Resolution Mechanism
UN	United Nations
UNDP	United Nations Development Program
NICRO	National Institute for Crime prevention and the Reintegration of Offenders
VPA	Victim Protection Act

Definition of terms

The terminologies appearing in this research have their meanings attached as follows;

Restorative justice

Refers to justice that is arrived at when the affected parties voluntarily submit and participate in a process that facilitates their meeting and discussion on the cause, impact and needs arising from the commission of crime and how best to mitigate them to their satisfaction.

Retributive justice

Refers to justice dispensed in the conventional formal criminal justice process.

Alternative justice

Means justice that is obtained in forums outside the formal justice system.

Abstract

Restorative justice is one of the many modern approaches to justice that are geared towards addressing the justice needs in the criminal justice systems. Its objective is to offer the affected parties a chance to dialogue by identifying the cause of the crime in question, the parties' needs arising from that crime, and how to best remedy the situation. This expands room for a people-centred process thus advancing the course of justice. Alternative justice systems, exhibit restorative justice principles and objectives which are geared towards achieving reparation, rehabilitation, and reintegration. These objectives eventually translate to deterrence which is one of the objectives of criminal law.

This research has discussed alternative justice systems as an embodiment of restorative justice principles and its understanding within the Kenyan context. The research found that restorative justice is an old idea of justice whose application has been dynamic to accommodate the legal requirements and social changes. It is no longer confined to the traditional dispute resolution model but has numerous other forums that are constituted based on religion, family, local administrative units, civil rights groupings etcetera, with all being referred to as the informal justice systems. The alternative justice elements have further been traced in the Kenyan legal and institutional structures, with Article 159(2)(c) forming a bedrock on which all are anchored and from which other laws and institutions of AJS draw their strength. The centre of focus in this research has been the practice of AJS in courts and the emerging jurisprudence as envisaged in the constitution.[1] However, uncertainty exists on the part of the courts on how they should treat negotiated settlements in cases classified as felonies. To cure this situation, the research borrows from the practice in South Africa and recommends to the Kenyan parliament to enact a law or laws that implement the constitution as well as legislating on diversion which has been described as a restorative justice tool. There is currently no statutory backing that is specific to diversion a fact that hampers its effective application. A law on diversion will be specific in making provisions on alternative to trial. In addition to legislation, the judiciary has a role to interpret the law in a way that promotes human rights.[2] This is an opportunity for courts to develop progressive jurisprudence

[1] Article 159(2)(c), Constitution of Kenya 2010.

[2] Article 20(3),(a) (b), Constitution of Kenya 2010.

on matters of AJS to harmonize, clarify, and create uniformity in practice thus enhancing trust to the justice system as a whole.

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

The penal practice in Kenya can be explained in three epochs; pre-colonial, colonial, and post-colonial.[3] In pre-colonial Kenya, traditional dispute resolution mechanisms were informed by the culture of every community and were applied to resolve all kinds of disputes that arose.[4]These practices were handed down from one generation to another verbally. Each community handled the aftermath of an offense following the cultural values of that community, which values are now seen to have been largely reflective of values in restorative justice.[5] Kinyanjui Sarah, among other scholars in Kenya acknowledges that there were also social practices of retributive nature in the Kenyan traditional society but restorative justice practices were to a larger extend practiced.[6] Further, the underlying objectives across most communities, were restoratively aimed at reconciling the offender and the victim.[7] Correction of the wrong by way of compensation and reintegration as opposed to merely punishing the offender was key.[8] It was a restorative kind of remedy for a wrong committed. This form of justice appreciated the full dimension of human

[3] Sarah Kinyanjui. "Restorative Justice in Traditional Pre-Colonial 'Criminal Justice Systems' in Kenya." Tribal Law Journal 10, 1 (2010) https://digitalrepository.unm.edu/tlj/vol10/iss1/1 accessed on 21 September 2021.

[4] Kariuki Muigua and Kariuki Francis, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' (2015) 1 Strathmore LJ 1 P http://erepository.uonbi.ac.ke/handle/11295/80138 accessed on 21 September 2021.

[5] Sarah Kinyanjui 'A Genealogical Analysis of the Criminal Justice System in Kenya: Rebirth of Restorative Justice for Juvenile?' https://digitalrepository.unm.edu/tlj/vol10/iss1/1/ accessed on 7 October 2020.

[6] Ibid.

[7] Ibid(n3).

[8] Sarah Kinyanjui. "Restorative Justice in Traditional Pre-Colonial 'Criminal Justice Systems' in Kenya." Tribal Law Journal 10, 1 (2010) https://digitalrepository.unm.edu/tlj/vol10/iss1/1 accessed on 21 September 2021.

experience that addressed the moral justice which reliefs both body and soul.[9] The arrival of the colonizer is blamed for the challenges currently experienced in the formal justice system, this is because the current legislative framework in Kenya is part of the legal materials that were inherited from the British colony.[10] The inherited criminal justice was mainly retributive.[11] The post-independent African governments, including Kenya, have been accused of perpetuating values and principles of common law in their criminal justice systems that emphasize retribution and general deterrence[12] instead of coming up with policies that address the cause of crime for effective implementation of crime prevention programs.[13] For the emergence of new approaches to justice like community justice, collaborative justice, holistic justice, transformative mediation, preventive law, therapeutic jurisprudence, and restorative justice as contemporary approaches,[14] restorative justice is recognized as an approach that has gained momentum globally.[15]The modern-day practice in Kenya is now said to be focused on restitution, restoration, and reintegration[16] which are principles of restorative justice. The Constitution of Kenya 2010, which has been described as a transformative and radical document that is futuristic as opposed to concentrating on the past,[17]

---

[9] Nqosa Mahao, 'Osereho Morwa Morwa Towe! African Jurisprudence Exhumed' (2010) 43 Comparative and International Law Journal of Southern Africa 317 https://www.jstor.org/stable/23253086 accessed on 8 February 2021.

[10] Michael Wabwile, 'The Place of English Law in Kenya' (2003) 3 Oxford University Commonwealth Law Journal 51 https://doi.org/10.1080/14729342.2003.11421422 accessed on 8 February 2021.

[11] Kariuki Muigua (n1).

[12] Dejo Olowu, 'Therapeutic Jurisprudence: Transforming Legal Education and Humanizing Criminal Justice in Africa' (2010) 43 De Jure 95 P https://heinonline.org/HOL/LandingPage?handle=hein.journals/rjupurco76&div=17&id=&page= accessed on 16 March 2021.

[13] Ibid.

[14] Ibid.

[15] Hadar Dancig-Rosenberg and Tali Gal, 'Restorative Criminal Justice' (2013) 34 Cardozo L Rev 2313 Provided by: University of Nairobi https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/cdozo34&section=67 accessed on 21 September 2021.

[16] ODPP, Diversion Policy,2019 accessed through https://www.odpp.go.ke/odpp-diversion-policy/ accessed 21 September 2021.

[17] Willy Mutunga, 'Human Rights States and Societies: A Reflection from Kenya' (2015) 2 Transnational Human Rights Review 63 http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1014&context=thr accessed on 21 September 2021.

obligates the judiciary to undertake reforms that will do away with colonial and neo-colonial inefficiencies and injustices.[18] This is achievable by the building of strong institutions, strengthening already existing institutions and legal structures as a basis of transformation.[19]This research seeks to evaluate the application of the principles of reparation, healing, and reintegration in criminal law to identify challenges and recommending improvement. These principles are mostly applied in the informal justice mechanisms which exhibit restorative forms of justice.[20]
The study evaluates restorative forms of justice practices adopted in South Africa and recommends best practices for Kenya. The choice of South Africa is informed by the fact that its constitution has been hailed for being transformative just like the Constitution of Kenya, 2010. Besides, it is a commonwealth country that shares the history of colonization with Kenya.

Restorative justice brings a new approach that emphasizes personal and relational harms caused by crime instead of solely viewing crime as harm against protected societal values.[21] Restorative justice has both strengths and weaknesses depending on one's worldview in comparison to the retributive justice system hence some scholars propose that these systems complement each other, making it efficacious if the two systems run together.[22] Neither the retributive nor the restorative forms of justice can generally serve as the only form of justice, but the one that is best suited at a given case scenario may be applied.[23]
Kenya has been described as a legal pluralist society that cannot justifiably have a single system of administering justice.[24] Besides the mainstream formal justice system, the concept of alternative justice systems, hereinafter referred to as AJS, has of late gained momentum and has been found

[18] Ibid.
[19] Ibid.

[20] Boyane Tshehla, 'The Restorative Justice Bug Bites the South African Criminal Justice System' (2004) 17 South African Journal of Criminal Justice 1 https://journals.co.za/doi/abs/10.10520/EJC52800 accessed on 21 September 2021.

[21] Hadar Dancig-Rosenberg and Tali Gal (n6).

[22] Ibid.

[23] Hadar Dancig-Rosenberg (n16).

[24] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) 1 Strathmore LJ 22 https://press.strathmore.edu/uploads/journals/strathmore-law-journal/SLJ1/1-SLJ-1-EKinama-TJS-a accessed on 3 December 2020.

not to exclude the criminal justice sector.[25] It is in this regard that there have been several policy frameworks, geared towards the fulfilment of the people's expressed wish under the constitution, such as, the diversion policy, the plea Bargaining policy, and the AJS policy which are meant to implement the alternative processes of resolving cases, other than by way of prosecution in a formal judicial process. The Plea bargaining policy was taken a notch higher by being provided for through legislation.[26] This research is concerned with the need for certainty and uniformity in the manner of interaction between these alternative systems and the formal justice system in practice. This enhances accountability and creates uniformity as well as access to justice for all.

1.2 Statement of the Problem

The Kenyan law offers opportunities for the resolution of cases in informal forums. The constitution obligates the courts and tribunals to promote AJS mechanisms including reconciliation and traditional dispute resolution mechanisms among others, as long as the same adhere to standards enlisted under Article 159(3) of the constitution. The launch of an AJS policy by the Judiciary on 26th August 2020 clears any doubts that these provisions apply to criminal law cases too. The AJS policy recognizes that AJS is a form of restorative justice and also that the use of other mechanisms in criminal cases has been going on in various courts notwithstanding the absence of clarity as to the scope and manner of application. There is a recommendation by the AJS task force that rules of reference be developed to guide the process of implementation of the constitution of Kenya 2010. There have to be guidelines as to which laws, policies, and rules to be developed and how they should be so developed to facilitate the AJS. The formal recognition and implementation of AJS in Kenya are still at the inception stage, its application in criminal cases is marred by uncertainties as each court seems to be adopting its style depending on the locality and jurisprudential underpinnings of individual officers seized with a case scenario. In the absence of adequate legal, both procedural and substantive, and institutional frameworks, the way forward is

[25] Kariuki Muigua and Kariuki Francis, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' (2015) 1 Strathmore LJ 1 P http://erepository.uonbi.ac.ke/handle/11295/80138 accessed on 21 September 2021.

[26] Criminal Procedure Code Chapter 75 Laws of Kenya, Section 173A-137O.

to assess what is available to ascertain the deficit as well as borrow best practices to guide the implementation. That is the concern of this research.

1.3 Hypothesis

The courts and tribunals are obligated to promote ADR mechanisms such as reconciliation, mediation and traditional dispute resolution mechanisms.[27] These mechanisms offer parties to a dispute an opportunity to voluntarily meet and discuss the cause, impact and needs arising as an aftermath of the crime in question and together innovate ways to best mitigate the harm. This research suggests that though the process of dialogue following an aftermath of an offence is largely found in mechanisms outside the formal criminal justice system commonly referred to as AJS, there are elements of AJS within the legal and institutional framework constituting the formal criminal justice system in Kenya. Further, that there is need to strengthen these elements that are already within the system to expand the scope of their application in practice hence access to justice to all. It is likely that such strengthening of AJS elements within the law will facilitate its implementation in Kenya.

1.4 Purpose of the Study

This study evaluates legal options available for implementing alternative justice processes in the Kenyan courts and the limitations such options exhibit to recommend mechanisms of adjustment for effective and efficient delivery of justice. It is expected that this research will contribute to the scholarly discourse and literature on AJS and to the general practice of law in Kenya.

1.5 Objectives of the study

The following are the objectives of the study:

i) To evaluate the meaning and scope of AJS as in the context of restorative justice in Kenya.

[27] Article 159(2)(c), Constitution of Kenya 2010.

ii) To critique the legal and institutional framework in the lenses of AJS as a form of restorative justice in Kenya.

iii) To establish the emerging jurisprudence on AJS as a form of restorative justice in the Kenyan courts.

iv) To interrogate best practices on AJS in the South African criminal justice system with a view to drawing lessons for Kenya.

1.6 Research Questions

(i) What is the understanding of AJS in relation to restorative justice in the Kenyan context?

(ii) To what extend is the legal and institutional framework supportive of AJS as a form of restorative justice in Kenya?

(iii) What are the jurisprudential issues emerging from the courts that are shaping the application of AJS as a form of restorative justice in Kenya?

(iv) What AJS best practices are in South Africa's criminal justice system that are useful for Kenya?

1.7 Significance of the Study

Kenyan criminal justice system is noted for its myriad of challenges such as; complex and cumbersome procedures that contribute to increased cost of litigation.[28] Re-victimization and increased trauma to the victims is also a concern hence the need for processes that take care of the interests of all the parties in a balanced way. Moreover, justice is not abstract, allowing the parties to participate will result to justice that resonate with their expectations. The constitution of Kenya offers an opportunity to the parties to have a dialogue and come up with the best solution they deem suitable to their circumstances.[29] The recent launching of AJS policy as part of the Judiciary's efforts to infuse AJS in the formal criminal justice system, is a manifestation of the relevance and contribution of this research to the practice of criminal law in Kenya.

---

[28] Kariuki Muigua, 'Heralding a New Dawn: Achieving Justice through effective application of Alternative Dispute Resolution Mechanisms (ADR) in Kenya,' *Chartered Institute of Arbitrators (Kenya), Alternative Dispute Resolution* 1.1 (2013): 43-78 http://kmco.co.ke/wp-content/uploads/2018/08/Heralding-a-New-Dawn-Access-to-Justice-PAPER accessed on 8 November 2021.

[29] Ibid(n27)

1.8 Scope of the Study

This research evaluates the legal and institutional framework in Kenya to ascertain how it has facilitated and curtailed the application of AJS. The opportunities and challenges of AJS in the Kenyan laws can better be expressed by practitioners of criminal law and therefore, the research concentrated on the practice of criminal law in the Kenyan courts.

1.9 Theoretical Framework

This study is guided by John Rawls' theory of justice that advocates for fairness in the operations of the law in the community. The theory of justice has been developed into two principles. First, that everyone has equal laim to basic rights and liberties hence structuaral frameworks should be accommodative of all.[30] Second, for equality to be achieved opportunities have to be made accessible even to the most disadvantaged in the society.[31] In short, the concept of justice addresses the fair distribution of fundamental rights and duties in the society.[32]The theory of justice came in as an acceptable alternative to the theory of utilitarianism by Jeremy Bentham that justified morality of actions by humans and social institutions to the extent that they tend to maximize the happiness of those they affect.[33]The theory of justice appreciates that the natural circumstances of human life such as being rich or poor, intelligent or stupid, man or woman, young or old et cetera, are subject to limited control but the social structures can be adjusted to accommodate everyone.[34]This in turn translates to minimization or elimination of inequalities in a well-ordered society. Fairness demands that equality of opportunities be key as opposed to sacrificing other people's advantages for the satisfaction per capita of all members of the society. Kariuki Muigua and Francis Muigua established that the formal justice regime in Kenya favors a few members of

---

[30] Rex Martin, 'Rawls's New Theory of Justice' (1994) 69 Chi-Kent L Rev 737 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/chknt69&section=41 accessed on 22 September 2021.

[31] Ibid.

[32] Frank I Michelman, 'In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice ' (1973) 121 U Pa L Rev 962 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/pnlr121&section=55 accessed on 22 September 2021.

[33] Dan W Brock, 'Theory of Justice, The ' (1973) 40 U Chi L Rev 486 https://www.jstor.org/stable/1599245 accessed on 22 September 2021.

[34] Ibid.

the society; those that are well-resourced financially and intellectually to the disadvantage of those that are poor or worse ignorant of their rights and freedoms.[35] This goes against the spirit and letter of the theory of justice generally hence the need to align legal and institutional operations with the principles herein for the good of the society. The research explores how realignment should be done by proposing an embrace of AJS to compliment the current system. The offenders and the victims are all human beings with dignity worth being protected even as justice systems come into operation to promote an environment where no one feels that they are a threat or feel threatened in their communities.[36]

1.10 Limitations of the study

This study has been undertaken at a period when there is restricted interaction of people due to COVID-19 pandemic. Further, most offices are operating with skeleton staff which has hampered the extent of the information that can be obtained as well as the accessibility of some primary materials. It has been difficult to Interview practitioners that are directly involved in this field of the study say, prosecutors, advocates, and judicial officers, this would have been very resourceful. Therefore, in overcoming such challenges, the researcher had to rely greatly on secondary data, such as books, journals, articles, periodicals, the constitution, statute, reports, and such materials as are accessible online. This research is informed by the observations made in the course of the researcher's practice as a judicial officer.

1.11 Research Methodology

This research relied on primary and secondary sources of data collection which informed the decision to take the desk review research method to meet the objectives of the study. Literature materials such as books, journals, articles, various constitutions and statutes, periodicals, and reports relating to the research topic were relied on. The research was equally informed by observations made in the course of practice in the Kenyan courts by the researcher. This research applied a qualitative form of data analysis that sought to establish concepts touching on the area

[35] Kariuki Muigua and Kariuki Francis, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' (2015) 1 Strathmore LJ 1

[36] Alfred Allan and Marietjie Allan, 'The South African truth and reconciliation commission as a therapeutic tool' (2000) 18 Behavioral Sciences & Law 459.

of research and views of both local and global scholars on the subject. In synthesizing this information, the research also adopted a comparative analysis of the Kenyan scenario to that of South Africa with a view to establishing lessons for Kenya. Together, these two approaches informed the conclusion and recommendations made by the researcher that addresses the research questions. This research will be placed in the library in print form to constitute reference materials.

1.12 Literature Review

The need for effective crime control measures activated discourse and the desire to either have an approach that supplements the formal criminal justice system or as a complete alternative to the same.[37] The approach that would bring sense to the victims of crime was appropriate as victims felt left at the periphery or completely out of a justice system.[38] Restorative justice approach has an objective that people who victimize others are required to 'make right' what they have done by restoring the victim's losses.[39] This restoration may be concrete or symbolic. Conceptualizing and defining restorative justice has been the subject of great discourse among scholars. It is now settled that restorative justice lacks an exhaustive definition. Kinyanjui Sarah argues that restorative justice being a dynamic concept, definitional precision should not be a centre of focus but principles that appreciate unique circumstances of a case scenario.[40]These principles that are exhibited in a restorative justice process were outlined by Johnstone and Van Ness as its largely informal nature, focuses on individuals affected by wrongdoing, attempts to foster interventions

[37] Hadar Dancig-Rosenberg and Tali Gal, 'Restorative Criminal Justice' (2013) 34 Cardozo Law Review 2313 https://heinonline.org/HOL/Page?public=true&handle=hein.journals/cdozo34&div=67&start_page=2313&collection=journals&set_as_cursor=0&men_tab=srchresults accessed on 29 October 2021.

[38] Howard Zehr and Mark Umbreit, 'Victim Offender Reconciliation: An Incarceration Substitute' (1982) 46 Fed Probation 63 https://heinonline.org/HOL/Page?public=true&handle=hein.journals/fedpro60&div=45&start_page=24&collection=journals&set_as_cursor=1&men_tab=srchresults accessed on 29 October 2021.

[39] Nancy Rodriguez, 'Restorative Justice, Communities, and Delinquency: Whom Do We Reintegrate' (2005) 4 Criminology & Pub Pol'y 103 accessed through https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/crpp4&section=13 accessed on 21 September 2021.

[40]Sarah Kinyanjui, 'Definition Deadlock or a Necessary Definition Gap? Towards Infusing the Criminal Justice System with Restorative Justice Values' (2019) 2019 E Africa LJ 149 https://heinonline.org/HOL/License accessed on 1 November 2021.

that address impact of wrongdoing, takes into account relational principles such as respect, inclusion, voluntariness and non-violence, prioritizes needs of the victims and its focus on enhancing relationships.[41] There are therefore various definitions that have emerged as to what restorative justice is with various stakeholders in the justice sector defining it as they best understand it in their areas of practice.[42] Restorative justice is said to comprise the idea that crime hurts and hence justice should bring about healing.[43]A position that is further affirmed by Van Ness and Karen Heetderks Strong adding that the injuries of crime are experienced by the victims, offenders and the communities.[44] Braithwaite, on the basis of this understanding presents restorative justice as;

> A process in which all stakeholders have an opportunity to discuss the hurts of a crime, how they might be repaired , how recurrence might be prevented, and how other needs of stakeholders can be met.[45]

This kind of definition points to restorative justice as a process that places parties at the centre with the objective of bringing healing to them following the harm caused by crime. It is for this reason that restorative justice is hailed for its opportunity to address the root cause of crime a fact that brings closure to conflicts.[46]In the context of this definition as well as the principles and objective of restorative justice, the administration of justice in the pre-colonial Kenya manifested the principles of restorative justice as it largely focused on the commission of the wrong and did not factor in the intent of the wrongdoer.[47] The commission of the act was followed by a discussion by parties and their representatives from the community on the compensation of the victim and

---

[41] Heather Strang, 'Handbook of Restorative Justice, by G.Johnstone and D.W. Van Ness (Eds.)' (2009) 48 How J Criminal Justice 226 https://heinonline.org/HOL/License accessed on 1 November 2021.

[42] Boyane Tshehla, 'The Restorative Justice Bug Bites the South African Criminal Justice System' (2004) 17 South Africa Journal of Criminal Justice 1.

[43] John Braithwaite, 'Encourage Restorative Justice.' criminology and public policy, Vol.6, no.4, November 2007, P.689-696.

[44]Daniel Van Ness and Karen Heetderks, Restoring Justice: An Introduction to Restorative Justice. New York 2014 https://doi.org/10.4324/9781315721330 accessed on 9 November 2021.

[45] Ibid (n36).

[46] Ibid(n33).

[47] Ibid.

how the offender would be held accountable for his actions.[48]In modern-day criminal law, we would say that the *actus reus* was enough, there was no consideration of the *mens rea* element on the part of the offender.

The African jurisprudence is generally acknowledged to have mostly exhibited a restorative justice model as its focal point.[49]This was for the same reasons that social fabric was valued and guarded by all. The parties remain members of the society hence reconciliation and reparation were for the common good of all.[50]The African customary and traditional practices have withstood the test of time despite having limited space within which it operated, the constitution of Kenya 2010 is hailed for having given these practices an impetus again. To achieve decolonization of jurisprudence,[51] the Kenyan courts are urged to embrace restorative justice in their adjudication of cases and building of a brand new approach as envisaged by framers of the constitution, as far as justice matters are concerned.

For a long time, the debate has been on the popularity, pros, and cons of each model of justice systems; retributive or restorative justice. There's a second option that advocates for the balancing of rights of the victims and the offenders by way of a 'balanced approach' between the two models in such a way that there is always an option or a fall back to retributive justice system whenever the parties fail to agree.[52]The latter being a hybrid type of system with elements of both retributive and restorative justice systems playing a complimentary role to each other.[53] The Kenyan criminal justice system seems to have adopted practices that are akin to restorative justice by accommodating negotiated settlements outside the formal justice system. This was initially

[48] Ibid.

[49] Ibid (n2).

[50] Ibid (n1).

[51] Willy Mutunga, 'Human Rights States and Societies: A Reflection from Kenya' (2015) 2 Transnational Human Rights Review 63.

[52] McEvoy K, Mika H and Hudson B, 'Introduction: Practice, Performance and Prospects for Restorative Justice' (2002) 42 The British Journal of Criminology 469.

[53] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) 1 Strathmore LJ 22 https://press.strathmore.edu/uploads/journals/strathmore-law-journal/SLJ1/1-SLJ-1-EKinama-TJS-a accessed on 3 December 2020.

confined to the juvenile justice[54] , however, the courts have opened it up to adult offenders in both petty and serious crimes.[55] This is notably manifested in the introduction of the Victim Protection Act, Criminal Procedure Bench book, sentencing policy guidelines and the Diversion Policy in the practice of criminal law.[56]AJS policy was launched in August 2020 in an effort to bring on board the informal sector. The efforts to mianstream the informal justice sector among adult offenders and particularly in felonies has faced some uncertainties in practice that have at times resulted in the rejection of such settlements by courts.[57]Therefore, whereas there is room for parties to engage out of court, there is need for a cut-out process that protects the rights of all parties guaranteeing certainty and uniformity of process hence access to justice for all. This will pave the way to progressive jurisprudence as far as alternative justice is concerned.

UNDP in 2006 recognized that the informal justice system is active in the resolution of conflicts both touching on civil and criminal justice.[58] It advocated for holistic reformation of the judicial system including the informal justice sector. The recognition of the informal sector would yield an embrace of restorative forms of justice. [59]

In post promulgation of the Kenyan Constitution 2010, Kinama Emily[60] in appreciating the diversity of Kenyan people based on race, religion, culture, and ethnicity rejected the idea of only relying on a single legal justice system and strongly emphasized the need to embrace and strengthen the application of TDRMs. [61]She articulated the provisions of Article 159(2)(c) of the

---

[54] Alfred Allan and Marietjie M Allan, 'The South African truth and reconciliation commission as a therapeutic tool' (2000) 18 Behavioral Sciences & Law 459.

[55] *Republic v Mohamed Abdow Mohamed Nairobi High Court criminal case No. 86 of 2011[2013] e KLR.*

[56] Sarah Kinyanjui, 'Definition Deadlock or a Necessary Definition Gap? Towards Infusing the Criminal Justice System with Restorative Justice Values' (2019) 2019 E Africa LJ 149 https://heinonline.org/HOL/License accessed on 1 November 2021.

[57] *Republic v Abdulahi Noor (alias Arab) Nairobi High Court criminal case No. 90 of 2013 [2016] e KLR.*

[58]UNDP Report on Informal justice systems <https://www.undp.org/content/dam/undp/library/Democratic Governance/Access to Justice and Rule of Law/Informal-Justice-Systems-Charting-a-Course-for-Human-Rights-Based-Engagement accessed on 16th March 2021.

[59] Ibid.

[60] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) 1 Strathmore LJ 22

[61] Ibid.

constitution of Kenya. There has been a further acknowledgment of the immense role of ADR and TDRMs in conflict resolution in Kenya and the benefits that they come with.[62] However, the suggestion by Kariuki Muigua and Kariuki Francis[63] for the need for research that illuminates the relationship between the formal forum and informal forums of conflict or dispute resolution is useful, particularly to this research.

In August 2020, an AJS policy launched by the judiciary clears any doubt as to whether the criminal aspect of the law is open for other mechanisms of conflict or dispute resolution. The same recognizes that in Kenyan courts, there is already AJS practiced in criminal cases albeit with a lack of clarity as to the extent of application.[64] This position was affirmed by Kinyanjui Sarah that there have been efforts to incorporate AJS into the formal juvenile justice.[65]The determination in Mohamed Abdow's [66]case is, of course, a classic pro- AJS jurisprudence developing in Kenya in the entire criminal justice system, openly accommodating traditional practices in the formal criminal law. Taking stock of such laws is an important issue. Further, there is need to establish the limitations of such laws and institutions that comprise AJS as well as sampling and recommending an adoption of the best approaches in other jurisdictions, in this case, South Africa. The recommendations, if adopted shall hopefully strengthen and improve service delivery in the Kenyan justice sector. The AJS policy suggests, among the intervention areas, the processes of auditing and review of existing legislations as well as judiciary guidelines to ensure coherent implementation of the AJS policy. This research delves into the evaluation of legal and institutional frameworks available for AJS, identifying their weaknesses and recommending adjustments to enhance mainstreaming of AJS in the formal criminal justice sector.

Certainty and uniformity in service delivery averts mistrust to the institutions and illegal practices such as people resorting to violent self-help practices such as mob justice which has been

[62] Kariuki Muigua and Kariuki Francis, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' (2015) 1 Strathmore LJ 1 http://erepository.uonbi.ac.ke/handle/11295/80138 accessed on 7 April 2020.

[63] Ibid.

[64] Ibid (n37).

[65] Sarah Kinyanjui, 'A Genealogical Analysis of the Criminal Justice System in Kenya: Rebirth of Restorative Justice for Juvenile?' http://erepository.uonbi.ac.ke/handle/11295/41276 accessed on 7 October 2020

[66] Ibid (n35).

described as a rational response by the community to the failure of the justice system.[67]Research has established that in the period August 1996 to August 2013 which is about seven years, a total of 1500 people died as a result of mob justice killings. Further, such killings that occurred within the period April-August 2013 alone[68] paints a picture of an upward trend of citizens resorting to mob justice, a fact that has contributed to mistrust to the institution of the courts.[69]Kariuki Muigua & Kariuki Francis find it necessary to shift from the formal to the informal justice system given that the latter, in their view, does not experience these challenges.[70] However, retributive and restorative models of justice both have the goal of ridding the society of atrocities and creating a new and better future hence complementing each other in their operation[71] especially in a pluralist society such as Kenya.[72] This research focuses on establishing the need for the seamless operation of restorative forms of justice within the mainstream formal justice system as opposed to having a single justice system. The choice of integrating restorative forms of justice or having a parallel restorative justice system to the mainstream retributive justice system has to be assessed based on the benefits they each have and how that should be done. The gap that is hoped to be filled by this research is how the formal (retributive) and the informal (restorative) justice systems can be blended in a way that effectively and uniformly results in access to justice in Kenya. This research puts into consideration caution against formalizing the informal justice sector as doing so may create hindrances further to the informal sector.[73]

1.13 Chapter breakdown

This research consists of six chapters outlined as hereunder:

---

[67] Jurg Helbling and Walter Kalin and Prosper Novirabo, 'Access to Justice, Impunity and Legal Pluralism in Kenya' (2015) 47 J Legal Pluralism & Unofficial L 347 https://heinonline.org/HOL/License accessed on 4 February 2021.

[68] Ibid.

[69] 'Kenya' (2010) 33 Annual Human Rights Report Submitted to Congress by US Department of State 344.

[70] Ibid (n15).

[71] Charles Villa-Vicencio, 'The Reek of Cruelty and the Quest for Healing - Where Retributive and Restorative Justice Meet' (1999) 14 J L & Religion 165 https://www.cambridge.org/core/journals/journal-of-law-and-religion/article/reek-of-cruelty-and-the-quest-for-healingwhere-retributive-and-restorative-justice-meet/D339CB41853422310B8267CEC90874EA accessed on 8,January 2021.

[72] Ibid (n8).

[73] Ibid.

Chapter1 includes the background of the study, Research problem, the purpose of the study, objectives of the study, research questions, significance of the study, hypothesis, the scope of the study, theoretical framework, research methodology, literature review, and limitation of the study.

Chapter 2 is a discussion on the understanding and scope of AJS as a form of restorative justice in the context of Kenya.

Chapter 3 discusses the elements of AJS as a form of restorative justice in the legal and institutional framework. There are various international, regional and national legal instruments discussed pointing out the extent to which they support AJS as a form of restorative justice.

Chapter 4 undertakes an in-depth discussion on the practice of AJS as a form of restorative justice in Kenya's criminal justice system with a special focus on jurisprudential issues that have emerged in courts. The strength and limitations of such approaches have been delved into.

Chapter 5 is a discussion on the South Africa's criminal justice system and specifically the legal and institutional framework and jurisprudential progress on alternative justice as a form of restorative justice. The discussion highlighted best practices that are likely to serve as a lesson for Kenya.

Chapter 6 wraps up by concluding the issues discussed in chapters two to five and makes recommendations that are likely to strengthen AJS in the Kenyan criminal justice system if implemented.

CHAPTER TWO

THE MEANING AND SCOPE OF ALTERNATIVE JUSTICE SYSTEMS AS A FORM OF RESTORATIVE JUSTICE IN KENYA

2.0 Introduction

Crime is an act that the law makes punishable.[74] It is further viewed as evil committed to an individual or community that stirs resentment, anger, and hatred as a direct reaction to crime hence the quest for vengeance against the perpetrators by those affected by the act.[75] The function of the state is to tame, balance and recast this quest by individuals for revenge through retributive justice.[76] Retributive justice thus acts as a formalized revenge for the victim. In retributive justice, the law outlines the offences and has prescribed punishment for each offence proportional to it. In the retributive justice system, the legal provisions as well as facts and evidence guide the courts in determining whether an offence known to the law was committed or not and also in determining the appropriate sentence to be meted against a guilty offender. The system of administering justice in retributive justice is adversarial where the arbiter is an impartial officer who is cautious not to descend to the arena of the dispute they preside over a fact that is said to render criminal courts to merely being mechanical processes. These kinds of challenges in the retributive justice system have led to calls for robust and progressive approaches that bear the needs of the people in mind[77]in their search for closure in a conflict situation. Restorative justice is a more appealing approach in that sense.

The Kenyan justice system previously emphasized a single formal mechanism of dispute resolution [78]yet the reality is that a lot of disputes accounting for an estimated 90% of all disputes

---

[74] Garner Bryan, Black's Law Dictionary, 10th edition (2009).

[75] Charles Villa-Vicencio, 'The Reek of Cruelty and the Quest for Healing - Where Retributive and Restorative Justice Meet' (1999) 14 J L & Religion 165 https://www.cambridge.org/core/journals/journal-of-law-and-religion/article/abs/reek-of-cruelty-and-the-quest-for-healingwhere-retributive-and-restorative-justice-meet/D339CB41853422310B8267CEC90874EA accessed on 21 September 2021.

[76] Ibid.

[77] Willy Mutunga, 'Human Rights States and Societies: A Reflection from Kenya' (2015) 2 Transnational Human Rights Rev 63.

[78] Kariuki Muigua and Kariuki Francis, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' (2015) 1 Strathmore LJ 1.

are being handled in informal settings.[79]This necessitated the need to re-evaluate the place of the informal dispute resolution mechanisms in the Kenyan justice system. These mechanisms are neither monitored nor supervised and they have no accountability mechanisms[80] exposing a big population of Kenyans to the likelihood of suffering injustices that may occur in these processes.

The Constitution of Kenya 2010 scaled the heights for the informal justice processes through Constitutional recognition. The legal provisions and processes that give room to alternative justice mechanisms in criminal law are very limiting with the question of the legality of action arising. Therefore, there is a need to expand the scope and operation of alternative justice systems in criminal law by removing hurdles and instead facilitating these processes through a structured corroboration with the formal justice system. Alternative justice systems should not be seen as competing with the formal justice system[81]or hold on to the belief that the formal justice system will further stifle other forms of justice.[82]This research suggests that mainstreaming other forms of justice will create people- processes envisaged by the constitution, which is, a cost-friendly, efficient, and effective justice system that is expected to transform and mitigate the limitations experienced in the retributive justice system in its current state.

In Kenya, all the justice systems, other than the formal justice systems, are seen to be pro-poor as they are affordable, accessible, simple, and flexible in terms of process and language used among many other benefits. Alternative justice systems have been found to have weaknesses such as the incapacity of those presiding over disputes, being susceptible to compromise, and the possibility of replicating pre-existing prejudices and discrimination against vulnerable groups such as women, children, and the marginalized.[83] To mitigate the weaknesses of both systems, the proposal to blend the two suffices. Alternative justice systems are largely restorative as opposed to being retributive given the manner of execution and their nature generally as explained earlier in this research.

---

[79] The Judiciary of Kenya, The Alternative Justice Systems Baseline Policy and Policy framework (2020).

[80] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) 1 Strathmore LJ 22.

[81] Jurg Helbling and Walter Kalin and Prosper Novirabo, 'Access to Justice, Impunity and Legal Pluralism in Kenya' (2015) 47 J Legal Pluralism & Unofficial L 347 https://doi.org/10.1080/07329113.2015.1080430 accessed on 21 September 2021.

[82] Ibid (n80).

[83] Ibid.

Retributive justice is regarded by some scholars as contradictory to restorative justice and running parallel with each other. The two have also been found by others to belong together.[84] This is the case if viewed from the lenses of those affected by crime. The two systems complement each other hence none of them should be viewed as superior to another.

Western justice and by extension, retributive justice had an impact of eroding restorative forms of justice as practiced in the African traditional society. Generally, the state plays a bigger role in retributive justice right from investigations, arrest, prosecution, trial, and correction processes, which is not the case with restorative justice that encourages participation and dialogue by those directly affected by the act.[85] Further, in restorative justice processes, procedural and substantive justice is dictated by parties based on their needs. The system's flexibility in accommodating parties' choices and needs brings them to trust in the process. Restorative justice elements have to be mainstreamed rather than being an appendage for any meaningful reform to be realized.[86]

2.1 Understanding AJS in the lenses of restorative justice in Kenya

restorative justice has no settled definition a fact that has led to various definitions of what restorative justice could be. The nature and goal of a process largely determine whether it qualifies as restorative justice or not.[87]The term 'restore' is said to have an objective of making 'right' or 'amend' hence any process that has some notion of healing and restoration qualify to be a restorative form of justice.[88]According to Heith Andrea restorative justice is a process whereby

---

[84] Ibid.

[85] Hadar Dancig-Rosenberg and Tali Gal, 'Restorative Criminal Justice' (2013) 34 Cardozo Law Review 2313 https://heinonline.org/HOL/Page?public=true&handle=hein.journals/cdozo34&div=67&start_page=2313&collection=journals&set_as_cursor=0&men_tab=srchresults accessed on 29 October 2021.

[86] Saulnier A and Sivasubramaniam D, 'Underlying Mechanisms and Future Directions' (2015) 18 New Criminal Law Review: An International and Interdisciplinary Journal 510.

[87] Sarah Kinyanjui, 'Definition Deadlock or a Necessary Definition Gap? Towards Infusing the Criminal Justice System with Restorative Justice Values' (2019) 2019 E Afr LJ 149 https://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/easfrilaj2019&section=11 accessed on 21 September 2021.

[88] Boyane Tshehla, 'The Restorative Justice Bug Bites the South African Criminal Justice System' (2004) 17 South African Journal of Criminal Justice 1 https://journals.co.za/doi/abs/10.10520/EJC52800 accessed on 21 September 2021.

parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications.[89]The centrality of parties rather than the state is of emphasis in restorative justice. The emphasis is on the healing and restoration of order and harmony.[90]Caution has to be placed on the literal meaning of the term 'restore' since there are instances when it is not possible to 'bring back' a situation as it were before the act complained of. The best example is in the event of the death of the victim, in which case, the effect of death on his/her immediate family members can only be mitigated. The active engagement of parties appreciates that it is not only the state that is violated when an offence is committed but there are real people with emotions and feelings as well as relationships that get violated too.[91]The best approach in resolving disputes of a criminal nature thus has to address the needs of these parties too. Failure to address these needs and insisting on an ineffective system may result in localized disagreements degenerating into broader conflicts as the courts dwell only on the legal questions leaving the underlying problems unresolved.[92]

Restorative justice practices are traceable to indigenous cultures throughout the world such as old native America and African culture among other indigenous cultures.[93]The whole idea of requiring one to make right of the wrongs they have done by restoring the victim(s) is an old idea.[94]The modern movement which constitutes programs, initiatives, and special projects geared towards seeing wrongdoers restore the victims has since seen the principles of restorative justice incorporated in the criminal law[95] in many jurisdictions as the programs also factor in the offenders.

---

[89]Andrea Haith, 'Restorative Justice' (2000) 47 Prob J 64 https://heinonline.org/HOL/LuceneSearch?terms=Andrea+Haith+restorative+justice&collection=all&searchtype=advanced&typea=text&tabfrom=&submit=Go&sendit=&all=true accessed on 2 November 2021.

[90] Cheryl M Graves and Donyelle L Gray and Ora Schub, 'Restorative Justice: Making the Case for Restorative Justice' (2005) 39 Clearinghouse Rev 219.

[91] Jeremy Akin, 'Arresting the Village-to-Prison Pipeline: Mandatory Criminal ADR as a Traditional Justice Strategy' (2017) 46 Ga J Int'l & Comp L 151.

[92] Uwazie Ernest, 'Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability' (2011) 16 Africa Centre for strategic studies http://www.jstor.org/stable/resrep19066 accessed on 25 March 2021.

[93] Ibid.

[94] Ibid (n8).

[95] Ibid.

In Kenya, the leagal system is largely retributive, Although there are efforts to incorporate aspects of restorative justice practices, the same have been underutilized.[96]This has been attributed to the inadequacy of policy guidelines and directions as well as legal frameworks to address the challenges relating to alternative forms of justice.[97] Further, the adversarial legal system has not made things any better. The Judges, magistrates, lawyers, prosecutors, and other actors in the practice of law understand how an arbiter has to conduct himself or herself during the proceedings in an adversarial system and under the training, they all received in law schools. [98] The curriculum that informed the system is that of common law, hence the need to decolonize the mindset as suggested by Willy Mutunga[99] through continuous legal education and training, seminars, and for the new trainees inductions with modern approaches such as restorative forms of justice with the African jurisprudence being emphasized. These forms of restorative justice practices are traceable to the precolonial era when the cultural practices in the traditional justice system were deployed in the resolution of disputes in forms now squarely falling within the restorative forms of justice.[100] The traditional justice system was then the people's known justice system until when the same was slowly eroded by the western justice that was largely regarded as superior.[101]These cultural practices have withstood the test of time and have heavily informed the modern-day concept of restorative justice in Kenya.[102] It is important to evaluate these practices that constituted restorative forms of justice in Kenya in three stages before, during and after colonization.

2.1.1 Restorative Justice in the pre-colonial Kenya

The indigenous communities in Kenya were governed under customary law and traditional

[96]Sarah Kinyanjui, 'A Genealogical Analysis of the Criminal Justice System in Kenya: Rebirth of Restorative Justice for Juvenile?'http://erepository.uonbi.ac.ke/handle/11295/41276 accessed on 7 October 2020.

[97] *Republic v Abdulahi Noor Mohamed (alias Arab) Nairobi High Court criminal case No. 90 of 2013 [2016] e KLR.*

[98] Dejo Olowu, 'Therapeutic Jurisprudence: Transforming Legal Education and Humanizing Criminal Justice in Africa' (2010) 43 De Jure 95 P.

[99] Ibid (n70).

[100] Ibid.

[101] Ibid (n63).

[102]Sarah Kinyanjui, "Restorative Justice in Traditional Pre-Colonial 'Criminal Justice Systems' in Kenya." Tribal Law Journal 10, 1 (2009) https://digitalrepository.unm.edu/tlj/ accessed on 30 October 2021.

practices which were handed down verbally from one generation to another.[103]The system was presided over by elders selected using criteria known and identifiable to that community and who were largely guided by broad societal values such as human dignity and brotherliness.[104] The adjudication of disputes in most communities was characterized by eating, drinking, and dancing together as an indication of a happy ending which is an objective of the resolution of crime.[105]Generally, the African jurisprudence has been hailed for having always had restorative forms of justice practices and particularly, in upholding human dignity.[106] However, it should be clear that not all these traditions exhibited restorative forms of justice, some had retributive elements in them.[107]Communalism was highly valued not only in pre-colonial Kenya but Africa as a whole, the traditional legal practices were aimed at maintaining relationships in the society and retention of the social fabric.[108]The elders faithfully adhered to their oath in dispensing justice hence the trust that the institutions commanded. In the pre-colonial era, there were no penal institutions such as prisons but all the same, the community handled wrongdoers, addressed crime as was then known, and managed them within the society and with the participation of community members. Simon Coldham[109] posits that the imposition of imprisonment and fines sentences were alien in Africa terming it 'unafrican'. In deciding what to do with a guilty offender, the elders were guided by the seriousness of the wrong committed and the extent of harm to the victim and the community. Severer punishment was meted on serious crime and those giving rise to personal redress would be addressed by the payment of compensation and encouragement of reconciliation between parties.[110]The interest of the elders presiding over a case was to establish the truth, that is, whether an offence was committed by the accused or not. It should be noted that the current

[103] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) 1 Strathmore LJ 22.

[104] Ibid (n2).

[105] Simon Coldham, 'Criminal Justice Policies in Commonwealth Africa: Trends and Prospects' (2000) 44 J Africa L 218.

[106] Ibid.

[107]Sarah Kinyanjui, 'Definition Deadlock or a Necessary Definition Gap? Towards Infusing the Criminal Justice System with Restorative Justice Values' (2019) 2019 E Africa LJ 149.

[108]Ibid (n9).

[109] Ibid (n53).

[110] Ibid.

classification of disputes as of civil or criminal nature was alien to the traditional justice system. [111]Consequently, there was no limitation as to the nature of the case and the extent to which the traditional justice system applied. Each community had its customs that prescribed what would follow upon commission of a particular offence. The finality of the decision of the elders brought closure to a dispute within a shorter time. The justice system was accessible, cost-effective, simple, and transparent.

2.1.2 Restorative justice in the colonial period

The British colonialists' arrival in Kenya brought with them the formal law of England through systemic legislation but did not completely do away with the customary law practices that were in place before.[112] The act of allowing the two systems, the formal and the informal to run concurrently, formally made Kenya a dualistic state as far as the justice sector is concerned.[113]All laws that were to be applied in Kenya were clearly outlined in the Judicature Act whose provision made customary law subservient to all written laws which were basically English common law and further subjected customary law to the infamous repugnancy clause.[114] This law provides;

> The High court, the court of appeal and all subordinate courts shall be guided by African Customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with the written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay[115]

Customary law was, therefore, to apply only upon being found not to be repugnant to justice and morality. This had the effect of stifling the practice of customary law as most cultures were rendered repugnant by the standards of English common law that was then most appealing to the jurists.[116]Common law was also the law that was well understood by the jurists who had received

---

[111]Sarah Kinyanjui, "Restorative Justice in Traditional Pre-Colonial 'Criminal Justice Systems' in Kenya." *Tribal Law Journal* 10, 1 (2010). https://digitalrepository.unm.edu/tlj/vol10/iss1/1 accessed on 8 November 2021.

[112] Ibid (n3).

[113] Ibid (n50).

[114] Judicature Act Chapter 8 Laws of Kenya, Section 3(2).

[115] Ibid.

[116] The Judiciary of Kenya, The Alternative Justice Systems Baseline Policy and Policy framework (2020).

their training on common law.[117]The repugnancy clause though subsists not only in the Judicature Act today but also in the Constitution of Kenya. It is said that the import and effect of the repugnancy clause have since mutated and is now capable of an interpretation that is progressive and favorable to TDRMs.[118]Despite the unfair level field on which the traditional justice system operated alongside the English common law during the colonial era, the two coexisted and served concurrently. The appeals from the native courts went to the formal English courts which determined the propriety of any customary law applied. Wabwile Micheal posits that common law was meant to cushion the settler community as opposed to aiding the Africans, it was a system designed for self-preservation.[119] It was therefore unfair that the traditional justice system, meant to serve the majority of natives, was not allowed to thrive. It is pertinent to note that the Judicature Act refers to cases of a civil nature only, traditions and culture were not available for cases of a criminal nature, basically because, crime was regarded as a violation against the state but as it shall be discussed in the next chapter, the Constitution of Kenya 2010 and relevant criminal law statutes has opened up this limitation extending it to conflicts of criminal nature albeit, again with limitations hence incorporating victims in dispute resolutions mechanisms.

2.1.3 Restorative justice in the post- colonial period

Kenya inherited a dual legal system from her colonial masters but, probably because the system now had the African majority, the native courts were done away with. The independent Kenyan government re-enacted and adopted colonial legislations entrenching common law into the Kenyan legal system[120], unfortunately, retaining the supreme status earlier accorded to it by the colonialist at the expense of the needs of their African populace, the values, and traditions that were in existence at the time which remained unrecognized by the law.[121] In Kenya, from the time of independence in 1963 up to 2010, the traditional justice system, in so far as criminal conflicts are concerned, remained informal and not overtly recognized by the law. Out-of-court settlements

[117] Ibid (n3).

[118] Ibid

[119] Ibid (n3).

[120] Ibid (n3).

[121] Ibid (n55).

were expressly limited and were subject to many supervisory powers as shall be discussed under legal framework later in this study. The task force on AJS policy confirmed that there are many such alternative dispute resolution practices in many communities throughout Kenya today despite them not being formally recognized by the law. African practices were informed by traditional values some of which the colonizer deemed repugnant to justice and morality dimming their overt operations in the community as they were declared illegal and against the law.

The traditional practices are directly tied to ethnic communities as each had its values and manner of practicing it. Localized conflict resolution mechanisms that accommodate the common challenges faced by inhabitants of these urban populations have been devised. Community-based programs, or religious based forums and the administrative authorities are set up as hybrid systems that work in conjunction with state organs[122] such as the police and the courts. The AJS task force cited Kipkelion AJS project in Kericho, Use of chiefs and probation officers as mediators, Muungano wa wanakijiji in Huruma- Nairobi, peace keeping committee in Westland- Nairobi, use of local administration such as chief's assistant chiefs, which is common countrywide, use of non-governmental organization such as Lang'ata Legal Aid Centre, use of paralegals from the community, etcetera.[123]This is beyond the specific traditional justice forums practiced in setups that have one ethnic community or religion which also exist and are robust in some areas such as the Maslah that apply sharia law among the Muslim community.[124]All these mechanisms have no legal framework and institutional framework that regulate them but are self-regulating yet research has shown that many people resort to informal mechanisms in dispute resolution despite being informal and unstructured. Their nature and approach to dispute resolution make them flexible, accessible, simple, and cost-effective.[125]

In considering the three distinct periods above discussed, it is clear that all 'other' forms of dispute resolution mechanisms, apart from the formal criminal justice system, have aspects constituting

[122] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) 1 Strathmore LJ 22.

[123] Ibid (n102).

[124] Ibid.

[125] Jurg Helbling and Walter Kalin and Prosper Novirabo, 'Access to Justice, Impunity and Legal Pluralism in Kenya' (2015) 47 J Legal Pluralism & Unofficial L 347.

restorative forms of justice in Kenya. These informal justice systems dubbed 'alternative justice systems' are resorted to by many Kenyans partly because of the societal values of social relations as well as the challenges in the formal justice system in meeting their needs. In modern Kenya, restorative forms of justice are found in these mechanisms and are commonly known by different names.These names are; African, community, traditional, non-formal, informal, customary, indigenous, and non -state justice systems all being used interchangeably.[126]Alternative justice systems[127] are a collective name for all of the informal justice resolution forums.

The Constitution of Kenya 2010 has been hailed for being a transformative tool in the sense that it recognizes the aspirations of the people of Kenya for social justice.[128] Culture is recognized as the foundation of the nation.[129]The state is obligated to ensure that all persons access justice by ensuring that all impediments and barriers to access to justice are removed. [130]Article 159(2) (c) was a breakthrough as far as customary law and traditional justice mechanisms that had suffered suffocation from the colonial period and post-independence period are concerned. The parties to a dispute are at liberty to be innovative in finding an amicable and the best solution for their disagreement.

The task force on the AJS Policy proposed that the repugnancy to morality and justice clause imported onto article 159 (3), as far as traditional dispute resolution mechanisms are concerned, is inconsequential apparently because every practice has to pass Constitutional threshold and observe the human rights as stipulated in the bill of rights.[131]The drafters of the constitution recognized and appreciated that there are practices in the African traditional and customary practices that go against the tenets of Human rights hence expressly subjected the same to the bill of rights which is well within the constitution.[132]

---

[126] Kariuki Muigua and Kariuki Francis, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' (2015) 1 Strathmore LJ 1.

[127] Ibid (n102).

[128] Constitution of Kenya 2010, Preamble.

[129] Constitution of Kenya 2010, Article 11.

[130] Constitution of Kenya 2010, Article 48.

[131]The Judiciary of Kenya, The Alternative Justice Systems Baseline Policy and Policy framework (2020) par 60.

[132] Oyeniyi Abe and Smith Ouma, 'A Re-Assessment of the Impact and Potency of Traditional Dispute Resolution Mechanisms in Post-Conflict Africa' (2017) 6 Ave Maria Int'l LJ 1.

Post-colonialism exists as an aftermath of colonialism, hence it becomes important to revisit the relevance of the colonizer's laws to assess their benefits and exploitative features to the natives.[133]This is what has been happening in Kenya. There have been policy measures undertaken to accommodate other systems of justice to enhance access to justice in line with the constitutional requirements.

The AJS policy offers a platform for engagement with other forms of dispute resolution mechanisms and a road map to the implementation and interventions that shall establish AJS in criminal law, therefore, effectively mainstreaming restorative justice practices in Kenya. To jumpstart a myriad of recommendations in the policy, a review of the laws to facilitate the implementation of AJS policy has to be done. The courts not only need to have a basis for engagement with the other 'informal' mechanisms in terms of the law but also the nature and form of such mechanisms should be clear. This will promote accountability and responsibility on the part of those exercising the mandate of adjudicating disputes in the informal sector. The role of the state to protect, promote and fulfil rights plays a big role in ensuring that access to justice is attained. All stakeholders in the justice sector are called upon to embrace AJS but this can only be done if structures are in place that guarantees such support. AJS is therefore an embodiment of restorative justice in modern-day Kenya. The diversion policy facilitates the engagement of AJS as an option to prosecution, a fact that was affirmed by the Director of Public Prosecutions Mr. Noordin Haji, in his acknowledgment[134] that diversion policy seeks to operationalize the constitution of Kenya. The policy[135] in defining restorative justice gives an inclusive definition, making it open for other definitions, in two ways as follows:

> The promotion of reconciliation, restitution, and responsibility through the involvement of the offender, the victim, their parents (if the victim and offender are children), and their communities.[136]

[133]Cunneen, Chris. "Postcolonial perspectives for criminology." (2011) file:///C:/Users/USER/Downloads/SSRN-id1739388 accessed on 3 November 2021.

[134]The ODPP Kenya, Diversion Policy (2019).

[135] Ibid.

[136] Ibid.

> A systematic legal response to victims or to the immediate community that emphasizes healing the injuries resulting from the offence.[137]

These two definitions create room for accommodation of any other definition based on the clearly, identifiable and known objectives of restorative justice.

Conclusion

The informal justice in Kenya, and which is the definition adopted for purposes of this study, therefore, is that kind of justice that is arrived at, outside the formal retributive justice system by way of voluntary participation of all affected parties, to the best of their creativity, in identifying their needs that cause and arising from the commission of a crime and how best to address them in a manner that brings closure to the conflict. The facilitative programs may take any form such as engagement by parties to a case alone or third party facilitations, for example; individuals from religious, cultural, family, professional communities etcetera, as long as they achieve the purpose of bringing parties together for dialogue and facilitating them to reach an agreement. Flexibility in terms of processes and concessions is key. The fact that parties volunteer to submit to the informal justice process and that they identify needs and find a suitable solution that best addresses the conflict are some of the aspects qualifying the informal processes as exhibiting restorative justice characteristics.

The next chapter sets out to identify and analyse aspects in which informal justice elements reflect within the mainstream justice system legally and institutionally to establish gaps and thereby recommending ways to strengthen them.

[137] Ibid.

CHAPTER THREE

THE ELEMENTS OF ALTERNATIVE JUSTICE SYSTEMS IN THE KENYA'S LEGAL AND INSTITUTIONAL FRAMEWORK

3.0 THE LEGAL FRAMEWORK

Kenya has embraced international law and its general rules and principles.[138] The Constitution of Kenya 2010 expressly recognizes treaties or covenants ratified by Kenya as forming part of the laws applicable.[139] It is therefore imperative to evaluate these international laws and principles that relate to access to justice to find out how the same has supported AJS as a form of restorative justice ideology. The discussion on this part will demonstrate the relationship between the national and international laws in the context of AJS.

The 2000 UN Vienna Declaration on Crime and Justice: Meeting the challenges of the 21st century where member states were encouraged to establish common principles on the use of restorative justice in criminal matters, is credited for having activated discourse on restorative justice in many countries despite the non- binding nature of the Declaration.[140] About a decade later, Kenya promulgated the 2010 Constitution expressly obligating courts to embrace alternative dispute resolution mechanisms including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms and to promote the same. This constitutional provision is a milestone as far as restorative justice in Kenya is concerned and away from an earlier situation that made many practices that would pass as restorative justice an illegality.

The Universal Declarations of Human Rights, International Covenant on Civil and Political Rights, Convention on Elimination of all Forms of Discrimination against Women among other instruments form a basic source of information that guide policy and legal frameworks of a state hence a source of important principles of justice that municipal laws should consider in coming up with legislative and policy frameworks for their people. In Africa as a region, eradication of all

[138] Constitution of Kenya 2010, Article 2(5).

[139] Constitution of Kenya 2010, Article2(6).

[140] Boyane Tshehla, 'The Restorative Justice Bug Bites the South African Criminal Justice System' (2004) 17 S Africa J Criminal Justice 1.

forms of colonization is of concern as an inspiration to the concept of Human and people's rights.[141]Legislative frameworks and institutional steps that tend towards decolonization are key to nature and encourage home-grown solutions as far as the justice system is concerned.[142] Though Human rights are universal, Africa as a region shares commonality based on the history of colonization as well as the geographical location which has a bearing on the resource endowment of the states constituting the region.

3.1 International and Regional Instruments

International law generally, is appreciated for the central role it plays in supporting either tribunals or truth and reconciliation commissions in unearthing past atrocities through elaborate investigations to assist both the victims and perpetrators bring to closure their past traumatizing experiences.[143]These two bodies apply the restorative justice principles of truth, forgiveness, reconciliation, and integration to achieve their mandate[144] which is the attainment of peace and stability.

The maintenance of an efficacious and humane justice system is a responsibility of the sate.[145]An effective system should also be informed by international standards manifest in form of principles such as Fairness, humanity, and accountability among others. The following principles have been found to resonate with those of restorative justice as discussed hereunder. They are principles anchored in various treaty laws which Kenya has ratified;

3.1.1 Human Dignity

The inherent human dignity and worth is a right that has been mentioned in nearly every human right instrument in global, regional, and local arenas. That by being human, everyone deserves to

---

[141] African Charter on Human and people's rights, Preamble.

[142] Willy Mutunga, 'Human Rights States and Societies: A Reflection from Kenya' (2015) 2 Transnational Human Rights Review 63.

[143] Alfred Allan and Marietjie M Allan, 'The South African truth and reconciliation commission as a therapeutic tool' (2000) 18 Behav Sci & L 459.

[144] Ibid.

[145] Salvador Declarations on Comprehensive strategies for Global challenges: crime prevention and criminal justice system and their development https://www.unodc.org/.../Salvador_Declaration accessed on 11 March 2021.

be treated as such; avoiding acts and omissions that will degrade, reduce and or in any manner dehumanize the person. Every human being is endowed with reason and conscience and is thus expected to act towards one another in a spirit of brotherliness.[146]In that spirit of brotherliness, an individual does not only owe another individual a duty of care but also to the community to which he/she belongs.[147] Every person has an inherent dignity to be respected and protected.[148] The philosophy of 'undugu' in Kenya's National anthem at stanza one which is equivalent to 'Ubuntu' in South Africa [149] has been cited as promoting social cohesion and brotherliness in the society. The idea of crime comes about in situations where a member of the community engages in an act or omission that has been identified by the government as prohibited and punishable.[150]Criminologists have explained how one may find himself/herself as having committed a crime by way of convergence of three factors; a potential offender, potential victim, and absence of a guardian.[151]Handlers, managers, or guardians are important to avert 'good 'people from doing wrong hence preventing crime in society. The need to be one's brother's keeper is encouraged which in turn translates to a peaceful society for all. The community has to be sensitized on the justice system available and how each functions for everyone to understand what follows upon being suspected, accused, or being a victim or a witness of a criminal act.[152]In Kenya, article 49 and 50 of the constitution provides for the rights of the accused upon arrest and upon arraignment to court respectively, whereas the Victim Protection Act generally, outlines the rights of victims of crime whose place initially was regarded as that of nominal complainants[153] and whose role was merely to testify as prosecutions' star witnesses. Their views are now required for consideration when important decisions affecting them are being made in the case such as in

[146] Universal Declaration of Human Rights, Article 1.

[147] International Covenant on Civil and Political Rights, Preamble.

[148] Article 28, Constitution of Kenya 2010

[149] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) 1 Strathmore LJ 22.

[150] Rebecca Wickes, 'Crime and Everyday Life' (2010) 43 Aust & NZ J Criminology 383.

[151] Ibid.

[152] Principle 2(18), UN Principles and Guidelines on access to Legal Aid in Criminal justice systems [2013] sourced from https://www.unodc.org/documents/justice-and-prison accessed on 11th March 2021

[153] *Juma Faraji Serenge alias Juma Hamisi v R Mombasa High Court Miscellaneous Criminal Application No. 42 of 2006 [2007] e KLR.*

sentencing.[154]International law, as well as local laws, outline the rights of all suspects, accused, witnesses and victims while interacting with a criminal justice process in whatever form and these rights have to be accessible and respected.[155] These requirements apply irrespective of the justice system adopted in a state. Informed by the fact that breaking the law does not lessen one's worth as a human being, there is need to guard against dehumanizing acts in any dealings with anyone going through a justice process. Justice is realized when the dignity of the people being served by the system is advanced and protected.[156]This dignity is achieved when an inclusive society is built.[157]To attain the ideal of these free human beings, conditions for such enjoyment have to be created and facilitated.[158]It can thus be inferred that appropriate legal and institutional structures are part of the conditions to be built, adjusted, and or modified to accommodate the needs of the society.[159]The society is served by the law and not the other way round. The legal system adopted ought not to disgruntle the masses in the society but has to be responsive to their needs.

A justice system that provides a platform for dialogue among the victim, offender, and community bolsters relations and maintains social cohesion during and after the settlement of a dispute. The Kenyan criminal procedure code under sections 176 and 204 recognizes that parties involved in a criminal case may wish to dialogue outside the formal justice system for whatever reasons. Upon an agreement and when appropriate complainants may ask for termination of criminal proceedings to their benefit. Restorative justice recognizes that the offender, despite the offence, remains a member of the community. The community is thus found to represent an important facet in restorative forms of justice.[160] The offender is held responsible and accountable by the community for her / his action by setting conditions to be met by the offender, for, example in requiring compensation, the latter having been accorded an opportunity to explain circumstances that drove

[154] The Kenyan Judiciary, Criminal Procedure Bench Book (2018) pp138.

[155] Principle 8(30) UN Principles and Guidelines on access to Legal Aid in Criminal justice systems [2013] https://www.unodc.org/documents/justice-and-prison accessed on 11 March 2021.

[156] Ibid(n110).

[157]Ibid.

[158] Ibid (n103).

[159] Nancy Rodriguez, 'Restorative Justice, Communities, and Delinquency: Whom Do We Reintegrate' (2005) 4 Crim & Pub Pol 103.

[160] Ibid

him into crime is one way that assures dignity and worthiness of an individual.[161] Both the victims and the offender desire to have closure which is achieved when they all gain an understanding of what happened and why it happened.[162] The aspect of dialogue addresses the needs of the victim and any other person affected by the proceedings.[163]

The challenge with the Kenyan criminal justice legal provisions is its exclusion of serious offences from the realm of dialogue outside the courts.[164] Any negotiation on cases that are expressly excluded has yielded unsuccessful applications to have the proceedings in court terminated on account of agreements.[165]

Moreover, any rehabilitation program for the offender arrived at through dialogue is consensual as the offender submits willingly to the process meant to improve him and make him a law-abiding citizen in the future. This choice to submit to a rehabilitative program adheres to the human rights principle of all people being free and with dignity to be respected.[166]The morality of compulsory rehabilitative programs by the state in the retributive justice system on offenders have been questioned for leaving no room for choice of participation[167] this in turn negatively impacts the efficacy of such programs. Charles Villa-Vicencio[168] in juxtaposing retributive justice with truth, justice, and reconciliation processes, found that speaking out the effect of violation by victim means more to the victim. In Kenya, the prosecutor is required to seek the views of the victim before engaging in the process of diversion or plea bargaining. In the same breath, the sentencing policy does require that the views of the victim are sought and or the interests of the victim be considered before admitting the accused to bail or even imposing a sentence. This dialogue

[161] Hadar Dancig-Rosenberg and Tali Gal(n79).

[162] Ibid (n152).

[163] Charles Villa-Vicencio, 'The Reek of Cruelty and the Quest for Healing - Where Retributive and Restorative Justice Meet' (1999) 14 J L & Religion 165.

[164] Criminal Procedure Code Chapter 75 Laws of Kenya, Section 176.

[165] *Juma Faraji Serenge alias Juma Hamisi (n145).*

[166] Jamil Ddamulira Mujuzi, 'Don't Send Them to Prison Because They Can't Rehabilitate Them: The South African Judiciary Doubts the Executive's Ability to Rehabilitate Offenders: A Note on S v. Shilubane 2008(1) SACR 295 (T)' (2008) 24 S Afr J on Hum Rts 330.

[167] Ibid.

[168] Charles Villa-Vicencio, 'The Reek of Cruelty and the Quest for Healing - Where Retributive and Restorative Justice Meet' (1999) 14 J L & Religion 165

facilitates the establishment of the best form of remedy to be accorded to those affected. If one is aggrieved, there has to be recourse in a court of law hence the need for a structured form of interaction between the formal and informal systems.

Restorative justice, as the name suggests is concerned with repairing the harm and not on punishment. The reservations on sentences associated with traditional justice practices that violate human rights such as banishment from communities, beatings, and infliction of curses being meted out on offenders or further exploiting victims in matters child marriage and general handling of defilement cases[169] should not arise as the same is contrary to the spirit of restorative justice. The retired chief justice, David Maraga in his statement on the AJS Framework policy, credited the policy for providing a dialogic space for both the judiciary and the AJS to deliver a transformative vision by way of reversal of structures that lead to gender oppression, social injustices and stigma, cultural domination and other forms of oppression.[170]A candid dialogue on restorative justice should root out any oppressive practices that may be applied under the guise of restorative justice.

3.1.2 Equality and inclusivity

All are equal and should not be discriminated against before the law,[171] either directly or indirectly. The law should not accord any form of advantage to anyone based on their gender, religion, wealth, age, or any other status over another. A justice system should consider everyone in the society including the vulnerable groups who comprise women, childrens and those with special needs. The handling of suspects and accused persons before the courts or tribunals should exhibit equality and impartiality.[172] A justice system is capable of excluding other members of society such as the poor. The Kenyan justice system to a common man is generally a complex process that may be difficult to follow unless one can afford the cost of hiring a lawyer. Other disadvantages come into play that may bring about inequalities and exclusivity, such as; the cost implications that come with numerous court attendances, a cumbersome evidentiary burden that at times weigh down on

[169] Ibid (n141).

[170] Ibid (n126).

[171] Universal Declaration of Human Rights, Article 7.

[172]International Covenant on Civil and Political Rights, Article 14.

victims and their witnesses etcetera. A justice system may discriminate directly or indirectly in terms of barriers that it creates to some people such as the poor, the uneducated etcetera.

The Constitution of Kenya has been hailed for advancing a people-centered ideology and fully embracing AJS, as a way of resolving disputes.[173]The provision reckoned with, as far as informal justice systems is concerned. The constitution enumerates some of the modes available for resolution of disputes as including; reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms. These modes of dispute resolution mechanisms are not conclusive, courts are open to encourage creativity and accommodate any other processes innovated by parties that will assist them to arrive at a just decision. It has been recognized that justice is not only served in the formal courts but also in the informal forums where the majority of people have resorted to, not only because of the challenges experienced in the justice system but as a way of life.[174]These informal processes, just like formal processes, are not always efficient and perfect which necessitates the call for recognition and streamlining. This will cushion litigants who resort to out-of-court settlements not to succumb to the exploitation of unregulated systems that no one can be held accountable for. Failure to have a legal and institutional framework that makes provisions, identifying alternatives to the formal criminal justice process, will render the provision in Article 159(2)(c) just that, provisions incapable of implementation.

The law abhors any practice meant to disadvantage women and girls merely based on their gender.[175] The International Covenant for Economic, Social, and Cultural Rights[176]calls on states, including Kenya, to take measures of entrenching in their constitutions and legislating against discrimination and inequalities of all kinds.The Constitution of Kenya guarantees equality and freedom from discrimination of any kind.[177]

Restorative justice forums outside the court are subject to the constitution, Bill of rights, and all other written laws[178]This offers an opportunity to challenge any decision that violates any

[173] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) 1 Strathmore LJ 22.

[174] Ibid (n126).

[175]Convention on Elimination of All forms of Discrimination against Women, Article 5.

[176] Article 2

[177] Article 27, Constitution of Kenya 2010.

[178] Constitution of Kenya 2010, Article 159(3).

constitutional right irrespective of the system of adjudication of the dispute, restorative forms of justice, or otherwise. Restorative justice is accessible, cheap, and flexible hence the requirement for inclusivity is achievable. Further, women are now participants in most of the hybrid forums that are set up in conjunction with the state organs to aid in the local resolution of disputes. For example, they serve as chiefs, assistant chiefs, and village elders just like their male colleagues. The AJS task force found out that in Othaya, apart from the local administrators, probation officers also sit in AJS committees where they serve as chairmen. The local administrators and probation officers may not necessarily be male hence addressing the fears of gender inequalities and mistreatment in the committees. However, the AJS task force found out that though a few of these forums have included the female gender, most of them are male-dominated and hence may most likely be biased in matters relating to women such as child marriage, FGM, Women inheritance, land, etcetera. There is a need therefore to have these forums supervised by the mainstream system to check on the conformity with the Constitutional tenets so as not to serve as grounds that perpetuate gender discrimination and oppression.

3.1.3 Principle of Fair trial

The defendant ha a right to be tried by an impartial tribunal according to the regular legal procedures.[179] A balanced outcome is gauged from the quality of the process and the impartiality of the arbiter. Once one is suspected of having been involved in crime and gets arrested the arraignment in a court of law within the time stipulated time follows.[180]It would therefore appear that in criminal proceedings, it is lawful to begin from the formal court which may then give directions on how the case proceeds whether by referring to other forums or otherwise. The complex nature of the concept of justice has been appreciated by many scholars hence the need to strike a balance when debating whether to prefer one system over another. It has been appreciated that both retributive and restorative justice systems have a role in society and none of the models

[179] Garner Bryan, Black's Law Dictionary, 9th Edition pp 676 https://www.amazon.com/Blacks-Law-Dictionary-Standard-Ninth/dp/0314199497 accessed on 1 November 2021.

[180] International Covenant on Civil and Political Rights, Article 9(3).

is perfect.[181] Dennis Ndambo[182] is of the view that there must be a balance between the interest of the victim and those of the wider society in determining which way to take in each case scenario. Further, Ndambo adds that the challenge in pursuing justice, it may not be clear which accountability mechanism is appropriate in all cases. In restorative justice, the offender has to admit his involvement in the offending act and voluntarily submit to the process of restoring a fact that renders the trial unnecessary.[183] The offender is entitled to all rights under Article 50 of the constitution which he has to be informed and if he/she elects to submit to the jurisdiction of a forum other than the court, these rights have to be guaranteed. The right to a fair trial is a right that is not subject to a limitation in Kenya[184]hence the need for a well-informed decision by parties to waive the right to go through a retributive justice as by law required. This waiver may be informed by the need for certainty of the future by both the victim and perpetrator that there will be no repeat of past abuses.[185]

Legal aid throughout a criminal process to the accused, witness, and victim is closely tied to other rights hence facilitative of a judicial process irrespective of the judicialn system in place.[186]Legal aid comprises legal advice, assistance, and representation for persons detained, arrested, imprisoned, suspected, accused, or charged with a criminal offence, victims, and witnesses. It also extends to an aspect of legal education, access to legal information, and other services.[187]

Legal systems have to be compliant with the international law requirements that safeguard the rights of everyone who happens to go through the system. There has to be clarity on what justice systems they are, how they are accessed, their functionality, what laws they apply, and the right of representation of parties in the process. A party should be allowed to participate in electing a process to submit to and such choice has to be a well-informed choice.

---

[181] Ibid (n114).

[182]Dennis Ndambo, 'In Pursuit of Justice and Peace: Kenya after the 2007 Elections' (2011) 1 Warwick Student L Rev 48.

[183] Hadar Dancig-Rosenberg and Tali Gal, 'Restorative Criminal Justice' (2013) 34 Cardozo L Rev 2313.

[184] Constitution of Kenya 2010, Article 25(c).

[185] Alfred Allan and Marietjie M Allan, 'The South African truth and reconciliation commission as a therapeutic tool' (2000) 18 Behav Sci & L 459.

[186] Principle 8(30) UN Principles and Guidelines on access to Legal Aid in Criminal justice systems [2013] sourced from https://www.unodc.org/documents/justice-and-prison accessed on 11 March 2021.

[187] Ibid.

3.2 National Laws

3.2.2 Criminal Procedure code

This code is a piece of legislation that determines processes in all cases of a criminal nature. It is a guide to a court of law on what to do at any given time in criminal proceedings. It is therefore important to review provisions that favour AJS in practice and their limitations. The state is the complainant in all criminal cases which are instituted in the name of the Republic. The state is thus the main complainant, a fact that causes victims of a crime to be treated as nominal complainants.[188] The state has a major role in the manner in which criminal proceedings are managed throughout the process and one cannot mention AJS without examining the powers of the ODPP and by extension the state as an institution of criminal law. The ODPP is therefore an important actor that can foster AJS in Kenya if properly engaged.

The CPC is applied subject to the provisions of the constitution, the latter being the supreme law. The Constitutional provisions limit the interpretation and application of the code but the reverse cannot happen. The main players who participate in the adjudication of criminal cases as provided for under the procedural law are the courts, the ODPP, the victim(s), and the offender(defence). The ODPP represents the interests of the general public.[189] Justice is a complex and subjective concept in itself[190] that calls for a balanced consideration of the interest of the victim, offender and the community for justice to be done. Justice and accountability mechanisms have to be balanced with the needs of the victims' restoration and generally in the maintenance of a peaceful society thereafter.[191]

3.2.3 Diversion policy

The diversion policy is one of the powerful restorative justice tools available that emanated from the ODPP. The policy was developed under the National Prosecution Policy, Article 159 of the

[188] *Juma Faraji Serenge alias Juma Hamisi (n145).*

[189] *Republic v Abdulahi Noor Mohamed (alias Arab) Nairobi High Court criminal case No. 90 of 2013 [2016] e KLR.*

[190] Dennis Ndambo, 'In Pursuit of Justice and Peace: Kenya after the 2007 Elections' (2011) 1 Warwick Student L Rev 48

[191] Ibid

constitution of Kenya, and the International Legal Framework.[192] Diversion allows a case to be dealt with outside the criminal trial if it is not already registered in court, or taken out of the criminal justice system at any stage before the close of the prosecution's case, with the sole purpose of allowing parties to agree outside the court process a process that has an effect of terminating a court case, if successful. Diversion is therefore an alternative to prosecution. It acknowledges that not all cases need to proceed to full trial as it has been in the past. Restitution, restoration, and reintegration are noted to be the focus of modern-day criminal law under the policy as opposed to punishment. The policy is meant for all stakeholders including the courts, apart from the prosecutors and investigators. It is slightly over five years since the policy came into effect, it will be important to assess its progress in the future so far as its implementation is concerned. Restorative justice needs to operate within the law hence the need to go beyond policy provision by entrenching the principles and elements in the diversion policy into law,[193]this will give confidence to all the stakeholders to act and in effect facilitate the implementation of the policy. In essence, the absence of a statute on which the diversion policy is anchored has slowed the wheels of its implementation.

3.2.4 Plea Bargaining

The provisions on plea bargaining were introduced vide the Criminal Procedure Code (Amendment) Bill 2008 to give room to an offender who wishes to exchange a plea of guilty for a lesser charge than what he or she would have faced, obtain a withdrawal of the charge or a stay of other charges or the promise not to proceed with other possible charges.[194]These provisions come in handy on matters of AJS given the aspect of negotiation and subsequent agreement between the prosecutor, the offender, and in consultation with the victim and other participants such as the investigating officer. Though the agreement is entered into by the prosecutor and offender, the victim has a right to be involved to give his views and wishes that shall inform the agreement.[195]

[192] Office of the Director of Public Prosecution, Diversion Policy (2015).

[193] Sarah Kinyanjui, 'Definition Deadlock or a Necessary Definition Gap? Towards Infusing the Criminal Justice System with Restorative Justice Values' (2019) 2019 E African LJ 149.

[194] Criminal Procedure Act Chapter 75 Laws of Kenya, Section 137A-137O.

[195] Victims Protection Act 2014 Laws of Kenya, Section 9(2).

The court in passing sentence and upon conviction based on a plea bargaining agreement is required to consider the intention and circumstances of the agreement, the victim impact statement, and the nature and amount of compensation, if any, among other considerations which shall impact the sentence.[196]This is in line with the principle of restitution and restoration which are tenets of restorative justice. The plea bargaining process, therefore, offers an opportunity for alternative justice and specifically restorative justice by its requirement for dialogue and agreement.

INSTITUTIONAL FRAMEWORK

3.3 The Office of the Director of Public Prosecutions

The ODPP is a constitutional office with a constitutional mandate to exercise prosecutorial powers in Kenya.[197] The power to prosecute or discontinue any prosecution lies with the prosecutor but such powers are checked by the court which has to permit such discontinuation, withdrawal, or termination based on grounds informing such a request which have to be disclosed.[198]

The law allows the prosecutor to apply to the court for termination of case before judgment is pronounced. If made before the accused is placed on his/her defence, it leads to a discharge, and if after one has rendered a defence, it leads to an acquittal.[199]The consequence of this is that a person discharged may be rearrested and charged again over the same facts whereas one who is acquitted is protected under the principle of *autrefois acquit*. Though in most cases, once one has been discharged a re-arrest is a rare phenomenon.[200]

The power to withdraw is moderated by the court. The court has to be furnished with satisfactory reasons informing the prosecution's application. The courts have been discouraged from being a hindrance to the powers of the prosecution to withdraw as the power to prosecute is with the prosecutor and not the court.[201]Further, that the law does not list instances when the court may

[196] *Eddlied Mandi Jilani & 2 others v Republic Mombasa High Court Criminal case no.24 of 2019 [2019] e KLR.*

[197] Constitution of Kenya 2010, Article 157.

[198] Constitution of Kenya 2010, Article 157(8).

[199] Criminal Procedure Code, Section 87(a).

[200] This is based on the observation by the researcher in the course of her practice in Kenyan courts

[201] *Republic v Leonard Date Sekento Kajiado High Court Criminal Revision No.1 of 2018 [2019] e KLR.*

decline the application[202]in the same way it does not limit the prosecutor on grounds to invoke the law on withdrawal. The prosecutor's invocation of a diversion process before the close of prosecution's case, as well as the initiation of plea bargaining negotiations with accused persons, are some of the ways of implementing restorative justice in Kenya but remains inadequately explored. The ODPP has to encourage its prosecution officers to embrace these processes to promote their implementation. Public awareness of the objective of diversion and plea bargaining as well as how these processes work has to be carried out. The powers of the prosecution to request for discontinuation by way of withdrawal are not limited by the nature of the offence, felony, or misdemeanour which again is a good thing as far as restorative justice is concerned**.**

3.3.1 The victim in relation to the ODPP

A victim is any natural person who suffers an injury, loss, or damage as a consequence of an offense[203]The victim plays a critical role in the criminal justice system process and therefore, largely determines the direction the case will take. The victim is a star prosecution's witness and in cases where the victim does not turn up, the case is all the same terminated by way of dismissal and the offender is acquitted.[204] In so far as alternative forms of justice are concerned, the victim has an opportunity, though in limited cases, to influence the termination of a case on grounds that they have agreed with the accused outside the formal court. In instances where the accused has compensated the victim, or that they have entered into some terms, which they must disclose to the court, then the court, if satisfied, may stay or terminate the proceedings.[205]The victim thus has to liase with prosecutor to submit a request to the court as to the agreement.

The court may decline and or the prosecution object to the request by the complainant to have the case terminated if the offence is serious on grounds of public interest, the interests of the administration of justice, and the need to avoid and prevent abuse of a legal process.[206]This has been the case for all offences categorized as felonies where victims have not been successful in

[202] Ibid.

[203]Victim Protection Act No. 17 of 2014, Section 2.

[204] Criminal Procedure Code, Chapter 75 Laws of Kenya, Section 202.

[205] Criminal Procedure Code Chapter 75 Laws of Kenya, Section 176.

[206] Constitution of Kenya 2010, Article 157(11).

certain instances to invoke the provisions on alternative dispute resolution mechanisms.[207]Whereas the courts have affirmed that criminal cases may be resolved through alternative dispute resolution mechanisms, they decried the absence of proper guidelines on how the same should be done, the scope, and generally how to incorporate these processes into the formal justice system.[208]This explains the discrepancy and inconsistency in the manner in which felonies have been considered when it comes to out-of-court settlements as well as the approaches taken by parties with some engaging the prosecution while others make applications directly to the court as victims of a crime. The victim, besides compensation and other terms of engagement, may ask the court to withdraw case for reasons that, if sufficient, the court may permit him/her to withdraw and acquit the accused.[209]There are similarities between section 204 and section 176 of the Criminal Procedure Code in the sense that the victim initiates the process and has to give grounds for the wish to terminate proceedings, and lastly, the explanation has to satisfy the court. There has to be an understanding that if there is compensation done or there are still pending assignments to be executed by the accused, section 176 of the Criminal Procedure Code comes into play, resulting in either a stay of proceedings or termination whichever is appropriate in the circumstances. The reasons that would prompt the complainant to move the court are wide, for example, an apology from the offender may be adequate for the complainant in some instances. The prosecution ordinarily guards against negative reasons through interrogation to ascertain grounds informing the wish to withdraw.[210]

In Plea bargaining, the process may be initiated by either the prosecutor or the offender or his advocate, and of interest, is that when it is initiated by the prosecutor, the victim and or his/her representative has to be accorded an opportunity to give his/her views on the agreement.[211]The provision has been criticized for not making it mandatory to consider the views of the victim and where it is obtained, that the prosecutor is not bound by it.[212]The enactment of the Victims

[207] *Kelly Kases Bunjika v Director of Public Prosecutions (DPP) & another Kabarnet High court Criminal Miscellaneous Application No. 79 of 2017 [2018] e KLR.*

[208] *Republic v Abdulahi Noor Mohamed (alias Arab) Nairobi High Court criminal case No. 90 of 2013 [2016] e KLR.*

[209] Criminal procedure court, Section 204.

[210] This is based on the researcher's observation in the course of her practice in the Kenyan courts

[211] Criminal Procedure Act Chapter 75 Laws of Kenya, Section 137A (c).

[212] Ibid (n160).

Protection Act activated the rights of the victims in a criminal justice process by supporting reconciliation in appropriate cases through restorative justice and provision of better information, support services, reparations, and compensation from the offender[213] among other rights. The act makes it obligatory on the part of the prosecution to engage the victim as of right[214] The victim is at liberty to engage with the offender be it in plea bargaining agreements scenario, pre-bail stage, presentencing stage, or at any other stage of the trial, and through the prosecution, the court is informed of the wishes of the victim. This may lead to the termination of the case or a facilitative sentence that promotes reconciliation and reintegration in line with restorative justice principles.

3.4 The Victim Protection Board

The enactment of the Victim Protection Act in Kenya is considered the greatest milestone as far as the recognition of victims in the justice process as main actors as opposed to merely being trial witnesses is concerned.[215]The Act establishes the Victim Protection Board whose role is to advise the Cabinet Secretary responsible for matters relating to justice aimed at protecting victims of crime.[216]This advice is on various areas enumerated under the Act such as the formulation of integrated program for protection of Victims, Coordination of activities and development of a charter for victims among other issues.[217]There is yet to be formulated such integrated program as envisaged under the Act as highlighted by Aura Ruth in relation to protection of the survivors of gender based violence.[218]The Act envisages coordinated activities that bring together all the stakeholders in the justice system for effective response. In view of the inadequacy of such programs and coordination, the level to which the Kenyan legal framework responds to the plight of victims has been said to be debatable.[219]The enactment of VPA and the establishment of the

[213] Victim Protection Act 2014, Section 3.

[214] Ibid (n195)

[215] *IP Veronica Gitahi & Another v R Mombasa Court of Appeal Criminal Appeal no.23 of 2016 [2017] e KLR.*

[216] The Victim Protection Act, 2014 Laws of Kenya, Section 31.

[217] Victim Protection Act, 2014 Laws of Kenya, Section 32(2)(a), (b),(d).

[218]Ruth Aura, Situational analysis and the legal framework on sexual and gender-based violence in Kenya: Challenges and opportunities 2017. https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=DR+RUTHAURA+SITUATIONAL+ANALYSIS&btnG= accessed on 2 November 2021.

[219] Ibid.

Board is a milestone in the history of Kenyan Criminal justice system but its implementation will go along in the realization of victim's rights. The victims' knowledge on the existence of the board and the role it plays in relation to their needs is vital. The victim's rights are now well balanced with those of the accused in the manner that the victim has room to air views at various stages of the criminal trial either personally or through a representative.[220]

3.5 Department of children services

This department, as the name suggests deal with children pursuant to the Children Act and article 53 of the constitution of Kenya. It is the requirement of the law that best interest of the child be considered whenever a decision affecting a child is under consideration.[221] Child victims and children in conflict with the law are all protected. The formal justice system is considered traumatizing and re- victimizing in some instances, especially in intra-familial cases of sexual assault that present complex situations to victims. [222]Deche proposed the application of the informal justice system in serious offences including the sexual offences to alleviate the crisis of trauma to victims of this category. In practice, diversion has been applied mostly where the offender is a child for the same reason of averting further traumatizing effects of a child who is in conflict with the law. Diversion of sexual offence related cases where both the offender and the victim are children is encouraged as both are considered to be children in need of care and protection. However, where an adult is involved and the child is the victim, the best interest of such a child dictates the course of action. The department of children services plays a key role in the interviewing of relevant individuals including the children involved and visiting the child's home environment for purposes of preparing reports for the court.

---

[220] *Joseph Lendrix Waswa v Republic Supreme Court of Kenya Petition no. 23 of 2019 [2020] e KLR.*

[221] Constitution of Kenya 2010, Article 53(2).

[222] Mercy Deche, Legal Response to Intra Familial Child Sexual Abuse in Kenya: A Case for Informal Justice. Danish Institute for Human Rights; 2013 https://www.humanrights.dk/sites/humanrights.dk/files/media/migrated/4127_72s_mercy_ifm accessed on 3 November 2021.

3.6 The Probation Department

The placement of offenders under the supervision of probation officers either under probation orders or community service orders are non -custodial sentences that provide alternatives to incarceration. Non- custodial sentences have been categorized as restorative sentences.[223] Although probation orders and community service orders are a form of punishment to the offender they provide room for restorative justice in the sense that the offender and the victim, with the support of the probation officer, are likely to discuss the issue and probably agree, despite being on non- custodial sentence. Further, the aspect of guidance and counselling that courts often put into consideration, is therapeutic on the offender to appreciate the magnitude and effect of the crime he committed to the victim, the community, and himself. This, in turn, is likely to translate to repentance reintegration, and reparation.

The courts rely on the facts, evidence, and the law to decide on the nature of the sentence to be meted on an offender. The enactment of the Probation of offenders Act, Cap 64 Laws of Kenya allow courts to call for social inquiry reports on the offenders in terms of pre-bail, home inquiry reports, presentence reports, probation reports, or community service reports for the offenders and victim impact statements for the victims. These reports serve as useful tools in determining the kind of directions and decisions the court makes, though are not binding.[224] The attitude of the victim captured in the report and the information about the offender by his relatives, local administration officers, and neighbours, have a bearing on the decision of the court if considered. This has been hailed as a leap in the Kenyan justice system that promotes and boosts the voice of victims of crime.[225] The decision of the court is thus not plugged in the air but on the facts. The challenge is that not all courts are bound to call for these reports in every case though advisable that the probation officers make these inquiries and prepare reports, especially in re -sentencing hearings.[226] In instances where the same are prepared, the court is not bound by the contents therein. It has been demonstrated that sometimes the reports do not reflect the truth as it happened

[223] Kenyan Judiciary, Sentencing Policy Guidelines 2015.

[224] *Republic v Peter Mutuku Mulwa & another Machakos High Court criminal case no.46 of 2003[2020] e KLR.*

[225] Rachel Muthoga and Robert Bowman, 'A Brief Survey of Sentencing Law and Its Practice in Kenya' (2010) 22 Fed Sent'g Rep 249.

[226] Ibid (n216).

in *R v PKK*[227]where the probation officer indicated that the family had agreed to forgive and receive back the offender who was son to the deceased in a manslaughter case, yet the reality was that there was disquiet in the family as the offender who was born out of wedlock was treated as a stranger who had killed his step- father. The courts are therefore cautioned not to adopt the probation reports in a wholesale manner but there must be justification for the court not to consider the recommendations of the probation officer.[228]The courts' placement of offenders on probation and community service should be taken positively by the court itself, the prosecutor, the victim, and the offender as it allows the victim, community, and the offender to engage, with the help of the probation officer hence an important restorative justice tool.

3.7 The court as an institution

The court is the ultimate arbiter and applies judicial discretion to allow or decline any form of an application made by either the victim or the prosecutor. The court has to be satisfied with the explanation rendered in support of the request for termination of proceedings. In the case of plea bargaining, the court analyses plea bargaining agreements to satisfy itself as to the procedural requirements and may adopt it and proceed to convict the offender or decline the agreement ordering the case to proceed to the hearing. The court is not a party to a plea-bargaining agreement. Courts exercise judicial powers donated to them by the people[229] who in adopting and enacting the constitution unto themselves and their future generations require courts to promote the principles of alternative forms of dispute resolution mechanisms including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms.[230]One of the ways of promoting these mechanisms in criminal cases is for the court to flex its satisfaction on reasons given by the prosecution and or the victims in all cases and recognizing that justice is not only served in courts but also outside the courts. This is the spirit that informed the resolution of some felonies outside the court.[231]

---

[227] *[2019] e KLR.*

[228] *Samuel Kihara Ndegwa v Republic Kerugoya High court criminal appeal no.64 of 2016 [2017] e KLR.*

[229] Constitution of Kenya 2010, Article 1(3) (c).

[230] Constitution of Kenya 2010, Article 159(2) (c).

[231] *Republic v Mohamed Abdow Mohamed (n47).*

Conclusion

The stakeholders in the criminal justice system, especially the courts and the Office of the Director of Public Prosecutions have a major role to play to ensure that restorative justice is embraced in the Kenyan criminal justice system. The duty to engage litigants on the options that are available right from the onset of a case, and clarity on how each operates hence facilitating an informed choice at the earliest opportunity available, squarely lies with these two institutions. In addition, the courts and the prosecution are legal institutions that guarantee constitutional safety nets including fair trial, equality, and inclusivity as well as human dignity among other rights available to the parties irrespective of the form of justice applied. The courts may also invite supportive institutions such as the probation department to engage parties on what their expectations are and accordingly advise on the choice of the options available to avert disgruntlement of any of the parties at the end of the trial.

The Criminal Procedure Code, which is the most basic procedural law, offers some opportunities for restorative justice to come into play. This law, under Sections 87(a), 176, and 204 and the most recently introduced, Sections 137A-137O of the code are provisions to reckon with when tracing restorative forms of justice in the Kenyan law, with all of them now firmly strengthened by article 159(2)(c) of the constitution. However, in this chapter, it has been established that there are serious limitations in these provisions which expressly exclude cases categorized as felonies from the realm of dialogue between victims or interested parties and the offenders as well as the community at large.

Further, diversion is recognized as a powerful tool of restorative justice. The same was introduced in Kenya through the Office of the Director of Public Prosecutions by way of a policy instrument that is yet to receive the force of law.

The researcher, in the next chapter, delves into case law to demonstrate how the cited legal provisions under the Criminal Procedure Code as well as article 159 of the Constitution of Kenya have been applied in practice and the challenges experienced by courts, prosecutors, and interested parties emanating from the manner of interpretation of these laws.

CHAPTER FOUR

JURISPRUDENCE AND EMERGING ISSUES ON ALTERNATIVE JUSTICE SYSTEMS AS A FORM OF RESTORATIVE JUSTICE IN KENYA

4.0 Introduction

The judicial arm of government exercises delegated authority on behalf of the people of Kenya with a role of interpreting the constitution and any other law in the administration of justice.[232] As a state organ, the judiciary and by extension courts and tribunals are bound by the national values and principles such as human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and accountability among others[233]in the performance of its role. This role is manifested through policy directions and court pronouncements in form of judgments. When pronouncing itself through judgments, the judiciary is obligated under the constitution to root out colonial and neo-colonial inefficiencies and injustices, partly, by way of the development of new competent, indigenous jurisprudence based on the constitutional value of patriotism.[234]Its focus should be to address societal needs through the law.

This part of the research analyses the decisions from the court that lean towards the promotion of informal dispute resolution mechanisms and by extension, restorative forms of justice. This is done under two broad classifications based on the promulgation date of the Constitution of Kenya 2010. This will assist in clearly bringing out the trends in courts before and after the promulgation to assess whether or not, there is any jurisprudential progress being made as far as criminal law and alternative justice are concerned.

4.1 Court decisions before Promulgation of the Constitution of Kenya 2010

[232] Constitution of Kenya 2010, Article 1(3)(c).
[233] Constitution of Kenya, Article 10.
[234] Willy Mutunga, 'Human Rights States and Societies: A Reflection from Kenya' (2015) 2 Transnational Human Rights Rev 63.

As discussed above, the Criminal Procedure Code is, as the name suggests, a procedural tool that guides the courts on what to do at every stage of the proceedings. Courts are accordingly guided that withdrawals can be applied for by the prosecutor or the complainant and that the court is to assess the reasons for such withdrawals whether they are merited or not based on the nature of the case and grounds informing the application. Section 176 of the Criminal Procedure Code gives room to the court to promote reconciliation and to encourage the amicable settlement of proceedings in cases of common assault and other cases not classified as felonies. It should be noted that the word 'may' is used in this provision, making it discretional on the part of the court when it comes to its application. Further, section 204 of the same law offers an opportunity to the complainant, at any stage of the proceedings, but before the final order is made, to request for withdrawal of his/her complaint. This provision puts a burden on the complainant to demonstrate a sufficient cause and a justification, capable of satisfying the court, that there is a need to allow such withdrawal. The court's decisions have to be supported by the law for purposes of accountability and predictability, a fact that is depicted in case law. The criminal Procedure Code is a key procedural law that guides every court on how who, and what should be done at every stage of the criminal proceedings. Consequently, the courts are expected to apply the provisions in the Criminal Procedure Code as stipulated. Consequently, as far as reconciliation and withdrawals are concerned, cases that are exempted are excluded from the realm of negotiated settlements.

In the case of *Juma Faraji Serenge alias Juma Hamisi v R,* [235]The court allowed the complainant's request for withdrawal of a robbery with violence case as against two of the accused persons leaving out one, the appellant. The appellant was aggrieved by the general conduct of the trial magistrate and asked for his recusal which application was declined prompting an appeal. The High Court judge, Maraga J, as he then was, found that the withdrawal of charges against the appellant's co-accused and their subsequent acquittal under section 204 Criminal Procedure Code was irregular. Various issues were raised in this decision; first the role of the state versus the victim

[235] *Mombasa High Court Miscellaneous Criminal Application No. 42 of 2006, [2007] e KLR.*

as complainants in a criminal charge and second, the limitation of section 176 and 204 Criminal Procedure Code. Thirdly, how the court should approach the whole idea of promoting, encouraging, and facilitating reconciliation as provided for under section 176 Criminal Procedure Code lest he be accused of bias and partisanship.

The appellate court explained that the 'real' complainant in all criminal cases, with an emphasis on felonies, is the state and that the victim is merely a 'nominal' complainant who cannot for whatever reason be allowed to withdraw a case unless the court is invoking section 176 CPC to promote, facilitate and encourage reconciliation in cases of minor assault. According to the judge, in this case, the state as the complainant should not equally be permitted to withdraw a case that is not of the nature of the common assault, or any other offence of a personal or private nature not amounting to felony, and not aggravated in degree. However, if the state is of the view that it does not have evidence against the accused or that on grounds of public interest, it is at liberty to withdraw under section 87 CPC or enter a nolle prosequi, in which case, the prosecution is not limited by the nature or classification of the case.

The appellate court in the Juma Faraji case above proceeded to set aside orders of withdrawal and acquittal and ordered the re- arrest of the appellant's two co-accused terming their acquittal dubious. The trial court by implication of his action waived the exclusion of felonies and allowed a robbery with violence case against some accused persons. The trial court was faulted for various reasons; first, allowing a provision that did not apply to a case of such a nature and secondly, acquitting two accused persons and leaving the appellant to proceed with the trial. This decision demonstrates the impact of the exclusionary clause in section 176 CPC on cases classified as felonies and those considered personal but aggravated in nature.

In the case of *Avril Atieno Adoncia v Republic* [236] the court sought to clarify the issue of a case that is of personal or private nature not amounting to a felony. In this case, the accused person was charged with being in possession of a stolen Kenya Airways ticket and using the same to travel from London to Kenya. Upon arrival at the Jomo Kenyatta International Airport, she was arrested and detained. The case was reported by Kenya Airways as the complainant, its legal officer later on deposed in an affidavit that they had negotiated with the accused and had agreed. Further, that

[236] *Nairobi High Court (Milimani Law Courts) Miscellaneous Criminal Application 876 of 2007 [2008] e KLR.*

the complainant had been compensated for the ticket, the subject matter of the proceedings, by the accused and they did not wish to proceed with the trial of the case. The trial court declined a withdrawal under section 204 CPC citing public interest. The High court in allowing the case to be withdrawn, found that the case was of private interest and not public interest.

Courts thus, in a strict application of the letter of the law, have been observing the classifications of cases as felonies and misdemeanours or as private and public interests. A case may be a misdemeanour but of an aggravated nature hence may be exempted from the operationalization of sections 176 and also 204 CPC. A felony is defined to mean an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with death, or with imprisonment for three years or more.[237]A misdemeanour on the other hand is simply defined as any offence that is not a felony. All felonies are barred from being terminated based on agreement, negotiations, and or reconciliation. On the other hand, the courts are encouraged to allow withdrawals that are lawful and only in misdemeanours in the spirit of case backlog reduction and for the interest of justice.[238]

Generally, the exercise of the option to negotiate an agreement between the complainant, the state, and the offender has in certain instances faced hurdles from the courts who find that justice will not be served if such requests to terminate the case or plea bargaining are allowed. Courts have been found sometimes to have declined requests as a result of ignorance on the part of the presiding court on what the law requires to promote and encourage such settlements[239]or simply the misdirection on the nature of the case.[240]However, it is clear that just as the law stipulates, the courts mostly allowed reconciliation where it was clear that the offences were misdemeanours and not aggravated in nature and of private interest only.

4.2 Decisions post- Promulgation of the Constitution of Kenya 2010

[237] Penal Code Chapter 63 Laws of Kenya, Section 4.

[238] *Shen Zhangua v Republic Nairobi High court of Kenya Miscellaneous Criminal Application no. 396 of 2006 [2006] e KLR.*

[239] Ibid

[240] *Avril Atieno Adoncia v Republic(n228).*

The general spirit of the liberating nature of the Constitution of Kenya 2010 has had its way to the manner of application and interpretation of the laws by the courts. Following the promulgation of the current constitution, judges have been called upon to take a proactive role in the development of the law in a manner that responds to the needs of the people, national interests and purposely in favor of a competent and indigenous jurisprudence based on constitutional values.[241]This is the genesis of a debate as to whether or not judges can make law. In relying on Article 20(3)(a) Mutunga Willy[242] calls a belief that judges don't make law as a myth of common law which the constitution of Kenya 2010 has moved away from. It is therefore pertinent to evaluate key decisions of the court in the light of this radical understanding that the constitution of Kenya 2010 allows the judiciary to develop a progressive jurisprudence, the jurisprudence that is responsive to the needs of its people hence transformative.

4.2.1 R V Mohamed Abdow Mohamed[243]

This case was regarded by the prosecuting counsel as a 'sui generis' case and successfully asked the court to treat it as such. The court, as a departure from the position that out of court negotiations would only be held in cases of misdemeanours that are not of aggravated nature and also that felonies are not for consideration when it comes to out of court settlements, went out of its way to allow the termination of the proceedings and discharged the accused on the strength of a negotiated settlement based on customary and traditional practice. The following issues emerge in this case;

4.2.1.1 Accommodating Customary and traditional practices in the criminal justice system

The victim's family and the accused in this case are Muslims hence bound by the same practice and traditions under Islamic law. The two families sat and agreed based on their common traditions and customs. The agreement was in the form of compensation that was considered adequate to restore the family of the deceased which is; camels, goats, and other traditional ornaments which were paid to the aggrieved family. A ritual was performed to pay for the blood of the deceased.

[241] Ibid (n185).

[242] Ibid.

[243] Ibid(n47).

The parties submitted to a traditional forum and participated in negotiations, they were satisfied that the agreement arrived at, and which had been fulfilled, was sufficient to compensate for the death of their kin.

The letter written to the ODPP and on which basis the decision was reached by the court is not specific as to the number of animals; how many camels, goats, and nature of ornaments given to the family of the deceased but what is clear is that the deceased's family was satisfied with the same as adequate. The satisfaction of the victim as to the best remedy to the wrongs suffered as a result of the criminal act is key, the opinions of third parties as to the inadequacy of such compensation or otherwise is not considered.[244]The community, the victims, and the offender get involved from the time of defining the wrong and the damage caused hence upon agreeing on the form of compensation, justice for them is served.[245]Traditional practices apply based on the ethnicity and or religion of the participants. The application of Islamic laws and traditions was facilitated by the fact that the participants herein are Muslims. This poses a challenge if the victim, the offender, and their respective families are of diverse customary backgrounds and do not subscribe to the same religious practices and beliefs, what is commonly referred to as trans-community issues.[246]This is the scenario that the modern-day Community-based dispute resolution systems, or faith-based systems community forums and the administrative authorities set up as hybrid systems as discussed earlier in this work, under item 2.1.3 in chapter one come into aid. These modern-day hybrid forums take care of diversities in cosmopolitan communities.

The penal code and the criminal procedure code have no provisions alluding to the consideration of customs and traditions in criminal proceedings. However, these are statutes that are subservient to the constitution. The court prosecutor and the court in the Abdow case invoked the provisions of Article 159(1) that require the court to be guided by alternative dispute resolution mechanisms such as reconciliation, mediation, and traditional dispute resolution mechanisms in the resolution

[244] Sarah Kinyanjui, 'Definition Deadlock or a Necessary Definition Gap? Towards Infusing the Criminal Justice System with Restorative Justice Values' (2019) 2019 E Afr LJ 149.

[245] Francis Kariuki, 'Traditional dispute resolution mechanisms in the administration of justice in Kenya' in ES. Nwauche (ed.) Citizenship and Customary Law in Africa, Centre for African Legal Studies, 2020, pp. 33-68 SSRN: https://ssrn.com/abstract=3646995 accessed 6 April 2021.

[246] Jurg Helbling and Walter Kalin and Prosper Novirabo, 'Access to Justice, Impunity and Legal Pluralism in Kenya' (2015) 47 J Legal Pluralism & Unofficial L 347.

of cases. The constitution of Kenya 2010 thus elevated the traditional dispute resolution mechanisms as well as all other alternative dispute resolution mechanisms to the extent, that they are now capable of being actively considered by courts, albeit on a case-to-case basis whenever invoked.[247]

The state is the real complainant hence has to be satisfied that the engagement of the victim and the offender will deliver 'real' justice.[248] The state makes a request to the court confirming that it does not object to the course taken by the parties involved to resolve the criminal offence outside the formal justice system. In this case, it is the court prosecutor who tabled the letter detailing the engagement to the court. The court prosecutor is the mouthpiece of the victims hence if bypassed, the court is likely to decline any request directly made by parties.[249]It is therefore important to keep abreast the court prosecutor of any engagement and why parties feel adequately compensated in a given case scenario. The requirements and fulfilment of any customs, traditions or practices recognized by all parties involved are needed for a smooth process. It seems that the attitude of the court prosecutors towards AJS will largely impact the success or otherwise of the alternative forms of dispute settlement hence restorative justice. There is, therefore, a need for full engagement and participation of the state as the complainant in negotiations. In summary, the custom, tradition, or practice that brings together the actors, that is; the offender, the victim, the state, and the community has to be embraced by all irrespective of the offence. These stakeholders are the consumers of justice whereas the court simply delivers it. If the victim and, or the victim's family have lost interest in the case because they have successfully negotiated, it is unlikely that they will cooperate with the prosecution a fact that may end up frustrating the case leading to its collapse. In their letter to the prosecution the family of the victim in emphasizing their wish and as a demonstration that justice, as they perceived it, would be done in allowing the termination stated;

> It's worth noting that it goes against our tradition to pursue the matter any further and/or testify against the accused person once we have received full compensation in the matter of which we already have.[250]

[247] Ibid

[248] Ibid (n227).

[249] Ibid (n200).

[250] Ibid (n241)

The prosecution had already begun experiencing difficulty in securing the attendance of witnesses which fact they expressed in support of the application for termination.

4.2.1.2 Offenders' exit formula from the formal justice system

The criminal procedure code outlines how the courts handle persons already indicted and going through the criminal justice process. There are clear instances when offenders are allowed to exit the process legally and in practice, either by way of discharge or acquittal. For example, the Office of the Director of Public Prosecutions may enter a *nolle prosequi* that seeks termination of a case on account of lack of sufficient evidence capable of sustaining a conviction, the accused person is discharged.[251] Secondly, if in the opinion of the court there is no offence known to the law that has been committed the court rejects to admit the charge and discharges the accused.[252]The court prosecutor may also apply for the withdrawal of the case for any other reasons which have to be disclosed to the court. Where the court is satisfied, the accused is discharged or acquitted depending on the stage at which the case has reached.[253] The acquittal or conviction upon the conclusion of the case is also another legally recognized way through which an accused exits a criminal justice process. Interestingly, the offender in Abdow's case was discharged not based on any of these known procedural law provisions but directly based on article 159 of the constitution and the satisfaction of the court that justice had been served. This is a procedure that is completely strange to the criminal law in Kenya but the trial court waded into it to facilitate justice to the parties hence creating a new jurisprudence. The court adopted its procedure that resulted in the discharge of the accused. Generally, a discharge does not bar any subsequent arrest and prosecution, notwithstanding compensation received and acknowledged by the victim or victim's family. This may therefore expose the accused to suffer prejudice for lack of a final settlement of the case. If the case is settled in this manner, then for closure to be reached, an absolute discharge by way of an acquittal should be the result.

[251] Criminal Procedure Code, Section 82.

[252] Criminal Procedure Code, Section 89(5).

[253] Criminal Procedure Code, Section 87.

Other cases have followed the decision in the Abdow case such *as R v Juliana Mwikali Kiteme &3 Others*[254] where the court proceeded to withdraw a case of murder upon a representation that a form of compensation in form of livestock had been paid in line with Kamba customs and traditions. The court invoked the provisions of articles 159(2)(c) and 159(3) of the constitution which provides for ADR as well as article 157 of the constitution and section 25 of the Office of the Director of Public Prosecutions Act which provides for the powers of the Office of the Director of Public Prosecution to discontinue criminal proceedings. Whereas the court in both Abdow and Kiteme's case above seems to suggest that the prosecutor has powers to discontinue proceedings, it should not be lost that these provisions in the constitution, the ODPP Act, and the criminal procedure court give the court the ultimate authority to allow or to disallow the same based on the circumstances of each case and reasons advanced for discontinuation or withdrawal, whichever is the case. The court has to be satisfied that justice will be served in such discontinuation. The accused persons in Kiteme's case, just like in Abdow's case, were discharged according to constitutional provisions and outside the criminal procedural law, the Criminal Procedure Code.
These two cases were further noted in the case of *Kelly Kases Bunjika v Director of Public Prosecution(DPP) & Another*[255] where the court found that to guard against abuse of process by the prosecutions who may seek to discontinue, withdraw or terminate proceedings on account of alternative dispute resolution mechanisms based on article 159 of the constitution, the Office of the Director of Public Prosecutions is guided by the principles under Article 157 of the constitution that requires them to put into consideration public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process. The accused in Kelly Kases Bunjika case which involved the offence of robbery with violence was not terminated because the complainant did not involve the state which represents the wider society.

4.2.4 Plea bargaining agreement as an alternative approach for felonies

The courts have been allowing withdrawals by prosecution or victims and subsequently, either discharging or acquitting the accused person depending on the provisions cited. This has been easy

[254] *Garissa High Court criminal case no. 10 of 2015 [2017] e KLR.*

[255] *Kabarnet High court Criminal Miscellaneous Application No. 79 of 2017, [2018] e KLR.*

in cases that are not felonies or misdemeanours that are not of aggravated nature. This has since been extended to felonies which, though expressly excluded from such procedures, the courts invoke Articles 159(2) (c) and 157 of the constitution as well as the provisions of the Office of the Director of public prosecutions Act, to allow out of court settlements under customary law and practice. This is new thinking and approach that has opened up provisions of the criminal procedure code that were previously so limiting.

The problem that currently exists is that not all courts adopt the interpretation in the Abdow case, instead, some courts have opted for a different approach when dealing with felonies by following the procedure under sections 137A-137O of the Criminal Procedure Code on plea agreements. These provisions stipulate how plea agreements should be entered into between the prosecutor and the accused and the engagement of the victims and other stakeholders such as the investigating officers. The validity of a plea agreement is determined by a court based on its compliance with the laid down procedure. In the case of *R v Abdulahi Noor Mohamed (alias Arab),*[256] the court expressly noted that she did not agree with the approach in the Abdow case and went ahead to suggest that parties should have explored the procedure under section 137A-137O of the Criminal Procedure Code on a plea agreement. The negotiations in plea bargaining agreements involve the office of the Director of Public Prosecutions and the offender. The prosecutor may consider the views and interests of the victim and the investigating officer but not bound by them, a fact found likely to water down the place and voice of the victim when it comes to the criminal justice process. The Plea bargaining approach was successfully applied in the case of *Republic v F L [2017] e KLR* where the mother was charged with the murder of her biological son. A plea bargaining agreement was prepared and explained to the accused who pleaded guilty to a lesser charge of manslaughter. In mitigation, it was submitted that the matter had been addressed under the Maasai customary and traditional practice and a mediator had engaged the family and reconciled the accused to her husband and children. To assist the family to overcome the trauma and pain arising from the offence, the court was invited to apply article 159 of the constitution. The court considered the circumstances of the case and the mitigating factors and handed the accused a probation sentence of three years and a directive to the probation department to find a qualified counselor for the accused to take her through the counseling process. The court mentioned the case in 90 days to get an update on the progress of the offender.

[256] Ibid (n247).

This approach is different from the Abdow approach in the sense that the accused is eventually convicted and sentenced and not a discharge that cuts short the life of the criminal proceedings. Technically, the plea agreement approach complies with the procedural aspect of the law as currently is, by not prematurely terminating a felony. The discretion of the court plays a major role in plea agreements since the prosecutor and the accused are not guaranteed of the non -custodial sentence or sentence that will give room to reconciliation, restoration, and the healing of the victims and the community. It is imperative to point out that an offence of manslaughter attracts a penalty of life imprisonment which, if meted, defeats the purpose and objective of plea bargaining. In *R v FL*[257] the court prosecutor left the decision to explore the law and do justice to the discretion of the court.

4.3 Challenges in the two approaches to felonies

There is no uniformity in the manner in which courts have approached the issue on out-of-court settlements relating to cases that are of personal but aggravated nature or felonies which are expressly prohibited from the realm of alternative dispute resolutions under the criminal law in Kenya. In the same way disparities in sentencing before the introduction of a sentencing policy, cast the judiciary in a bad light,[258] the lack of consistent and certain manner of addressing negotiated agreements by victims and offenders, may create negative perceptions and distrust of the judiciary as an institution. The tenets of access to justice demand a system and a process that is predictable, certain, and uniform in their application.

The Abdow case approach is criticized for lacking legal backing as judges and magistrates have not been accorded jurisdictional authority by statute to discharge an accused based on customary law and traditional practices or rituals. Further, the same may open Pandora's box as far as the withdrawal of serious cases is concerned hence jeopardizing public security and societal interests, and welfare.

On the other hand, the plea bargaining approach creates uncertainty on the part of the offender and the prosecutor as to the nature of sentence that is likely to be passed by the court which reserves its discretionary power to pass a statutory sentence notwithstanding the mitigating statements and

[257] Ibid.

[258] The Judiciary, Sentencing policy Guidelines, pp 2 par 4; Kenya (2016).

presentation of whatever agreements entered into by parties. This is attributed to an adversarial system of trial which does not make a court a party to the negotiations whose purpose generally, is meant to earn an accused a lenient sentence.[259]The attractive plea bargaining agreement is also said to lure innocent accused persons to take a shortcut of admitting the charge for a lenient sentence rather than go through a full trial.[260]This gives an impression that plea bargaining agreements at times cause injustices rather than the justice it seeks to meet.

The dilemma thus is whether or not plea bargaining suffices as an ADR process owing to how the same is executed and whether breaking the barriers that categorize cases as misdemeanours and felonies as far as opportunities for ADR is concerned should be the way to go, that is, the Abdow case approach.

4.4 The Victim's role in a trial process

The enactment of the Victim Protection Act which is a statute meant to implement article 50(9) of the constitution. The same outlines victim's rights and responsibilities pertaining to the role of the victim in a trial process.[261] The same has been hailed as a milestone for Kenya as far as victims' rights are concerned. The victim's role has moved away from that of only being the prosecution's witness and being treated as nominal and passive in a case as was held in the Juma Faraji case discussed under 4.2.1.1 above. The courts have activated the right of a victim to participate in a criminal trial by giving their views and concerns either directly or through an advocate for the court's consideration.[262]The court articulated the right of participation of victims in a way that balance the rights of both the victim and the offender. The advocate for the victim who acts alongside the prosecutor now has audience to address the court on behalf of the victim as opposed to the previous situation of always speaking through the prosecutor. The complainant's views and concerns shall equally be considered by the trial court based on the available legal and institutional framework.

---

[259] 'Plea Bargaining' (2011) 9 Jailhouse Law Manual 1.

[260] Avishalom Tor and Oren Gazal-Ayal and Stephen M Garcia, 'Fairness and the Willingness to Accept Plea Bargain Offers' (2010) 7 J Empirical Legal Stud 97.

[261] Victim Protection Act, 2014 Laws of Kenya, Section 9.

[262] *Joseph Lendrix Waswa v Republic Supreme Court of Kenya Petition no. 23 of 2019 [2020] e KLR.*

Conclusion

It is clear from the case law that there is room for criminal offences, pending in courts to be settled in informal settings, which gives impetus to restorative justice within the formal criminal justice system. This is largely left to the discretion of the courts and the prosecution to allow and initiate these interventions in an active case. The problem is that these Criminal procedure code provisions that are facilitative of restorative justice are limiting despite the freedom to resort to alternative justice forums availed by article 159(2)(c) of the constitution of Kenya. Though the constitution provides for the engagement of alternative justice systems, there is no procedural law to facilitate the same in all categories of offences. Judicial officers and prosecutors are public servants; their decisions should be backed by law for accountability reasons hence the reluctance on the part of certain judicial officers to invoke article 159(2)(c) of the constitution despite its supremacy over the statutory law. The law does not only give confidence to these officers in their daily duties but also creates certainty and uniformity in the application of legal principles in practice which translates to trust for the institutions of justice. There is a need to create harmony in decision making to avoid the dilemma created through current case law as to the manner of incorporation of alternative justice into the formal justice system specifically, in offences categorized as felonies. Chapter Five establishes how South Africa has approached the whole idea of restorative justice and any lessons for Kenya that will address the limitations above discussed.

CHAPTER FIVE

ALTERNATIVE JUSTICE SYSTEMS IN SOUTH AFRICA AND BEST PRACTICES FOR KENYA

5.1 Introduction

Restorative justice practices in South Africa are prominently practiced in rural areas where, since the pre-colonial period, traditional practices such as makgotla have been applied in the resolution of cases.[263] The elders preside over the adjudication of disagreements such as those between husbands and their wives. The modern-day restorative justice in criminal law in South Africa is traced back to the establishment of the Truth and Reconciliation Commission after the South Africans emerged from apartheid in the year 1994.[264] The objectives of the commission embodied restorative justice elements, which are; reconciliation, restoration, and integration. The Commission offered an alternative of amnesty, reparation, and rehabilitation to get the truth and to come to terms with that which had happened, as well as offering support to the victims and perpetrators to overcome the effect of evil committed.[265] The establishment of the commission is said to have been anchored in the African philosophy of Ubuntu commonly stated in Isi-Zulu intonation as *umuntu ngumuntu ngabantu* whose translation is said to mean ' a person is a person only through others'. A philosophy that informs the resolution of disputes outside the formal justice process to date.[266] Both the South African black and coloured community reportedly practice negotiations of disagreements even after cases are reported to the police.[267] The courts

[263] Salome Maimane, 'Restorative Justice for Adult Offenders in South Africa: A Comparative Study of Canada New Zealand England and Wales' (University of Pretoria 2017).

[264] Ann Skelton, 'The South African Constitutional Court's Restorative Justice Jurisprudence' (2013) 1 Restorative Just 12.

[265] Alfred Allan and Marietjie M Allan, 'The South African truth and reconciliation commission as a therapeutic tool' (2000) 18 Behav Sci & L 459.

[266] Serges Djoyou, 'Cultural Values as a Source of Law: Emerging Trends of Ubuntu Jurisprudence in South Africa' (2018) 18 Afr Hum Rts LJ 625.

[267] Mistry Duxit, 'The Dilemma of Case Withdrawal: Policing in the "New" South Africa"' (2000) 3 British criminology Conference.

have subsequently been hailed for the development of home-grown jurisprudence and especially by infusing restorative justice thinking in the sentencing process and demonstrating the ability to develop a linkage between restorative justice and the African concept of Ubuntu [268]yielding to a progressive jurisprudence envisaged by Section 39 of South African's constitution. This provision enjoins the courts to interpret statutes in a manner that promotes the spirit, purport, and objectives of the Bill of rights. The acceptance of the philosophical concept of Ubuntu in South Africa gave, and still gives the restorative forms of justice a wide advantage and opportunity to develop.

The concept of Ujamaa or Undugu, meaning brotherhood, in Kenya has been recognized as being an equivalent to Ubuntu[269] demonstrating that in the African culture as a whole, relationships are fancied and appreciated. The urge to maintain this societal bond calls for a model of resolution of disagreements that bring people together and not disintegrating relations further. The Kenyan Judiciary just like the South African judges needs to come out boldly, jurisprudentially, to reflect this African philosophy of togetherness appreciating that offenders and victims come from families and communities that value relationships too. Section 39 of the South African Constitution that gives judges a footing is mirrored under article 20(1)(b) of the Constitution of Kenya 2010, which if adequately utilized by courts, has a great potential for the growth of restorative justice in Kenya. Section 39 of the South African constitution requires that any legislation be interpreted in a manner that promotes the spirit, purport, and objects of the bill of rights. In the same way, article 20(4) of the Constitution of Kenya requires that while interpreting the Bill of Rights the court shall promote the spirit, purport and object of the Bill of Rights.

5.2 Legal and institutional framework for restorative justice in South Africa

5.2.1 The legal framework

The history of the development of the legal system in South Africa has some similarities with that of Kenya and especially when analysed in the sense of the three stages of precolonial, colonial, and post-colonial periods. The traditional setup had its way of resolving disputes based on the

[268] Ibid (n241).

[269] Emily Kinama, 'Traditional Justice Systems as Alternative Dispute Resolution under Article 159(2) (c) of the Constitution of Kenya, 2010' (2015) 1 Strathmore LJ 22.

traditions and customs of the community. This was done by traditionally recognized leaders whose jurisdiction had no limits. However, for the arrival of the colonialist as explained earlier in Chapter two, these practices were regarded as backward hence the need for a modern system of administering justice. With the arrival of common law, traditional practices on the administration of justice were limited to traditional and customary law-related disputes among Africans only.[270]Further, the same was subjected to a repugnancy clause just like in the Kenyan scenario. Following the political liberation from the apartheid in 1994, the customary law and traditional justice practices in South Africa, just like the common law, derive their force from the constitution and none is superior to another.[271]

South Africa's criminal justice process generally, is guided by the constitution and the criminal procedure Act. The courts are enjoined to interpret the Bill of Rights in a manner that promotes values that underlie an open and democratic society based on human dignity, equality, and freedom.[272]The criminal procedure Act just like the Kenyan Code is an instructive document on what should be done at every stage of a criminal trial. The following are restorative justice elements in the Act:

5.2.1.1 Withdrawal of cases

A careful study of South Africa's criminal procedure Act shows that it has no equivalent of sections 176 and 204 of the Kenyan Criminal Procedure Code. This means that the victim of the crime, cannot directly present his/her wishes to discontinue criminal proceedings of whatever nature already before a court of law, for whatever reasons, after the charge is registered and plea taken. However, the state, through the police as well as the prosecution may allow complaints to be withdrawn for reasons given to them by such victims, including agreements with the offender before the charge is preferred. These withdrawals before the case is presented to the court is quite common and it is not limited to petty offense but cuts across both serious and petty crimes.[273] The prosecutor is also allowed to make such withdrawals citing reasons such as spousal relationships

[270] M I Madondo, 'Looking into Areas of Concern in the Traditional Courts Bill' (2019) 82 THRHR 247.

[271] Ibid.

[272]The Constitution of the Republic of South Africa 1996, Section 39(1).

[273] Mistry Duxit, 'The Dilemma of Case Withdrawal: Policing in the "New" South Africa"' (2000) 3 British criminology Conference.

in cases of domestic violence.[274]Several reasons are cited by victims as a basis for withdrawal such as; that the perpetrator has sought forgiveness and the victim has forgiven him, that the family of the complainant and that of the accused discussed the issues and agreed, that the elders have agreed etcetera. The challenges of the formal criminal justice system such as being too slow and securing a low number of convictions even in serious crimes such as murder have contributed to the high rate of withdrawals in South Africa.[275] These two instances of withdrawals are an opportunity for AJS to intervene in bringing parties together and finding an amicable solution for the crime as an alternative to prosecution. Victims may at this stage, together with their perpetrators be referred to a restorative justice institution such as a social services department or peace committees.

5.2.1.2 Diversion

Diversion is a restorative justice tool that offers an alternative to prosecution. This is often invoked at pre-reporting and pretrial stages of a case, upon withdrawal by the prosecutor. In South, Africa diversion has developed in juvenile justice whereby children, in appropriate cases, get diverted from the criminal justice system to other forums purposely to protect children from the adverse effects of the criminal justice system.[276]The process safeguards the best interest of the child. The Juvenile Justice Act specifically provides for the diversion process, what it means, the scope of application, the objectives thereto, the stages where it is applicable, and finally, who to initiate the process. This piece of legislation has increased the effectiveness of the process and has encouraged its application in courts. The application and interpretation of this law positively impact the development of the principle of diversion hence restorative justice although, to juvenile justice only. As discussed under the sub-topic 'withdrawal' above, diversion in South Africa is active among adults too despite the absence of legislation.

It is argued that diversion of both youths and adults in South Africa was practiced way back even before the enactment of the Juvenile Justice Act[277]but the need to crystalize it into law for effective protection of rights and regulation of all forms of diversion was required. The emphasis on the

[274] Criminal Procedure Act 1977, Section 195.

[275] Ibid (n254).

[276] Jamil Ddamulira Mujuzi, 'Diversion in the South African Criminal Justice System: Emerging Jurisprudence' (2015) 28 S Africa J Crim Just 40.

[277] Ibid.

legality of actions by public officials in South Africa drives the call for legislation in the area of diversion. The Child Justice Act has met this requirement only to the extent of juvenile offenders where diversion is practiced with certainty. Diversion advocates for the resolution of cases outside a formal framework provided for by the law.[278]There is no such statute providing for diversion among the adult offenders though practiced by the police and the prosecution. The practice of diversion among adult offenders is entirely left to the prosecutorial discretion as well as that of the police at the pre-trial stage, a fact that has been found to hamper the number of adult offenders' referrals to restorative justice institutions.[279]This demonstrates the importance of having a piece of legislation in place that provides for every restorative justice tool such as diversion, plea bargaining, which is well taken care of in Kenya, termination of cases on account of settlement under traditional dispute resolution forums, or any other alternative justice system.

5.2.1.3 Plea Bargaining Agreement as a tool of restorative justice

Plea bargaining agreement was introduced in South Africa in 2001 through section 105A of the Criminal Procedure Act. The provisions on plea bargaining under the South African law echo the provision of section 137A -137O of the Kenyan Criminal Procedure Code in the meaning, purpose, and how to execute a plea bargaining agreement. The law on plea bargaining is seen as displacing the long informal traditional agreements practices[280]making the negotiations and the agreements formal as well as entrenching the same into the criminal justice system. The restorative aspect of plea bargaining agreements in South Africa is the authority given to the prosecutor to negotiate on the aspect of, if applicable, an award for compensation as contemplated under section 300 of the Criminal procedure Act,[281]the consideration of the interests of the community,[282] the engagement of the victim and or the victims representative on the inclusion in the agreement, the condition on

[278] Ibid.

[279] Maimane Salome, 'Restorative Justice for Adult Offenders in South Africa: A Comparative Study of Canada New Zealand England and Wales,' University of Pretoria (2017).

[280] Kercher Martin, 'Plea Bargaining in South Africa and Germany' (Doctoral Dissertation, Stellenbosch University 2013).

[281] Criminal Procedure Act of SA, Section 105A1(a) (ii) (dd).

[282] Criminal Procedure Act, Section 105A1(b)(ii) (dd).

compensation or any other specific benefit instead of compensation for damage or pecuniary loss.[283]

The usage of plea bargaining in South Africa remains low according to Kercher Martin.[284]The parties to a criminal case, that is the victim and the offender engages in negotiations through their legal representatives; the prosecutor, and defense counsel respectively. The parties do not have direct control of the process which is dictated by the law and neither can one tell the final sentence the court will eventually impose. Plea bargaining for that reason demonstrates inadequacy as far as restorative justice is concerned.

5.2.2 Institutional Framework

The department of correctional services is under the executive being headed by the minister of justice and correctional services who also serves as a member of parliament. Its mission is to contribute to a just, peaceful, and safer South Africa through effective and humane incarceration of inmates, rehabilitation, and social integration of offenders. The rehabilitation function thus is one of the roles of the department among other functions.[285]This department thus comes at the tail end of the criminal trial when dealing with convicted prisoners though also handles prisoners who are remanded pending the determination of their cases.

5.2.2.1 National Institute for Crime Prevention and the integration of offenders

NICRO, as it is commonly known, is a national non-governmental organization in South Africa that is credited for many restorative justice projects and programs in South Africa. The organization has been responsible for the provision of diversion services and specifically, for children since 1992 with statistics showing that an estimated 10,000 children yearly[286] are diverted

[283] Criminal Procedure Act, Section105A1(b)(iii) (bb).

[284] Ibid (n261).

[285]Jamil Ddamulira Mujuzi, 'Don't Send Them to Prison Because They Can't Rehabilitate Them: The South African Judiciary Doubts the Executive's Ability to Rehabilitate Offenders: A Note on *S v. Shilubane 2008(1) SACR 295 (T)' (2008)* 24 S Afr J on Hum Rts 330

[286] NICRO for a safe South Africa Home (nicro.org.za) accessed on 3.7.2021.

to the institution which runs various programs geared towards meeting restorative justice objectives. These programs are;

a) The youth empowerment Scheme
b) Pretrial community services
c) Victim offender mediation and
d) Family group conferencing

The effectiveness of the programs has enhanced confidence in the diversion process and prompted the incorporation of adults too leading to the launching of programs such as Adult life skills that is an extension of the Youth Empowerment program.[287]The organization collaborates with criminal justice agencies such as the police and the prosecutors for successful operations.

5.2.2.2 Sentencing options by courts

The judiciary has various options when sentencing the offenders[288] including the placement into institutions established as correctional service centers for rehabilitating offenders. These are custodial sentences in nature whose efficacy in guaranteeing actual rehabilitation of offenders has been doubted by courts of law. The courts advocate for either short custodial sentences or altogether preferring to pass the non -custodial sentences to facilitate rehabilitation outside these government institutions.[289]Imprisonment as a sentence is equally meant to achieve rehabilitation as one of the four objectives of punishment.[290] Prisons are not focused on rehabilitation but mostly concentrate on the security of prisoners a fact said to have contributed to an environment that is deplorable and described as criminogenic[291]contrary to the constitutional provisions on the Bill of Rights, as well as the objectives of the Correctional Services Act. In instances where prisoners who are charged for periods not exceeding 5 years,[292] courts may sentence such offenders by

[287] Maimane Salome, 'Restorative Justice for Adult Offenders in South Africa: A Comparative Study of Canada New Zealand England and Wales' (University of Pretoria 2017)

[288] Criminal Procedure Act 1977, Section 276(1) (e).

[289]Ibid (n278).

[290] D Erasmus and A Hornigold, 'Court Supervised Institutional Transformation in South Africa' (2015) 18 Potchefstroom Elec LJ 2456.

[291] Ibid.

[292] Criminal Procedure Act 1977, Section 276(1) (i).

placing them under correctional supervision or if imprisoned, the provision to release them on parole before the end of their prison terms to gradually reintegrate them into society.[293]This release on parole is subject to the discretion of the parole board. The victim has a right to make representations in certain matters about the placement on parole or placement of the offender under correctional supervision.[294] The courts in this regard, in exercising their discretion with the needs of the victims and the community in mind, may elect to encourage or discourage restorative justice practices from the kind of sentences meted on the offenders. The sentences on committal to statutory institutions, imprisonment for periods less than 5 years which pave the way to parole, placement to correctional supervision, and use of suspended sentences are facilitative to restorative justice. In the case of juveniles, the courts upon convicting the offenders have the discretion to refer them to relevant institutions such as Victim-offender mediation and family group conferences.[295]

5.3 Legislative efforts to strengthen Alternative justice for adult offenders

To strengthen restorative justice practices in South Africa, a Bill was tabled before parliament in 2008 to regulate the structure and functioning of traditional courts which would have ordinarily administered justice based on restorative justice practices in both civil and criminal law.[296] However, the same was resisted by the public on grounds that the same was likely to entrench discrimination against women who formed a larger population in the rural areas where the same was to be applied. Secondly, that the same would create a separate legal system for 17 million people without room for opting out of its jurisdiction.[297] The bill is yet to become law.

5.4 South Africa's Jurisprudence on Restorative Justice

[293] Murdoch Watney, 'Assessment of the South African Parole System (Part 1)' (2017) 2017 J S Afr L 704

[294] Criminal Procedure Act 1977, Section 299A.

[295] Child Justice Act 2008, Section 73.

[296] M I Madondo, 'Looking into Areas of Concern in the Traditional Courts Bill' (2019) 82 THRHR 247.

[297] Jennifer Williams and Judith Klusener, 'The Traditional Courts Bill: A Woman's Perspective' (2013) 29 S Afr J on Hum Rts 276.

The constitution recognizes customary law as a source of lawin South Africa [298] and as a way of life just like Kenya. Having found that the traditional customary justice is largely restorative, the appreciation of customs in terms of tradition and religion makes South Africa a pluralist society in the sense that it has more than one set of legal systems where these groups have their legal issues addressed.[299] The courts of law, however, are recognized for their role in ventilating any violated rights of individuals in such forums.[300]

The Bill of Rights in South Africa's constitution strengthens the importance of dignity and respect for humanity which is closely linked to the philosophy of Ubuntu.[301]The court being endowed with the duty to interpret the Bill of Rights is enjoined to do so in a manner that underlies an open and democratic society based on these values; dignity, equality, and freedom.[302]The question is, to what extent have the courts implemented these constitutional values? This can only be ascertained from the decisions made in courts. In this chapter, some of the decisions of the court are examined to establish how they uphold restorative justice principles in South Africa.

5.4.1 The juvenile courts

The enactment of the Child Justice Act in 2008 in South Africa was based on the principle of restorative justice and the philosophy of Ubuntu which was already widely recognized and embraced at the time.[303]The Act made provisions on diversion allowing children in appropriate cases to be processed outside the criminal justice system that was seen as working against them in many aspects. The Act in this regard follows the international principle in the best interest of the child.[304]The law on juvenile justice and the interpretation of the Child Justice Act has an impact

[298] The Constitution of the Republic of South Africa, Section 211.

[299] Rautenbach Christa, 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010) 42 The Journal of Legal Pluralism and Unofficial Law 143.

[300] Ibid.

[301] Ann Skelton, 'Tapping Indigenous Knowledge: Traditional Conflict Resolution, Restorative Justice and the Denunciation of Crime in South Africa' (2007) 2007 Acta Juridica 228.

[302] Ibid (n267).

[303] Skelton Ann 'Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective' (2002) 42 The British Journal of Criminology 496.

[304] United Nations Convention on the Rights of the child, Article 3.

of improving and bringing clarity in its implementation. The Act provides for instances when diversion is appropriate and the procedure of going about it. This guides the prosecutor, the court, and other stakeholders hence certainty in the practice of restorative justice. The offender first acknowledges the offence in a formal inquiry before a magistrate and others including the guardians and relevant probation officer.[305] The law guides the process of diversion to prevent abuse of rights. The lawfulness of a diversion order may be called into question.[306] The following are reported cases that went to the High court for review challenging legality or regularity of the processes of diversion as follows;

In the case of *S v Ngubeni 2014 (1) SACR 266 (GSJ)*[307]the court convicted an accused person of the offence of theft upon being charged with stealing a Cadbury chocolate bar. However, upon mitigation by the accused the court realized that it was dealing with a minor who ought to have been dealt with under the Act, the court proceeded to reverse the conviction by entering a plea of not guilty and referred the case for preliminary inquiry under the CJA. On appeal, all the proceedings before the trial court were set aside for reasons that all cases involving minors have to undergo preliminary inquiry to determine the suitability of diversion. A stand that Jamil Ddamulira Mujuzi[308] differs with on grounds that the basis of finding that all juvenile cases have to start with preliminary inquiry is not backed by any legal provision under the Act. The prosecutor is allowed under the Act to divert a minor offender even before such inquiries can be made[309] meaning that such offenders are unlikely to interact with even such preliminary stage. The Act duly guides the prosecutor on what to look out for before such diversion is done.

The Act provides that the prosecutor upon considering the record presented during the preliminary inquiry, the interest of the victim and in consultation with the police officer may indicate [to the

[305] Jamil Ddamulira Mujuzi, 'Diversion in the South African Criminal Justice System: Emerging Jurisprudence' (2015) 28 S Afr J Crim Just 40.

[306] Ibid.

[307] Ibid (n297).

[308] Ibid.

[309] Section 41, Child Justice Act 2008 https://www.justice.gov.za/legislation/acts/2008-075_childjustice accessed on 16 June 2021.

court] that the case is diverted.[310] The High court in relying on this provision faulted the trial magistrate in *S v Sobekwa [2013] JOL 30901 (ECG)*[311] who ordered diversion on its motion without the indication of the court prosecutor. The action of the court was not supported by any provision of the law. Neither the court nor the offender directly or through a lawyer can initiate a diversion. The High court reviewed a decision to divert a case based on submissions of an advocate with the support of the probation officer's report in the case of *Rabupape v S Unreported (A907/2014) [2014] ZAGPPHC 948 (2 December 2014)*[312]

Clearly, the South African juvenile justice and diversion is well outlined in the law and if utilized by the court, the prosecutor or any other party, accountability for its application is easy to follow. The requirement to engage and ascertain the wishes and the interest of the victim and that of the wider community is a restorative element in the process.

The Act appreciates that not all cases are eventually diverted hence the need to take care of the offenders who go through the criminal justice system. The court is given room to apply restorative justice at the sentencing stage by referring the offender to programs such as; family group conference and victim-offender mediation.[313] Once a restorative justice institution has finalized on a case, a report is submitted to the court which shall either confirm, amend or substitute whichever is appropriate. Any other sentence can only be passed by the court if the offender protests the recommendations of a restorative justice institution.

5.4.2 The adult offenders

South Africa, just like Kenya, has no piece of legislation that specifically provides for restorative justice for adult offenders hence the efforts to introduce traditional courts Bill discussed under item 5.3 above. Further, as highlighted earlier in this work, customary law whose application is allowed under the constitution is largely restorative. Therefore, courts in accommodating customary law practices which are grounded in the philosophy of Ubuntu, greatly manifest

[310] Child Justice Act 2008 https://www.justice.gov.za/legislation/acts/2008-075_childjustice accessed on 16 June 2021.

[311] Ibid (n295).

[312] Jamil Ddamulira Mujuzi, 'Diversion in the South African Criminal Justice System: Emerging Jurisprudence' (2015) 28 S Afr J Crim Just 40.

[313] Child Justice Act, Section 73(1).

restorative justice in courts intending to impose an alternative to imprisonment sentences that are humane and balanced.[314] Besides the humaneness of the sentences, South Africa was equally grappling with the challenges of overcrowded prisons hence alternative sentences to imprisonment as well as a legislative intervention to recognize aspects of customary law was advocated as part of the efforts to resolve it.[315] Further, there were doubts over the effectiveness of the rehabilitation programs and the general ability of the executive to carry out effective rehabilitation of offenders.[316]This effectively hampered the efficacy of the imprisonment sentence in combating recidivism.

The court in *S v Shilubane 2008(1) SACR 295(T)*[317] where a 35-year-old offender was charged with theft of 7 fowls valued at R216.16 and cooked them. He was convicted on his plea of guilty and sentenced to direct imprisonment for nine months. Both the trial magistrate and the prosecution conceded that the sentence imposed was disturbingly inappropriate. In reviewing the sentence, the judge in giving guidance to sentencing urged courts to be innovative and proactive in opting for alternative sentences instead of direct imprisonment. This decision directly called upon courts to avoid imposing imprisonment sentences or give short term periods of imprisonment as the court felt that the imprisonment facility was not adequate to prevent future crimes or even in rehabilitating the offenders. This decision was criticized for failing to observe the separation of powers.[318]

In *S v Maluleke 2008(1) SACR(T)*[319] The accused person was charged of murder of a young person who had been caught breaking and stealing from a house. The accused together with her husband actively participated in a sustained assault of the deceased. The husband, unfortunately, died during the pendency of the case. The sentencing of the accused herein brought up multiple issues

---

[314] Boyane Tshehla, 'The Restorative Justice Bug Bites the South African Criminal Justice System' (2004) 17 S Africa J Criminal Justice 1.

[315] Ibid.

[316] Jamil Ddamulira Mujuzi, 'Don't Send Them to Prison Because They Can't Rehabilitate Them: The South African Judiciary Doubts the Executive's Ability to Rehabilitate Offenders: A Note on *S v. Shilubane 2008(1) SACR 295 (T)' (2008)* 24 S Afr J on Hum Rts 330.

[317] Ibid.

[318] Ibid.

[319] *S v Maluleke* https://www.napierlibrary.co.nz/assets/mcelrea/State-v-Maluleke-Sth-Africa-HC-20060613 accessed on 1 June 2021.

in mitigation. First, she was a widow with 4 minor children who depended on her. Secondly, the accused had no reliable source of income to take care of her children and she had demonstrated remorse and regrets towards the act. Thirdly, the parties acknowledged that there was a customary practice in the community of an apology. The court utilized the opportunity offered by this custom and proceeded to sentence the accused to an imprisonment period of 8 years which he suspended for 3 years on the condition that the accused apologizes to the mother of the victim and her family according to customary practice within a month. This nature of sentence initiated the process of healing the wounds among parties in compliance with restorative justice principles. This approach is an infusion of restorative justice principles into the mainstream criminal justice system. This infusion was done even though a crime of murder is a serious crime and severe punishment is provided for under the law. The judge extended humanness to the accused and her 4 minor children and the need for a peaceful coexistence between the accused and the deceased's family.

The courts in South Africa have equally faced a dilemma on whether or not to apply AJS in serious crime. In the case of *Director of Public Prosecutions, North Gauteng v Thabete 2011(2) SACR 567(SCA)*[320]the victim of rape requested that the court considers the offender for a non-custodial sentence for reasons that the offender had apologized to the victim who had accepted the apology and forgiven him. Despite the seriousness of the offence of rape, the court sentenced the offender to imprisonment for ten years which sentence was wholly suspended for 5 years.

In South Africa therefore, the restorative justice practices are active in the juvenile justice system and maybe engaged at any stage of the case whereas for the adult offenders, once they are indicted, the restorative justice process comes in at the sentencing stage. The manner of implementation of restorative justice is largely dependent on the nature of the sentence imposed by the court. The courts in the cited cases imposed imprisonment terms that are suspended within a defined period during which the behaviour of the offender is monitored. The acceptance of this justice system in South Africa is demonstrated in the cases above cited, an attitude that needs to be embraced by all stakeholders in Kenya for restorative justice to succeed.

[320] Maimane Salome, 'Restorative Justice for Adult Offenders in South Africa: A Comparative Study of Canada New Zealand England and Wales' (University of Pretoria 2017).

Conclusion

The South African legal system exhibits restorative justice principles of reconciliation, rehabilitation, reintegration, and healing in its processes. This is manifested at distinct stages of the case; before reporting a case or after reporting but before the indictment of an offender. Cases may either be diverted to forums outside the court and if already in court, a formal withdrawal is placed by the court prosecutor. Diverted or withdrawn cases may be resolved by simple mechanisms of apology, compensation or by way of referral to a complex program such as rehabilitation and counselling of the parties. Further, the development of reliable programs that support diversion is credited to the entrenchment of diversion practice into law through Child Justice Act. South Africa's effort to introduce traditional Justice Bill, which has since failed thrice, serves to demonstrate the quest for the legislature to enact a law that would enhance the application of customary practices in special courts that parties will volunteer to go before and by extension implementing restorative justice as part of the overall justice system. The reasons for the failure of the bill to take effect is a great lesson to Kenya, that the forums other than the formal retributive justice have to be left to the choices of litigants who have to volunteer in submitting to them. The alternative justice is not a forum for a selected category of people but should be left open to whoever desires and is willing to have their case handled in the alternative forum irrespective of other considerations. Thirdly, the courts have actively incorporated restorative justice elements at the sentencing stage where the mitigating circumstances of the parties or their families, based on social inquiry reports, as well as the willingness of the victims or their families to dialogue with the offender under the pretext of customary law practice is considered. Lastly, the philosophy of Ubuntu that advocates for social ties and which is embraced by the South African people as well as the courts, has resulted in the emergence of home grown jurisprudence incorporating customary practices at the sentencing stage.

Thus, the researcher proceeds to conclude the study and to propose recommendations that are informed by the above analysis of the South African criminal justice system.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

CONCLUSION

Restorative justice as established in this research is that form of justice that addresses the needs of all parties affected as a result of the commission of a crime. The focus is to address the underlying cause and impact caused by the crime in question, to avert its reoccurrence in the future. Restorative justice is only possible where dialogue among parties is entertained. The parties identify their needs causing and arising out of a criminal act and innovate the best possible solution that holds the offender accountable, averts reoffending as well as fear on the part of the victim, offender, and the community. AJS forums are such forums where principles of restorative forms of justice are effectively advanced and which should be encouraged and utilized by institutions of justice in compliance with the law.

The courts and the prosecutors previously adhered to the code declining what is expressly prohibited and strictly being guided by the code in the dealing of criminal cases. Sections 176 and 204 of the Criminal Procedure Code expressly excluded cases of personal nature but aggravated and all those categorized as felonies from the realm of negotiated settlements, a fact that remains to date.

There is a discrepancy in the manner of interpretation and application of the law in criminal cases and particularly in matters reconciliation with some courts strictly applying the CPC while others invoke Article 159 of the constitution to discharge offenders based on customary law settlements. The dilemma is whether to break the barriers under section 176 and 204 CPC as was done in the *Abdow*[321] case or to address the issue within the law by way of plea agreements as suggested in the *Abdulahi Noor Mohammed* [322]case. This scenario has exhibited inconsistencies and uncertainties in the manner of application of the law that encourages AJS.

[321]Ibid (n47).

[322] *[2016] e KLR(n49).*

The plea agreement provisions under sections 137A- 137O of the Criminal Procedure Code offer an opportunity for dialogue and negotiations between the court prosecutor and the offender or offender's advocate, to earn the accused a lesser charge, or having some charges against the offender withdrawn or stayed in exchange for a plea of guilty. Compensation or some form of restitution by the accused may also be included in the agreement. Although the prosecutor technically represents the victim and the community, the views of the victim and the investigating officer may be considered in the terms of the agreement. The court is not a party to the negotiations leading up to a plea agreement but participates in its adoption hence the final settlement of the case. The non-involvement of the court leaves out the aspect of the sentence from negotiations as the court reserves its discretion to pass sentence according to law. On plea agreements in South Africa, there is an aspect of sentence agreement[323] to cure the certainty on the kind of sentence the offender should expect from the court. This law touching on sentence agreement requires that should the accused person admit the charge and convicted following an agreement, it should follow that a just sentence is imposed by the court,[324]or that part or the whole sentence be suspended.[325]In South Africa, just like in Kenya, the court is still not privy to the agreement and is bound to impose the sentence as it deems just in the circumstances of each case but the fortunate part as far as South Africa is concerned is that the sentence is already dictated by law, it has to be suspended in part or as a whole. Though plea and sentence agreements have been available for application in South Africa Anderson Mauritz[326] terms it as new to South Africa probably due to its underperformance.

[323] criminal Procedure Act of South Africa 1977, Section 105A.

[324] Criminal Procedure Act of South Africa 1977, Section 105A (1)(a), (ii)(aa).

[325] Criminal Procedure Act of South Africa 1977, Section 105A (1)(a), (ii)(cc)

[326] Anderson A Mauritz, 'Alternative Disposal of Criminal Cases by the Prosecution: Comparing the Netherlands and South Africa,' (Universiteit van Amsterdam 2014) https://pure.uva.nl/ws/files/1782816/133662_04 accessed on 6 August 2021.

Diversion is an important and effective tool for restorative justice as it provides opportunities for forums serving as alternatives to prosecution. In South Africa, diversion among the children is provided for under the Child Justice Act which clearly defines what diversion is, when, and how it applies making it certain for the prosecution, the lawyers, and the courts to practice it. The interpretation of the provisions of the Act by the superior courts promotes its jurisprudential growth creating certainty and uniformity in practice and decision making. Though the law confines diversion to juveniles, it is also being practiced among adult offenders in South Africa. Further, there are well-developed national organizations such as NICRO, that have taken up the implementation of the Act by developing programs that address different needs of offenders in a systematic manner. This is found to be unlike before when diversion fell squarely within the framework of prosecutor's discretion which made a diversion be applied in a selective and disjointed manner.[327]

On the adult offenders, the prosecutor's decision to divert or not to divert is still left to the discretion of the prosecutor.Though diversion policy avails diversion for both children and adult offenders in Kenya the circumstance of each case is considered on merit as to whether it qualifies or not for diversion.Further, its practice is found underutilized for reasons that the same lacks the force of law.

The criminal Procedure Act of South Africa does not have a specific provision that requires the incorporation of customary practice. However, the case law highlighted in this research shows that the South African judges have embraced restorative justice in appropriate cases and without discrimination based on the nature of the crime. Their approach is that customary law practice on reconciliation is incorporated at the sentencing stage of a case. There were efforts in South Africa to legislate on customary law by creating customary Courts but the same became unsuccessful after the Bill failed severally.

In *S v Shilubane 2008(1) SACR 295(T)* above, the courts were encouraged to utilize imprisonment sentences sparingly and instead be innovative and proactive in finding alternative sentences. This has not been applied discriminatively as courts have accommodated the parties' agreement even

[327] Ibid

in serious cases. In the instances where parties have not expressly agreed, the courts have suggested to them and allowed them to dialogue hence initiating the process of healing despite full trial and subsequent conviction.

The courts have a wider opportunity within their discretionary powers to accommodate dialogue or agreements of parties, the interest of those with a stake in a criminal offence and the community interest as a whole. It might be after an indictment but before the closure of the prosecution's case for withdrawal and diversion, or, at the sentencing stage upon conviction, like in South Africa, which conviction may be as a result of plea bargaining or full trial. The advantage of leaving restorative justice open to come into play at any stage of a case is to allow parties into the realm of restorative justice at the appropriate time that they choose to submit to it. This innovation by courts will result in home-grown jurisprudence that is likely to offer a solution to the needs of the people who are in search of justice.

The Kenyan constitution being the supreme law of the land cannot be limited by the Criminal Procedure Code which is subject to the constitution. The courts are at liberty, within judicial discretion, to innovate and to be proactive, just like the South African courts, to apply a real solution that is locally available, including but not limited to customary law practice in resolving cases. The Abdow[328] procedure and the Mohamed Noor Mohamed[329] procedure that has so far been applied in Kenya cannot be faulted given that both, in the opinion of the researcher, are regular in the Kenyan context but either of them cannot be said to be the only way available for parties. Restorative justice can apply at any stage of a conflict since restoration, reparation, reintegration, rehabilitation, and reconciliation which are the objectives of restorative justice can intervene at any stage. Although it is recommended that the earlier they apply the better for the parties.

RECOMMENDATIONS

This research picked up the following as important aspects that if applied in Kenya would greatly improve the implementation and the practice of restorative justice;

[328] Ibid (n47).

[329] Ibid(n49).

I Legislative interventions

(a) Enactment of law

The Kenyan Parliament should enact a law that defines the scope of diversion, whom it applies, and when and how the same should be applied in the same way CJA of South Africa does. It is expected that law in place is likely to attract the attention of other actors in the justice sector, equivalent to NICRO in South Africa, that will assist in designing national programs for diverted offenders creating certainty in the long run as to where and how the diverted offenders shall be dealt with. The Kenyan diversion policy has an advantage in the sense that the policy allows its application right from the reporting stage up to the time before the closing of the prosecution's case. If this is done for both juveniles and adult offenders, this will greatly promote the practice of restorative justice in Kenya.

(b) Amendment of existing laws

To prevent the hindrances to the negotiated settlements in deserving cases, it is recommended that the Kenyan parliament amends section 176 of the Criminal Procedure Code specifically removing the exclusionary phrase that exempts felonies and personal matters of aggravated nature from the realm of reconciliation. The opening up of this provision and leaving the same to the discretion of the prosecutors and the courts to apply in appropriate cases is in tandem with article 159 of the constitution of Kenya.

Further, in the same way, the South African Criminal Procedure Code has guided sentencing where plea agreement has been entered, it is hereby recommended that the Kenyan parliament amends section 137I of the Criminal Procedure Code to include options for sentencing where plea agreement is reached. This will create certainty to the accused and also the prosecution on the nature of sentences available hence boosting confidence in the process. Further, this will cushion the offender who concedes to a plea of guilty and who presently is still left under the mercy of the court as to what sentence will be imposed.

II Judicial interventions

a) Constitutional Interpretation

The Kenyan courts should be guided by Article 20(4) of the constitution of Kenya which is similar to section 39 of the South African's constitution in the interpretation of the law which provision requires courts to adopt an interpretation that promotes values that underlie an open and democratic society based on human dignity, equality, equity, and freedom as well as the purport and objects of the bill of rights.[330] This form of interpretation is open to innovations and creativity in decision-making to arrive at the most suitable approach that fits a particular case scenario.

b) Social philosophy

The courts in Kenya should embrace and be guided by the philosophy of 'undugu' or 'ujamaa' in decision making which is akin to Ubuntu that is largely credited for forming the foundation of restorative justice in South Africa. Undugu or Ujamaa as well as Ubuntu are philosophies that appreciate that parties to a case come from communities that value social ties hence the need to enhance social fabric rather than disintegrating them. These philosophies seek to humanize justice processes.

The judicial mind-set needs to be aligned with restorative justice objectives and opportunities within Kenyan law. This can be achieved through continuous legal training, workshops, and seminars. Consequently, it is recommended that Judicial Training Institute should consider incorporating the aspect of the philosophy of ujamaa in continuous judicial training they offer. In the same breath, South African judges have embraced ubuntu, Undugu, or Ujamaa concept should inform decision making in Kenyan courts. Decisions are not made in a vacuum but in the context of societal values and lived realities of people.

[330] Constitution of Kenya 2010, Article 20(4).

SELECTED BIBLIOGRAPHY

Books and Publications

Heather Strang, 'Handbook of Restorative Justice, by G.Johnstone and D.W. Van Ness (Eds.)' (2009) 48 How J Crim Just 226 accessed through https://heinonline.org/HOL/License on 1 November 2021.

Van Ness D and Heetderks K, Restoring Justice: An Introduction to Restorative Justice. New York 2014 https://doi.org/10.4324/9781315721330 accessed on 9 November 2021.

Wickes R, 'Crime and Everyday Life' (2010) 43 Aust & NZ J Criminology 383 https://heinonline.org/HOL/License on 2 November 2021 accessed on 2 November 2021.

Reports and Researches

Deche M, Legal Response to Intra Familial Child Sexual Abuse in Kenya: A Case for Informal Justice. Danish Institute for Human Rights; 2013 https://www.humanrights.dk/sites/humanrights.dk/files/media/migrated/4127_72s_mercy_ifm accessed on 3 November 2021.

Mauritz A, 'Alternative Disposal of Criminal Cases by the Prosecution: Comparing the Netherlands and South Africa,' Doctoral Dissertation (Universiteit van Amsterdam 2014) https://pure.uva.nl/ws/files/1782816/133662_04 accessed on 6 August 2021.

Jurg H and Walter K and Novirabo P, 'Access to Justice, Impunity and Legal Pluralism in Kenya' (2015) 47 J Legal Pluralism & Unofficial L 347 https://doi.org/10.1080/07329113.2015.1080430 on 21 September 2021.

'Kenya' (2010) 33 Annual Human Rights Report Submitted to Congress by US Dep't St 344 https://www.knchr.org/Portals/0/AnnualReports/Annual%20Report%202010%20to%202011 on 2 November 2021.

Journals

Greenawalt A, 'Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court' (2009) 50 Va J Int'l L 107.

Alfred A and Marietjie M, 'The South African truth and reconciliation commission as a therapeutic tool' (2000) 18 Behavioral Science & L 459.

Boyane T, 'The Restorative Justice Bug Bites the South African Criminal Justice System' (2004) 17 S Afr J Crim Just 1.

Braithwaite J, 'Setting Standards for Restorative Justice (2002) 42 The British Journal of Criminology 563.

Dejo O, 'Therapeutic Jurisprudence: Transforming Legal Education and Humanizing Criminal Justice in Africa' (2010) 43 De Jure 95 P.

Hadar D and Tali G, 'Restorative Criminal Justice' (2013) 34 Cardozo L Rev 2313 Provided by: University of Nairobi

Jurg H and Walter K and Novirabo P, 'Access to Justice, Impunity and Legal Pluralism in Kenya' (2015) 47 J Legal Pluralism & Unofficial L 347.

Kariuki M and Kariuki F, 'Alternative Dispute Resolution, Access to Justice and Development in Kenya' (2015) 1 Strathmore LJ 1.

Kariuki F, 'Traditional dispute resolution mechanisms in the administration of justice in Kenya' in ES. Nwauche (ed.) Citizenship and Customary Law in Africa, Centre for African Legal Studies, 2020, pp. 33-68.

Kercher M, 'Plea Bargaining in South Africa and Germany' (Doctoral Dissertation, Stellenbosch University 2013).

Kinama E, 'Traditional Justice Systems as Alternative Dispute Resolution under Johnstone G, *Restorative Justice: Ideas, Values, Debates* (Routledge 2013).

Kinyanjui S, 'A Genealogical Analysis of the Criminal Justice System in Kenya: Rebirth of Restorative Justice for Juvenile?'<http://erepository.uonbi.ac.ke/handle/11295/41276> accessed on 7 October 2020.

Kinyanjui S, 'Definition Deadlock or a Necessary Definition Gap? Towards Infusing the Criminal Justice System with Restorative Justice Values' (2019) 2019 E Afr LJ 149.

Kinyanjui, S. "Restorative Justice in Traditional Pre-Colonial 'Criminal Justice Systems' in Kenya." *Tribal Law Journal* 10, 1 (2010).

Mujuzi J D, 'Diversion in the South African Criminal Justice System: Emerging Jurisprudence' (2015) 28 S Afr J Crim Just 40

Mujuzi J D, 'Don't Send Them to Prison Because They Can't Rehabilitate Them: The South African Judiciary Doubts the Executive's Ability to Rehabilitate Offenders: A Note on S v.

Maimane S, 'Restorative Justice for Adult Offenders in South Africa: A Comparative Study of Canada New Zealand England and Wales' (University of Pretoria 2017).

Mistry D, 'The Dilemma of Case Withdrawal: Policing in the "New" South Africa"' (2000) 3 British criminology Conference.

McEvoy K, Mika H, and Hudson B, 'INTRODUCTION: Practice, Performance, and Prospects for Restorative Justice (2002) 42 The British Journal of Criminology 469.

Rautenbach C, 'Deep Legal Pluralism in South Africa: Judicial Accommodation of Non-State Law' (2010) 42 The Journal of Legal Pluralism and Unofficial Law 143.

Rex M, 'Rawls's New Theory of Justice' (1994) 69 Chi-Kent L Rev 737Zehr H, ‘Commentary: Restorative Justice: Beyond Victim-Offender Mediation’ (2004) 22 Conflict Resolution Quarterly 305.

Rodriguez N, 'Restorative Justice, Communities, and Delinquency: Whom Do We Reintegrate' (2005) 4 Criminology & Pub Pol'y 103.

Skelton A, 'Tapping Indigenous Knowledge: Traditional Conflict Resolution, Restorative Justice and the Denunciation of Crime in South Africa' (2007) 2007 Acta Juridica 228

Skelton S, 'The South African Constitutional Court's Restorative Justice Jurisprudence' (2013) 1 Restorative Just 12.

Serges D, 'Cultural Values as a Source of Law: Emerging Trends of Ubuntu Jurisprudence in South Africa' (2018) 18 Africa Human Rights LJ 625.

Villa-Vicencio C, 'The Reek of Cruelty and the Quest for Healing - Where Retributive and Restorative Justice Meet' (1999) 14 J L & Religion 165.

Wabwile M, ‘The Place of English Law in Kenya’ (2003) 3 Oxford University Commonwealth Law Journal 51.